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November 7, 2013

Via TCEQ Electronic Filing System

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

Re: TCEQ Docket No. 2012-0971-AIR; SOAH Docket No. 582-12-6347; EOG Resources, Inc., Air Quality Proposed Permit No. 95412

Dear Ms. Bohac:

Pursuant to Judge Wilkov and Judge Vickery's October 18, 2013 letter, enclosed is PROTESTANTS REBECCA HARRIS, HOLLY HARRIS-BAYER AND RED RIVER MOTORCYCLE TRAILS, INC.'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGES' PROPOSAL FOR DECISION and ORDER. All parties are being provided with a copy pursuant to the Certificate of Service attached to the filing.

Should you have any questions regarding this filing, counsel for Protestants may be reached at (713) 524-1012.

Sincerely,

BLACKBURN CARTER, P.C.



Zona Amerson – Legal Assistant

Enclosure

c: Judge Penny A. Wilkov and Judge Travis Vickery – *Via SOAH's E-Filing System*

SOAH DOCKET NO. 582-12-6347
TCEQ DOCKET NO. 2012-0971-AIR

APPLICATION BY EOG RESOURCES, INC., § BEFORE THE STATE OFFICE
FOR AIR QUALITY PERMIT § OF
NUMBER 95412 § ADMINISTRATIVE HEARINGS

**PROTESTANTS REBECCA HARRIS, HOLLY HARRIS-BAYER AND RED RIVER
MOTORCYCLE TRAILS, INC. RECREATION PARK'S EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGES' PROPOSAL FOR DECISION**

COME NOW Rebecca Harris, Holly Harris-Bayer and Red River Motorcycle Trails, Inc. Recreation Park ("Protestants" or "RRMT") and file their Exceptions to the Administrative Law Judges' Proposal for Decision issued in the above referenced case on October 18, 2013.

Protestants' Exceptions primarily focus on the following issues: whether the permit application demonstrates that emissions from the proposed facilities will comply with all the rules and regulations of the commission and with the intent of the Texas Clean Air Act (TCAA), including the protection of the health and property of the public in accordance with 30 T.A.C. § 116.111(a)(2)(A)(i); whether the permit application includes information demonstrating that the requirements of 30 T.A.C. § 101.4 regarding nuisance are met; whether the permit application includes information demonstrating that the requirements of 30 T.A.C. § 101.3 regarding circumvention are met.

Protestants specifically except to Findings of Fact Nos. 25, 26, 27, 28 generally, 28i, 29, 32, 40, 41, 42, 43, 44, 45, 46, 48, 50, 51, 52, 55, 56, 57, 59, 63, 102, 106, 108, 110, 114, 118, 125, 126, 128, 139, and 140; and to Conclusions of Law Nos. 13, 14, 27, 28, 30, 34, 35, 36, and 37.

A. SUMMARY OF NUISANCE AND OTHER TEXAS CLEAN AIR ACT (TCAA) REQUIREMENTS

30 T.A.C. § 101.4 states that “No 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”. The important words in this definition are “any source whatsoever”. This definition is not limited to sources as defined within the term “facility” but is instead applicable to “any source whatsoever”. Protestants argue that this very broad inclusion of all sources mandates the inclusion of road emissions and quarry emissions as well as background emissions in the evaluations of air pollutants from the facility. EOG Resources, Inc., (“Applicant” or “EOG”) made no such evaluation as will be discussed below.

The Applicant failed to meet the requirements of 30 T.A.C. § 101.4. With regard to whether the emissions from the facility will *contribute* to nuisance conditions, the Administrative Law Judges (“ALJ”) inappropriately excluded road emissions and quarry emissions from the analysis. Although Protestants do not dispute that these emissions are to be excluded for purposes of modeling emissions from a “facility,”¹ that exclusion does not apply towards a determination of whether a nuisance condition will occur as a result of the entire industrial sand processing plant operations. In fact, it is just the opposite. Texas Commission on Environmental Quality (“TCEQ”) guidance explicitly directs an applicant to *include* road emissions for a nuisance evaluation. More importantly, the definition of “nuisance” strongly counters the ALJs’ position.

¹ 30 T.A.C. § 116.10(4).

Consistent with the scope of the nuisance definition, one of the issues presented at the hearing was, “[w]hether the permit application includes information demonstrating that the requirements of 30 T.A.C. § 101.4 regarding nuisance are met.”² The relevant inquiry can be stated as whether the emissions from the proposed sand processing plant will combine with emissions from *any source whatsoever*, culminating in a nuisance condition for the nearby citizens.

Although we agree that TCEQ guidance as well as the definition of “facility”, excludes road and quarry emissions when determining whether a “facility”³ complies with NAAQS, TCEQ guidance differs with respect to emissions causing nuisance conditions. Specifically, the TCEQ Air Quality Modeling Guidelines explicitly states that, “road emissions must meet ... the nuisance provision in 30 T.A.C. Chapter 101 (§101.4).”⁴

Nuisance evaluations are to be based upon all sources and not just facility sources. Here, the Applicant failed to conduct any such analysis that included all sources. And when all sources are included, there are significant air pollution issues with this proposed EOG project that the Applicant and the TCEQ staff have failed to evaluate.

Roads are recognized as being a source of emissions of particulate matter, including silica, at the proposed EOG sand plant, as trucks or other vehicles travel across them, stirring up and re-suspending into the air the dust and sand that had previously been deposited on them.⁵ Yet, the Applicant failed to evaluate the emissions from any of the roads, both paved and unpaved, that will be constructed and used as part of this sand mining and processing project.⁶ The primary reason given by the Applicant for its failure to include any roads as a source of

² PFD p. 11, 84.

³ 30 T.A.C. § 116.10(4).

⁴ ED Exhibit 15 at p. 59.

⁵ TR at 52, 72, and 127; EX-JT-1 at 6.

⁶ TR at 52, 72.

emissions is that a “road” is not a “facility”, and the Applicant believes that it is only required to evaluate emissions from a “facility.”⁷ Also, the Applicant’s permit engineer, Ms. Hoover, stated that she inquired of the TCEQ staff as to whether she was required to calculate emissions from the roads and was told “no”.⁸

There is TCEQ guidance (RG-25) that addresses what sources of emissions should be evaluated for an air permit, and how such an evaluation should be conducted.⁹ This guidance also identifies how to evaluate emissions from roads, as shown on pages 58-60 of the guidance. Thus the TCEQ guidance recognizes that roads are a source of emissions, and also recognizes that such roads need to be evaluated as a source of emissions, by providing a procedure to do so. This is in direct conflict with the Applicant’s position that a road does not need to be evaluated as a source of emissions simply because it is not a “facility.” Protestants agree that a “road” is not a “facility” that requires an air permit. But this does not automatically mean that no emissions will occur from any roads that are used as part of the operations of this sand processing plant. The TCEQ guidance seemingly recognizes this fact.

Yet, this same TCEQ Guidance also states that if an applicant plans to implement Best Management Practices (BMP) on the roads, e.g. by watering them as needed, it is not required to consider any emissions from any such roads.¹⁰

This would make sense if it were recognized that by implementing BMPs on roads, the result would be that there would be NO emissions from the roads. But this is not the case.¹¹ Ms. Hoover acknowledged that even with BMPs applied to these roads, this emission control technology only has an efficiency rating of about 75%, according to AP-42, meaning that there

⁷ TR at 29, 52, 57, and 60; CX-5.

⁸ TR at 966.

⁹ APP EX-13.

¹⁰ APP EX-29 at 4; APP EX-13 at 58.

¹¹ EX-JT-1 at 6.

would still be considerable emissions from these roads.¹² She also testified that the use of roads to transport waste material back to the quarry would emit more particulate matter, including silica, than the conveyor system that is proposed to transport material from the quarry to the plant, which is considered a facility source whose emissions were calculated and modeled.

It is also clear that, in evaluating the potential emissions from a proposed project that includes one or more facilities that do require an air permit, all sources of emissions need to be evaluated in order to determine what the expected emission of air contaminants will be so that an appropriate assessment can be made as to whether such emissions will cause or contribute to a condition of air pollution in violation of the TCAA, as well as other applicable rules.

Also, even though the Applicant proposes to use BMP on its roads, by watering or sweeping them as needed, these practices do not totally eliminate emissions of particulate matter from such roads.¹³ The Environmental Protection Agency (“EPA”) provides, in its AP-42 Manual, procedures for estimating such emissions, even with watering.¹⁴ In addition, it is unclear how often or effective the BMP proposed by the Applicant will be on reducing the emissions from its roads, given that the draft permit conditions on the Applicant only require that it water such roads when there are “visible emissions”, which may be difficult or impossible to determine at night and/or throughout the entire project site on all roads.¹⁵

It has been argued that the Applicant will comply with this provision because there is a provision in the proposed permit that prohibits the maintenance of a nuisance condition. However, the mere placement of a provision in the proposed permit does not mean anything. Even if the Applicant complies with the terms and conditions of this permit, there are still

¹² TR at 972-3.

¹³ TR at 972-3; 990.

¹⁴ TR at 972-3, 987.

¹⁵ APP EX-3 at 3; TR at 403.

unaddressed issues that may violate the nuisance prohibition. It seems clear that some type of quantitative assessment of the concentrations and health-related issues of all sources to be constructed and operated by this Applicant is required under 30 T.A.C. § 101.4.

Unlike preconstruction rules regarding new sources, the nuisance rule is not limited to a source that is a defined facility. Under this rule, no person may discharge from any source whatsoever one or more pollutants that cause health problems. There will be emissions from roads and the quarry during plant operations, which will add to background air pollution levels surrounding the site. Despite this prohibition applicable to all sources, the Applicant never evaluated the combined effects of these sources on the surrounding land uses including the Red River Motorcycle Trails, a family recreational facility.

We also acknowledge the Draft Permit's prohibition on nuisance conditions. However, the mere placement of such a provision in the Draft Permit means nothing, because a possible nuisance condition (and related health issues) would have to arise to compel a comprehensive evaluation of all emission sources such as roads and the quarry. Instead, under 30 T.A.C. § 101.4, an assessment of the concentrations and health-related issues of all sources should have been required.

EOG and the Executive Director ("ED") argue that Section 101.4 is not a preconstruction requirement for a new source review permit, but rather a prohibition on creating a nuisance once the plant is in operation. EOG asserts that there is no objective threshold or standard for nuisance with which to compare the predicted emission from the proposed facilities for preconstruction review purposes.¹⁶ EOG argues that, based on EOG's air dispersion modeling analysis, EOG's permit engineer, modeler, and the toxicologist all testified that nuisance

¹⁶ TR. at 125; APP. EX. 28 at 15; APP. EX. 29 at 11.

conditions are not expected to occur at the plant.¹⁷ Mr. Buller concurred, opining that the use of BMPs as required by the Draft Permit will be adequate to prevent nuisance conditions.¹⁸

The ALJs have noted throughout this Proposal for Decision (“PFD”), that roads and the quarry are expected to generate some emissions. However, the ALJs do not find that it was necessary for EOG to establish the non-existence of nuisance conditions at the proposed plant as part of the application process. While EOG may be correct that there is no objective threshold for nuisance with which to compare the predicted emissions from the proposed facilities for preconstruction review purposes, the Applicant’s and the ED’s experts concluded that operations at the plant are not expected to create such conditions, even without objective standards. The ALJs agree with the ED and the Applicant that, so long as the proposed plant is operated within the bounds of the Draft Permit, and the Applicant uses BACT and BMPs, nuisance conditions are not expected to arise at the plant. In the event that a complainant reports suspected nuisance conditions at the plant, the TCEQ has the means to monitor and prohibit such emissions according to the ALJs. The ALJs conclude that the preponderance of the evidence shows that operations at the plant will comply with 30 T.A.C. § 101.4. This is small consolation for the neighbors to the facility, guests to the Red River Motorcycle Trails, Inc. recreational park, and the Protestants.

B. EMISSION SOURCES

1. Roads

The ALJs have concluded in their PFD that since a “road” is not a “facility”, an applicant for a New Source Review Permit is not required to model any emissions from any roads, that might be constructed as an integral part of a proposed facility seeking such a permit, in making

¹⁷ TR. at 124-26; APP. EX. 28 at 15; APP. EX. 29 at 11.

¹⁸ TR. at 423.

the required determination that the proposed facility will be protective of human health and the environment.¹⁹ Also, while the ALJs acknowledge that the roads will be a source of emissions during the operation of the proposed facility, they have found that the emissions will not be significant due to the fact that all of the roads within the property will be paved and BMPs will be used to minimize any such emissions from these roads.²⁰ However, the Applicant has not quantified how much emissions will occur from these paved roads, even with BMPs, such that it is not known by anyone how significant or insignificant such emissions will be. Also, while the ALJs have stated that the Applicant has proposed and the Draft Permit requires that “on-property roads will be paved”, no such requirement is included in the Draft Permit attached to the PFD, nor is any such representation made or included in the Permit Application by EOG.

2. Quarry

The ALJs have concluded in their PFD that since a “quarry” is not a “facility”, an applicant for a New Source Review Permit is not required to model any emissions from any quarry or mining operations, that might be an integral part of a proposed facility seeking such a permit, in making the required determination that the proposed facility will be protective of human health and the environment.²¹ It is important to note that the Applicant did include in its modeling, certain emissions from some of the operations that will be conducted within the quarry, such as the loading of mined material (wet sand) onto conveyors, and the transporting of such material (wet sand) along these conveyors to the sand processing plant; however, the Applicant chose not to include in its modeling other operations within the quarry, such as the mining operations.²² Also, while the ALJs acknowledge that the quarry, and specifically the

¹⁹ PFD p. 21

²⁰ PFD p. 23

²¹ PFD p. 25.

²² PFD p. 25.

mining operations to be conducted there, will be a source of emissions during the operation of the proposed facility, the Applicant has not quantified how much emissions will occur from these mining operations at the quarry, such that it is not known by anyone how significant or insignificant such emissions will be, especially since the Applicant did not know exactly how the mining operations would be conducted.

3. Combined Water

The ALJs have concluded in their PFD that an applicant is not required to model any emissions from “combined water” since such emissions have never been required to be considered before by the Commission.²³ This is not legal justification for not considering such a source of emissions in the evaluation of this permit.

4. Background Levels

The ALJs have concluded that background levels of silica were taken into consideration by the TCEQ Toxicology Division in its Tier III review that was conducted on the potential impacts to human health due to the proposed facility.²⁴ This finding is inconsistent with the testimony of Ms. Curry from the Toxicology Division that she only considered background sources of silica from existing industrial sites in the area, of which there were none.²⁵ Protestants argued that there were other background levels of silica that should have been considered and accounted for during the Tier III review, but this argument and issue was not addressed by the ALJs in their PFD.²⁶ Also, the ALJs found that background levels of silica do not need to be included in the ESL evaluation due to the conservatism involved in setting the ESLs for silica.²⁷

²³ PFD p. 27.

²⁴ PFD p. 27.

²⁵ PFD p.63.

²⁶ PFD p. 64.

²⁷ PFD p. 29.

This finding is inconsistent with the requirement under the Tier III review guidelines that the Toxicology Division must consider the “existing levels of the constituent”.

C. DISPERSION MODELING/RESULTS

1. Worst-case Conditions

The ALJs concluded that appropriate worst-case meteorological conditions were used in the modeling analysis conducted by the Applicant in this case.²⁸ However, it is clear from the record that based on additional analyses that were conducted, the one year (1988) of modeling did not evaluate worst-case conditions.

2. Number of Years for Analysis

The ALJs concluded that the use of 1 year (1988) of meteorological data for the air dispersion modeling for long-term analysis is consistent with TCEQ Guidelines.²⁹ This is not true and not supported by any evidence in the record. The Guidelines specifically state that for long-term analysis, 5 years of meteorological data is to be used.³⁰

3. Source of Meteorological Data

The ALJs concluded that the meteorological data for Denton was “not available” to Mr. Zimmermann when he conducted his air dispersion modeling for the proposed project, and the use of any such data would not be consistent with TCEQ Guidelines.³¹ However, this is not true and not supported by any evidence in the record. While it is true that although this particular meteorological data had been processed by the TCEQ, it had not yet been put on its website by February, 2012. This Denton data however, was available to Mr. Zimmermann and anyone else who wanted to process it themselves, account for any potential bias in low wind speeds, and then

²⁸ PFD p.50.

²⁹ PFD p. 54.

³⁰ PFD p. 52.

³¹ PFD p. 56.

use it in conducting such modeling. The use of other data besides what is on the TCEQ website is allowable under the TCEQ Guidelines for air dispersion modeling.

D. CIRCUMVENTION

The ALJs have concluded that there is no evidence that the Applicant has violated the Commission rules under 30 T.A.C. §101.3 or the TCAA regarding circumvention.³² There is clear evidence that the Applicant chose to use trucks along a road to transport waste material from the plant back to the quarry, instead of the conveyor system that was chosen by the Applicant to transport material from the quarry to the plant. Ms. Hoover, the engineer for the Applicant, testified that this road would have greater emissions of PM than the conveyor system that is proposed to transport material from the quarry to the plant. Since this was a choice that the Applicant made, it is clear that such choice to use a road rather than a conveyor system to transport material between the quarry and the plant was to minimize the emissions that would otherwise have to be modeled and analyzed in the evaluation of impacts to human health and the environment, thus circumventing the Commission rules and the TCAA.

E. TRANSCRIPTION COSTS

Protestants agree with the ALJs' recommendation in their PFD that all of the transcription costs be assessed against the Applicant for the reasons given in the PFD.

F. CONCLUSION

The Applicant EOG Resources, Inc. failed to meet its burden on multiple issues. The Applicant has failed to demonstrate that its air quality permit application satisfies the Texas Clean Air Act and the TCEQ regulations which are designed to be protective of air quality, human health and the environment. Accordingly, Protestants Rebecca Harris, Holly Harris-

³² PFD p. 84.

Bayer and Red River Motorcycle Trails, Inc. Recreation Park, respectfully request that the Commission reject the ALJs' recommendation and deny issuance of the air quality permit.

Respectfully submitted,

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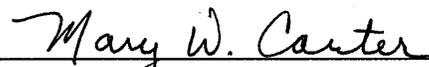
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***Attorneys for Protestants Rebecca
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CERTIFICATE OF SERVICE

On this 7th day of November, 2013, a true and correct copy of the foregoing instrument was served on all attorneys of record by the undersigned via the method designated below.



Mary W. Carter

FOR THE OFFICE OF THE CHIEF CLERK:

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