

Bryan W. Shaw, Ph.D., *Chairman*
Carlos Rubinstein, *Commissioner*
Toby Baker, *Commissioner*
Zak Covar, *Executive Director*



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

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

October 22, 2012

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

**RE: INVISTA S.A.R.L.
TCEQ DOCKET NO. 2012-0482-AIR**

Dear Ms. Bohac:

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 "Eli Martinez".

Eli Martinez, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2012-0482-AIR

**IN THE MATTER OF INVISTA S.a.r.l. § BEFORE THE
RENEWAL OF AIR QUALITY § TEXAS COMMISSION ON
PERMIT NO. 809 § ENVIRONMENTAL QUALITY**

**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 renewal of an air permit that does not authorize an increase in allowable emissions or the emission of a new contaminant.

I. INTRODUCTION

E.I. DuPont de Nemours Company (DuPont) applied to the TCEQ for the renewal of a permit that will authorize the applicant to continue operating a nitric acid plant. The permit application was received on March 7, 2003, and declared administratively complete on May 23, 2003. The Notice of Receipt and Intent to Obtain an Air Quality Permit (public notice) for this permit application was published on June 18, 2003, in the *Victoria Advocate* and on August 13, 2003, in *Revista de Victoria*. A copy of the permit application was placed at the Victoria Public Library in Victoria throughout the public comment period. The applicable comment period ended on August 28, 2003.

DuPont was granted a permit to construct the nitric acid plant at the Victoria chemical complex on May 9, 1973. The plant was issued its original operating permit on July 20, 1978. The plant sought and obtained an amendment that was approved on August 10, 1990, to expand the nitric acid plant. The plant sought and obtained a second amendment that was approved on March 17, 1992, to properly reflect the actual configuration of the

plant. The permit was renewed once again, on June 4, 1993. As permit expiration again approached, DuPont filed a second renewal application on March 7, 2003. Subsequent to filing the renewal application, DuPont sold the nitric acid plant to INVISTA S.a.r.l. (INVISTA or Applicant). After purchase of the nitric acid plant by INVISTA, but prior to completion of the technical review, the Executive Director agreed to hold active review of this renewal for six months to allow the applicant to complete environmental audits of its newly acquired facilities at the Victoria complex. During technical review of this application, it was determined that the renewal could not be processed without a companion amendment to authorize certain ongoing emissions, primarily nitrous oxide (N₂O).

INVISTA applied for such an amendment on December 30, 2005. Public notice was published in the *Victoria Advocate* on February 8, 2006. No comments were received and after technical review and modeling audits were completed, the amendment was issued on January 31, 2011. During pendency of this action, commission rules were changed effective in 2006, to require authorization of planned maintenance, startup and shutdown (MSS) emissions. On January 7, 2008 INVISTA applied to amend permit No. 809 to authorize MSS emissions from the nitric acid plant. Public notice was published in the *Victoria Advocate* on March 20, 2008. No comments were received as a result of this notice and the amendment was issued on January 31, 2011. The N₂O and MSS emissions added to permit No. 809 are existing emissions that did not require new construction.

The renewal of this permit will not increase permit allowable emissions, i.e. those emissions already authorized in the amended permit. Further, the renewal will not result in an increase in emissions of any air contaminant not previously emitted. In accordance with state law regarding permit renewals (Texas Health and Safety Code, § 382.055(e)), the commission may not impose requirements that are more or less stringent than those of the existing permit.

Due to a change in commission policy, INVISTA was required to republish notice of the renewal, as previously amended. The Notice of Receipt and Intent to Obtain an Air Quality Permit (public notice) for this permit application was republished on October 1, 2010, in the *Victoria Advocate*. The public notice included notification of the amendment actions for N₂O and MSS emissions. TCEQ also directed INVISTA to publish notice of the Executive Director's preliminary decision to issue the renewal as amended in the *Victoria Advocate* on April 28, 2011. A copy of the permit application was available at the Victoria Public Library in Victoria, throughout the public comment period, which ended on May 28, 2011. No additional comments or hearing requests were received. The Executive Director prepared a Response to Comment (RTC) which was filed with the Office of the Chief Clerk (OCC) on February 27, 2012.

One timely hearing request was received from Todd W. Hoeffner, representing Cynthia Brookhouser, II.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 Piegasa, Carmine Schifano, Arlene Schultz, Vernon Singleton, H.E. and Dianna Stevenson, Georgia Vega, and Forrest Volkert. 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 denial of the hearing request in light of the statutory prohibition against holding 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."¹

II. APPLICABLE LAW

¹ Texas Health and Safety Code §382.056(g).

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).

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. A Right to Hearing Does Not Exist on INVISTA's Renewal Application because the Renewal Will Not Result in an Increase in Allowable Emissions or the Emission of an Air Contaminant Not Previously Emitted.

As an initial matter, the Commission must determine whether a right to a contested case hearing exists on this application. No right to a contested case hearing exists on a renewal application under Chapter 382 of the Texas Health and Safety Code if the application would not result in an increase in allowable emissions and would not result in the emission of an air

contaminant not previously emitted.² However, notwithstanding THSC section 382.056(g), the Commission may hold a hearing on a permit renewal “if the commission determines that the application involves a facility for which the applicant’s compliance history is classified as unsatisfactory according to Commission standards under Section 5.753 and 5.754, Water Code, and rules adopted and procedures developed under those sections.”³ INVISTA has a compliance rating of 9.80 for the site, and company rating of 10.52, both of which are classified as satisfactory.

Therefore, based on a review of the criteria set forth in THSC section 382.056(g) and (o), the applicant’s compliance history does not trigger an opportunity for a hearing on this renewal application based on the Applicant’s compliance history. For this reason, OPIC must conclude that there is no right to a hearing on this renewal application.

IV. CONCLUSION

For the reasons set forth above, the Office of Public Interest Counsel respectfully recommends that the Commission find that no right to a hearing exists on this application for renewal of an air permit that does not authorize an increase in allowable emissions or the emission of a new contaminant. OPIC therefore recommends that the hearing request of Todd W. Hoeffner be denied.

² Tex. Health & Safety Code (hereinafter “THSC”) § 382.056 (g); 30 TAC § 55.201(i)(3); 55.211(d)(2).

³ THSC § 382.056(o).

Respectfully submitted,

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Public Interest Counsel

By 
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CERTIFICATE OF SERVICE

I hereby certify that on October 22, 2012, 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

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TCEQ DOCKET NO. 2012-0482-AIR**

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