

Jon Niermann, *Chairman*
Emily Lindley, *Commissioner*
Bobby Janecka, *Commissioner*
Toby Baker, *Executive Director*



Garrett T. Arthur, *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

November 21, 2022

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

**RE: IN THE MATTER OF THE APPLICATION TO AMEND AIR QUALITY
PERMIT NO. 6606
FLINT HILLS RESOURCES INGLESIDE LLC
INGLESIDE MARINE TERMINAL
TCEQ DOCKET NO. 2022-1541-AIR**

Dear Ms. Gharis:

Enclosed for filing is the Office of Public Interest Counsel's Response to Motion to Overturn in the above-entitled matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Sheldon P. Wayne".

Sheldon P. Wayne, Attorney
Assistant Public Interest Counsel

cc: Mailing List

TCEQ DOCKET NO. 2022-1541-AIR

IN THE MATTER OF THE	§	BEFORE THE TEXAS COMMISSION
APPLICATION TO AMEND	§	
AIR QUALITY PERMIT NO. 6606	§	ON
FLINT HILLS INGLESIDE LLC	§	
INGLESIDE MARINE TERMINAL	§	ENVIRONMENTAL QUALITY

**OFFICE OF PUBLIC INTEREST COUNSEL'S
RESPONSE TO MOTION TO OVERTURN**

To the Members of the Texas Commission on Environmental Quality:

The Office of Public Interest Counsel (“OPIC”) at the Texas Commission on Environmental Quality (“TCEQ” or “Commission”) files this response to the motion to overturn the Executive Director’s (“ED”) decision granting Flint Hills Ingleside LLC’s (“Flint Hills” or “Applicant”) application to amend Air Quality Permit No. 6606, which, among other things, authorizes increased sulfur dioxide emissions at its Ingleside Marine Terminal (“Facility”). The motion was filed by Ingleside on the Bay Coastal Watch Association and Coastal Alliance to Protect Our Environment (“Movants”). OPIC respectfully shows the following:

I. Summary of Position

As discussed below, OPIC respectfully recommends that the Commission grant the motion to overturn and grant the Movants’ requested relief.

II. Background

On April 7, 2021, the Commission received Flint Hills’ application to amend Air Quality Permit no. 6606 to authorize modification to the Facility located at 103 FM 1069, Ingleside, San Patricio County. This amendment sought to authorize an increase in emissions in the following air contaminants: hazardous air pollutants, carbon monoxide, hydrogen sulfide, nitrogen oxides, organic compounds, particulate matter,

and sulfur dioxide. The Notice of Receipt of Application and Intent to Obtain Air Permit (“NORI”) was published in English on April 29, 2021 and in Spanish on May 4, 2021. For this type of application, at least one hearing request must be received within 30 days of publication of the NORI. No timely hearing requests were received in response to the NORI, therefore, no further opportunity to request a contested case hearing was provided. The Notice of Application and Preliminary Decision for an Air Quality Permit was published in Spanish on March 29, 2022 and in English on March 31, 2022. A public meeting was held on May 13, 2022. The public comment period was extended to the end of the public meeting, and closed on that same date. On October 11, 2022, the ED mailed its Response to Comments and issued the amendment to permit no. 6606. The deadline to file a motion to overturn was November 3, 2022, and the motion was timely filed November 2, 2022.

The motion seeks to overturn this amendment on the grounds that Flint Hills’ application underrepresented the Facility’s potential to emit sulfur dioxide, and as a result, was processed as a minor modification by the ED and did not undergo prevention of significant deterioration (“PSD”) review. Additionally, Movants allege that Ingleside on the Bay Coastal Watch Association’s hearing request, which raised this same issue with respect to sulfur dioxide, was effectively denied by the ED. OPIC notes that this hearing request was submitted on July 14, 2022, but was not considered by the Commission because it was deemed untimely by the ED. As a result, this matter was processed as an uncontested action by the ED, and the Commission has never had the opportunity to consider the merits of the Association’s argument.

III. Applicable Law

Motions to overturn are governed by Title 30, Chapter 50 of the Texas Administrative Code. Air quality permits under Title 30, Chapter 116 of the Texas Administrative Code are subject to the motion to overturn process.¹ Chapter 50 provides that the applicant, public interest counsel, or other person may file with the TCEQ Chief Clerk a motion to overturn the ED's action on an application.² A motion to overturn must be filed no later than 23 days after the date the agency mails notice of the signed permit, approval, or other action of the ED to the applicant and persons on any required mailing list for the action.³ An action by the ED is not affected by a motion to overturn unless expressly ordered by the Commission.⁴ Further, the Commission or General Counsel may extend the period of time for filing a motion to overturn and for taking action on a motion by up to 90 days after the date the agency mails notice of the signed permit, approval, or other action of the ED.⁵

IV. Discussion

Movants seek to overturn the ED's decision to grant the amendment to permit no. 6606, which among other things, increased allowable sulfur dioxide emissions. Movants argue that this increase exceeds the 40 tons per year sulfur dioxide threshold for a major modification pursuant to 40 Code of Federal Regulations ("CFR") § 52.21(b)(23)(i), and as a result should have undergone PSD review. As authority, they point to TCEQ Rule § 116.160(c)(2)(C), which through the incorporation of 40 CFR § 52.21(r)(4), requires that major modifications be subject to PSD review.

¹ 30 Texas Administrative Code ("TAC") § 50.131(b)(1).

² 30 TAC § 50.139(a).

³ 30 TAC § 50.139(b).

⁴ 30 TAC § 50.139(d).

⁵ 30 TAC § 50.139(e).

The Facility began an expansion project in 2019, in which it added new oil storage tanks and activities associated with the storage tanks. This 2021 permit amendment was submitted to update representations from the 2019 expansion project. Specifically, the 2021 amendment updates emissions to reflect as-built changes of the expansion project, correct representations, and add changes that should have been included in the original application. Movants argue that these changes render the expansion a major modification for sulfur dioxide, and therefore, the application should have been subject to PSD review and the process should have featured further public participation opportunities. OPIC finds the Movants' contentions persuasive and respectfully recommends granting this motion to overturn.

The 2019 expansion project application included 2.31 tons of increased sulfur dioxide emissions for maintenance, startup, and shutdown ("MSS") of the new storage tanks. These MSS activities were permitted not by permit no. 6606, but instead by permit by rule ("PBR") no. 107625. However, the MSS emissions were included in the expansion project's 2019 emissions calculations associated with permit no. 6606. In 2019, the total increase of sulfur dioxide because of the expansion project was estimated at 39.69 tons per year—barely below the 40 tons per year major modification threshold for sulfur dioxide.

In 2021, Flint Hills updated its emissions calculation for sulfur dioxide to 38.10 tons per year, based on an increase in the throughput of barge and ship loading of crude oil and condensate. However, at the same time, it omitted the 2.31 tons of sulfur dioxide emissions associated with MSS activities. When this 2.31 tons is included in the emissions calculation, it increases sulfur dioxide emissions to 40.41 tons per year, which exceeds the major modification threshold.

Movants argue, and OPIC agrees, that as a result, the project should have undergone PSD review and the public should have been afforded additional opportunities to participate in the amendment process as required for major modifications. OPIC notes that permit amendments must comply with Title 30, Chapter 39 of the TAC.⁶ For air quality applications subject to PSD review such as this one, this would extend the period of time for requesting a contested case hearing to 30 days after the mailing of the ED's Response to Comments ("RTC").⁷ In contrast, a minor modification has a shortened hearing request period, wherein at least one request must be received within 30 days of the last publication of the NORI in order to extend the period for requesting hearings to 30 days after the mailing of the ED's RTC.⁸

Movants also raised this issue in timely comments to the Commission and take issue with the ED's response, explaining that the ED is improperly categorizing their concern as one of aggregation, which differs from the issue that Movants have raised here. In the RTC, the ED took the position that consistent with EPA guidance, projects should be technically and economically related to be aggregated, and that projects that are more than three years apart are presumed not to be technically and economically related.⁹ However, Movants explain that aggregation is not relevant here, because these are not separate emissions from the 2019 expansion project, but instead, are the actual emissions increases associated with the expansion project that were estimated in 2019.

Again, OPIC finds Movants' argument and explanation persuasive. The MSS emissions authorized by PBR no. 107625 appear to be inextricably intertwined with the

⁶ 30 TAC § 116.116(b)(4).

⁷ 30 TAC § 39.411(e)(11)(A)(i).

⁸ 30 TAC § 39.411(e)(11)(A)(vi).

⁹ Federal Register Vol. 74, No. 10, pg. 2376, dated January 15, 2009.


expansion project, and therefore, with permit no. 6606. The letter Flint Hills sent to TCEQ explaining the registration revisions it sought for PBR no. 107625 states that it is increasing the number of maintenance and cleaning activities commensurate with the new storage tanks authorized under permit no. 6606. Additionally, as previously discussed, the 2019 emissions calculations for permit no. 6606 included the emissions associated with MSS activities under PBR no. 107625. This does not seem to be a case of multiple separate projects that allow for ED discretion in determining whether they should be aggregated together for emissions calculations purposes, but instead is a single years-long project with multiple emissions sources that should all be accounted for, and not artificially separated, as it appears happened here.

V. Conclusion

For the reasons discussed above, OPIC respectfully recommends that the Commission grant the Motion to Overturn, overturn the ED's approval of Amendment to Air Quality Permit no. 6606, and remand the application to the ED for further processing and public participation consistent with the requirements applicable to major modifications.

Respectfully submitted,

Garrett T. Arthur
Public Interest Counsel

By: 
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CERTIFICATE OF SERVICE

I hereby certify that on November 21, 2022, a true and correct copy of the Office of Public Interest Counsel's Response to Motion to Overturn was 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, electronic mail, or by deposit in the U.S. Mail.



Sheldon P. Wayne

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TCEQ Docket No. 2022-1541-AIR

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