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

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

June 7, 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: **CITGO REFINING AND CHEMICALS COMPANY, LP**
TCEQ DOCKET NO. 2010-0556-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 that reads "Amy Swarholm".

Amy Swarholm, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

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TCEQ DOCKET NO. 2010-0556-AIR

**IN THE MATTER OF
THE APPLICATION OF
CITGO REFINING AND
CHEMICAL COMPANY,
LP, PERMIT NO. 9604A
AND PSD-TX-653M1**

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**BEFORE THE TEXAS
COMMISSION ON
ENVIRONMENTAL
QUALITY**

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

TO THE HONORABLE MEMBERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

COMES NOW, the Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (the Commission or TCEQ) with a Response to Hearing Requests in the above-referenced matter.

I. INTRODUCTION

CITGO Refining and Chemical Company, LP (CITGO or Applicant) has applied for a New Source Review Authorization under the Texas Clean Air Act (TCAA) § 382.0518. The proposed permit would authorize the modification of the No. 2 Fluid Catalytic Cracking Unit (FCCU) at the Applicant's East Plant by installing additional air blowers, testing of the FCCU unit for 12 months at a higher throughput, and pending satisfactory test results, authorization of the modified FCCU unit at a higher throughput level after the test period. The current facility is located at 1801 Nueces Bay Boulevard (the East Plant), at 7350 Interstate Highway 37, Corpus Christi, Nueces County, Texas. The proposed permit would authorize the release of the following contaminants; nitrogen oxides (NOX), carbon monoxide (CO), volatile organic compounds (VOC), particulate matter, including particulate matter less than 10 microns (PM/PM10), sulfur dioxide (SO2), and sulfuric acid (H2SO4).

TCEQ received this application on June 13, 2007. On June 28, 2007, the Executive Director (ED) declared the application administratively complete. The Notice of Receipt and Intent to Obtain Air Quality Permit (NORI) was published in the *Corpus Christi Caller Times* on July 25, 2007. The Notice of Application and Preliminary Decision (NAPD) was published in the *Corpus Christi Caller Times* on November 3, 2009. The public comment period ended on January 3, 2009, and the period to request a contested case hearing ended on April 9, 2009. TCEQ received one comment and request for a contested case hearing from Enrique Valdiva on behalf of Citizens for Environmental Justice, the Refinery Reform Campaign, and the South Texas Colonias Initiative on September 10, 2007. For the reasons discussed below, OPIC recommends that the Commission deny the pending hearing request.

II. ANALYSIS OF REQUESTS FOR CONTESTED CASE HEARINGS

A. Applicable Law

This application was declared administratively complete after September 1, 1999, and is subject to the requirements of Texas Water Code (TWC) § 5.556 added by Acts 1999, 76th Leg., Ch. 1350 (commonly known as "House Bill 801"). Under the applicable statutory and regulatory requirements, a hearing request must substantially comply with the following: give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request; identify the requestor's personal justiciable interest affected by the application showing why the requestor is an "affected person" who may be adversely affected by the proposed facility or activity in a manner not common to members of the general public; request a contested case hearing; list all relevant and material disputed issues of fact that were raised during the comment period that are the basis of the hearing request; and provide any other information specified in the public notice of application. 30 TAC § 55.201(d). 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." This justiciable interest does not include an interest common to the general public. 30 TAC § 55.203(c)

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

Accordingly, pursuant to 30 TAC § 55.209(e), 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.

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.¹

The executive director, the public interest counsel, or the applicant may request that a group or association provide an explanation of how the group or association meets the requirements of 30 TAC § 55.205(a).

B. Determination of Affected Person Status

TCEQ received a letter requesting a contested case hearing on this matter from Enrique Valdiva on behalf of Citizens for Environmental Justice, the Refinery Reform Campaign, and the South Texas Colonias Initiative.

The hearing request states numerous concerns of the three requesting organizations that are related to the organizations' purposes. The South Texas Colonias Project states its purpose as improving the living conditions of residents of colonias. The Refinery Reform Campaign is an organization committed to cleaning up refineries. The purpose of CEJ is to achieve environmental justice in Corpus Christi. The request states that several CEJ members live and work near the facility and live in the fence-line community of Hillcrest. The organization is concerned that the proposed permit amendment would harm the health of its members, and would allow increased amounts of air pollutants to be emitted into an area harmed by CITGO in the past. The hearing request expresses concern about the high number of birth defects in Corpus Christi, as well as the disproportionate environmental impact of the CITGO facility on minority and low-income individuals. The requestors are claiming an interest in clean, healthy air for the populations of Corpus Christi and the Hillcrest community.

While CEJ, the Refinery Reform Campaign, and the South Texas Colonias Initiative raise concerns about the impact upon the health of unidentified members living near the plant and disproportionate impacts on minority and low income individuals, their request fails to demonstrate how any specific, identified member is an affected persons.

None of the three requesting organizations has met the requirements for group or associational standing because none has identified a member who would otherwise have standing in her or his individual capacity. CEJ identifies Suzie Canales as a member,

¹ 30 TAC § 55.205(a)

organization director, and resident of Corpus Christi. South Texas Colonias Initiative identifies Lionel Lopez as a member, director of the organization, and a resident of Corpus Christi. The Refinery Reform Campaign claims standing through director Denny Larson. Based solely on this information and without more, OPIC cannot find that Suzie Canales, Lionel Lopez, or Denny Larson have a personal justiciable interest in this application which is not common to the general public residing in Corpus Christi.

For this reason, OPIC cannot find that these requesting organizations meet the requirements of 30 TAC §55.205(a)(1). Therefore, because these organizations are not affected persons, OPIC must recommend that their request be denied. OPIC will reconsider its position of affected person status based on any timely filed reply showing that any of the organizations' members would have standing in their individual capacities.

C. Issues Raised in the Hearing Request

In the event the Commission disagrees with the affected person analysis stated above and grants a hearing, OPIC provides the following analysis of issues. The following issues have been raised in the hearing requests:

1. Whether the health of Corpus Christi residents would be adversely affected by proposed facility emissions, including but not limited to: VOCs, organic compounds, sulfur dioxide, carbon monoxide, nitrogen oxides, sulfuric acid mist and particulate matter including particulate matter less than 10 microns .
2. Whether minority and low income individuals would be disproportionately impacted by emissions from the proposed facility.

D. Issues Raised in the Comment Period

The issues raised in the hearing request were raised in the comment period and have not been withdrawn. 30 TAC §§ 55.201(c) and (d)(4), 55.211(c)(2)(A).

E. Disputed Issues

There is no agreement between the hearing requestors and the ED on the issues raised in the hearing requests.

F. Issues of Fact

If the Commission considers an issue to be one of fact, rather than one of law or policy, it is appropriate for referral to hearing if it meets all other applicable requirements. 30 TAC § 55.211(c)(2)(A). All of the issues presented are issues of fact.

G. Relevant and Material Issues

The hearing requests raise issues relevant and material to the Commission's decision under the requirements of 30 TAC §§ 55.201(d)(4) and 55.211(c)(2)(A). In order to refer an issue to SOAH, the Commission must find that the issue is relevant and material to the Commission's decision to issue or deny this permit. *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 “[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”). Relevant and material issues are those governed by the substantive law under which this permit is to be issued. *Id.*

TCEQ is responsible for the protection of air quality under the TCAA and accompanying administrative rules. The purpose of the TCAA is “to safeguard the state's air resources from pollution by controlling or abating air pollution and emission of air contaminants, consistent with the protection of public health, general welfare, and physical property, including the esthetic enjoyment of air resources by the public and the maintenance of adequate visibility.” TEX. HEALTH & SAFETY CODE § 382.002. In addition, “[n]o person shall discharge from any source whatsoever one or more air contaminants or combinations thereof, in such concentration and of such duration as 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.” 30 TAC § 101.4.

Issue No. 1 is relevant and material to air quality and effects on human health. Accordingly, Issue No. 1 is appropriate for referral to SOAH.

Issue No. 2 raises environmental justice concerns. TCEQ has made a strong policy commitment to address environmental equity by creating an environmental equity

program within the Office of Public Assistance. The stated goals of this program include: to help citizens and neighborhood groups participate in the regulatory process; to ensure that agency programs that substantially affect human health or the environment operate without discrimination; to incorporate into agency policies a sensitivity to the collection and analysis of demographic information for areas surrounding facilities or sites; and to make sure that citizens' concerns are considered thoroughly and are handled in a way that is fair to all. However, there is no concrete guidance addressing how environmental equity is to be considered in the TCEQ permitting process. No TCEQ permitting rules address environmental equity issues such as the location of permitted facilities in areas with minority and low-income populations, disparate exposures of pollutants to minority and low-income populations, or the disparate economic, environmental, and health effects on minority and low-income populations. Therefore, the environmental justice issue could not be addressed in proceedings on this application and cannot be considered relevant and material to the decision on this application.

H. Issues Recommended for Referral

If the Commission determines that any of the requestors are affected persons, OPIC would recommend that the following disputed issues of fact be referred to SOAH for a contested case hearing:

1. Whether the health of Corpus Christi residents would be adversely affected by facility emissions, including but not limited to: VOCs, organic compounds, sulfur dioxide, carbon monoxide, nitrogen oxides, sulfuric acid mist and particulate matter including particulate matter less than 10 microns .

I. Maximum Expected Duration of Hearing

Commission Rule 30 TEX. ADMIN. CODE § 55.115(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 be longer than one year from the first day of the preliminary hearing to the date the proposal for decision is issued. To assist the Commission in stating a date by which the judge is expected to issue a proposal for decision, and as required by 30 TEX. ADMIN. CODE §55.209(d)(7), OPIC estimates

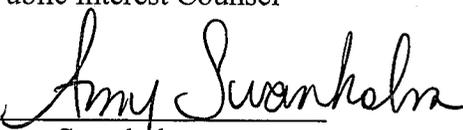
that the maximum expected duration of a hearing on this would be nine months from the first date of the preliminary hearing until the proposal for decision is issued.

III. CONCLUSION

For the reasons discussed above, OPIC recommends that the Commission deny the hearing requests of Citizens for Environmental Justice, the Refinery Reform Campaign, and the South Texas Colonias Initiative. OPIC will reconsider its recommendation based on any timely reply filed by the requestors showing that any member of the requesting organizations has standing in his or her individual capacity.

Respectfully submitted,

Blas J. Coy, Jr.
Public Interest Counsel

By: 
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CERTIFICATE OF SERVICE

I hereby certify that on June 7, 2010 the original and seven true and correct copies of the Office of the 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.


Amy Swanholm

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TCEQ DOCKET NO. 2010-0556-AIR

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