

**TCEQ DOCKET NO. 2012-0482-AIR
PERMIT NO. 809**

APPLICATION BY	§	BEFORE THE
	§	
INVISTA S.Á R.L.	§	TEXAS COMMISSION ON
	§	
VICTORIA, VICTORIA COUNTY, TEXAS	§	ENVIRONMENTAL QUALITY

APPLICANT’S RESPONSE TO REQUESTS FOR CONTESTED CASE HEARING

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

COMES NOW Applicant INVISTA S.á r.l. (“*INVISTA*” or “*Applicant*”) and, pursuant to 30 Tex. Admin. Code § 55.209(d), files this response to the requests for contested case hearing submitted to the Texas Commission on Environmental Quality (“*TCEQ*” or “*Commission*”) by Cynthia Brookhouser, H. D. Campbell, Barbara Chambers, Brandon Haskell Cook, Thomas Davidson, Johnny Denning, Sharon Harper, Robert and Diane Howell, Douglas Lawrence, Asa and Marilyn Logan, Marvin Patterson, Anton and Joanne Piegsa, Carmine Schifano, Arlene Schultz, Vernon Singleton, H. E. and Dianna Stevenson, Georgia Vega, and Forrest Volkert (collectively, “*Requestors*”) concerning INVISTA's application to renew Air Quality Permit No. 809 (the “*Application*”) and thereby authorize the continued operation of the Nitric Acid Unit at INVISTA's Victoria Site. The hearing requests should be denied for three reasons. First, the Application seeks to renew an existing air permit with no associated increase or change in allowable emissions, for which there exists no opportunity for a contested case hearing under the Texas Clean Air Act.¹ Second, Requestors are not affected persons because there is no reasonable relationship between Requestors' stated interests and the activity authorized by Permit No. 809.² Third, the requests do not raise issues that are relevant to the Commission's decision on the Application and thus do not meet the minimum regulatory requirements for referral to the State Office of Administrative Hearings (“*SOAH*”).³

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

² See 30 TEX. ADMIN. CODE § 55.203(c)(3).

³ See 30 TEX. ADMIN. CODE § 50.115(c).

I. BACKGROUND

On March 7, 2003, E.I. du Pont de Nemours and Company (“*DuPont*”) filed the Application with TCEQ to renew Air Quality Permit No. 809 (the “*Permit*”) and thereby authorize the continued operation of the Nitric Acid Unit located at its Victoria Site in Victoria County, Texas. TCEQ declared the Application to be administratively complete on May 23, 2003, and Notice of Receipt of Application and Intent to Obtain Air Permit Renewal was published in the *Victoria Advocate* on June 18, 2003. The Spanish language version of the notice was published in *Revista de Victoria* on August 13, 2003. On June 30, 2003, following this first public notice, TCEQ received letters from Requestors requesting a contested case hearing.

On April 30, 2004, DuPont and INVISTA finalized the sale of the DuPont Textiles & Interiors assets to INVISTA, including the Victoria Nitric Acid Unit authorized by Permit No. 809.⁴ Shortly thereafter, INVISTA commenced and conducted audits examining compliance at the Victoria Site in accordance with the Texas Environmental, Health, and Safety Audit Privilege Act⁵ and a corporate audit agreement that INVISTA entered into with the U.S. Environmental Protection Agency (“*EPA*”) pursuant to EPA’s Policy on Incentives for Self-Policing: Discovery, Disclosure, Correction, and Prevention of Violations.⁶ As a result of these compliance audits, INVISTA disclosed to TCEQ, among other things, inconsistencies between previously filed permit applications for the Victoria Nitric Acid Unit and the unit’s operations.

To correct those inconsistencies, INVISTA filed an application to amend the Permit with TCEQ on December 30, 2005. TCEQ declared the amendment application to be administratively complete on January 23, 2006, and INVISTA published Notice of Receipt of

⁴ TCEQ transferred the Permit to INVISTA on November 1, 2004.

⁵ Tex. Rev. Civ. Stat. Ann. art. 4447cc (Vernon’s).

⁶ 65 Fed. Reg. 19618 (Apr. 11, 2000).

Application and Intent to Obtain Air Permit in the *Victoria Advocate* on February 8, 2006. The Spanish language version of the notice was published in *Revista de Victoria* on February 3, 2006. While this permit amendment application was pending, TCEQ adopted rules requiring authorization of existing planned maintenance, startup, and shutdown (“MSS”) emissions.⁷ Accordingly, on January 7, 2008, INVISTA filed an application to amend the Permit to authorize planned MSS emissions from the Nitric Acid Unit. TCEQ declared the MSS amendment application to be administratively complete on February 21, 2008, and INVISTA published Notice of Receipt of Application and Intent to Obtain Air Permit in the *Victoria Advocate* on March 20, 2008.⁸ No comments or hearing requests were submitted to TCEQ regarding the December 30, 2005 or January 7, 2008 amendment applications, and a single amendment responding to both amendment applications was issued by TCEQ on January 31, 2011.

Although not specifically required by TCEQ's public notice rules, INVISTA published an Amended Notice of Receipt of Application and Intent to Obtain Air Permit Renewal in the *Victoria Advocate* on October 1, 2010. The amended notice explained that the Application, in addition to renewing the permit, would incorporate related permit amendments. Then, on April 28, 2011, INVISTA published Notice of Application and Preliminary Decision For Renewal of an Air Quality Permit in the *Victoria Advocate*. No comments or hearing requests were submitted to TCEQ following publication of these notices.

The renewal of the Permit will not increase permit allowable emissions above the rates authorized by the January 31, 2011 amendment, nor will it authorize emissions of any air contaminant not currently authorized by the Permit.

⁷ See 30 TEX. ADMIN. CODE § 101.222(h).

⁸ Although the prior notices were published in both English and Spanish, alternate language newspaper notice was not required pursuant to 30 TEX. ADMIN. CODE § 39.405(h). Accordingly, this notice and the subsequent permit renewal notices were published in English only.

**II.
ARGUMENT**

A. THE APPLICATION IS FOR A NO-INCREASE RENEWAL.

INVISTA seeks no authority to construct or modify the Nitric Acid Unit through the Application. As a result, the Application is for a straightforward renewal of the Permit, with no associated increase or change in emissions compared to the Permit as amended on January 31, 2011.⁹ The Texas Clean Air Act prohibits the Commission from holding a contested case hearing on permit renewals such as this one where there will be no increase in allowable emissions or emissions of new air contaminants,¹⁰ except where “the [C]ommission determines that the application involves a facility for which the applicant's compliance history is classified as unsatisfactory”¹¹ That lone exemption does not apply here because the compliance history classifications for both INVISTA and the INVISTA Victoria Plant are satisfactory.¹² Accordingly, pursuant to the Texas Clean Air Act, the requests for a contested case hearing must be denied.

B. REQUESTORS ARE NOT AFFECTED PERSONS BECAUSE THERE IS NO REASONABLE RELATIONSHIP BETWEEN REQUESTORS' STATED INTERESTS AND THE SCOPE OF THE APPLICATION.

TCEQ's contested case hearing rules specify that, in determining whether a person qualifies as an affected person, the question of “whether a reasonable relationship exists between the interest claimed and the activity regulated” must be considered.¹³ It is clear from Requestors' hearing request letter that the interest they claim and the activity authorized by the Permit, the

⁹ As discussed in Section I of this response, prior to TCEQ's issuance of the January 31, 2011 permit amendment, INVISTA published two separate notices of the permit amendment applications. Although those notices included instructions for submitting public comments and requesting a contested case hearing on the permit amendment applications, no public comments or hearing requests were submitted to TCEQ.

¹⁰ See TEX. HEALTH & SAFETY CODE § 382.056(g) (“The [C]ommission may not . . . hold a public hearing . . . in response to a request for a public hearing on [a] . . . renewal that would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted.”).

¹¹ TEX. HEALTH & SAFETY CODE § 382.056(o).

¹² Under TCEQ's recently revised compliance history rules, see 37 Tex. Reg. 5283 (July 13, 2012), the compliance histories for both INVISTA and the INVISTA Victoria Plant have been classified as satisfactory.

¹³ 30 TEX. ADMIN. CODE § 55.203(c)(3).

operation of the Nitric Acid Unit, are not related. Specifically, Requestors state: “[T]his facility burns approximately 300 million pounds of *hazardous waste* every year without ever possessing a hazardous waste permit. DuPont’s own internal documents and analysis . . . confirm that the stack emissions contain barium, cerium, chromium, cobalt, copper, lead, manganese, and zinc. It is an undisputed fact that these *heavy metals* are contaminating [Requestors’] properties, breathing air (both indoor and outdoor), plants, animals and their internal organs.”¹⁴ As explained by the Executive Director in his Response to Public Comment, neither the burning of hazardous wastes nor heavy metal emissions is authorized by the Permit.¹⁵ Accordingly, the “reasonable relationship” contemplated by 30 Tex. Admin. Code § 55.203(c)(3) does not exist.

C. THE REQUESTS DO NOT RAISE ISSUES THAT ARE RELEVANT TO THE COMMISSION'S DECISION ON THE APPLICATION.

Even if there were some increase or change in emissions associated with the Application (there is not) and Requestors were affected persons (they are not), only relevant and material disputed issues of fact can be referred to SOAH for a contested case hearing.¹⁶ However, none of the “facts” upon which Requestors' hearing requests are based meet this criterion. Requestors primarily base their hearing requests on alleged “facts” regarding heavy metal emissions. As explained in Section II.B of this response, the Nitric Acid Unit does not emit, nor does the Permit authorize emissions of, heavy metals. Accordingly, the “facts” regarding heavy metal emissions

¹⁴ Hearing Request Letter at 2 (emphasis added).

¹⁵ See Executive Director's Response to Public Comment at 3 (“The commenter appears to refer to boilers and industrial furnaces (BIF) regulations and to emissions from Stacks 5, 6, and 7. These are stacks for boilers number 1, 2, and 3, which are authorized in INVISTA Permit Nos. 812 and 813. *These boilers are not part of the Nitric Acid plant that is the subject of this renewal The facilities encompassed by Permit No. 809 do not emit carcinogenic or heavy metal compounds.*”) (emphasis added); *Id.* at 5 (“When Permit No. 809 is renewed, the[] emission points [associated with the Nitric Acid Plant] will be authorized to emit ammonia, nitric acid, nitrogen oxides, nitrous oxides, and products from the combustion of natural gas. *Permit No. 809 will not authorize any emissions of toxic heavy metals. Permit No. 809 will not authorize any emissions of chromium or of manganese.*”) (emphasis added).

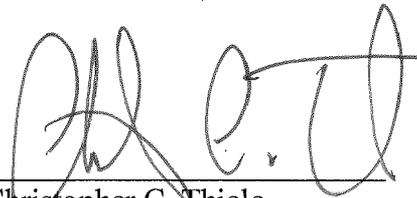
¹⁶ See 30 TEX. ADMIN. CODE § 50.115(c) (“The [C]ommission may not refer an issue to SOAH for a contested case hearing unless the [C]ommission determines that the issue: (1) involves a disputed question of fact; (2) was raised during the public comment period; and (3) is relevant and material to the decision on the application.”).

relied upon by Requestors are in no way relevant to the Commission's decision on the Application.

III. CONCLUSION

As set forth above, the hearing requests must be denied because the Application seeks to renew an existing air permit with no associated increase or change in allowable emissions, for which there exists no opportunity for a contested case hearing under the Texas Clean Air Act. Additionally, Requestors are not affected persons because there is no reasonable relationship between Requestors' stated interests and the activity authorized by the Permit. Finally, the requests do not raise issues that are relevant to the Commission's decision on the Application and thus do not meet the minimum regulatory requirements for referral to SOAH. For these reasons, INVISTA respectfully requests that the Commission deny the requests for contested case hearing and renew the Permit in accordance with the Executive Director's recommendation.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Applicant's Response to Request for Contested Case Hearing has been served via U.S. First Class Mail on all parties whose names appear on the attached mailing list on this 22nd day of October, 2012.

A handwritten signature in black ink, appearing to read 'C. Thiele', written over a horizontal line.

Christopher C. Thiele

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