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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

August 29, 2008

LaDonna Castañuela, Chief Clerk
Texas Commission on Environmental Quality
Office of the Chief Clerk (MC-105)
P.O. Box 13087
Austin, Texas 78711-3087

2008 AUG 29 PM 4: 32
CHIEF CLERKS OFFICE
TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

Re: **FLINT HILLS RESOURCES, LP**
TCEQ DOCKET NO. 2008-0293-AIR

Dear Ms. Castañuela:

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

Sincerely,

A handwritten signature in cursive script, appearing to read "Garrett Arthur".

Garrett Arthur, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

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TCEQ DOCKET NO. 2008-0293-AIR

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FLINT HILLS RESOURCES, LP	§	BEFORE THE
PROPOSED AMENDMENT TO	§	
AIR QUALITY FLEXIBLE PERMIT	§	TEXAS COMMISSION ON
NO. 8803A / PREVENTION OF	§	
SIGNIFICANT DETERIORATION	§	ENVIRONMENTAL QUALITY
PERMIT NO. PSD-TX-413M8	§	

CHIEF CLERKS OFFICE

**OFFICE OF PUBLIC INTEREST COUNSEL'S
RESPONSE TO HEARING REQUESTS AND
REQUESTS FOR RECONSIDERATION**

To the members of the Texas Commission on Environmental Quality:

The Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (TCEQ or the "Commission") files this response to hearing requests and requests for reconsideration.

I. Introduction

On August 9, 2006, Flint Hills Resources, LP (FHR or the "Applicant") applied to the TCEQ to amend Air Quality Flexible Permit No. 8803A / Prevention of Significant Deterioration Permit No. PSD-TX-413M8. The amendment would make the following changes to the permit: incorporation of multiple Standard Permits and a Permit by Rule Registration; reauthorization of ammonia emissions from the SNCR (selective non-catalytic reduction) installation on the FCCU (fluid catalytic cracking unit) CO (carbon monoxide) Boiler / Scrubber; voidance of a Standard Permit; and the addition of an ammonia cap to the permit's MAERT (maximum allowable emission rate table). This facility is known as the West Refinery, and the refinery is located at 2825 Suntide Road in Corpus Christi, Nueces County.

FHR's application was declared administratively complete February 5, 2007, and on February 16, 2007, the first notice was published in the *Corpus Christi Caller-Times*. The

second notice was published June 1, 2007 in the same newspaper. The public comment period closed July 2, 2007, and the Chief Clerk mailed the Executive Director's (ED) Response to Comments (RTC) on January 16, 2008. The deadline for hearing requests and requests for reconsideration was February 15, 2008. On March 16, 2007, TCEQ received a timely hearing request from Citizens for Environmental Justice (CFEJ), Refinery Reform Campaign (RRC), and South Texas Colonias Initiative. On February 15, 2008, CFEJ and RRC (collectively the "Requestors") timely requested reconsideration and reiterated their hearing request.

For the reasons stated herein, OPIC recommends that the request for reconsideration be granted and the hearing request be denied.

II. Applicable Law

A. Hearing Requests

This application was declared administratively complete after September 1, 1999, and is therefore subject to the procedural requirements adopted pursuant to House Bill 801 (76th Leg., 1999).

Under Title 30, Texas Administrative Code (TAC) § 55.201(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;
- (2) identify the person's personal justiciable interest affected by the application, including a brief, but specific, written statement explaining in plain language the requestor's location and distance relative to the proposed facility or activity that is the subject of the application and how and why the requestor 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 requestor should, to the extent possible, specify any of the executive director's responses to comments that the requestor 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.

Under 30 TAC § 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. An interest common to members of the general public does not qualify as a personal justiciable interest. Section 55.203(c) provides relevant factors to be considered in determining whether a person is affected. These factors include:

- (1) whether the interest claimed is one protected by the law under which the application will be considered;
- (2) distance restriction 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.

As provided by 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;
- (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.

Under 30 TAC § 55.211(c)(2), a hearing request made by an affected person shall be granted if the request:

- (A) raises disputed issues of fact that were raised during the comment period, that were not withdrawn by the commenter by filing a withdrawal letter with the chief clerk prior to the filing of the executive director's response to comment, and that are relevant and material to the commission's decision on the application;
- (B) is timely filed with the chief clerk;
- (C) is pursuant to a right to hearing authorized by law; and
- (D) complies with the requirements of § 55.201.

B. Requests for Reconsideration

Section 55.201(e) of the TCEQ procedural rules states that any person may file a request for reconsideration of the ED's decision, and the request must expressly state that the person is requesting reconsideration of the executive director's decision and give reasons why the decision should be reconsidered. A response to a request for reconsideration should address the issues raised in the request. 30 TAC § 55.209(f).

III. Analysis of Hearing Requests

A. Whether the requestor is an affected person

The March 16, 2007 hearing request was submitted by Citizens for Environmental Justice, Refinery Reform Campaign, and South Texas Colonias Initiative. On February 15, 2008, CFEJ and RRC submitted a letter which is both a hearing request and a request for reconsideration, but there is no mention of South Texas Colonias Initiative in this second letter. OPIC considers CFEJ, RRC, and South Texas Colonias Initiative to be the three hearing requesters.

According to 30 TAC § 55.205(a), a hearing request by a group or association must show that at least one member of the group would otherwise have standing to request a hearing in his or her own right. The March 16th hearing request indicates that the Director of CFEJ, Suzie Canales, is a Corpus Christi resident. The March 16th hearing request also states that Suzie Canales and members of CFEJ live and work near, and are directly affected by the FHR facility. The follow-up February 15, 2008 hearing request provides no information concerning individual members of any of the groups. Ms. Canales is the only member of CFEJ named in either hearing request, and the information concerning her is inadequate to make a determination that she is an affected person. Neither hearing request demonstrates that Ms. Canales has a personal justiciable interest distinguishable from an interest of the general public. Under the requirements of § 55.205(a), a finding that Ms. Canales is an affected person would be a necessary prerequisite to group standing for CFEJ. Therefore, OPIC cannot find that CFEJ qualifies as an affected person.

Regarding the South Texas Colonias Initiative, the only information provided is that Lionel Lopez is the Director. Without further information concerning a member that would individually have standing, OPIC cannot find that the South Texas Colonias Initiative qualifies as an affected person.

Regarding RRC, the March 16th hearing request states that Denny Larson is Director of the group, and the RRC is a national campaign that seeks to clean up refineries. Again, without further information concerning Mr. Larson or another member of RRC that would individually have standing, OPIC cannot find that RRC qualifies as an affected person.

Under § 55.205(b), OPIC may request that a group or association provide an explanation of how the group or association meets the requirements for group standing. OPIC requests that any reply from CFEJ, RRC, and the South Texas Colonias Initiative be filed by September 15th and provide further information showing that at least one member from each organization could individually qualify as an affected person. OPIC will reconsider its position on these hearing requests based on any such information provided in a timely filed reply.

Alternatively, if the Commission finds that any of the hearing requestors are affected persons, OPIC provides the following analysis of the issues raised in the hearing request.

B. Which issues raised in the hearing requests are disputed

The first disputed issue raised in this hearing request is whether the Applicant relied on a withdrawn TCEQ guidance document to exempt certain emissions from public notice. The hearing requestors contend that FHR relied on this guidance document to

exempt from public notice 118.86 of the total 137.69 tons per year of emission increases that FHR seeks in this application.

The second disputed issue is the contention that the Applicant's reliance on emission factors indicates that its monitoring of emissions is inadequate to assure compliance with all applicable requirements and emissions limits.

C. Whether the dispute involves questions of fact or of law

The disputed issues involve questions of fact.

D. Whether the issues were raised during the public comment period

The issues were raised during the public comment period.

E. Whether the hearing request is based on issues raised solely in a public comment which has been withdrawn

The hearing request is not based on issues raised solely in a public comment which has been withdrawn.

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

This application is subject to the notice provisions in 30 TAC, Chapter 39. The issue concerning notice is therefore relevant and material to the Commission's decision on this application.

The adequacy of the Applicant's emissions monitoring and its compliance with all applicable emissions limits is an issue which concerns permit conditions based on and rule requirements contained in 30 TAC, Chapter 116. This issue is therefore relevant and material to the Commission's decision on the application.

G. Maximum expected duration for the contested case hearing

OPIC expects a maximum duration of 12 months from the first day of the preliminary hearing to issuance of the proposal for decision.

IV. Analysis of Requests for Reconsideration

In their request for reconsideration, CFEJ and RRC specifically raise three issues. First, they contend that emission factors often drastically underestimate actual emissions of numerous pollutants, and TCEQ should therefore reconsider its reliance on emission factors in this permit. Instead, TCEQ should require direct measurement of all emissions which are not currently subject to direct monitoring. Second, Requestors ask that TCEQ reconsider the LDAR (leak detection and repair) requirements contained in this permit and instead require direct measurement technology. Specifically, Requestors suggest that the permit require leak minimization within 24 hours of identification and leak repair within 7 days of detection. Finally, the request for reconsideration states that the TCEQ must consider the environmental justice issues raised by Requestors and cannot brush them aside with a reference to an "800 number."

Requestors' first and second points can generally be described as suggested changes to make the permit more prescriptive. OPIC agrees that wherever possible TCEQ should reduce its reliance on emission factors to calculate emissions. More monitoring and less reliance on emission factors could result in a more accurate record of a facility's actual emissions. As stated by the Requestors, EPA has acknowledged that 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.¹ Regarding the permit's LDAR requirements, the Requestors' suggestion seems like a straightforward way to reduce fugitive emissions, and thus VOC emissions, at this refinery. The Requestors' position is strengthened by the fact that EPA's Office of Inspector General has recognized the problem of under reporting of VOC emissions from the refining sector.² In summary, the Requestors' first and second reasons for reconsideration of the ED's decision could lead to a permit which is more protective of human health and the environment. Based on these two issues, OPIC supports reconsideration of the ED's decision.

Regarding the environmental justice argument, TCEQ has no specific guidance addressing how environmental justice is to be considered in the agency permitting process. No TCEQ permitting rules address environmental justice issues such as the location of permitted facilities in areas with minority and low-income populations, disparate exposure to pollutants by minority and low-income populations, or the disparate economic, environmental, and health effects on minority and low-income populations. For these reasons, the OPIC cannot support the Requestors' environmental justice argument as a basis for reconsideration of the ED's decision.

V. Conclusion

OPIC finds that CFEJ, RRC, and the South Texas Colonias Initiative do not presently qualify as affected persons and therefore recommends their hearing requests be denied. However, OPIC is requesting under § 55.205(b) that each of these groups provide an explanation of how the group meets the requirements for group standing. If such explanations are provided, OPIC may reconsider its position regarding the affected person status of these groups.

¹EPA Document AP-42, *Compilation of Air Pollutant Emission Factors*, Introduction, p. 1 (Vol. 1, 5th ed., Jan. 1995).

² *EPA Can Improve Emissions Factors Development and Management*, EPA Office of Inspector General, Report No. 2006-P-00017 (March 22, 2006).

Should the Commission find that any of the hearing requestors qualify as affected persons, OPIC recommends that the following issues be referred to the State Office of Administrative Hearings for a contested case hearing:

- Whether the Applicant relied on a withdrawn TCEQ guidance document to exempt certain emissions from public notice.
- Whether the Applicant's reliance on emission factors indicates that its monitoring of emissions is inadequate to assure compliance with all applicable requirements and emissions limits.

Of the three issues raised by Requestors in support of their request for reconsideration, OPIC supports the following two:

1. FHR's permit should require direct measurement of all emissions which are not currently subject to direct monitoring.
2. FHR's permit should require the refinery's LDAR program to use Fourier Transformation Infrared Spectroscopy (FTIR) or a portable VOC detection device, and the permit should require leak minimization within 24 hours of identification and leak repair within 7 days of detection.

OPIC recommends the Commission grant the request for reconsideration and remand this matter to the ED for further action. OPIC further recommends that the Commission direct the ED to consider changing FHR's permit to incorporate the Requestors' two suggestions set out above.

Respectfully submitted,

Blas J. Coy, Jr.
Public Interest Counsel

By 

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CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2008, the original and eleven true and correct copies of the foregoing document were filed with the TCEQ Chief Clerk, and copies were served to all parties listed on the attached mailing list via hand delivery, facsimile transmission, inter-agency mail, or by deposit in the U.S. Mail.



Garrett Arthur

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TCEQ DOCKET NO. 2008-0293-AIR

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