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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

October 15, 2007

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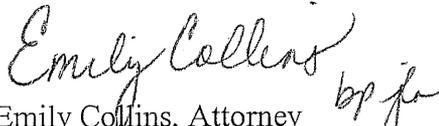
2007 OCT 15 PM 2:20
CHIEF CLERKS OFFICE
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

**RE: EXXONMOBIL OIL CORPORATION
TCEQ DOCKET NO. 2007-1460-AIR**

Dear Ms. Castañuela:

Enclosed for filing is the Public Interest Counsel's Response to Request for Hearing in the above-entitled matter.

Sincerely,


Emily Collins, Attorney
Public Interest Counsel

cc: Mailing List

Enclosure

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TCEQ DOCKET NO. 2007-1460-AIR

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IN THE MATTER OF THE
APPLICATION OF EXXONMOBIL
OIL CORPORATION FOR
FLUIDIZED CATALYTIC CRACKER
UNIT SCR BEAUMONT, JEFFERSON
COUNTY FOR AMENDMENT OF AIR
QUALITY PERMIT NO. 46534 AND
PSD-TX-992M1

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BEFORE THE TEXAS
CHIEF CLERKS OFFICE

COMMISSION ON

ENVIRONMENTAL QUALITY

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S
RESPONSE TO REQUEST FOR HEARING**

COMES NOW, the Office of Public Interest Counsel ("OPIC") of the Texas Commission on Environmental Quality (the "Commission" or "TCEQ") and files this Response to Hearing Request in the above-referenced matter, and would respectfully recommend referring this matter to the State Office of Administrative Hearings ("SOAH").

I. INTRODUCTION

Based on a consent decree with the U.S. Environmental Protection Agency, ExxonMobil Oil Corporation ("Exxon" or "Applicant") submitted an air quality permit amendment application to TCEQ for construction and operation of a selective catalytic reduction ("SCR") system to control emissions of nitrogen oxides ("NOx") from a fluidized catalytic cracking ("FCC") unit. The draft permit authorizes the operation of the FCC unit followed by a CO boiler, the newly installed SCR system, and then a wet gas scrubber. The SCR system will reduce NOx emissions and increase emissions of condensable particulate matter, sulfuric acid, and ammonia. The increased emission rates for condensable particulate matter and sulfuric acid mist constitute major modifications

TCEQ received Exxon's application on January 5, 2007, and the Executive Director ("ED") declared the application administratively complete on January 24, 2007. The Applicant

published a Notice of Receipt of Application and Intent to Obtain an Air Permit on February 1, 2007, in the *Beaumont Enterprise*, and on February 5, 2007, in *La Voz de Beaumont-Port Arthur*.

The Applicant published a Notice of Application and Preliminary Decision on May 24, 2007, in *La Voz de Beaumont-Port Arthur* and on May 29th, 2007, in the *Beaumont Enterprise*. TCEQ received a timely hearing request from Rev. Roy L. Malveaux. The public comment period ended on June 26, 2007. The ED issued a Response to Public Comment on August 15, 2007. The period for submitting contested case hearing requests ended on September 14, 2007.

Based on the information submitted in the request and a review of the information available in the Chief Clerk's file on this application, OPIC recommends granting the hearing request.

II. APPLICABLE LAW

The Executive Director declared this application administratively complete on January 24, 2007. As the application was declared administratively complete after September 1, 1999, a person may request a contested case hearing on the application pursuant to the requirements of Texas Health & Safety Code section 382.056 and Texas Water Code Chapter 5, Subchapter M, Environmental Permitting Procedures, section 5.556 added by Acts 1999, 76th Leg., ch 1350 (commonly known as "House Bill 801").

Under the applicable statutory and regulatory requirements, a hearing request must substantially comply with the following: give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request; identify the requestor's personal justiciable interest affected by the application showing why the requestor is an "affected person" who may be adversely affected by the proposed facility or activity in a manner not common to members of the general public; request a contested case hearing; list all relevant and material

disputed issues of fact that were raised during the comment period that are the basis of the hearing request; and provide any other information specified in the public notice of the application. 30 TEXAS ADMIN. CODE ("TAC") § 55.201(d). Hearing requests must be submitted to the Chief Clerk's Office in writing no later than 30 days after the Chief Clerk's transmittal of the Executive Director's Response to Comments. 30 TAC § 55.201(c).

Under 30 TAC section 55.203(a), 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." This justiciable interest does not include an interest common to the general public. *Id.* Relevant factors that will be considered in determining whether a person is affected include:

- (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, safety, and 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.

30 TAC § 55.203(c).

The Commission shall grant an affected person's timely filed hearing request if: (1) the request is made pursuant to a right to hearing authorized by law; and (2) the request raises disputed issues of fact that were raised during the comment period and that are relevant and material to the Commission's decision on the application. 30 TAC § 55.211(c).

Accordingly, responses to hearing requests must specifically address:

- (1) whether the requestor is an affected person;
- (2) which issues raised in the hearing request are disputed;

- (3) whether the dispute involves questions of fact or law;
- (4) whether the issues were raised during the public comment period;
- (5) whether the hearing request is based on issues raised solely in a public comment withdrawn by the commenter in writing by filing a withdrawal letter with the Chief Clerk prior to the filing of the Executive Director's Response to Comment;
- (6) whether the issues are relevant and material to the decision on the application; and
- (7) a maximum expected duration for the contested case hearing.

30 TAC § 55.209(e).

III. DISCUSSION

The Applicant published a Notice of Application and Preliminary Decision on May 24, 2007, in *La Voz de Beaumont-Port Arthur* and on May 29th, 2007, in the *Beaumont Enterprise*. The Chief Clerk received one hearing request from Rev. Roy L. Malveaux, who states concern that increased emissions of sulfuric acid mist, particulate matter, and ammonia, among other air pollutants, will affect him and the members of his church, the Shining Star Baptist Church.

A. Rev. Malveaux is an "affected person."

Rev. Malveaux has a personal justiciable interest related to a legal right affected by this application. The proximity of Rev. Malveaux's residential property and place of worship to the facility combined with his interests regarding the potential adverse impacts of the constituents emitted from facility support a finding that he is an "affected person."¹ Rev. Malveaux states that his residence is located at 605 Elgie Street, Beaumont, Texas, 77705 and his Church and workplace is located at 590 Elgie Street, Beaumont, Texas, 77705.² Rev. Malveaux states that his residence is located less than one and one-half miles from the Exxon facility, and the Church is located "in close proximity." The ED map shows that Rev. Malveaux's residence is located

¹ 30 TAC § 55.203(c).

² Rev. Malveaux's Hearing Request, date-stamped June 21, 2007.

within one and a half miles of the facility. Rev. Malveaux's concern regarding air quality is protected by the law under which this application will be considered, including Texas Health and Safety Code sections 382.002, 382.0518 and 30 TAC sections 116.111(a), 116.160. Rev. Malveaux's interest in air quality reasonably relates to the potential effects of the emission of air contaminants.³ Furthermore, air quality may affect Rev. Malveaux's and his Church members' health and his use of his property and the Church property.⁴

As Rev. Malveaux's property is located within a mile and a half of the facility there is a reasonable relationship between the interests stated and the activity regulated.⁵ The applicable area of review for this major modification is stated in 40 CFR section 52.21(k), which states that "allowable emission increases from the...modification, in conjunction with all other applicable emissions increases or reductions (including secondary emissions), would not cause or contribute to air pollution in violation of: (1) any national ambient air quality standard *in any air quality control region*; or (2) any applicable maximum allowable increase over the baseline concentration *in any area*" (emphasis added).⁶ The applicable area of review combined with the other factors in 30 TAC section 55.203, such as the demonstration of a reasonable relationship between the interest claimed and the activity regulated, provide a standard for administrative standing properly based on the law under which the application is considered by the

³ 30 TAC § 55.203(c)(3).

⁴ 30 TAC § 55.203(c)(4).

⁵ *Id.*

⁶ 30 TAC section 116.160(c)(2)(B) incorporates 40 CFR section 52.21(k).

Commission.⁷ Therefore, OPIC recommends that the Commission find that Rev. Malveaux is an affected person.

B. The Factual Issue Raised in the Hearing Request Regarding Air Quality is Disputed, Raised During the Comment Period, and Relevant and Material to the Commission's Decision on Exxon's Application.

The hearing request raises the following issue: Will the facility adversely affect the health of Rev. Malveaux and the members of his church, especially the young and elderly members?

1. The hearing requestors raise issues disputed by the parties.

No agreement exists between the parties on the issues discussed above. In the ED's Response to Comments, dated August 15, 2007, the ED stated that the increased emissions are "minimized by requirements added to the permit conditions to ensure emission control is best available control technology." In addition, the Executive Director's states that the increases in emissions were evaluated using an approved air dispersion model and were "predicted to be insignificant for particulate matter, within requirements of state rules for sulfuric acid mist, and acceptable for ammonia" as reviewed through applicable guidance.⁸ As evidenced by the

⁷ Furthermore, it is well established in Texas that, in a hearing request, a requestor does not need to show that they will ultimately prevail on the merits, such as proving ultimate impacts merely to gain administrative standing, but must show that they will "potentially suffer harm or have a justiciable interest that will be affected." *United Copper Industries, Inc. v. Grissom*, 17 S.W.3d 797, 803 (Tex.App. – Austin 2000), citing *Heat Energy Advanced Technology, Inc. v. West Dallas Coalition for Environmental Justice*, 962 S.W.2d 288 (Tex.App. – Austin 1998). In addition, the right to appear in an administrative proceeding is construed liberally to foster the inclusion of a diversity of viewpoints "in order to determine where the public interest lies and how it should be furthered." *Railroad Comm'n of Texas v. Ennis Transp. Co.*, 695 S.W.2d 706, 710 (Tex.Ct.App.1985); *Texas Industrial Traffic League*, 628 S.W.2d at 196; *Fort Bend County v. Texas Parks & Wildlife Comm'n*, 818 S.W.2d 898, 899 (Tex.App. – Austin 1991). Standing requirements for purposes of judicial review, by contrast, serve to "avoid suits where there is no genuine controversy susceptible of judicial resolution and enforcement." *Texas Industrial Traffic League*, 628 S.W.2d at 196.

⁸ Executive Director's Response to Public Comment, Response 1, dated August 15, 2007.

hearing request, Rev. Malveaux disputes the position of the ED that the increased emissions are adequately protective of their interests. Therefore, the issue set forth above is disputed.⁹

2. The hearing requestor raises an issue of fact.

Rev. Malveaux raised a specific factual issue in his hearing requests about the impacts of increased emissions from the proposed modification. As this is an issue of fact, rather than an issue of law or policy, the issue is appropriate for referral to hearing.¹⁰

3. The hearing requestor raises an issue similarly raised in comments on the application.

Rev. Malveaux filed his request for hearing during the public comment period. The Executive Director appears to have based his Response to Comments on the issue raised in the hearing request. The issues that were raised during the comment period have not been withdrawn. Therefore, the issues raised in the hearing requests were also raised during the public comment period.¹¹

4. The issue raised regarding air quality is relevant and material to the Commission's decision on this application.

Rev. Malveaux's concerns regarding air quality and any resulting health impacts are relevant and material to the Commission's decision on this application under the requirements of 30 TAC sections 55.201(d)(4) and 55.211(c)(2)(A). The factual issue raised by the hearing

⁹ 30 TAC §§ 50.115(c)(1); 55.201(d)(4); 55.209(e)(2); 55.211(c)(2)(A).

¹⁰ 30 TAC § 55.211(b)(3)(A), (B).

¹¹ 30 TAC §§ 55.201(c), (d)(4); 55.211(c)(2)(A).

requestor relates directly to whether the applicant will meet the requirements of applicable substantive law.¹²

Pursuant to THSC section 382.0518(b)(2), the applicant must demonstrate that there is no indication that the emissions from the facility will contravene the intent of the Health and Safety Code, which states a state policy to “safeguard the state’s air resources from pollution by controlling or abating air pollution and emissions of air contaminants, consistent with the protection of public health, general welfare, and physical property, including the esthetic enjoyment of air resources by the public and the maintenance of adequate visibility.” In addition, the Applicant must demonstrate that “allowable emission increases from the proposed modification, in conjunction with all other applicable emissions increases or reductions (including secondary emissions), would not cause or contribute to air pollution in violation of (1) any national ambient air quality standard in any air quality control region; or (2) any applicable maximum allowable increase over the baseline concentration in any area.”¹³ Therefore, air quality considerations must be taken into account in the Commission’s determination on this application.

5. OPIC recommends that the Commission refer the issue regarding air quality to SOAH.

In light of the requirements of 30 TAC sections 50.115(b) and 55.211(b)(3)(A)(i), OPIC recommends that any referral to the State Office of Administrative Hearings (“SOAH”) include

¹² See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-251 (1986) (in discussing the standards applicable to reviewing motions for summary judgment the Court stated the following: “[a]s to materiality, the substantive law will identify which facts are material...it is the substantive law’s identification of which facts are critical and which facts are irrelevant that governs.”)

¹³ 40 CFR § 52.21(k) (incorporated by 30 TAC § 116.160(c)(2)(B)).

the following issue: Will the facility adversely affect the health of Rev. Malveaux and the members of his church, especially the young and elderly members? (Rev. Roy L. Malveaux's hearing request, date-stamped June 21, 2007)

C. OPIC Estimates that the Maximum Expected Duration of Hearing will be Nine Months.

Commission rule 30 TAC section 50.115(d) requires that any Commission order referring a case to SOAH specify the maximum expected duration of the hearing by stating a date by which the judge is expected to issue a proposal for decision. The rule further provides that no hearing shall proceed longer than one year from the first day of the preliminary hearing to the date the proposal for decision is issued. In assisting the Commission to state a date by which the judge is expected to issue a proposal for decision, and as required by 30 TAC section 55.209(e)(7), OPIC estimates that the maximum expected duration of hearing on this application would be nine months from the first date of the preliminary hearing until the proposal for decision is issued. OPIC bases our opinion on the duration of this case on the following factors:

- Once the preliminary hearing is held and parties have been established, the parties generally require between 20 to 45 days to review the application, retain required experts to evaluate the application and draft permit, and draft their discovery requests.
- The Texas Rules of Civil Procedure allow a period of twenty (20) days for responses to discovery requests. (maximum of 9 weeks total)
- Parties to TCEQ cases heard by SOAH generally file written direct cases, including "pre-filed testimony," which requires a procedural schedule accommodating staggered dates upon which each party submits their case. A period of time must be provided between the dates upon which each party pre-files its direct case to allow for review of the testimony and preparation of the next party's written case based on that review. In OPIC's experience, this process requires a period of at least two weeks, and usually three to four weeks, between filings. If the Executive Director is participating in the case, the period allowed for filing pre-filed testimony and exhibits can range from six (6) weeks to twelve (12) weeks, depending on the complexity of the issue. (maximum of 21 weeks total)

- The parties generally need a period of one (1) week to three (3) weeks to review, draft, and file written objections to the pre-filed testimony. (maximum of 24 weeks total)
- The ALJ generally requires the parties to meet either in person or via telephone for a pre-hearing conference, the outcome of which the ALJ may need to draft and produce a written order. OPIC estimates that this may take between 2 and 5 days. (maximum of 25 weeks total)
- The hearing on the merits can last anywhere from one or two days to several weeks, depending on the issues referred. In this case, a single issue has been raised, but a general air quality issue may produce an extremely complicated and technical hearing. OPIC estimates the hearing time needed in this case could be between 4 days and 8 days, depending on the development of issues during discovery. (maximum of 27 weeks total)
- SOAH Administrative Law Judges' generally require sixty (60) days of the duration for drafting their proposal for decision. (maximum of 35 weeks total, or 8.75 months)

The schedule laid out above, however, reflects a schedule where every advocate, expert, staff member, and ALJ has a clear schedule that will accommodate the above timeframe flawlessly. Clearly, such circumstances rarely exist. In the interest of providing a realistic estimate of the time it takes to prepare for and subsequently participate in and conduct a technical and complicated hearing, OPIC recommends that the Commission allow a hearing duration of nine (9) months in this case, which should accommodate the schedules of everyone involved in the case and provide efficient resolution of the case.

IV. CONCLUSION

For the reasons set forth above, the Office of Public Interest Counsel respectfully recommends that the Commission grant the contested case hearing requests of Rev. Malveaux and refer this matter to the State Office of Administrative Hearings for a hearing on the issue described above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 15, 2007, the original and eleven true and correct copies of the Office of Public Interest Counsel's Response to Request for Hearing were filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail or by deposit in the U.S. Mail.

Vic McWherter
Vic McWherter

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TCEQ DOCKET NO. 2007-1460-AIR

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