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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

August 29, 2008

Ms. LaDonna Castañuela
Office of the Chief Clerk
Texas Commission on Environmental Quality
Post Office Box 13087, MC-105
Austin, Texas 78711-3087

CHIEF CLERKS OFFICE

2008 AUG 29 PM 6:46

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

Re: Executive Director's Response to the Hearing Requests and Requests for Reconsideration regarding Flint Hills Resources, LP Amendment of Flexible Permit No. 8803A/PSD-TX-413M8; Docket No Docket No 2008-0293-AIR

Dear Ms. Castañuela:

Enclosed for filing is the original and eleven copies of the Executive Director's Response to Hearing Request and Request for Reconsideration regarding Flint Hills Resources, LP Amendment of Flexible Permit No. 8803A/PSD-TX-413M8.

If you have any questions or comments, please call me at (512)239-6033.

Sincerely,

A handwritten signature in cursive script that reads "Erin Selvera".

Erin Selvera
Staff Attorney
Environmental Law Division

Enclosures

**TCEQ FLEXIBLE AIR QUALITY PERMIT NO. 8803A
PREVENTION OF SIGNIFICANT DETERIORATION (PSD) AIR QUALITY PERMIT
NO. PSD-TX-413M8**

APPLICATION BY	§	BEFORE THE
FLINT HILLS RESOURCES, LP	§	TEXAS COMMISSION ON
NUECES COUNTY, TEXAS	§	ENVIRONMENTAL QUALITY

2007 JUN 29 PM 4:46
CHIEF CLERK'S OFFICE
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

**EXECUTIVE DIRECTOR'S RESPONSE TO REQUESTS FOR RECONSIDERATION
AND 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 Flint Hills West Refinery and the distance in relation to the Protestant with a local address 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

Flint Hills Resources, LP (FHR or Applicant) has applied to the TCEQ for the amendment of Flexible Permit No. 8803A/PSD-TX-413M8 for the West Refinery. The West Refinery is located at 2825 Suntide Road, Corpus Christi, Nueces County, Texas. The plant will emit the following air contaminants: nitrogen oxides (NOx), carbon monoxide (CO), volatile organic compounds (VOC), particulate matter including particulate matter with a diameter less than ten microns (PM/PM₁₀), sulfur dioxide (SO₂), hydrogen sulfide (H₂S) and ammonia.

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.

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The Applicant seeks authorization to incorporate Standard Permit Authorization Nos. 74076, 77459, 77655, 79214 and Permit by Rule Registration No. 75266 into the permit. The applicant is also seeking reauthorization of ammonia emissions from the SNCR (selective noncatalytic reduction) installation on FCCU CO Boiler/Scrubber (EPN AA-4) and voidance of the Standard Permit 76446. Furthermore, an ammonia cap will be added to the Maximum Allowable Emission Rate Table (MAERT) of the permit. There will be no physical or operational changes as a result of these amendments because construction and operation is currently authorized under the existing authorizations as noted above.

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.

TCEQ received a flexible permit amendment application on August 9, 2006 to incorporate (roll-in) several standard permits and a permit by rule. This application was declared administratively complete on August 15, 2006. During the application review, the applicant requested to void Standard Permit 76446. It was determined that because the ammonia emissions authorized under Standard Permit 76446 were not included in the flexible permit cap, and those emissions are above the public notice trigger level of 5 tons per year, public notice would be required. Therefore, the application was declared administratively complete for a second time on February 5, 2007, and the company was then required to publish notice. Notice of Receipt and Intent to Obtain an Air Quality Permit (NORI) amendment for this application was published on February 16, 2007, in the *Corpus Christi Caller Times*. The application was declared technically complete as of May 25, 2007. The Notice of Application and Preliminary Decision (NAPD) for this Air Quality Permit amendment was published on June 1, 2007 in the *Corpus Christi Caller Times*. The comment period for this application closed on July 2, 2007.

The ED's RTC was filed with the Chief Clerk on January 11, 2008 and mailed on January 16, 2008 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 time for requests for reconsideration and additional hearing requests ended on February 15, 2008. The TCEQ received timely requests for reconsideration from the following persons: Benjamin Wakefield, Counsel for the Environmental Integrity Project (EIP) submitted comments on behalf of Citizens for Environmental Justice (CFEJ) and Refinery Reform Campaign (RRC) and also from Suzie Canales on behalf of CFEJ and RRC, both on February 15, 2008. The TCEQ

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

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received timely hearing requests during the public comment period from the following persons: Enrique Valdivia, counsel for Texas Rio Grande Legal Aid on behalf of CFEJ, RRC and the South Texas Colonias Initiative on March 16, 2007 and June 29, 2007.

II. Applicable Law for Requests for Reconsideration

The commission must assess the timeliness and form of the requests for reconsideration, as discussed above. The form requirements are set forth in 30 TAC § 55.209 (f) which states "Responses to requests for reconsideration should address the issues raised in the request."

III. Response to Requests for Reconsideration

Each of the three requests for reconsideration address responses to the Executive Director's Response to Comment filed on January 11, 2008. The ED provides the following responses to the requests for reconsideration.

REQUEST FOR RECONSIDERATION 1:

The Requesters ask that TCEQ reconsider its Response 2 to the Comment 2 of the Executive Director's Response to Public Comments (RTC) in light of an Alberta DIAL Study and a Sweden DIAL study as referenced in their Request for Reconsideration letter dated February 15, 2008. According to the commenters, the Alberta DIAL study, conducted in an Alberta Refinery in Canada, showed much higher measured VOC and benzene emissions from fugitive sources and the storage sources compared to the emission factor estimates such as those found in AP-42. According to the commenters, the Sweden DIAL study found that, using DIAL rather than emission estimates, the real emission level in 1988 for the BP Refinery in Goteborg, Sweden could be estimated as being 20 times higher than what the calculations showed. They further add that these studies, which are acknowledged by EPA, show that actual hazardous air pollutants (HAPs), VOC, and other numerous pollutants are much higher than the estimations done by the emission factors. Commenters also note that EPA has determined benzene emissions as a "national cancer risk driver".

Based on those studies, commenters request that TCEQ should reconsider their reliance on AP-42 emission factors in this permit amendment and should require direct measurement of all emissions, including the boilers and heaters. Further, the commenters state: "in light of the Alberta DIAL Study - acknowledged by EPA- TCEQ should reconsider its RTC statement that the allowable rates based on AP-42 emission factors are in most cases overestimated."

TCEQ RESPONSE:

In this amendment, the VOC increases due to AP-42 factor changes were only for fuel gas combustion sources No. 2 Parex Hot Oil Heater (EPN N-103), West Crude Heater, and West Crude Vacuum Heater (EPN A-103). The DIAL (Differential Absorption Light Detection and Ranging) study the commenters reference about a demonstration project done in a refinery

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using an infrared imaging camera technique for detection of leaks from storage and fugitive sources, not AP-42 factors for heaters. Therefore, the referenced DIAL studies should not apply to this amendment's AP-42 factor updates for the heaters. The commenters reference the higher benzene concentrations measured by DIAL studies, however benzene emissions are not an issue in this amendment.

In addition, the "Notice to Reader" section of the DIAL study report, Alberta Research Council indicates that they do not give any warranty with respect to the reliability, accuracy, validity or fitness of the information, analysis and conclusions contained in the DIAL Study Report. TCEQ's Air Permitting program typically does not to rely on techniques that are not fully developed, validated and/or incorporated into the federal and state rules or guidance in the United States. TCEQ's Air Permitting program conducts permitting based on existing EPA and TCEQ Rules, regulations, and federal and state guidelines and has long years of experience and confidence in the EPA Methods and estimation techniques.

Initial testing of the combustion sources subject to this application were completed for NOx and CO and those sources are also being tested by Continuous Emission Testing Systems (CEMS). The fuel gas burned in these heaters is very similar to natural gas. Fuel gas fired in these heaters is expected to result primarily in CO₂ emissions, the remaining of the emissions being the criteria pollutants. In this amendment, a NOx emission factor of 0.045 lb/MMBtu (HHV) is used in the estimation of NOx allowables from the heaters. However, as seen from the Continuous Emission Monitor System (CEMS) test results below, measured average NOx emission factors from the heaters are much lower than the vendor's emission factor of 0.045 lb/MMBtu and much lower than the AP-42 factor for boilers and heaters burning natural gas in Table 1.4-1 of AP42, Volume 1. (AP42 factor of 76 lb/MMscf for controlled boilers would be equivalent to 0.074 lb/MMBtu based on fuel gas higher heating value of 928 Btu/scf.)

CEMS Start Date	CEMS End Date	NOx, av. (lb/MMBtu) (West Crude Heaters)	NOx, av. (lb/MMBtu) (#2 Parex Heater)
7/26/2006	1/1/2007	0.018	
1/1/2007	1/1/2008	0.019	
11/14/2007	1/1/2008		0.029
1/1/2008	8/23/2008	0.021	0.034

CEMS Start Date	CEMS End Date	CO, av. (ppmv) (West Crude Heaters)	COav. (ppmv) (No.2 Parex Heater)
7/26/2006	1/1/2007	0.97	
1/1/2007	1/1/2008	13.93 (approx. 0.0104 lb/MMBtu)	
11/14/2007	1/1/2008		-1.34*
1/1/2008	8/23/2008	8.33	-2.53*

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*CO emissions for the No.2 Parex Heater fall within the extreme low range of the analyzer span, therefore, read negative numbers. It is customary to interpret the negative readings as being less than 1 ppmv.

Similarly, as seen from the above table, although CEMS test results for CO show much lower emission factors from the heaters, the AP-42 factor for CO of 84 lb/MMscf (approx. 0.082 lb/MMBtu or 100 ppmv) is used for estimations of CO allowables to be conservative and to minimize Title V deviations in case of occasional spikes. For pollutants for which vendor data and testing are not available, or they are available but they do not represent occasional variability and spikes, it is a common practice to use the generally more conservative AP-42 factors. Therefore, in this amendment, the TCEQ's original claim that AP-42 factors from fuel gas combustion sources generally overestimate emissions is accurate.

Furthermore, the draft permit for this amendment has extensive initial stack testing requirements for heaters and boilers for certain pollutants (SC. Nos. 44, 45 and 46) and continuous emission monitoring systems (CEMS) for heaters, boilers, FCCU CO Boiler Scrubber and SRU Incinerators (SC Nos. 49 and 50) to generate actual test results. The commenters can review the revised draft permit conditions to find out about the testing requirements incorporated in to the permit as a result of this case by case review. Note that there are no testing requirements for VOC emissions from the heaters. According to engineering judgment, if combustion is done to almost completion, as indicated by the low CO test results in the stacks, the actual VOC emission factor should be below the AP-42 factor estimation of 5.5 lb/MMscf.

Based on TCEQ's case by case review indicating that adverse impacts expected would be low, the costs of testing every source for every pollutant is high, and test results obtained from short-term testing would not be representative of the variability in testing parameters and all operating conditions, it is not be reasonable to require testing of every source for every pollutant. All available reliable data is being used by EPA in the compilation of the AP-42 factors for sources, therefore, it is expected that those emission factors will be conservative in most cases.

Finally, in comment letters dated March 16, 2007 and June 29, 2007, opposing the use of the AP-42 factors in permitting, commenters cited the following section from the "Introduction" Section of the EPA's document titled 'Compilation of Air Pollution Emission Factors AP-42'.

"Data from source-specific emission tests or continuous emission monitors are usually preferred for estimating a source's emissions because those data provide the best representation of the tested source's emissions."

Commenters however did not include the rest of that paragraph which shows EPA's support for the use of the AP-42 factors under certain circumstances:

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"However, test data from individual sources are not always available and even then, they may not reflect the variability of actual emissions over time. Thus, emission factors are frequently the best or only method available for estimating emissions, in spite of their limitations."

The above citation confirms EPA's support for the use of the AP-42 factors under certain circumstances and thus the appropriateness TCEQ's use of AP-42 factors in this situation.

REQUEST FOR RECONSIDERATION 2:

Commenters request that TCEQ reconsider its response (Response 6) to Comment 6 in RTC filed January 16, 2008) for the following reasons:

"Monitoring, recordkeeping and reporting requirements are vitally important. Without adequate monitoring, there is no way to determine whether or not refineries are complying with their permit limits and, consequently, no way to take enforcement action against those who violate their limits. The EPA itself has acknowledged: In the absence of effective monitoring, emission limits, can, in effect, be little more than paper requirements. Without meaningful monitoring data, the public, government agencies and facility officials are unable to fully assess a facility's compliance with the Clean Air Act."

Commenters also state that recent studies (Alberta DIAL Study and Sweden DIAL Study) demonstrated measured HAP (hazardous air pollutants) and other air emissions from many significant sources within refineries are "up to 100 times greater than emission factor estimates". Commenters state: "Fugitive emissions are chronically underestimated because they are so infrequently and poorly monitored. However, such leaks are extremely significant sources of HAP emissions. The EPA itself has observed that while individual leaks are typically small, the sum of all fugitive leaks from the thousands of potential sources at a refinery can be one of its largest emission sources. Indeed, fugitives account for nearly half of refinery HAP emissions. Fugitive air emission typically include HAPs which are also volatile organic compounds (VOCs), such as benzene (an EPA-designated "national cancer risk driver"); 1,3 butadiene; toluene; and xylenes"

The commenters also cite the Alberta DIAL Study and state that the study "found that, compared with emission factor estimates, DIAL detected 33 times more VOC and 96 times more benzene from storage emissions and 12 times more VOC and 8 times more benzene from fugitive emissions. Similarly, the Sweden DIAL Study found that, using DIAL rather than emission estimates, the real emission level in 1988 for the BP refinery (in Goteborg, Sweden) could be estimated at some 14,000 tons/a, i.e. 20 times higher than what the calculations showed."

The commenters continue their argument asking TCEQ to reconsider its response regarding the LDAR (Leak Detection and Repair) requirements contained in this permit, in light of the cited studies and EPA pronouncements, and request direct measurement using the LDAR technology.

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Further, the commenters ask that, in the 28VHP Fugitive monitoring of the draft permit (in SC. 18E), TCEQ incorporate a specific timeframe in which reinspection and repair must take place. They specifically ask that the draft permit require leak minimization within 24 hours of leak identification and leak repair within 7 days of detection.

TCEQ RESPONSE:

The VOC fugitive emission increase, due to the rolling in of standard permitted (Std Permit No. 79214) wastewater fugitives at EPN F-WW-MID is only 0.05 lb/hr and 0.24 tpy. This source was included the current permit's (current permit dated July 25, 2008) Emission Sources, Emission Caps, Individual Emission Limitations (MAERT) Table. Since the minimal wastewater fugitive emissions from the standard permit were previously authorized, the increase in this amendment is not a true increase. There will be no physical or operational changes as a result of this amendment. As noted above, all sources are being incorporated from existing (previously authorized) standard permits and the permit by rule.

For estimation of fugitives, applicants use the emission factors and control credits in the TCEQ Guidance Document titled "Fugitives", not AP-42 factors. Those fugitive emission factors were developed by EPA through rigorous testing of fugitive components using gas analyzers. Estimation of fugitives by this method is very conservative since emission factor is applied to all fugitive components, based on the assumption that all components will leak, although in reality, not all components will leak. For estimation of tank emissions, applicants use the most recent version of EPA Tank program, not AP-42.

Prior to this amendment, the 28M Fugitive monitoring program applied to some components and 28 VHP fugitive program to others. In this permit amendment, the 28M fugitive program is deleted and all components are made subject to 28VHP program (Special Condition (SC) No. 18) which is more stringent. The 28VHP fugitive monitoring program is an essential tool in performing initial and periodic checks to detect leaking components and to implement a priority for repairs. It represents Best Available Control Technology (BACT) for fugitive control in this case, based partly on cost effectiveness.

The TCEQ recently upgraded the 28VHP fugitive program requirements to make it more stringent and included timelines for certain requirements in accordance with 40 CFR Part 60 Subpart VV. For instance, the 3rd sentence in SC.18E of the 28VHP program now reads as follows:

"Gas or hydraulic testing of the new and reworked piping connections at no less than operating pressure shall be performed prior to returning the components to service or they shall be monitored for leaks using an approved gas analyzer within 15 days of the components being returned to service."

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The second paragraph of SC.18E is expanded to read as follows:

“Each open-ended valve or line shall be equipped with an appropriately sized cap, blind flange, plug, or a second valve to seal the line. Except during sampling, both valves shall be closed. If the removal of a component for repair or replacement results in an open-ended line or valve, it is exempt from the requirement to install a cap, blind flange, plug, or second valve for 72 hours. If the repair or replacement is not completed within 72 hours, the line or valve must have a cap, blind flange, plug, or second valve installed, or the open-ended valve or line shall be monitored for leaks above 500 ppmv daily.”

Please note the 28VHP Fugitive Program upgrade will apply to all permits that require this program, not just this permit amendment. Also, SC. 18F is revised to specify that gas analyzer used for leak checking will conform to requirements of Method 21 of 40 CFR Part 60, Appendix A. The new language also includes requirements about the response factor. VOC instrument testing in this fugitive program performed according to EPA Method 21 is a well established method and has been an industry standard for many years. SC.18H is also revised to include the following requirement to be in conformance with the 40 CFR Section 60.482.7: “A first attempt to repair the leak must be made within 5 days. Records of the first attempt to repair shall be maintained.”

In summary, per the newly revised 28VHP program, a first attempt to repair a leak is needed within 5 days, and records of the first attempt to repair will also be kept. (SC.18H) Repair will take place within 15 days or placed on delay of repair. (SC. 18I) If the repair or replacement of open ended valves can not be done in 3 days, the valves and lines will be closed or they will be monitored for leaks at the 500 ppmv leak detection limit.(SC.18E) These are well established standard practice timelines, in conformance or better than the leak detection and control timelines in the federal rules, that take into account scheduling inspection and repair personnel at a large refinery facility which contains thousands of potential leak points, to attempt the repair. The commenters can review the revised draft permit's Special Condition No. 18 to find out about the above-mentioned upgrades made to the 28VHP program. The commenters' suggestion to minimize the leak within 24 hours of identification and leak repair within 7 days may not be reasonably achieved and may not be cost effective in a large refinery like Flint Hills West Refinery. In addition, Flint Hills West Refinery has good standing with regards to compliance and enforcement inspections therefore, more stringent timelines than the other refineries in operation would not be justified.

Finally, please see TCEQ's response regarding the Alberta and Sweden Dial Studies and use of those camera techniques in Response to Requests for Reconsideration 1 above.

REQUEST FOR RECONSIDERATION 3.

Commenters ask that TCEQ reconsider its Response to Comment 3 regarding environmental justice issues citing to Executive Order No. 12898. Commenters state that when environmental justice issues are raised, the permitting authority (TCEQ must conduct an environmental justice analysis to determine whether the refinery expansion will have disproportionately high and adverse health or environmental effects on minority populations and low-income populations.

TCEQ RESPONSE:

The purpose of this amendment is to incorporate Standard Permit Authorization Nos. 74076, 77459, 77655, 79214 and Permit by Rule Registration No. 75266 into the permit. This amendment will reauthorize ammonia emissions from the SNCR (selective noncatalytic reduction) installation on FCCU CO Boiler/Scrubber (EPN AA-4) currently authorized under Standard Permit 76446, which is being voided. As noted above, there will be no physical or operational changes as a result of these amendments therefore, disproportionately high and adverse health or environmental effects on minority populations and low-income populations is not expected.

Furthermore, in accordance with Executive Order 12898, the TCEQ conducts its permitting program in a manner that ensures such program, policies and activities do not have the effect of excluding persons from participation, or subjecting persons to discrimination because of their race, color or national origin. This program includes opportunity to participate in decisions about activities that may affect their environment and/or health through the notice and comment process and the contested case hearing process. All timely comments and requests for reconsideration received on this application have been considered by the Executive Director's staff which resulted in some changes to the permit. In addition all timely comments, responses, hearing requests and requests for reconsideration will be submitted to the Commissioners for their consideration regarding whether to grant or deny the amendments under this application.

IV. Applicable Law for Hearing Requests

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

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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 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.

For hearing requests submitted on behalf of a group or association, an additional analysis is also necessary. Under 30 TAC § 55.205(a), 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;

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- (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.

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.

V. Analysis of Hearing Requests

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

All of the hearing requests were submitted during the public comment period. However, the ED has determined the hearing requests of Citizens for Environmental Justice, Refinery Reform Campaign and South Texas Colonias Initiative do not substantially comply with all of the requirements for form in 30 TAC § 55.201(d).

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

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Specifically, the ED has determined the hearing request of Citizens for Environmental Justice as submitted under signatures of Suzie Canales, Benjamin J. Wakefield and Enrique Valdivia fail to include an address or daytime telephone number as required by 30 TAC § 55.201(d) (1). Although the request submitted by Mr. Valdivia identifies Ms. Canales as a member of CFEJ and indicates that she is a Corpus Christi resident who lives and works near the facility, the request does not provide a specific, location or distance relative to the proposed facility. The only address provided for CFEJ and Ms. Canales was provided as part of Mr. Wakefield's Withdrawal of Appearance letter submitted on May 14, 2008 after the end of the comment period. For reference, this address is marked on the attached map and appears to be approximately thirteen miles from the Flint Hills refinery. None of the hearing requests identify other contact persons for CFEJ. In addition, this 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 the requests submitted on behalf of Refinery Reform Campaign by Suzie Canales, Benjamin J. Wakefield and Enrique Valdivia, no address or daytime telephone number as required by 30 TAC § 55.201(d) (1) was provided. The request submitted by Mr. Valdivia identified Denny Larson as the Director for RRC but does not give an address or state that he lives near the facility. However, Mr. Wakefield's Withdrawal of Appearance letter submitted on after the end of the comment period does include a California address for Mr. Larson. This 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).

As for the request submitted on behalf of the South Texas Colonias Initiative, no person was identified as a member of the group nor was an address or other contact information provided.

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

The ED asserts that even when read as a whole, the hearing requests as submitted by all three persons do not demonstrate that Ms. Canales 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.⁷ As noted above, using the address provided in Mr. Wakefield's Withdrawal of Appearance letter, the location of Ms. Canales is approximately 13 miles from the Flint Hills facility and therefore, she is not likely to be impacted differently than any other member of the general public.

Because the requests were submitted on behalf of the three above named groups, the requests must also be evaluated for group or associational standing. A group or association may request a

⁷ *United Copper Industries and TNRC v. Joe Grissom*, 17 S.W.3d 797 (Tex. pp.-Austin, 2000)

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contested case hearing only if the group or association meets all of the requirements noted in section IV above. In this case, the only persons identified as representatives of CFEJ or RRC are Suzie Canales and Denny Larson respectively. However, as noted above, none of the requests for either of these persons meet all of the requirements for standing in their own right as required by 30 TAC § 55.205(a)(1). The requests identifying Ms. Canales and Mr. Larson do not substantially comply with the requirements of 30 TAC § 55.201(d) regarding for or establish that either person is an affected person under 55.203(c). Finally, none of the requests identify other persons who would otherwise have standing to request a hearing in their own right.

In conclusion, the ED asserts that even when read together, none of the hearing requests submitted on this application substantially comply requirements for form, establish affected person status, or comply with all of the requirements for group or associational standing.

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 IV 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. Requesters submitted three issues in their requests for reconsideration. The ED provided responses to these Requests for Reconsideration in this document. Given that the responses to Requests for Reconsideration are provided in this document, the ED cannot determine or speculate if any issue of fact, law or policy may continue to be disputed by the hearing requesters. 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 issues noted above remain disputed.

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1. Three potential issues involving a question of fact.

1. Whether Flint Hills Resources' use of emission factors is adequate to assure compliance with all applicable requirements and limits;
2. Whether the monitoring requirements are sufficient to determine compliance with permit limits.
3. Whether TCEQ has adequately considered the environmental justice aspects of the permit.

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 16, 2007, and ended on July 2, 2007. The issues listed above upon which the hearing requests in this matter are based were raised initially in comments received during the public comment period and in requests for reconsideration filed February 15, 2008. If the commission determines that the hearing requester is an affected person, these issues 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.

Issues one and two above concern statutory and regulatory requirements that must be satisfied by this permit application and thus are referable issues. Issue three addresses a mixed question of fact and policy. It is a question of fact whether or not the ED considered environmental justice aspects of the permit. However, the environmental justice program is based on EPA policy and the approach taken to address environmental justice issues there again is addressed through TCEQ policy. Therefore, ED concludes issues one and two and part of issue three are referable issues.

VI. Maximum Expected Duration of the Contested Case Hearing

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

VII. Executive Director's Recommendation

The Executive Director respectfully recommends the commission:

- A. Find the hearing requests and requests for reconsideration in this matter were timely filed;
- B. Find the hearing requests in this matter do not satisfy all of the requirements for form under 30 TAC § 55.201(d);
- C. Find Suzie Canales is not an affected person in this matter;
- D. Find that, Citizens for Environmental Justice, Refinery Reform Campaign and South Texas Colonias Initiative have not met all of the requirements of group or association standing under the Commission's rules;
- F. Find the maximum expected duration of the contested case hearing, if held, would be six months.

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Respectfully submitted,

Texas Commission on Environmental Quality
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Representing the Executive Director of the
Texas Commission on Environmental Quality

CERTIFICATE OF SERVICE

On the 29th day of October, 2008, an original and 11 true and correct copies of the foregoing instrument were filed with the Office of the Chief Clerk and served on all persons on the attached mailing list by the undersigned via deposit into the U.S. Mail, inter-agency mail, facsimile, electronic mail, and/or hand delivery.



Erin Selvera

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

2008 OCT 29 PM 4:46

CHIEF CLERK'S OFFICE

MAILING LIST
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DOCKET NO 2008-0293-AIR; PERMIT NO 8803A

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