

Bryan W. Shaw, Ph.D., *Chairman*
Buddy Garcia, *Commissioner*
Carlos Rubinstein, *Commissioner*



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

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
Protecting Texas by Reducing and Preventing Pollution

January 29, 2010

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: **HOUSTON REFINING, L.P.**
TCEQ DOCKET NO. 2009-0179-AIR

Dear Ms. Castañuela:

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

Sincerely,

A handwritten signature in cursive script, appearing to read "Garrett Arthur", written over a horizontal line.

Garrett Arthur, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

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DOCKET NO. 2009-0179-AIR

APPLICATION BY	§	BEFORE THE
HOUSTON REFINING, L.P.	§	TEXAS COMMISSION ON
AIR PERMIT NO. 2167	§	ENVIRONMENTAL QUALITY

OFFICE OF PUBLIC INTEREST COUNSEL'S
RESPONSE TO HEARING REQUEST

To the Members of the Texas Commission on Environmental Quality:

The Office of the Public Interest Counsel (OPIC) at the Texas Commission on Environmental Quality (TCEQ or the "Commission") files this response to hearing requests in the above-referenced matter.

I. Introduction

On August 7, 2008, Houston Refining L.P. ("Houston Refining" or the "Applicant") applied to the TCEQ for renewal of Air Flexible Permit No. 2167. Houston Refining operates a refinery at 12000 Lawndale Street in Houston, Harris County.

Houston Refining's application was declared administratively complete August 22, 2008. Newspaper notice was published September 2, 2008 in the *Houston Chronicle* and September 3, 2008 in *La Voz*. The comment period, which was extended, ended September 29, 2008. On December 16, 2008, the ED filed his Response to Comments (RTC), and a public meeting was held. A second public meeting was held on January 29, 2009.

The TCEQ received timely hearing requests from the City of Houston and the Environmental Integrity Project (EIP). EIP's hearing request was submitted on behalf of the American Lung Association, Environmental Defense Fund, and Galveston Houston Association for Smog Prevention.

For the reasons stated herein, OPIC finds that the public interest warrants a hearing, and we recommend the Commission grant a hearing on public interest grounds.

II. Applicable Law

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 30 Texas Administrative Code (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 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.

The Texas Clean Air Act provides that the Commission may not hold a hearing on a renewal which would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted.¹ This limitation does not apply to a

¹ See TEX. HEALTH AND SAFETY CODE § 382.056(g).

facility for which the applicant's compliance history is rated as "Low" under the TCEQ's compliance history classification system.²

Texas Clean Air Act § 382.056 further provides that the Commission must consider a hearing request in accordance with the procedures provided by § 5.556 of the Texas Water Code.³ Section 5.556 grants the Commission the authority to hold a hearing "if it determines that the public interest warrants doing so."⁴ Additionally, the TCEQ rules allow the Commission to refer an application to the State Office of Administrative Hearings (SOAH) if the Commission determines that a hearing would be in the public interest.⁵

III. Houston Refining Has Applied for a "No Increase Renewal"

In spite of the fact that this renewal includes the incorporation of alterations, amendments, permits by rule, and changes in emission factors, OPIC concludes that the application does qualify as a "no increase renewal."⁶ The Applicant's changes include: updating calculations for currently permitted sources to reflect the latest calculation methodologies; incorporating several Permits by Rule (PBR); updating emission factors; and adjusting the benzene emission factor for heater and boiler emissions to match test data. The Applicant and Executive Director (ED) assert that these changes, among others, will result in emissions decreases at Houston Refining. However, the City of Houston contends that the benzene reductions claimed in the application are generally not supported by changes in operations, additional environmental controls, or monitoring data; and most of the reductions appear to be based on revised calculations for which there is no supporting information. Although the parties

² See TEX. HEALTH AND SAFETY CODE § 382.056(o).

³ See TEX. HEALTH AND SAFETY CODE § 382.056(n).

⁴ TEX. WATER CODE § 5.556(f).

⁵ See 30 TEX. ADMIN. CODE § 55.211(d)(1).

⁶ OPIC notes that Houston Refining submitted a concurrent amendment application that is not subject to public notice or an opportunity for a contested case hearing.

disagree regarding whether benzene emissions are actually being reduced, it does appear that Houston Refining's application qualifies as a no increase renewal, because the quality of emissions is not changing and the quantity of allowable emissions is not increasing.

Regarding compliance history, Houston Refining is rated as "Average", and the exception for a "Low" compliance history therefore does not apply to this application.

For these reasons, the requestors have no legal right to a contested case hearing on this application, and OPIC cannot conclude that the requestors are affected persons under 30 TAC § 55.203. However, this determination does not foreclose the Commission from referring this application to SOAH if the public interest warrants a hearing.

IV. Public Interest Factors Weigh in Favor of a Hearing

Due to public interest factors which are unique to this application, OPIC recommends the Commission exercise its authority to hold a public interest hearing. Also, the City of Houston, in addition to a traditional hearing request, has specifically asked for a public interest hearing.

A. Public Health

According to the City of Houston's hearing request, Houston Refining's flexible permit is the largest authorization of benzene air emissions in Harris County. The City also states that this refinery's rate of benzene air emissions per barrel of refined product is 50% higher than the average of all Texas refineries. The City further states that this permit has not undergone a review with public participation since 2000, and since that time, a great deal of information about the refinery's adverse impact has become known. Given that benzene causes cancer in humans, the City asserts that Houston Refining's air emissions pose an unreasonable health risk to Houstonians. In its request, the City urges the Commission to grant a public interest hearing

so that the Commission has a full and adequate record concerning the public health impacts presented by renewal of this application.

An additional concern raised by the City of Houston is the potential for benzene emissions to contribute to Houston's nonattainment of the National Ambient Air Quality Standard (NAAQS) for ozone. Given that benzene is a volatile organic compound (VOC), VOC's are precursors to ozone formation, and ozone pollution is a public health issue, the City is justifiably concerned that Houston Refining's benzene emissions may adversely impact public health.

Based on Houston Refining's potential to adversely impact public health in the Houston area, in contravention of the Texas Clean Air Act's stated purpose, OPIC supports the City of Houston's request for a public interest hearing.⁷

B. Public Participation

According to the City's hearing request, Houston Refining's flexible permit has been changed 17 times since issuance in 1999, and only one change triggered public notice. While it may be true that the applicable statutes and regulations have exempted the majority of these permit changes from public notice, the public should now be afforded the opportunity to fully participate in the TCEQ permitting process via a contested case hearing. It would be decidedly contrary to the public interest for the Commission to grant yet another change to Houston Refining's permit without the benefit of a robust evidentiary record, which can only be provided by a hearing at SOAH.⁸

⁷ See TEX. HEALTH AND SAFETY CODE § 382.002(a), which states, "The policy of this state and the purpose of this chapter are 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"

⁸ The need for a public interest hearing regarding this flexible permit is highlighted by the Environmental Protection Agency's (EPA) proposed disapproval of Texas' flexible permits program, including the public notice rule for flexible permits. See 74 Fed. Reg. 48480, 48491 (2009) (proposed Sep. 23, 2009).

C. Compliance History

Three environmental agencies have jurisdiction over this refinery: TCEQ, City of Houston Bureau of Air Quality Control, and Harris County Public Health and Environmental Services. According to the City of Houston, the three agencies issued a combined total of 30 Notices of Violation between 2002 and 2008, and a combined total of 30 Notices of Enforcement. Additionally, TCEQ has entered into 16 Agreed Orders with Houston Refining since 2002.

Regarding compliance history, TCEQ rule states as follows:

Notwithstanding any other commission rules, the commission may refer an application to SOAH if the commission determines that the application is for ... renewal of an air permit ... that involves a facility for which the applicant's compliance history contains violations which are unresolved and which constitute a recurring pattern of egregious conduct which demonstrates a consistent disregard for the regulatory process, including the failure to make a timely and substantial attempt to correct the violations.⁹

Using TCEQ's compliance history formula, Houston Refining is admittedly an average performer. However, OPIC believes that the question of whether Houston Refining's compliance history shows "a recurring pattern of egregious conduct which demonstrates a consistent disregard for the regulatory process" is an appropriate issue for a public interest hearing.¹⁰

V. Parties to the Public Interest Hearing

In referring this application to SOAH for a contested case hearing, OPIC recommends that the public interest would be further served by having the designated parties to the hearing include the hearing requestors. The City of Houston, EIP, American Lung Association, Environmental Defense Fund, and Galveston Houston

⁹ 30 TEX. ADMIN. CODE § 55.211(d)(2).

¹⁰ *Id.*

Association for Smog Prevention have included detailed information in their comments and requests which needs to be scrutinized through the hearing process so that the appropriate record may be developed for the Commission's consideration.

VI. Issues to Refer to SOAH

For the public interest hearing, OPIC recommends the following disputed issues of fact, all of which are relevant and material to the Commission's decision on this application, be referred to SOAH:

1. Whether Applicant's benzene air emissions pose an unreasonable health risk to the public
2. Whether the concentrations of benzene in Houston neighborhoods downwind of Applicant's refinery are too high
3. Whether the benzene emissions from Applicant contribute significantly to the elevated benzene levels in Houston neighborhoods
4. Whether the permitting process has accounted for the cumulative risk imposed on the public by Applicant's refinery
5. Whether Applicant's compliance history warrants denial of the application
6. Whether the benzene reductions claimed in the permit are supported by actions that will result in reductions
7. Whether the permit should require verification of benzene emissions via direct observation or monitoring
8. Whether dispersion modeling should be required to support the application
9. Whether the application and permit account for the presence of a school within 3,000 feet of the refinery
10. Whether the application contains errors and omissions regarding emissions from heaters and boilers, flares, delayed coker units, storage tanks, cooling towers, wastewater system, fugitives, and fluidized catalytic cracking unit
11. Whether the permit complies with EPA requirements regarding benzene emissions

12. Whether Applicant's emissions are contributing to Houston's ozone nonattainment status

VII. Conclusion

There is no right to a hearing on a no increase renewal of an air permit. However, OPIC respectfully recommends that the Commission exercise its authority under the Texas Water Code and TCEQ rules to hold a public interest hearing. OPIC finds that the unique public interest factors presented by this application, including public health, public participation, and compliance history, warrant a public interest hearing. We further recommend that the parties and issues set out above be included in the Commission's order referring this matter to SOAH for a contested case hearing in the public interest.

Respectfully submitted,

Blas J. Coy, Jr.
Public Interest Counsel

By 
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CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2010, the foregoing document was filed with the TCEQ Chief Clerk, and copies were served to all parties listed on the attached mailing list via hand delivery, facsimile transmission, electronic mail, inter-agency mail, or by deposit in the U.S. Mail.

A handwritten signature in black ink, appearing to read "Garrett Arthur", written over a horizontal line.

Garrett Arthur

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TCEQ DOCKET NO. 2009-0179-AIR

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