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March 27, 2013

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

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2013 MAR 27 PM 4:15
CHIEF CLERK'S OFFICE

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

Dear Mr. Trobman:

Please find attached ExxonMobil Chemical Company's Request for a Direct Referral and Motion for Expedited Hearing regarding the application for Permit No. 102982. Please contact me if you have questions or if you need more information. ExxonMobil is requesting that this request be posted for the April 10, 2013 TCEQ Commission Agenda and that a reasonable amount of time be allotted for oral argument.

Thank you for your consideration.

Sincerely,



Derek Seal

Enclosures: Request for a Direct Referral and Motion for Expedited Hearing
Service List
Certificate of Service

cc: Service List

TCEQ DOCKET NO. _____

APPLICATION OF EXXONMOBIL FOR
ISSUANCE OF AIR QUALITY PERMIT
NO. 102892 FOR THE CONSTRUCTION
OF A NEW ETHYLENE PRODUCTION
UNIT AT EXXONMOBIL'S BAYTOWN
OLEFINS PLANT, LOCATED IN
HARRIS COUNTY , TEXAS

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BEFORE THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

**EXXONMOBIL'S REQUEST FOR
A DIRECT REFERRAL AND
MOTION FOR EXPEDITED HEARING**

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

COMES NOW Applicant ExxonMobil Chemical Company ("*ExxonMobil*") and files this request for a direct referral and motion to request that the Commissioners of the Texas Commission on Environmental Quality (the "*TCEQ*") determine that upon direct referral to the State Office of Administrative Hearings ("*SOAH*"), a hearing of no more than six months (from the date of the SOAH preliminary hearing until the issuance of the proposal for decision) is warranted regarding the above referenced application (the "*Application*").

I. BACKGROUND

On May 22, 2012, ExxonMobil submitted the Application, which would authorize a new ethylene production unit at ExxonMobil's Baytown Olefins Plant under TCEQ's Minor New Source Review Program. As explained in Section 1.1 of the Application, the proposed new ethylene production unit is expected to create about 350 full-time jobs and about 10,000 temporary construction jobs in the U.S. Gulf Coast Region, and through multiplier effects, it is estimated that 3,700 permanent jobs will be created in the local community. The new

ethylene production unit would be constructed in and integrated into existing ExxonMobil facilities, taking advantage of existing energy infrastructure. It is estimated that the project related to the expansion of ExxonMobil's Baytown Olefins Plant as proposed by the Application would increase regional economic activity by \$870 million per year and generate more than \$90 million per year of additional tax revenues for local communities.

The TCEQ Executive Director (the "*Executive Director*") issued the Notice of Receipt of Application and Intent to Obtain Air Permit ("*NORI*") for the Application on May 30, 2012. ExxonMobil properly published notice, and the first comment period ended on July 23, 2012. In response to the NORI, a single letter was received by the TCEQ Chief Clerk on July 3, 2012 from Environmental Integrity Project ("*EIP*"). The letter states that EIP, the Sierra Club, and Air Alliance Houston ("*AAH*") are submitting comments, and that EIP, AAH, and Matthew S. Tejeda are requesting a contested case hearing on the Application.¹ The Application is currently undergoing technical review but ExxonMobil anticipates the issuance of the Executive Director's preliminary decision in the next week or two.

Pursuant to TEX. WATER CODE § 5.557(a), the Commission has statutory authority to directly refer a matter to SOAH. Either the Executive Director or the applicant can request a direct referral at any time. *See also* 30 Texas Administrative Code ("*TAC*") §55.210(a). If a direct referral has been received, the Chief Clerk is required to refer the application directly to SOAH for a hearing after the Executive Director's preliminary decision is issued. *See* 30 TAC §55.210(b). ExxonMobil requests a direct referral of the Application to SOAH for a hearing, but for the reasons stated below, respectfully requests that the Commissioners specify that the maximum duration of the hearing must be no longer than six months from the date of the SOAH preliminary hearing until the issuance of the proposal for decision.

¹ As noted below, ExxonMobil does not concede that the hearing request is a valid hearing request.

II. THE TCEQ COMMISSIONER'S AUTHORITY TO CONSIDER THIS MATTER AND LIMIT THE DURATION OF A HEARING

The Commission has clear authority to entertain and act on ExxonMobil's motion, under both the Commission's plenary authority to take action as the Commission deems appropriate and under a plain reading of TCEQ rules.

A. The Commission has Plenary Authority to Limit the Duration of a Hearing on ExxonMobil's Application

The Texas Water Code establishes what has been described in prior cases as the Commission's plenary authority under which "[t]he commission has the powers to perform any acts whether specifically authorized by [the Texas Water Code] or other law or implied by [the Texas Water Code] or other law, *necessary and convenient* to the exercise of its jurisdiction as provided by [the Texas Water Code] and other laws." (emphasis added) *See* TEX. WATER CODE § 5.102(a). Although not specifically enumerated as a power of the Commission with respect to applications directly referred to SOAH, the authority of the Commission to specify a reasonable time within which a hearing shall be held by SOAH is necessarily implied from the Commission's authority to hold and call hearings (*See* TEX. WATER CODE § 5.102(b)), to delegate to an administrative law judge of SOAH the responsibility to hear any matter before the Commission (*See* TEX. WATER CODE § 5.311(a)), and to safeguard the state's air resources from pollution by controlling or abating air pollution and emissions of air contaminants, consistent with, among other things, the general welfare. (*See* TEX. HEALTH & SAFETY CODE CODE § 382.002(a)).

The Commission has exercised its plenary authority in a number of prior cases. For example, in the Texas Disposal Systems Landfill, Inc. matter, the Commission determined that it had plenary authority based in substantial part on TEX. WATER CODE § 5.102 (and other sources of plenary authority that are not directly applicable to ExxonMobil's Application) to take up and consider a hazardous waste enforcement matter that was pending

at the agency. *See Order concerning the Petition of Texas Disposal Systems Landfill, Inc.*, TCEQ Docket No. 2007-1019-IHW (Order Issued July 30, 2007). This case demonstrates the Commission's 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.

In the *Asarco* case, which is directly applicable to the Commission's authority to determine under what conditions to refer a matter to SOAH for a hearing, the Commission's order stated that the Commission had "*determined to exercise its plenary authority* to hold a hearing in the public interest under Chapter 5 of the Water Code and referred to [SOAH] the application." (emphasis added) *See Interim Order concerning the application by Asarco Incorporated to renew Air Quality Permit No. 20345*, TCEQ Docket No. 2004-0049-AIR (Order Issued May 14, 2004). In that case, the Commission's plenary authority to *sua sponte* refer an air permitting matter to a hearing was upheld by the 261st Judicial District Court of Travis County. *See Asarco Incorporated v. TCEQ*, Cause No. GN401709 (Order Issued March 9, 2005). Thus, the Commission's plenary authority to take action (in the absence of a statutory or regulatory provision directly prohibiting the proposed action) on a request such as ExxonMobil's motion to set the duration of a hearing on ExxonMobil's Application has been recognized by the Commission and the Travis County District Court.

In yet another case, the Commission called-up and considered a direct referral request for a water right application that was pending at the TCEQ, and the Commission considered the jurisdictional issues relating to the application rather than allowing the application to be processed further. *See Order denying the application by the San Marcos River Foundation for a new water right*, TCEQ Docket No. 2003-0027-WR (Order Issued March 20, 2003). The *San Marcos River Foundation* matter is 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. However, ExxonMobil is not requesting a substantive decision from the Commission as the parties were requesting in the *San Marcos River Foundation* case, *i.e.*, a determination regarding whether the

Commission had jurisdiction over the application. Instead, ExxonMobil's request is only for the Commission to direct SOAH to conclude a hearing in no more than six months.

In short, the Commission has established by past precedent that it can exercise its plenary authority that emanates from TEX. WATER CODE § 5.102(a) (and other plenary authority) if the Commission deems that it is warranted to call-up, consider, and act on matters pending at the TCEQ, as the Commission deems necessary and convenient.

B. The Texas Water Code and Provisions of TCEQ's Rules Applicable to the ExxonMobil Application Allow the Commission to Consider this Matter and Limit the Duration of a Hearing

TEX. WATER CODE § 5.557 (Direct Referral to Contested Case Hearing) governs Commission authority to directly refer a matter to a hearing at SOAH. TCEQ's rule at 30 TAC §55.210 implements TEX. WATER CODE § 5.557 and requires that a request for a direct referral must be filed with the TCEQ Chief Clerk (as has been done in this case). The rule goes on to provide that upon request by the Executive Director or the applicant, the application shall be direct referred after issuance of the Executive Director's preliminary decision. Although direct referral requests are traditionally handled by the TCEQ Chief Clerk without involvement of the Commissioners, nothing in either TEX. WATER CODE § 5.557 or 30 TAC §55.210 prohibits the Commission from limiting the time for the hearing in a direct referral.

TCEQ rules at 30 TAC Chapter 50, Subchapter F (Action by the Commission) sets forth the types of actions that the Commission can be expected to take on applications such as ExxonMobil's Application in this case. In particular, Subchapter F includes 30 TAC §50.117(a) which provides that the Commission may take a host of actions, including to "grant or deny an application in whole or in part, suspend the authority to conduct an activity . . . dismiss proceedings, amend or modify a permit or order, *or take any other appropriate action.*" (emphasis added) This section of TCEQ's rules is a stand-alone section in

Subchapter F that generally describes Commission authority, and could apply to either a direct referral, such as ExxonMobil's request in this case, or to other applications for which the Commission is deciding whether a hearing request is valid. Nothing in the language of 30 TAC §50.117(a) or the context of subsection (a) within 30 TAC §50.117 limits its applicability to any particular Commission action. Thus, the Commission has authority under 30 TAC §50.117(a) to establish a timetable for a hearing on an application directly referred to SOAH.

III. JUSTIFICATION FOR THE COMMISSION TO EXERCISE ITS DISCRETION AND GRANT EXXONMOBIL'S MOTION

As described above, the construction of the proposed ethylene production unit at ExxonMobil's Baytown Olefins Plant would have substantial, positive economic impacts on the State of Texas. Even a short delay in the order of several months could preclude the realization of the positive economic impacts that would be beneficial to the local community. Although it is not clear that the sole hearing request that has been received on ExxonMobil's Application is a valid hearing request, ExxonMobil is requesting a direct referral to SOAH in order to present its case for obtaining authorization to construct on the most expeditious and certain path available to it.

The Application provides that the proposed project will not result in emissions of criteria pollutants exceeding the annual emission limits established by ExxonMobil's existing permit for its Olefins Plant. ExxonMobil is fully prepared to demonstrate during a hearing that the Application meets all technical and legal requirements and is protective of human health and safety and the environment as required by TCEQ's rules. ExxonMobil is simply requesting that SOAH be directed to return a proposal for decision to the Commission on a reasonable timetable.

Lastly, the hearing requesters would not be prejudiced by a hearing duration of six months. ExxonMobil is prepared to offer a procedural schedule that will give all of the

parties sufficient time to prepare for and present their respective positions in an expeditious and efficient manner.

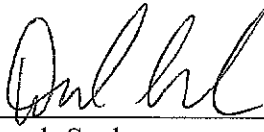
IV. CONCLUSION AND PRAYER

The Commission is authorized by the Texas Water Code to “perform any acts” – whether specifically authorized or implied by the Texas Water Code or other law – that are “necessary and convenient to the exercise of its jurisdiction . . . ” TEX. WATER CODE § 5.102(a). This is often referred to as the Commission’s “plenary authority.” Given the Commission’s clear authority under the Texas Water Code to limit the duration of a hearing referred by it to SOAH after determining the validity of hearing requests, the Commission has implied authority to take such action in matters directly referred to SOAH. This authority can be implied from powers granted to the Commission by the Texas Water Code and/or the Texas Clean Air Act in Texas Health & Safety Code, Chapter 382.

The Commission also has the authority to interpret its own rules, including its own rules relating to Commission authority to impose reasonable limits on the duration of a hearing. ExxonMobil requests that the Commission post the motion on the next available Commission Agenda since time is of the essence, and directly refer the Application to SOAH for a hearing of no more than six months from the date of the preliminary hearing to the issuance of the proposal for decision.

Dated: March 27, 2013

Respectfully Submitted,

By: 
Derek Seal
State Bar No. 00797404

Albert R. Axe
State Bar No. 01457400

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

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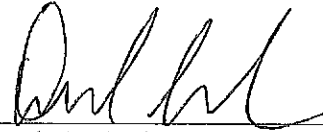
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Certificate of Service

I hereby certify that on this 27th day of March, 2012, a true and correct copy of the foregoing document was provided to the persons on the attached Service List via fax or hand delivery, and was also provided via regular mail.

A handwritten signature in black ink, appearing to read 'Derek L. Seal', written over a horizontal line.

Derek L. Seal