

Buddy Garcia, *Chairman*  
Larry R. Soward, *Commissioner*  
Bryan W. Shaw, Ph.D., *Commissioner*



Blas J. Coy, Jr., *Public Interest Counsel*

## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

December 19, 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

Re: **CITGO REFINING & CHEMICAL COMPANY, L.P.**  
**TCEQ DOCKET NO. 2008-0779-AIR**

Dear Ms. Castañuela:

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

Sincerely,

A handwritten signature in cursive script that reads "Eli Martinez" followed by a flourish.

Eli Martinez, Attorney  
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

2008 DEC 19 PM 2:54  
CHIEF CLERKS OFFICE  
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

REPLY TO: PUBLIC INTEREST COUNSEL, MC 103 • P.O. BOX 13087 • AUSTIN, TEXAS 78711-3087 • 512-239-6363

P.O. Box 13087 • Austin, Texas 78711-3087 • 512-239-1000 • Internet address: [www.tceq.state.tx.us](http://www.tceq.state.tx.us)

printed on recycled paper using soy-based ink

**TCEQ DOCKET NO. 2008-0779-AIR**

2008 DEC 19 PM 2:54

<p><b>IN THE MATTER OF THE APPLICATION OF CITGO REFINING AND CHEMICAL COMPANY, L.P. FOR AMENDMENT OF AIR QUALITY PERMIT NO. 46637</b></p>	<p>§ § § § §</p>	<p><b>BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY</b></p>	<p>CHIEF CLERKS OFFICE</p>
---	----------------------------------	--	----------------------------

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

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 that the Commission find that no right to a hearing exists on this application for amendment of an air permit.

**I. INTRODUCTION**

Citgo Refining and Chemicals Company, L.P. ("Citgo" or "Applicant") has applied to the TCEQ for amendment of existing Air Permit Number 46637 under Texas Clean Air Act (TCAA) § 382.0518. This permit will authorize Applicant to modify Barge Dock 7 to load gasoline and gasoline blend components. The facility is located at 1801 Nueces Bay Boulevard, Corpus Christi, Nueces County. Contaminants authorized under this permit include: volatile organic compounds (VOC), nitrogen oxides (NO<sub>x</sub>), carbon monoxide (CO), and sulphur dioxide (SO<sub>2</sub>).

The Executive Director ("ED") received the application on February 2, 2007, and declared the application administratively complete on March 15, 2007. The Applicant published the Notice of Receipt of Application and Intent to Obtain an Air Permit (NORI) on April 11, 2007, in the *Corpus Christi Caller Times*. The public comment period ended on December 21, 2007. The Executive Director filed a Response to Comments (RTC) on April 1, 2008. An amended RTC was filed on May 20, 2008 and mailed by the chief clerk on May 26, 2008. The deadline for requesting a hearing was on June 26, 2008. On May 14, 2007, a timely-filed

hearing request was submitted by attorney Enrique Valdivia on behalf of Citizens for Environmental Justice, Refinery Reform Campaign, and South Texas Colonias Initiative acting jointly.

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 request of Citizens for Environmental Justice and denying the hearing requests of the Refinery Reform Campaign and South Texas Colonias Initiative based on the absence of specific information establishing associational standing.

## II. APPLICABLE LAW

Because this application was declared administratively complete after September 1, 1999, it is subject to the requirements of Texas Health and Safety Code Section 382.056 (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 (hereinafter "TAC") § 55.201(d) (2006). 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).

The Commission has also set forth specific criteria for judging whether a group or organization should be considered an “affected person.” 30 TAC § 55.205(a) states that a group or association may request a hearing if:

- 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.

Any group or association which meets all of these criteria shall be considered an “affected

person.”

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

#### A. Associational Standing Requirements

As a preliminary issue, the Commission must determine whether the requesting associations have standing under the Texas Administrative Code to be granted a hearing. The joint request submitted by Mr. Valdivia names and outlines the purpose of each of the represented groups separately and does not represent that the requesting entities have formed a common group to request a hearing. Each association will therefore be evaluated separately.

According to the request, Citizens for Environmental Justice is a non-profit community organization “which works to achieve environmental justice in Corpus Christi.”<sup>1</sup> South Texas Colonias Initiative is a non-profit organization “working to improve living conditions for residents of the *colonias*”— residential areas along the Texas-Mexico border that often lack the most basic living necessities, such as potable water and sewer systems, electricity, paved roads,

---

<sup>1</sup> Valdivia, Enrique. “Comments of Citizens for Environmental Justice, Refinery Reform Campaign and South Texas Colonias Initiative, Request for Contested Case Hearing on the Application and Attempt to Obtain Air Permit No. 46637...” May 9, 2007, at p.1.

and safe and sanitary housing.<sup>2</sup> The Refinery Reform Campaign is a national campaign that seeks to “clean up refineries.”<sup>3</sup> The stated purpose of each of these associations is germane to the interests they seek to protect, and OPIC finds that each group has therefore substantially complied with 30 TAC §55.205(a)(2).

30 TAC §55.205(a)(1) additionally requires a group or association requesting a hearing to name one or more members of the group or association who would otherwise have standing to request a hearing in their own right. The hearing request submitted by Mr. Valdivia on behalf of the requestors, however, does not identify a specific individual whose personal justiciable interests will be impacted by the Applicant's activities.

A subsequent submission by Mr. Valdivia, written solely on behalf of Citizens for Environmental Justice (CFEJ), names Jim Miller as an affected member who “faces risks of harmful exposure to emissions from Applicant's facility greater than and distinct from the general public's.”<sup>4</sup>

No member of South Texas Colonias Initiative or the Refinery Reform Campaign was named in any filing. Without a specific member who would have standing in their own right on which to base affectedness, OPIC cannot recommend that the Commission grant the requests of South Texas Colonias Initiative or the Refinery Reform Campaign. OPIC may reconsider its recommendation in light of any timely subsequent filing in which an affected individual from either or both of the above organizations is appropriately specified.<sup>5</sup>

---

<sup>2</sup> *Id.* See also: <http://www.sos.state.tx.us/border/colonias/index.shtml>

<sup>3</sup> *Id.*

<sup>4</sup> Valdivia, Enrique. “Application of Citgo Refining and Chemicals Company, L.P. for Amendment of Air Quality Permit No. 46637.” December 1, 2008.

<sup>5</sup> 30 TAC §55.205(b) states that the Public Interest Counsel may request that a group or association provide an explanation of how the group or association meets standing requirements.

## **B. Jim Miller and the Citizens for Environmental Justice**

Mr. Valdivia states in his supplemental filing that Jim Miller is a member of the Citizens for Environmental Justice and resides “less than eight miles West of the Applicant’s facility.”<sup>6</sup> The Information Resources Division of the TCEQ has located Mr. Miller’s residence in relation to the East Plant Dock 7 of the CITGO Corpus Christi Refinery and produced a map indicating the distance between the locations is 5.7 miles.<sup>7</sup> 30 TAC §55.203(c)(3) states that a reasonable relationship must exist between the interest claimed and the activity regulated for a requesting party to be considered statutorily affected and granted a contested case hearing.

Potential impacts of Applicant’s air permit on human health and the environment were evaluated by the Executive Director, taking into account emission concentrations and utilizing air dispersion modeling techniques to ensure compliance with state and federal standards, Effects Screening Levels (ESLs), and National Ambient Air Quality Standards (NAAQS) promulgated by the Environmental Protection Agency (EPA). The Executive Director has concluded that, based on potential concentrations authorized by the permit, “it is not expected that there will be adverse health effects in the general public, sensitive subgroups, or animal life as long as the facility operates in compliance with its permit.”<sup>8</sup> Based on Mr. Miller’s relative distance from the emission source, OPIC finds that Mr. Miller’s in-home risk of health complications from the permitted activity are attenuated and do not support a finding of a reasonable relationship.

---

<sup>6</sup> *Id.*

<sup>7</sup> “Amendment Application for CITGO Refining and Chemical Co., L.P. Air Permit 46637.” Map Requested by TCEQ Office of Legal Services.

<sup>8</sup> “Executive Director’s Amended Response to Public Comment.” May 20, 2008. Response No. 1, p. 4.

### **C. Incidental and Recreational Use of an Affected Resource**

According to the supplemental filing, Mr. Miller is also “an avid fisherman who frequently fishes in Nueces Bay within a mile of Applicant’s facility” and “frequently travels from his home to within a mile of (the) Applicant’s facility,”<sup>9</sup> potentially increasing his exposure to Applicant’s emissions. A portion of the northern edge of the coastline facing Nueces Bay is within the one-mile marker boundary set out in the Executive Director’s map.

30 TAC §55.203(a) states that an affected person is one who has a personal justiciable interest not “common to members of the general public.” Factors to be considered in determining whether a person in fact has a justiciable interest are articulated at Texas Water Code (TWC) §5.115(a) and 30 TAC §55.203(c). TWC §5.115(a) states that an “affected person,” “person affected,” or “person who may be affected” is one who has a personal justiciable interest related to “a legal right, duty, privilege, power, or economic interest affected by the administrative hearing.” Mr. Miller has a legal right to engage in incidental and recreational uses of Nueces Bay and has a personal justiciable interest in the Texas Health and Safety Code’s protections of air quality in the areas where he engages in recreational activity. Because Mr. Miller represents that he frequently engages in recreational activities near the emission point, his interests are uncommon with members of the general public, who are not actually exposed to the ambient air surrounding Barge Dock 7 on a regular basis.

30 TAC §55.203(c), adopted on September 29, 1999 when the current form of TWC §5.115(a) had been fully expressed, provides additional factors to be employed in determining whether a personal justiciable interest “related to a legal right, duty, privilege, power, or

---

<sup>9</sup> Valdivia, Enrique. “Application of Citgo Refining and Chemicals Company, L.P. for Amendment of Air Quality Permit No. 46637.” December 1, 2008.

economic interest” has been established. One of those factors is the likely impact of the regulated activity on use of the impacted resource by the person.<sup>10</sup> As a fisherman in close proximity to the emissions source, Mr. Miller is affected by emissions from the facility. Potential impact to the air Mr. Miller breathes while fishing may affect his health or deter his use and enjoyment of Nueces Bay.

30 TAC §55.203(c)(4) states that another factor to be considered in affected person analysis is the likely impact of the regulated activity “on the health and safety of the person.” Mr. Miller is reportedly afflicted with respiratory illness severe enough to occasionally require an oxygen tank to help him breathe. In addition to further separating Mr. Miller from members of the general public, this condition puts at issue Mr. Miller’s health and safety in respect to the volatile organic compounds (VOC), nitrogen oxides (NO<sub>x</sub>), carbon dioxide (CO), and sulfur dioxide (SO<sub>2</sub>) allowed by the proposed permit. Additionally, Benzene, a naturally occurring carcinogen estimated to cause approximately 40 to 60 U.S. deaths a year,<sup>11</sup> accounts for about 1 percent of gasoline content<sup>12</sup> and will necessarily be emitted during loading operations at Barge Dock 7. Such emissions do not operate in isolation—Benzene concentrations have placed Nueces County on the TCEQ’s “Air Pollutant Watch List” since 1998.

Finally, 30 TAC §55.203(c)(3) states another factor in determining whether a person is affected by the permitted activity is the existence of a reasonable relationship between the interest claimed and the activity regulated. Due to the relatively close proximity of Mr. Miller’s

---

<sup>10</sup> 30 TAC §55.203(c)(5)

<sup>11</sup> “EPA Seeks Less Benzene in Gasoline.” Washington Post. March 2, 2006. <http://www.washingtonpost.com/wp-dyn/content/article/2006/03/01/AR2006030102113.html>

<sup>12</sup> Id,

activities within one mile of the emissions source, a reasonable relationship does exist between his fishing activities and the affected natural resource utilized.

For these reasons, OPIC recommends that Mr. Miller be found an affected person. Based on CFEJ member Mr. Miller's affected person status, OPIC further finds that CFEJ has associational status under 30 TAC §55.205. Furthermore, CFEJ's hearing request states concerns protected by the law under which the application will be considered, including nuisance,<sup>13</sup> compliance history,<sup>14</sup> and inconsistency of annual versus hourly emission rates. Such interests reasonably relate to the potential effects of facility operations.<sup>15</sup>

#### **D. Issues Analysis**

The hearing request raises the following issues:

- (1) Will the facility create nuisance conditions that adversely affect the hearing requestor's health?
- (2) Does the Applicant's compliance history warrant denial of the permit amendment?
- (3) Are the hourly versus annual permit rates inconsistent?
- (4) Do historical zoning restrictions based on race result in the ongoing exposure of people of color and modest economic means to increased environmental hazards and concomitant health impacts as opposed to more affluent communities who may enjoy greater agency?

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

No agreement exists between the parties on the issues discussed above.

##### **2. The hearing requestors raise issues of fact.**

The requestors raise specific factual issues in their hearing requests about nuisance conditions, compliance history, and permitting inconsistencies. As these are issues of fact, rather than issues of law or policy, these issues are appropriate for referral to hearing.<sup>16</sup> Although

---

<sup>13</sup>30 TAC § 101.4 (2006).

<sup>14</sup>30 TAC §60.1(a)(1).

<sup>15</sup>30 TAC § 55.203(c)(3).

<sup>16</sup> 30 TAC § 55.211(b)(3)(A), (B).

OPIC is sympathetic toward CFEJ's concerns regarding historical disadvantages to the poor and people of color, as well as the environmental impacts their communities face, the Commission's rules contain no specific standards for evaluating such impacts or making permitting decisions based on such issues. Therefore, these environmental justice issues are issues of policy and not appropriate for referral to SOAH.

**3. The hearing requestors raise issues similarly raised in comments on the application.**

All of the above concerns were raised during the comment period and have not been withdrawn.

**4. The issues raised by the requestor regarding nuisance conditions and the effect of emissions on the hearing requestor's health are relevant and material to the Commission's decision on this application.**

The hearing request raises issues that 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 issues raised by the hearing requestor directly relates to whether the applicant will meet the requirements of applicable substantive law.<sup>17</sup>

In accordance with THSC section 382.0518(b)(2), the Commission may grant a permit "if, from the information available to the commission, including information presented at any hearing held under Section 382.056(k), the commission finds:...(2) no indication that the emissions from the facility will contravene the intent of this chapter, including protection of the public's health and physical property." Furthermore, pursuant to 30 TAC section 101.4, the Applicant shall not "discharge...air contaminants...in such concentration and of such duration as

---

<sup>17</sup> 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.")

are or may tend to be injurious to or to adversely affect human health or welfare, animal life, vegetation, or property, or as to interfere with the normal use and enjoyment of animal life, vegetation, or property.” Therefore, a potential nuisance condition that may affect the hearing requestor’s health is relevant and material to the Commission’s decision on this application.<sup>18</sup>

Compliance history is specifically referenced as a factor utilized by the Commission when making decisions regarding the amendment of permits<sup>19</sup> and is appropriately referable to SOAH. Consistency of permitted emission rates is also appropriately referable because of the importance they have in both modeling and enforcement actions.

**5. Any Commission referral to SOAH should include issues regarding human health and nuisance conditions.**

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 the following issues:

1. Will the permit amendment create nuisance conditions?
2. Does the Applicant’s compliance history warrant denial of the permit amendment?
3. Does an inconsistency exist between the permitted hourly versus annual emission rates?

**E. 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

---

<sup>18</sup> 30 TAC §55.209(e)(6) (2006).

<sup>19</sup> 30 TAC §60.1(a)(1)(A).

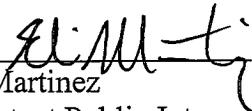
judge is expected to issue a proposal for decision, and as required by 30 TAC section 55.209(e)(7), OPIC estimates that the maximum expected duration of any hearing on this application would be nine months from the first date of the preliminary hearing until the proposal for decision is issued.

### III. CONCLUSION

For the reasons set forth above, the Office of Public Interest Counsel recommends granting the contested case hearing request of Citizens for Environmental Justice and referring this matter to the State Office of Administrative Hearings for a hearing on the issues described above. OPIC respectfully recommends that the Commission find that South Texas Colonias Initiative and the Refinery Reform Campaign are not affected persons. OPIC may reconsider its recommendation if an affected individual is named in a subsequent filing.

Respectfully submitted,

Blas J. Coy, Jr.  
Public Interest Counsel

By   
Eli Martinez  
Assistant Public Interest Counsel  
State Bar No. 24056591  
(512)239.3974 PHONE  
(512)239.6377 FAX

2008 DEC 19 PM 2:55

**CERTIFICATE OF SERVICE** CHIEF CLERKS OFFICE

I hereby certify that on December 19, 2008, the original and seven true and correct copies of the Office of Public Interest Counsel's Response to Hearing Request 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.

  
\_\_\_\_\_  
Eli Martinez

**MAILING LIST**  
**CITGO REFINING & CHEMICAL COMPANY, L.P.**  
**TCEQ DOCKET NO. 2008-0779-AIR**

**FOR THE APPLICANT:**

Eric Bigelow, Sr. Env. Advisor  
Citgo Refining & Chemicals Co. LP  
P.O. Box 9176  
Corpus Christi, Texas 78469-9176  
Tel: (361) 844-4882  
Fax: (361) 844-5108

**FOR THE EXECUTIVE DIRECTOR:**

Deanna Sigman, Staff Attorney  
Texas Commission on Environmental Quality  
Environmental Law Division, MC-173  
P.O. Box 13087  
Austin, Texas 78711-3087  
Tel: (512) 239-0600  
Fax: (512) 239-0606

Beecher Cameron, Technical Staff  
Texas Commission on Environmental Quality  
Air Permits Division, MC-163  
P.O. Box 13087  
Austin, Texas 78711-3087  
Tel: (512) 239-1495  
Fax: (512) 239-1300

Juan M. Barrientez, Technical Staff  
Texas Commission on Environmental Quality  
Air Permits Division, MC-163  
P.O. Box 13087  
Austin, Texas 78711-3087  
Tel: (512) 239-4786  
Fax: (512) 239-1300

**FOR OFFICE OF PUBLIC ASSISTANCE:**

Bridget Bohac, Director  
Texas Commission on Environmental Quality  
Office of Public Assistance, MC-108  
P.O. Box 13087  
Austin, Texas 78711-3087  
Tel: (512) 239-4000  
Fax: (512) 239-4007

**FOR ALTERNATIVE DISPUTE  
RESOLUTION:**

Kyle Lucas  
Texas Commission on Environmental Quality  
Alternative Dispute Resolution, MC-222  
P.O. Box 13087  
Austin, Texas 78711-3087  
Tel: (512) 239-4010  
Fax: (512) 239-4015

**FOR THE CHIEF CLERK:**

LaDonna Castañuela  
Texas Commission on Environmental Quality  
Office of Chief Clerk, MC-105  
P.O. Box 13087  
Austin, Texas 78711-3087  
Tel: (512) 239-3300  
Fax: (512) 239-3311

**REQUESTER:**

Enrique Valdivia, Counsel  
Texas Rio Grande Legal Aid  
1111 N. Main Ave.  
San Antonio, Texas 78212-4713