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April 8, 2013

Mr. Les Trobman, General Counsel  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78711-3087

*via electronic submission and fax*

**Re: Request for a Direct Referral and Motion for Expedited Hearing on  
Application of ExxonMobil Chemical Company for Proposed Air Quality Permit  
No. 102982**

Dear Mr. Trobman:

Please find attached Environmental Integrity Project and Air Alliance Houston's Response in Opposition to ExxonMobil's Motion for Expedited Hearing regarding the application for Permit No. 102982. Please contact me if you have questions or if you need more information.

Sincerely,

A handwritten signature in black ink, appearing to read 'G. Clark-Leach', is written in a cursive style.

Gabriel Clark-Leach

Enclosure

**TCEQ DOCKET NO. 2013-0657-AIR**

	§	
<b>APPLICATION OF EXXONMOBIL</b>	§	<b>BEFORE THE</b>
<b>FOR ISSUANCE OF AIR</b>	§	
<b>QUALITY PERMIT NO. 102892</b>	§	<b>TEXAS COMMISSION</b>
<b>FOR THE CONSTRUCTION OF A</b>	§	
<b>NEW ETHYLENE PRODUCTION</b>	§	<b>ON</b>
<b>UNIT AT EXXONMOBIL'S</b>	§	
<b>BAYTOWN OLEFINS PLANT,</b>	§	<b>ENVIRONMENTAL QUALITY</b>
<b>LOCATED IN HARRIS COUNTY,</b>	§	
<b>TEXAS</b>		

**ENVIRONMENTAL INTEGRITY PROJECT AND AIR ALLIANCE HOUSTON'S  
RESPONSE IN OPPOSITION TO EXXONMOBIL'S MOTION FOR EXPEDITED  
HEARING**

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

Environmental Integrity Project and Air Alliance Houston (“Commenters”) respectfully request that the Commissioners deny ExxonMobil Chemical Company’s (“ExxonMobil”) Motion for Expedited Hearing in the above-referenced matter. Where, as here, an applicant requests a direct referral to the State Office of Administrative Hearings (“SOAH”), the SOAH judge assigned to the case is responsible for establishing a schedule for the hearing. For this reason, and the reasons discussed below, it would be inappropriate for the Commissioners to grant ExxonMobil’s motion.

**I. BACKGROUND**

ExxonMobil filed an application for a permit authorizing construction of a new ethylene production unit at its Baytown Olefins Plant. The new unit, which will be located in the Houston Galveston Brazoria ozone nonattainment region, will emit hundreds of tons of ozone forming pollutants each year. Commenters timely filed a request for a contested case hearing on ExxonMobil’s application on July 3, 2012. As of the time of this filing, the Executive Director has not issued his preliminary decision in this matter. Once the preliminary decision is made to approve ExxonMobil’s application, and the Executive Director issues a draft permit, members of the public will have 30 days to comment on the draft permit and request a contested case hearing. After the close of this comment period, the Executive Director must draft a response to all

significant comments. When the response to comments is issued, members of the public will have an additional 30 days to request a contested case hearing.

## II. LEGAL BACKGROUND

Affected persons are entitled to request a contested case hearing on an application for a permit to construct a new source of air pollution. In cases such as this, where one or more timely requests for a contested case hearing are filed, the Commission must evaluate these requests, unless an applicant or the Executive Director requests a direct referral. 30 TAC §§ 55.210 (Direct Referrals) and 55.211 (Commission Action on Requests for Reconsideration and Contested Case Hearing). Where a direct referral is not requested, the Commission may refer an application to SOAH for a contested case hearing only after it decides how many parties will participate in the hearing, which issues SOAH is to consider, and the maximum expected duration of the hearing. Texas Water Code § 5.556(e); 30 TAC §§ 50.211(b), 80.6(d). The Commission makes these decisions only after the opportunity to submit public comments has ended and the Executive Director has issued his response to public comments. 30 TAC § 55.211(b) (“The commission will evaluate public comment, executive director's response to comment, requests for reconsideration, and requests for contested case hearing[.]”). However, when an applicant requests a direct referral, the Texas Water Code and the Commission’s rules provide that the rules and statutes that give the Commission authority to limit parties, issues, and the maximum duration of the hearing do not apply. Texas Water Code § 5.557(b) (providing that statute instructing the Commission to establish a maximum expected duration for the hearing does not apply to direct referrals); 30 TAC § 80.6(b)(5) (directing the chief clerk to send to SOAH the commission’s list of disputed issues and maximum expected duration of the hearing, *unless* the case is directly referred under 30 TAC § 55.210). In directly referred cases, the Chief Clerk and not the Commission refers the matter to SOAH for a hearing, and SOAH judges and not the Commission are responsible for designating parties, limiting evidence and issues, and ensuring that hearings are conducted as expeditiously as possible. 30 TAC § 80.4(c)(10).

## IV. ARGUMENT

### A. **There is no need for the Commission to exercise its “plenary” authority**

ExxonMobil acknowledges that no rule or statute directly authorizes the Commission to impose a deadline for issuance of the proposal for decision in a directly referred contested case hearing. ExxonMobil Motion at 3 (noting that the power to specify a deadline for the issuance of a proposal for decision in a directly referred contested case hearing is not a specifically enumerated power of the Commission). Nonetheless, ExxonMobil asks the Commission to exercise its “plenary authority” to limit the duration of the contested case hearing in this matter, where it has requested a direct referral to SOAH. The Commission should not grant

ExxonMobil's request. Where, as here, the Commission's rules clearly address a certain circumstance, it is unnecessary and inappropriate for the Commission to invoke its general jurisdictional powers to avoid giving these rules full effect. In a directly referred case, the SOAH judge presiding over the hearing is responsible for establishing a schedule for the expeditious conduct of the hearing. ExxonMobil has not provided any reason to think that SOAH will be unable to properly establish a reasonable schedule for the conduct of the hearing in this case.

**B. No deadline for the issuance of the proposal for decision should be set until after the deadline for filing hearing requests has passed**

Even where the Commission has express authority to establish a maximum expected duration for a contested case hearing, the Commission's rules indicate that this decision should be made only after the public comment periods for the application have ended and the Executive Director has issued his response to comments. 30 TAC § 55.211(b). In such cases, the Commission's decision as to the maximum expected duration of the hearing is informed by the number of people granted party status as well as the number and complexity of issues referred. Tex. Water Code § 5.556(e)(2) (indicating that maximum expected duration of the hearing must be consistent with the number and nature of the issues to be considered at the hearing). In this case, the second public comment period has not yet begun and ample opportunity remains for members of the public to request a hearing and to raise issues of material fact to be considered at the hearing. Because this is so, the Commission does not have sufficient information upon which to base a decision regarding the amount of time necessary to properly conduct a hearing on ExxonMobil's application. Even if the Commission disagrees with Commenters and decides that it may properly establish a deadline for issuance of the proposal for decision in this matter, the Commission should wait until after the Executive Director issues his response to comments and the deadline for requesting a hearing has passed to make this decision.

**C. The cases that ExxonMobil cites do support its request**

ExxonMobil cites three different TCEQ orders in support of its motion. None of these orders addresses circumstances that remotely resemble the present case. The fact that these cases are the best examples ExxonMobil could find in support of its motion indicates that its request is highly unusual, and perhaps unprecedented.

First, ExxonMobil cites the Commission's *Order concerning the Petition of Texas Disposal Systems Landfill, Inc.*, TCEQ Docket No. 2007-1019-IHW (Order Issued July 30, 2007) for the proposition that the Commission has "authority to take up and consider matters pending at the agency as the Commission deems necessary and convenient to the exercise of its jurisdiction, whether or not a TCEQ rule clearly provides for consideration of the matter by the

Commissioners.” ExxonMobil Motion at 4. This Order was issued to clarify a previous order by the Commission granting a party’s motion to overturn and to correct an error made by the Executive Director in carrying out a previous order. The fact that the Commission decided it proper to clarify its previous order and to correct an error by the Executive Director has no bearing on the question of whether the Commission may properly intervene in this case to establish a deadline for issuance of the proposal for decision, despite the fact that this responsibility is left to the SOAH judge presiding over the case.

Second, ExxonMobil cites the *Asarco* case where the Commission granted a hearing request in the public interest. ExxonMobil at 4. It is unclear why ExxonMobil believes this case supports its position. In *Asarco*, after considering timely filed hearing requests, public comments, the Executive Director’s response to comments, and other filings and oral argument, the Commission referred Asarco’s application to renew its air permit to SOAH for a hearing on two limited issues and set a maximum expected duration for the hearing just as the Commission’s rule 30 TAC § 55.211(b)(3)(A) provides. However, this provision does not apply to cases that are directly referred to SOAH. 30 TAC § 80.6(b)(5) (directing the chief clerk to send to SOAH the commission’s list of disputed issues and maximum expected duration of the hearing, *unless* the case is directly referred under 30 TAC § 55.210); *See also* Tex. Water Code § 5.557(b) (providing that statute instructing the Commission to establish a maximum expected duration for the hearing does not apply to direct referrals). Moreover, the *Asarco* Order indicates that ExxonMobil’s proposed schedule is likely unreasonable. In the *Asarco* case, the Commission established a significantly longer deadline of nine months from the date of the preliminary hearing for the SOAH judge to issue a proposal for decision on two limited issues arising from an application to renew an existing permit. Here, because ExxonMobil has requested a direct referral, parties will not be limited to two narrow issues. Moreover, ExxonMobil’s application requests authorization to construct a new significant source of air pollution in a nonattainment area. Thus, it is likely that SOAH will need to consider evidence on issues that are more technically demanding than the issues raised in the *Asarco* case. Because this is so, the significantly shorter six month deadline that ExxonMobil has requested is likely unreasonable.

Finally, ExxonMobil cites the Commission’s *Order denying the application by San Marcos River Foundation for a new water right*, TCEQ Docket No. 2003-0027-WR (Order Issued March 20, 2003) as “directly analogous to ExxonMobil’s request in the present motion, which is for the Commission to call-up and exercise its discretion relative to the Application for which a direct referral has been requested.” ExxonMobil Motion at 4. In the cited Order, the Commission denied an application for a new water right, because the Commission determined that it did not have authority to issue the requested permit. Here, Commenters agree that Commission may deny ExxonMobil’s application if it finds it does not have authority to issue the requested permit. However, the Commission’s authority to deny an application it does not

have authority to grant does not suggest that the Commission should act to establish a deadline for issuance of the proposal for decision in this case, where its rules delegate that responsibility to the presiding SOAH judge.

V. CONCLUSION AND PRAYER

While Commenters understand that ExxonMobil is eager for its permit to be issued as soon as possible, this is likely true for all permit applicants. It is not a reason for the Commission to depart from the procedure for handling direct referrals established by its rules. If ExxonMobil would like the Commission to make decisions regarding the proper scope and duration of the hearing on its application, it should not request a direct referral. If ExxonMobil would prefer to avoid any delay associated with the Commission's consideration of hearing requests, it is entitled to have its application directly referred to SOAH. However, ExxonMobil may not have it both ways: it may not ask the Commission to limit the duration of the hearing without allowing for the full process the Commission's rules require for Commission decisions on hearing requests. Accordingly, we respectfully request that the Commission deny ExxonMobil's Motion for Expedited Hearing.

Respectfully Submitted,

**ENVIRONMENTAL INTEGRITY PROJECT**

By:

A handwritten signature in black ink, appearing to read 'G. Clark-Leach', is written over a horizontal line.

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## Certificate of Service

I hereby certify that on this 8<sup>th</sup> day of April, 2013, a true and correct copy of the foregoing document was provided to the following persons via fax and regular mail.



Gabriel Clark-Leach

### **Executive Director**

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