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CHIEF CLERKS OFFICE

TCEQ AIR QUALITY PERMIT NO. 46534
PSD AIR QUALITY PERMIT NO. PSD-TX-992M1

APPLICATION BY	§	BEFORE THE
EXXONMOBIL OIL CORPORATION	§	
FOR FLUIDIZED CATALYTIC	§	TEXAS COMMISSION ON
CRACKER UNIT SCR	§	
BEAUMONT, JEFFERSON COUNTY	§	ENVIRONMENTAL QUALITY

EXECUTIVE DIRECTOR'S RESPONSE TO HEARING REQUESTS

The Executive Director (ED) of the Texas Commission on Environmental Quality (Commission or TCEQ) files this response (Response) to the requests for a contested case hearing submitted by persons listed herein. The Texas Clean Air Act (TCAA) §382.056(n) requires the commission to consider hearing requests in accordance with the procedures provided in Tex. Water Code §5.556.¹ This statute is implemented through the rules in 30 Texas Administrative Code (TAC) Chapter 55, Subchapter F.

A map showing the location of the site for the proposed facility is included with this response and has been provided to all persons on the attached mailing list. In addition, a current compliance history report, technical review summary, modeling audit, and draft permit prepared by the ED's staff have been filed with the TCEQ's Office of Chief Clerk for the commission's consideration. Finally, the ED's Response to Public Comments (RTC), which was mailed by the chief clerk to all persons on the mailing list, is on file with the chief clerk for the commission's consideration.

I. Application Request and Background Information

ExxonMobil Oil Corporation has applied to the TCEQ for a permit amendment to construct a selective catalytic reduction (SCR) system on their fluidized catalytic cracking unit (FCCU) to reduce emissions of nitrogen oxides (NO_x). The facility is located at 1795 Burt Street, Beaumont, Jefferson County. Contaminants authorized under this permit amendment include particulate matter, sulfuric acid mist, and ammonia.

It appears the Applicant is not delinquent on any administrative penalty payments to the TCEQ. The TCEQ Enforcement Database was searched and no enforcement activities were found that are inconsistent with the compliance history.

The permit application was received on January 5, 2007, and declared administratively complete on

¹ Statutes cited in this response may be viewed online at www.capitol.state.tx.us/statutes/statutes.html. Relevant statutes are found primarily in the Texas Health and Safety Code and the Texas Water Code. The rules in the Texas Administrative Code may be viewed online at www.sos.state.tx.us/tac/index.shtml, or follow the "Rules, Policy & Legislation" link on the TCEQ website at www.tceq.state.tx.us.

The permit application was received on January 5, 2007, and declared administratively complete on January 24, 2007. The Notice of Receipt and Intent to Obtain an Air Quality Permit (public notice) for this permit application was published on February 1 and 5, 2007, in the *Beaumont Enterprise* and *La Voz*, respectively. The Notice of Application and Preliminary Decision was published in the *La Voz* on May 24, 2007 and in the *Beaumont Enterprise* on May 27, 2007.

The ED's RTC was mailed on August 7, 2007. The ED's Amended RTC was mailed on August 15, 2007, to all interested persons, including those who asked to be placed on the mailing list for this application and those who submitted comment or requests for contested case hearing. The cover letter attached to the RTC included information about making requests for contested case hearing or for reconsideration of the ED's decision.² The letter also explained hearing requesters should specify any of the ED's responses to comments they dispute and the factual basis of the dispute, in addition to listing any disputed issues of law or policy.

The TCEQ received timely hearing requests during the public comment period from the following persons: Rev. Roy L. Malveaux for himself and on behalf of the members of the Shining Star Baptist Church (SSBC).

II. Applicable Law

The commission must assess the timeliness and form of the hearing requests, as discussed above. The form requirements are set forth in 30 TAC § 55.201(d):

- (d) A hearing request must substantially comply with the following:
- (1) give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request. If the request is made by a group or association, the request must identify one person by name, address, daytime telephone number, and, where possible, fax number, who shall be responsible for receiving all official communications and documents for the group;
 - (2) identify the person's personal justiciable interest affected by the application, including a brief, but specific, written statement explaining in plain language the requester's location and distance relative to the proposed facility or activity that is the subject of the application and how and why the requester believes he or she will be adversely affected by the proposed facility or activity in a manner not common to members of the general public;
 - (3) request a contested case hearing;
 - (4) list all relevant and material disputed issues of fact that were raised during the public comment period and that are the basis of the hearing request. To facilitate the

² See TCEQ rules at Chapter 55, Subchapter F of Title 30 of the Texas Administrative Code. Procedural rules for public input to the permit process are found primarily in Chapters 39, 50, 55 and 80 of Title 30 of the Code.

commission's determination of the number and scope of issues to be referred to hearing, the requester should, to the extent possible, specify any of the executive director's responses to comments that the requester disputes and the factual basis of the dispute and list any disputed issues of law or policy; and
(5) provide any other information specified in the public notice of application.

The next necessary determination is whether the requests were filed by "affected persons" as defined by Tex. Water Code § 5.115, implemented in commission rule 30 TAC § 55.203. Under 30 TAC § 55.203, an affected person is one who has a personal justiciable interest related to a legal right, duty, privilege, power or economic interest affected by the application. An interest common to members of the general public does not qualify as a personal justiciable interest. Local governments with authority under state law over issues raised by the application receive affected person status under 30 TAC § 55.203(b).

In determining whether a person is affected, 30 TAC § 55.203(c) requires all factors be considered, including, but not limited to, the following:

- (1) whether the interest claimed is one protected by the law under which the application will be considered;
- (2) distance restrictions or other limitations imposed by law on the affected interest;
- (3) whether a reasonable relationship exists between the interest claimed and the activity regulated;
- (4) likely impact of the regulated activity on the health and safety of the person, and on the use of property of the person;
- (5) likely impact of the regulated activity on use of the impacted natural resource by the person; and
- (6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

If the commission determines a hearing request is timely and fulfills the requirements for proper form and the hearing requester is an affected person, the commission must apply a three-part test to the issues raised in the matter to determine if any of the issues should be referred to the State Office of Administrative Hearings (SOAH) for a contested case hearing. The three-part test in 30 TAC § 50.115(c) is as follows:

- (1) The issue must involve a disputed question of fact;
- (2) The issue must have been raised during the public comment period; and
- (3) The issue must be relevant and material to the decision on the application.

The law applicable to the proposed facility may generally be summarized as follows. A person who owns or operates a facility or facilities that will emit air contaminants is required to obtain

authorization from the commission prior to the construction and operation of the facility or facilities.³ Thus, the location and operation of the proposed facility requires authorization under the TCAA. Permit conditions of general applicability must be in rules adopted by the commission.⁴ Those rules are found in 30 TAC Chapter 116. In addition, a person is prohibited from emitting air contaminants or performing any activity that violates the TCAA or any commission rule or order, or that causes or contributes to a condition of air pollution.⁵ The relevant rules regarding air emissions are found in 30 TAC Chapters 101 and 111-118. In addition, the commission has the authority to establish and enforce permit conditions consistent with this chapter.⁶ The materials accompanying this response list and reference permit conditions and operational requirements and limitations applicable to this proposed facility.

III. Analysis of Hearing Requests

A. Were the requests for a contested case hearing in this matter timely and in proper form?

The hearing request was submitted during the public comment period. However, the ED has determined the hearing requests of Rev. Malveaux does not substantially comply with all of the requirements for form in 30 TAC § 55.201(d).

The ED has determined the hearing request of Rev. Malveaux meets only two of the requirements for form in 30 TAC § 55.201(d). In accordance with 30 TAC § 55.201(d) (1), the request of Rev. Malveaux provides a residential address and the address of the SSBC. As indicated on the attached map, the Rev. Malveaux resides 1.31 miles from the facility and the SSBC is 1.3 miles from the facility. Because both addresses are more than 1 mile from the proposed facility, they are not likely to be impacted differently than any other member of the general public. Also, in accordance with 30 TAC § 55.201(d) (3), Rev. Malveaux expressly requests a contested case hearing.

However, the ED has determined that the hearing request does not meet the requirements under 30 TAC § 55.201(d) (2) or (4). Rev. Malveaux's request fails to identify any personal justiciable interest or why the requestor believes he or she will be adversely affected by the proposed facility in a manner not common to members of the general public as required by 30 TAC § 55.201(d) (2). With regard to 30 TAC § 55.201(d) (4), Rev. Malveaux's request does not expressly state any specific disputed issues of fact or any disputed issues regarding responses provided in the Executive Director's Response to Comments. However, the issue of whether there will be adverse health effects on Rev. Malveaux or children and the elderly, members of the Shining Star Baptist Church, because of its close proximity to the plant could be inferred from the request.

³ TEXAS HEALTH & SAFETY CODE § 382.0518

⁴ TEXAS HEALTH & SAFETY CODE § 382.0513

⁵ TEXAS HEALTH & SAFETY CODE § 382.085

⁶ TEXAS HEALTH & SAFETY CODE § 382.0513

Additionally, the ED addressed all public comments in this matter by providing responses in the RTC. The cover letter from the Office of the Chief Clerk attached to the RTC states that requesters should, to the extent possible, specify any of the ED's responses in the RTC that the requesters dispute and the factual basis of the dispute, and list any disputed issues of law or policy.⁷ Neither the Rev. Malveaux nor any members of the SSBC filed a response to the ED's RTC. In the absence of a response from the hearing requester or any members of the SSBC within the thirty-day period after the RTC was mailed, the ED cannot determine or speculate whether the hearing requester continues to dispute the issue of fact alluded to in the request. The ED nevertheless has evaluated the merits of the requests before action is taken regarding this application. The potential disputed issue of fact is addressed below.

B. Are those who requested a contested case hearing in this matter affected persons?

The hearing requester listed herein submitted a letter requesting a hearing. However, this requester has not demonstrated that he is an "affected person" as defined in 30 TAC § 55.203. The threshold test of affected person status is whether the requestor has a personal justiciable interest affected by the application, and this interest is different from that of the general public.⁸ The hearing request letter submitted by Rev. Malveaux indicates he lives less than a mile and a half from the facility at 605 Elgie Street. Additionally, the requester indicates that Shining Star Baptist Church located at 590 Elgie Street is in close proximity to the facility. The ED has not identified any requesters who reside within 1 mile of the proposed facility. *See* attached map. As both addresses are more than 1 mile from the proposed facility, both Rev. Malveaux and members of the SSBC are not likely to be impacted differently than any other member of the general public.

In addition to his personal request, Rev. Roy L Malveaux timely requested a hearing on behalf of the members of the Shining Star Baptist Church. A group or association may request a contested case hearing only if the group or association meets all of the following requirements:

- (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.⁹

SSBC is represented by Rev. Malveaux. As discussed above, Rev. Malveaux failed to demonstrate he is an affected person, and therefore does not have standing to request a hearing in his own right.

⁷ See 30 TAC § 55.201(d)(4).

⁸ *United Copper Industries and TNRC v. Joe Grissom*, 17 S.W.3d 797 (Tex. App.-Austin, 2000)

⁹ 30 TAC § 55.205(a)

Further, SSBC has not identified any members who would have standing in their own right to request a hearing. The request made by the SSBC must meet all the requirements of 30 TAC § 55.205(a), therefore it is not necessary to consider the other two requirements of that section. SSBC does not have standing to request a hearing.

C. Which issues in this matter should be referred to SOAH for hearing?

If the commission determines any of the hearing requests in this matter are timely and in proper form, and some or all of the hearing requesters are affected persons, the commission must apply the three-part test discussed in Section II to the issues raised in this matter to determine if any of the issues should be referred to SOAH for a contested case hearing. The three-part test asks whether the issues involve disputed questions of fact, whether the issues were raised during the public comment period, and whether the issues are relevant and material to the decision on the permit application, in order to refer them to SOAH.

The ED addressed all public comments in this matter by providing responses in the RTC. The cover letter from the Office of the Chief Clerk transmitting the RTC cites 30 TAC § 55.201(d)(4), which states that requesters should, to the extent possible, specify any of the ED's responses in the RTC the requesters dispute and the factual basis of the dispute, and list any disputed issues of law or policy. As stated above, the hearing request filed by Rev. Malveaux did not expressly state any disputed issues of fact but alluded to health effects caused by emissions from the facility. In the absence of a response from any of the other hearing requesters within the thirty-day period after the RTC was mailed, the ED cannot determine or speculate on any issue of fact that may continue to be disputed by the hearing requester. The hearing requester did not allege any issues of law or policy. However, the ED acknowledges the hearing requesters have one more opportunity to identify disputed issues of fact in their replies to the positions of the ED, Office of Public Interest Counsel, and the Applicant regarding the hearing request. Therefore, to facilitate the commission's consideration of this matter, the ED has analyzed the remaining two parts of the test, assuming that the issue alluded to in the comments in this matter remain disputed.

1. One potential issue involving a question of fact.

Although not expressly stated, the requester alluded to the issue of whether there will be adverse health effects on children and the elderly who are members of the Shining Star Baptist Church because of its close proximity to the plant.

2. Were the issues raised during the public comment period?

The public comment period is defined in 30 TAC § 55.152. The public comment period begins with the publication of the Notice of Receipt and Intent to Obtain an Air Quality Permit. The end date of the public comment period depends on the type of permit. In this case, the public comment period

began on February 1, 2007, and ended on June 6, 2007. The issue listed above upon which the hearing requests in this matter are based was raised in comments received during the public comment period. If the commission determines that the hearing requester is an affected person, this issue may be considered by the commission.

3. Whether the issues are relevant and material to the decision on the application.

In this case, the permit would be issued under the commission's authority in Tex. Water Code § 5.013(11) (assigning the responsibilities in Chapter 382 of the Tex. Health & Safety Code) and the TCAA. The relevant sections of the TCAA are found in Subchapter C (Permits). Subchapter C requires the commission to grant a permit to construct or modify a facility if the commission finds the proposed facility will use at least the best available control technology (BACT) and the emissions from the facility will not contravene the intent of the TCAA, including the protection of the public's health and physical property. In making this permitting decision, the commission may consider the Applicant's compliance history. The commission by rule has also specified certain requirements for permitting. Therefore, in making the determination of relevance in this case, the commission should review each issue to determine whether it is relevant to these statutory and regulatory requirements that must be satisfied by this permit application.

The issue of health impacts to humans was alluded to during the comment period. Whether the proposed facility will be protective of human health is a factual issue that is relevant and material to the commission's decision on the application. The ED concludes impact of air emissions to human health is a referable issue.

IV. Maximum Expected Duration of the Contested Case Hearing

The ED recommends the contested case hearing, if held, should last no longer than four months from the preliminary hearing to the proposal for decision.

V. Executive Director's Recommendation

The Executive Director respectfully recommends the commission:

- A. Find the hearing request in this matter was timely filed;
- B. Find the hearing request in this matter does not satisfy all of the requirements for form under 30 TAC § 55.201(d);
- C. Find Reverend Roy L. Malveaux is not an affected person in this matter;

- D. Find that, unless the Shining Star Baptist Church submits additional information that establishes the church meets requirements under 30 Tex. Admin. Code 55.204(a), the church does not meet the requirements of a group or association under the Commission's rules;
- E. If the commission determines the requester is an affected person, refer the following issue to SOAH: Whether air emissions from the proposed facility will adversely affect human health; and
- F. Find the maximum expected duration of the contested case hearing, if held, would be four months.

Respectfully submitted,

Texas Commission on Environmental Quality
Glenn Shankle, Executive Director

Stephanie Bergeron Perdue, Deputy Director
Office of Legal Services

Robert Martinez, Director
Environmental Law Division



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Representing the Executive Director of the
Texas Commission on Environmental Quality

CERTIFICATE OF SERVICE

On the 15th day of October, 2007, a true and correct copy of the foregoing instrument was served on all persons on the attached mailing list by the undersigned via deposit into the U.S. Mail, inter-agency mail, facsimile, or hand delivery.



Erin Selvera

MAILING LIST
EXXONMOBIL OIL CORPORATION
DOCKET NO. 2007-1460-AIR, PERMIT NO 46534, PSD-TX-992M1

FOR APPLICANT:

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FOR ALTERNATIVE DISPUTE
RESOLUTION:

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ExxonMobil Oil Corporation Permit No. 46534 and PSD-TX-992M1
Hearing Requestor Map for November 7, 2007 Agenda
Map Requested by TCEQ Office of Legal Services



Texas Commission on Environmental Quality
 GIS Team (Mail Code 197)
 P.O. Box 13087
 Austin, Texas 78711-3087

October 3, 2007

0 0.1 0.2 0.4 Miles

Projection: Texas Statewide Mapping System
 (TSMS)

Scale 1:24,000

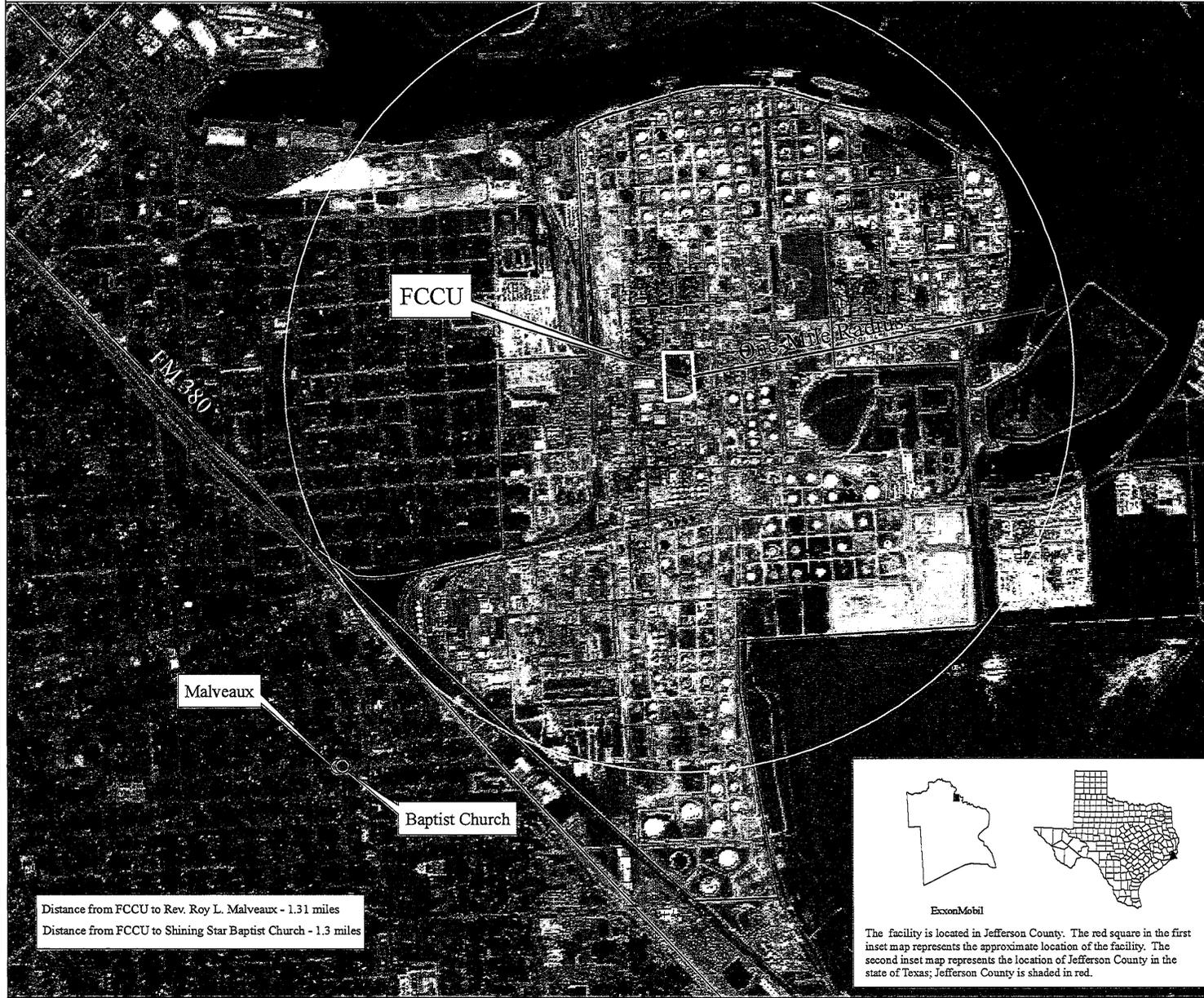
Legend

- ExxonMobil
- FCCU
- Requestors

Source: The location of the facility was provided by the TCEQ Office of Legal Services (OLS). TCEQ obtained the site information from the Applicant and the requestor information from the Office of the Chief Clerk. The counties are U.S. Census Bureau 1992 TIGER/Line Data (1:100,000). The background of this map is a source photograph from the 2004 U.S. Department of Agriculture Imagery Program. The imagery is one-meter Color-Infrared (CIR). The image classification number is tx245_1-1.

This map depicts the following:

- (1) The approximate location of the Fluidized Catalytic Cracking Unit. This is labeled "FCCU".
- (2) Outline of the ExxonMobil plant.
- (3) Requestors.
- (4) Circle and arrow depicting the 1-mile radius. This is labeled "One-Mile Radius".



Distance from FCCU to Rev. Roy L. Malveaux - 1.31 miles
 Distance from FCCU to Shining Star Baptist Church - 1.3 miles

ExxonMobil
 The facility is located in Jefferson County. The red square in the first inset map represents the approximate location of the facility. The second inset map represents the location of Jefferson County in the state of Texas; Jefferson County is shaded in red.

This map was generated by the Information Resources Division of the Texas Commission on Environmental Quality. This map was not generated by a licensed surveyor, and is intended for illustrative purposes only. No claims are made to the accuracy or completeness of the data or to its suitability for a particular use. For more information concerning this map, contact the Information Resource Division at (512) 239-0800.