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April 30, 2007

**VIA FACSIMILE (512) 239-3311 and  
FEDERAL EXPRESS**

Ms. LaDonna Castañuela  
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Texas Commission on Environmental Quality  
12100 Park 35 Circle  
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TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY  
2007 APR 30 PM 4:40  
CHIEF CLERKS OFFICE

RE: Docket No. 2007-0168-AIR Permit Nos. 45586 and PSD-TX-1055 Calhoun County  
Navigation Industrial Development Authority.

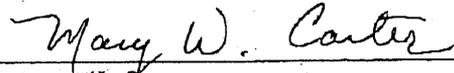
Dear Ms. Castañuela:

Enclosed for filing in the above-styled Docket Number are the original and a copy of **Requestors' Reply to Responses To Hearing Requests**. Please file-stamp the extra copy and return it via the enclosed self addressed and stamped envelop.

Thank you for your consideration of these comments.

Sincerely,

BLACKBURN CARTER, P.C.

  
\_\_\_\_\_  
Mary W. Carter

Enclosures

cc: See Certificate of Service and Mailing List

CHIEF CLERKS OFFICE  
APR 30 PM 4:30  
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

**TCEQ DOCKET NO. 2007-0168-AIR**

**APPLICATION BY CALHOUN § BEFORE THE TEXAS COMMISSION**  
**COUNTY NAVIGATION DISTRICT, §**  
**PERMIT NO. 45586 & PSD-TX-1055, § ON**  
**POINT COMFORT, CALHOUN §**  
**COUNTY § ENVIRONMENTAL QUALITY**

**REQUESTORS' REPLY TO RESPONSES TO HEARING REQUESTS**

TO THE HONORABLE MEMBERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

COME NOW, the Sustainable Energy and Economic Development Coalition ("SEED") and Public Citizen (hereinafter the "Requestors"), and file this their Reply to Responses to Hearing Requests in the above styled matter.

**I. Introduction**

Both SEED and Public Citizen timely submitted comments and a hearing request on September 12, 2005 in response to the public Notice of Receipt and Intent to obtain an Air Quality Permit (NORI). At that time, SEED and Public Citizen listed a large number of technical and factual concerns they had about the permit application and the actions proposed by the Applicant. SEED timely submitted additional comments and a hearing request on March 31, 2006 in response to the public Notice of Application and Preliminary Decision (NAPD).

**II. Comments and requests for hearing were timely received by TCEQ**

A hearing request may be submitted during the public comment period and within 30 days after the Executive Director ("ED") issues the Response to Comments (RTC). 30 TAC §§ 55.156(d); 55.201(a); 55.251. SEED and Public Citizen submitted their hearing requests during the public comment period on September 12, 2005. SEED submitted a second hearing request during the public comment period on March 31, 2006. Both the ED and the Office of Public

Interest Counsel ("OPIC") state in their Responses that SEED and Public Citizen's hearing requests and comments were timely received.

### **III. Affected persons**

An "affected person" is defined by TCEQ rules as "one who has a personal justiciable interest related to a legal right, duty, privilege, power or economic interest affected by the application." 30 TAC § 55.203(a). An organization may request a hearing if it meets the three requirements of 30 TAC § 55.205(a). These are whether: (1) one or more members of the group or association would otherwise have standing to request a hearing in their own right; (2) the interests the group or association seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of the individual members in the case. 30 TAC § 55.205(a)(1)—(3).

The TCEQ rules recognize that when an organization seeks a hearing on behalf of its members, it may provide more details about its members to establish that they are "affected persons." Under 30 TAC § 55.205, the "executive director, the public interest counsel, or the applicant may request that a group or association provide an explanation of how the group or association meets the requirements of subsection (a) of this section. The request and reply shall be filed according to the procedure in §55.209 of this title..." 30 TAC § 55.205(b).

#### **A. Individuals**

In its response, the ED found that SEED and Public Citizen had not provided sufficient information to comply with the requirements of 30 TAC § 55.201(d). The ED correctly invites the Requestors to provide additional information about their members. If such information is provided, the ED states that he may reconsider his recommendation. In its response, OPIC found that SEED had provided sufficient information.

Therefore, pursuant to 30 TAC § 55.205(b), SEED provides the following additional information about its members.

**Ruby and Keith Williams** are members of SEED. They live at 47 Deaf Smith, Point Comfort, 77978. Their home lies approximately 2.2 miles NNW of the Joslin plant. They have two children, and Mr. Williams works at the Alcoa World Alumina ("AWA") plant. They are concerned about the health impacts of the proposed emissions upon their family and home. The AWA plant lies within 1 mile of the Joslin plant. As part of his job, Mr. Williams may have to work within areas where the proposed emissions levels for vanadium and silica will exceed ESLs. Therefore they concerned about the health impacts of these and other emissions.

**Mr. Tim Strykus** is a member of SEED. He lives, with his wife and young daughter at 209 Bell, Point Comfort, 77978. His home lies approximately 2.2 miles NNW of the Joslin plant. Mr. Strykus is a fisherman who fished in the waters of Lavaca Bay, directly south of the Joslin plant. He is familiar with the impacts of mercury pollution from the Alcoa/Lavaca Bay Superfund site on the waters of the bay, and upon his fishing activities. The mercury emissions from the Joslin plant may add to the mercury contamination. Mr. Strykus has an economic interest that is not shared by members of the general public. Both his home and his livelihood may be impacted by the proposed facility.

**Mr. Clay Maxwell** is a member of SEED who works at the AWA facility. He spends his workdays within 1 mile of the Joslin plant. As part of his job, Mr. Strykus may have to work within areas where the proposed emissions levels for vanadium and silica will exceed ESLs. Mr. Strykus is therefore concerned about the health impacts of these and other emissions.

**Mr. John Dugger** is a member of SEED who is a co-owner and rancher at the IT Ranch, which is situated along State Highway 172 approximately 4 - 5 miles from the Joslin plant.

Mr. Dugger is concerned about the impacts to the cattle on his ranch and the health of himself and his workers.

Three of the members of SEED (Ruby and Keith Williams, Tim Strykus) live in the small City of Point Comfort (the "City"). The City is a small municipality that is surrounded on all landward sides by industrial facilities.<sup>1</sup> The wind blows predominantly from the southerly through east-southeasterly direction for the majority of months, and will blow the air emissions from the Joslin plant directly toward the City and its residents.

Additionally, pursuant to 30 TAC § 55.205(b), Public Citizen provides the following additional information about its members.

**Ms. Mary Johnson** is a member of Public Citizen. She lives at 189 Private Rd 3121, Edna, TX, 77957-4854. Her husband has asthma and she is concerned that the emissions from the proposed facility will adversely impact his health.

**Dr. Wendall Wilson** is a member of Public Citizen. He lives at 1307 N. Wheeler, Victoria, Texas 77902-0412. Dr. Wilson has allergies, and he is concerned that the emissions from the plant will exacerbate his allergies.

**Diane Wilson** is a member of Public Citizen. She lives at 600 Ramona Rd., Seadrift, TX 77983 which is approximately 18 miles from the Joslin plant. Ms. Wilson is particularly worried about mercury emissions from the proposed facility. Her son is autistic and Ms. Wilson believes it was caused by mercury contamination in Lavaca Bay.

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<sup>1</sup> The City lies immediately north of the AWA facility, and is impacted by emissions of corrosive air contaminants, and red dust blowing of the mud lakes. It also lies immediately and directly west of the Formosa Plastics facility. As stated by the Applicant, a two-units petcoke power plant was recently granted an air permit at the Formosa facility. All these sources of air emissions are within two miles of the City. A mercury-contaminated Superfund site is found within 1 mile of the City. Now the Applicant seeks to add a fourth major source of air emissions within two miles, directly to the south of the City.

**B. The close proximity of the affected members establishes that they have personal justiciable interest**

Under TCEQ Rule 55.203, the distance of the person from the proposed emissions is one of the factors used to determine their status as an affected person. 30 TAC § 55.203(c)(2) (“...distance restrictions or other limitations imposed by law on the affected interest.”). Unlike some other activities regulated by the TCEQ (e.g. concrete batch plants), neither the Texas Clean Air Act, nor its associated rules define a certain distance beyond which no person could be affected by air emissions from a proposed facility such as the Joslin plant. For air permits, the TCEQ and State Office of Administrative Hearings (“SOAH”) Judges have used a range of distances from as low as one mile, to as high as twenty miles. Their decision is often based on practical factors such as the size of the proposed facility, the quantity of the emissions, and other factors such as stack height.

In the recent case of the consolidated TXU coal-fired power plant permits proceeding, the SOAH Judges ruled that any qualified person within twenty miles could seek, and would automatically be granted, party status.<sup>2</sup>

The instant permit application is for a 300MW petcoke-fired power plant. Approval of this permit will result in significant amounts of air emissions being authorized. At least 70 pounds per years of mercury emissions will be authorized to be released in the immediate area of the already mercury-contaminated Superfund site and waters of Lavaca Bay. According to the

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<sup>2</sup> See Order No. 8, Consolidated Applications of TXU Generation Company LP for State Air Quality Permits and PSD Permits, before the State Office of Administrative Hearings, SOAH Docket No. 582-07-0614, TCEQ Docket no. 2006-1851-AIR (“In these proceedings, the ALJs have made the admittedly imprecise determination that persons residing within at least twenty miles from the facility have standing to participate if they are otherwise qualified.”) (Jan. 24, 2007).

Applicant, the Joslin plant will annually emit large quantities of air contaminants such as SO<sub>2</sub> (2070 tpy), PM (596 tpy), NO<sub>x</sub> (812 tpy), CO (1741 tpy) and H<sub>2</sub>SO<sub>4</sub> (422 tpy).<sup>3</sup>

Therefore, SEED and Public Citizen respectfully request that this additional information be considered by the Commission, and that they find that both SEED and Public Citizen are organizations that satisfy the definition of "affected persons" and that their members have a personal justiciable interest not common to the general public.

#### **IV. All relevant and material disputed issues of fact were properly raised in Requestors' comments**

Requestors fundamentally disagree with the extreme and unsupportable position put forth by the Applicant in their response regarding whether relevant and material issues were raised during the public comment period. In its Response, the Applicant proposes to shift the full burden of proof in a permitting proceeding onto the Requestor during the public comment period. According to TCEQ rules, it is the Applicant, as the moving party, that bears the burden of proof in a hearing. *E.g.* 30 TAC §§ 80.17(a); 80.117(b) (the applicant bears the burden of proof).

For example, the Applicant contends that because the Requestors have not found specific faults with the projected emissions as modeled by the Applicant, then the Commission must accept them as undisputed fact issues.<sup>4</sup> Issues such as the accuracy of the modeled projected emissions are matters that can only be determined by the Requestors during the contested case hearing because discovery is essential to such a determination. The information made available to interested parties during the public comment period is not sufficient to determine the accuracy of the modeling or the projected emissions. Discovery, of the sort allowed during the contested

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<sup>3</sup> See Attachment 2, Applicant's Response to Hearing Requests.

<sup>4</sup> Applicant's Response to Hearing Requests, at 8-9.

case hearing process, allows the protestant to have access to the full range of materials and information applicable to this permit application. Depositions of experts are essential to determine the accuracy of the projected emissions estimates. At the public comment stage depositions of the applicant and their experts are not an available procedure to the interested parties.

Therefore, Requestors urge the Commission to follow long-established practices regarding the preservation of issues during the public comment process, and reject the Applicant's attempt to require the Requestors to present their direct case during the comment period.

Furthermore, the Requestors agree with OPIC and the ED on the relevant and disputed issues of facts they have identified from the comments and that they find could be referred for a hearing on the permit application. However, the requestors also believe other issues are relevant and material to the Commission decision. These are addressed in the sections below.

### **A. Mercury**

The Alcoa/Lavaca Bay Superfund site covers the 3500 acres of Lavaca Bay immediately west of the Joslin plant (beginning approximately 0.1 miles from the Joslin property) which are closed to fishing because of high levels of mercury contamination, and another 420 acres of a spoil island with contaminated sediments.<sup>5</sup> In their 2006 Request, SEED stated that it believed that the impacts of mercury and other heavy metals were not adequately considered. The Requestors continue to believe that the authorization of significant mercury emissions (70 lb/yr) so close to the mercury-contaminated Superfund site require a very careful analysis of potential

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<sup>5</sup> See EPA Region 6, ALCOA/Lavaca Bay site status document (updated April 2, 2007), available at <http://www.epa.gov/earth/r6/6sf/pdf/files/0601752.pdf>.

impacts, including the cumulative impacts of other mercury emissions nearby. It should be noted that the already permitted Formosa power plant has projected mercury emissions of 78 lb/yr.<sup>6</sup>

These mercury emissions may be deposited in the adjacent Superfund site. Any additional mercury in the Lavaca Bay area will worsen the already-existing high levels of contamination of sediments, fish and shellfish in the bay. The mercury emissions from the Joslin plant may hinder EPA's remediation efforts, and may require additional actions be undertaken. Therefore, the proposed mercury emissions will have potential environmental, health and economic impacts that were not adequately considered in the draft permit.

### **B. Baseline monitoring**

In its Response, OPIC states that the issue of whether comprehensive baseline monitoring is required in Point Comfort is an "issue of policy for TCEQ and the Commissioners to consider, and is not appropriate for referral to hearing."<sup>7</sup> Requestors believe that the unique circumstances of the City of Point Comfort require a careful consideration of the ambient air quality in the area. The City is immediately adjacent to two major industrial facilities, Formosa and AWA, and will be very close to the recently-permitted petcoke power plant at Formosa.

The baseline background concentrations for SO<sub>2</sub>, NO<sub>2</sub>, and PM<sub>10</sub> in the Joslin permit is the same as used in the Formosa permit. The Formosa permit has been approved, and the significant emissions from it may result in changes to the background concentrations. Yet the Joslin application uses the same background concentrations and does not make any allowance or adjustment for the now-permitted Formosa sources.

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<sup>6</sup> See Permit No. 76044 and PSD-TX-1053, Formosa Plastics Corporation.

<sup>7</sup> OPIC's Response to Hearing Requests, at 8.

The ED does recommend that this is a relevant and material issue that may be referred for a hearing.<sup>8</sup> Therefore, the Requestors believe that the background concentrations of criteria air pollutants in the Point Comfort air have not been accurately considered in the draft permit. The impacts of additional sources of authorized emissions upon residents, workers and the environment can only be properly and fully considered once the actual ambient air quality has been determined for the Point Comfort area.

**C. CO<sub>2</sub> is an air contaminant and has environmental impacts that must be considered**

The Requestors raised issues during public comments concerning carbon dioxide (CO<sub>2</sub>) emissions from the Joslin power plant. They believe these emissions are relevant for the following reasons.

The TCEQ is empowered to consider CO<sub>2</sub> emissions on a record showing that CO<sub>2</sub> emissions meet the definition of "air contaminant" or "air pollution" under the Texas and federal Clean Air Acts. The Supreme Court recently had an opportunity to consider whether Carbon dioxide could be regulated by the EPA under the federal Clean Air Act, and whether EPA's refusal to regulate emissions from mobile sources was reasonable. *See Massachusetts v. EPA*, 127 S. Ct. 1438, (U.S. 2007). The Court held that the Clean Air Act's sweeping definition of "air pollutant" includes "any air pollution agent or combination of such agents, including any physical, chemical . . . substance or matter which is emitted into or otherwise enters the ambient air . . ." (citing 42 U.S.C. § 7602(g)).

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<sup>8</sup> ED's Response to Hearing Requests, at 9.

"On its face, the definition embraces all airborne compounds of whatever stripe, and underscores that intent through the repeated use of the word "any." Carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons are without a doubt "physical [and] chemical . . . substances which [are] emitted into . . . the ambient air." The statute is unambiguous."

*Massachusetts v. EPA*, 127 S. Ct. 1438, 1460 (U.S. 2007).

This proceeding is governed by the preconstruction permit provision of the Texas Clean Air Act, Section 382.0518 of the Health and Safety Code. Under subsection 382.0518(a), this section applies to "a new facility ... that may emit air contaminants," and subsection (b) conditions the grant of a permit on a finding that there is "no indication ... the emissions from the facility will contravene the intent of this chapter ...."

"Air contaminants" is a defined phrase in the Act: "'Air contaminant' means particulate matter, radioactive material, dust, fumes, gas, mist, smoke, vapor, or odor, including any combination of those items, produced by processes other than natural." Tex. Health & Safety Code § 382.003(2) (emphasis added). Thus, any "gas" created by non-natural processes - including CO<sub>2</sub> generated by a power plant - under the plain language of the definition is an "air contaminant." A contaminant becomes "air pollution" if its presence or duration "may tend to be injurious" to protected values. Tex. Health & Safety Code § 382.003(3). Therefore, Requestors believe that the TCEQ may consider CO<sub>2</sub> emissions for the purposes of BACT, and protection of the public's health and physical property. Tex. Health & Safety Code § 382.0518(b). Requestors believe that the TCEQ should consider the technical practicability and economic reasonableness of gasification (IGCC) and CO<sub>2</sub> capture or sequestration as BACT options for this permit.

Requestors believe that CO<sub>2</sub> emissions are relevant to the "other environmental impacts" and "other costs" elements of the BACT analysis under Texas and federal law. In performing its BACT analysis, the TCEQ must take into account "energy, environmental, and economic

impacts and other costs." See 42 U.S.C. § 7479(3) (defining BACT under the federal Clean Air Act); 40 C.F.R. § 52.2(b)(12) (same); see also 30 TAC § 116.101(3). Requestors also believe that CO<sub>2</sub> emissions are relevant to the "additional impacts" analysis required under the PSD permitting program under Texas and federal law. See 40 C.F.R. § 52.21(o); 30 TAC § 116.160(c) (incorporating federal PDS standards).

The OPIC recommends that the issue of whether CO<sub>2</sub> is an "air contaminant" as defined by the Texas Health & Safety Code § 382.003(3) is a factual issue that was raised by SEED and should be referred for a hearing.

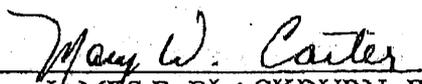
## V. Conclusion

There are serious air quality and other environmental issues raised by this permit application. The Requestors believe that these matters can only be addressed by a full and fair contested case hearing as provided by the TCEQ rules. The Requestors respectfully request a contested case hearing on this application.

Respectfully submitted,

BLACKBURN CARTER, P.C.

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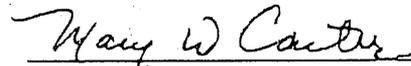
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**CERTIFICATE OF SERVICE**

On this 30th day of April, 2007, a true and correct copy of the foregoing instrument was served on all attorneys of record by the undersigned via regular U.S. Mail, and/or Certified Mail/Return Receipt Requested, and/or hand delivery, and/or facsimile transmission, and/or Federal Express Overnight Mail.

  
\_\_\_\_\_  
Mary W. Carter

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