



TULANE ENVIRONMENTAL LAW CLINIC

Ref. 151-004

November 28, 2005

Via Fax and U.S. Mail

Ted R. Broyles, II. Attorney
Office of the Secretary, Legal Affairs Division
Louisiana Department of Environmental Quality
P.O. Box 4302
Baton Rouge, LA 70821-4302
Phone: 225-219-3985
Fax: 225-219-4068

Re: Joint Comments of St. Bernard Citizens for Environmental Quality, Louisiana Bucket Brigade, and National Refinery Reform Campaign on the Settlement Agreement for *In the Matter of: Chalmette Refining, L.L.C.*, LDEQ Proceedings under La. R.S. 30:2001, et seq.
Agency Interest No.: 1376
Settlement Tracking No.: SA-WMM-05-0057
Enforcement Tracking Nos.: MM-PP-01-0008, WE-CN-02-0005, MM-CN-02-0108, WE-CN-99-0170

Dear Mr. Broyles:

St. Bernard Citizens for Environmental Quality, Louisiana Bucket Brigade, and National Refinery Reform Campaign respectfully submit the following joint comments on the settlement agreement for *In the Matter of: Chalmette Refining, L.L.C.*, Louisiana Department of Environmental Quality enforcement proceeding under the Louisiana Environmental Quality Act, La. R.S. 30:2001, et seq. St. Bernard Citizens for Environmental Quality, Louisiana Bucket Brigade, and National Refinery Reform Campaign reserve the right to rely on comments submitted by any other person or entity in these proceedings.

St. Bernard Citizens for Environmental Quality is an organization whose goal is to reduce pollution and protect public health in St. Bernard Parish. The Louisiana Bucket Brigade is an environmental health and justice organization that works with the St. Bernard Citizens for Environmental Quality and other Louisiana communities that neighbor the state's oil refineries

and chemical plants. Members of St. Bernard Citizens for Environmental Quality and the Louisiana Bucket Brigade live in Chalmette and suffer health risks from breathing air that Chalmette Refining has contaminated. Indeed, the Eastern District of Louisiana has determined that members of St. Bernard Citizens for Environmental Quality and the Louisiana Bucket Brigade have suffered legally cognizable injury from the Chalmette Refinery. *St. Bernard Citizens for Environmental Quality, et al. v. Chalmette Refining, L.L.C.*, 354 F. Supp. 2d 697, 702 (E.D. La. 2005) (citizen suit alleging violations of the Clean Air Act and Emergency Planning and Community Right to Know Act).

St. Bernard Citizens for Environmental Quality, Louisiana Bucket Brigade, and National Refinery Reform Campaign appreciate this opportunity to comment on LDEQ's settlement agreement with Chalmette Refining. They also recognize that the monitoring provisions of the consent order that the settlement agreement refers to are a positive and necessary step. As detailed below, however, St. Bernard Citizens for Environmental Quality, Louisiana Bucket Brigade, and National Refinery Reform Campaign have identified several deficiencies in the settlement agreement, many of which focus on the community monitoring plan. St. Bernard Citizens for Environmental Quality, Louisiana Bucket Brigade, and National Refinery Reform Campaign and have also provided their recommendations for improving the community monitoring plan.

Moreover, St. Bernard Citizens for Environmental Quality, Louisiana Bucket Brigade, and National Refinery Reform Campaign question whether the proposed settlement agreement provides the public with any significant benefit in light of the proposed federal consent decree and the LDEQ monitoring order that is already in place. Specifically, what does this settlement agreement offer the public in return for the lavish benefits (in the form of unnecessarily broad and vague releases from liability) that it grants to Chalmette Refining, ExxonMobil, and others?

COMMENTS

I. ADDITIONAL MONITORING IS NEEDED TO ACCURATELY MEASURE COMMUNITY AIR FOR POLLUTANTS EMITTED BY CHALMETTE REFINING.

The settlement agreement requires Chalmette Refining "to purchase the Air Monitors as described in the Administrative Order on Consent . . . [and] donate those Air Monitors to LDEQ at the time of such installation as a Beneficial Environmental Project." Agreement ¶ III.A. The Administrative Order on Consent, which became effective May 24, 2005, is an agreement between LDEQ and Chalmette Refining requiring Chalmette Refining to "implement the 'St. Bernard Enhanced Ambient Monitoring Program' [which includes] the purchase and installation of the ambient air monitoring equipment described in Appendix B, on or before December 31, 2005." (referred to in these comments as the "LDEQ/Chalmette Refining monitoring plan") Consent Order at ¶ V.

St. Bernard Citizens for Environmental Quality, Louisiana Bucket Brigade, and National Refinery Reform Campaign are pleased that LDEQ and Chalmette Refining are working together

to implement an improved air monitoring program for the Chalmette community. However, because the Chalmette Refinery has continuously exceeded permit limits for various pollutants (see *St. Bernard Citizens for Environmental Quality*, 2005 WL 2952768, *2 (finding Chalmette Refining liable for over 2,000 Clean Air Act violations)), St. Bernard Citizens for Environmental Quality, Louisiana Bucket Brigade, and National Refinery Reform Campaign request additional monitoring so that the community, LDEQ and its agents can accurately measure and identify the pollutants that come from the refinery at any given time. Indeed, the Eastern District ruled: “For entities regulated under the Clean Air Act, ‘the burden is clearly on the source to do whatever is necessary to assure compliance.’” *Id.* (quoting 45 Fed. Reg. 59,874, 59,877 (Sept. 11, 1980)). Specifically, in addition to the LDEQ/Chalmette Refining monitoring plan discussed in the settlement agreement and specified in the Administrative Order on Consent, St. Bernard Citizens for Environmental Quality, Louisiana Bucket Brigade, and National Refinery Reform Campaign request continuous real-time monitoring using both infra red and ultra violet monitoring equipment installed along the entire Chalmette Refinery fenceline and at hotspots within the community that are selected by the community members.

A. Continuous 24/7 Monitoring

The LDEQ/Chalmette Refining monitoring plan specifies six monitoring stations, none of which will provide speciated volatile organic chemicals (VOCs) on a continuous basis for 24-hours a day, seven days a week. Instead, three of the six monitoring stations “will monitor for VOC by continuous analyzer, toxic air pollutants by 6-day/24-hour sampling and by summa canister samplers in response to VOC triggers, and SO₂ and H₂S by continuous analyzer.” Consent Decree, Appendix B at ¶ III. As for the remaining three stations, the LDEQ/Chalmette Refining monitoring plan provides no schedule or period for monitoring various pollutants. See *Id.* The problem with the LDEQ/Chalmette Refining monitoring plan is it does not collect data continuously—every day, all day. In fact, the LDEQ/Chalmette Refining system will not even record VOC data unless triggered by a high contaminant reading. Therefore, if the trigger is set too high, no data will be recorded. St. Bernard Citizens for Environmental Quality, Louisiana Bucket Brigade, and National Refinery Reform Campaign ask that the proposed system be supplemented with infra red and ultra violet monitoring equipment that continuously samples and records all data so that the community, LDEQ and its agents can develop baseline readings, historic comparisons and other useful measures of its air quality with respect to the air pollutants from the Chalmette Refinery.

B. Fenceline and Community Hotspot Monitoring

The LDEQ/Chalmette Refining monitoring plan does not require Chalmette Refining to install monitors along the entire fenceline of the refinery. Without fenceline monitoring, debate will continue as to whether the pollutants measured by the monitors come from the Chalmette Refinery or from some other nearby facility. Fenceline monitoring will greatly improve the ability to identify the pollutant source.

In addition, the LDEQ/Chalmette Refining monitoring plan states that LDEQ “will designate the installation sites” for the monitors. Consent Order at ¶ V. In fact, LDEQ has identified six monitoring stations. See Consent Order, Appendix B. St. Bernard Citizens for Environmental Quality, Louisiana Bucket Brigade, and National Refinery Reform Campaign object to this provision giving unilateral authority to LDEQ to designate community monitoring stations. The community must be involved in this process and must be consulted with to identify hotspots within the community for placing monitoring equipment.¹ Therefore, the LDEQ/Chalmette Refining monitoring plan must be amended to provide for community input in placing monitoring stations.

II. ALL STATIONS MUST BE TESTED FOR ALL TARGET COMPOUNDS IN PARTS PER BILLION AND HEAVY METALS MUST BE INCLUDED IN THE PARTICULATE MATTER ANALYSIS.

The LDEQ/Chalmette Refining monitoring plan specifies the target compounds to be monitored at each of the six monitoring stations. See Consent Order, Appendix B, ¶ III. For example, “[t]he existing LDEQ Meraux Station . . . will monitor for PM_{2.5} [, whereas] [t]he existing LDEQ Arabi Station . . . will monitor for O₃ and SO₂.” *Id.* Neither of these stations monitors the same compounds, nor do they monitor for VOC or H₂S as planned for the enhanced LDEQ Chalmette Vista Station, new Chalmette High School Station, and new West Bank Station. *Id.* St. Bernard Citizens for Environmental Quality, Louisiana Bucket Brigade, and National Refinery Reform Campaign ask that the LDEQ/Chalmette Refining monitoring plan be amended to require that all stations test for all target compounds identified in the LDEQ/Chalmette Refining monitoring plan, which include: criteria pollutants (O₃, NO₂, CO, SO₂ and PM_{2.5}); VOCs (benzene, toluene, xylene and carbon disulfide); H₂S; and total suspended particulate. Consent Order, Appendix B, ¶ II. In addition, St. Bernard Citizens for Environmental Quality, Louisiana Bucket Brigade, and National Refinery Reform Campaign also request that the LDEQ/Chalmette Refining monitoring plan specify heavy metal analysis of the particulate matter. In addition, the LDEQ/Chalmette Refining monitoring plan must require that all testing parameters be set to identify compounds in parts per billion.

St. Bernard Citizens for Environmental Quality, Louisiana Bucket Brigade, and National Refinery Reform Campaign also request that all additional monitoring, as specified in paragraph A of these comments, test for all target compounds in parts per billion.

III. PUBLIC MUST HAVE ACCESS TO AMBIENT MONITORING INFORMATION ON A REAL-TIME BASIS.

The LDEQ/Chalmette Refining monitoring plan states that monitored data once collected and validated will be made available to the public on the internet. Consent Order, Appendix B, ¶

¹ In fact, St. Bernard Citizens for Environmental Quality and Louisiana Bucket Brigade have taken many air samples to identify hotspots within the community for the purpose of placing monitoring equipment. In addition, these groups have operated a monitoring system at one site for over 30 days in cooperation with St. Bernard Parish.

VIII. However, the plan fails to provide a timeframe for publishing such information. In order for the data to be meaningful to the public it must be made available on the internet on a real-time basis. This way, community members can draw associations between such data and odors caused by flaring events, malfunctions, and other events at the refinery. Therefore, St. Bernard Citizens for Environmental Quality, Louisiana Bucket Brigade, and National Refinery Reform Campaign request that the LDEQ/Chalmette Refining monitoring plan be amended to require that all monitoring data be made available to the public on a real-time basis via the internet.²

In addition, the LDEQ/Chalmette Refining monitoring plan states that “[s]ummary reports will also be compiled and made available to the public in accordance with LDEQ public records procedures.” Consent Order, Appendix B, ¶ III. St. Bernard Citizens for Environmental Quality, Louisiana Bucket Brigade, and National Refinery Reform Campaign request that this provision be amended to require that all such summary reports also be made available to the public on the internet so that the public can review reports and the data posted on the internet together.

IV. THIRD PARTY NEEDED TO CONDUCT MONITORING, SORT AND EVALUATE DATA, AND MAINTAIN EQUIPMENT.

St. Bernard Citizens for Environmental Quality, Louisiana Bucket Brigade, and National Refinery Reform Campaign also request that the settlement agreement be amended to require a third party to be hired to review, sort, and evaluate all data from all monitors, including those in the LDEQ/Chalmette Refining monitoring plan and the additional monitors requested in these comments. LDEQ or Chalmette Refining must demonstrate that this third party is qualified and selected through an open competition process. The settlement agreement must also specify who will pay for the third party, and that party should be Chalmette Refining. Having a third-party in charge of all monitoring activities and data will help create an effective, objective and well-run monitoring program.

V. LDEQ’S PROPOSED RELEASE OF CHALMETTE REFINING, EXXONMOBIL AND OTHERS IS OVERBROAD AND UNLAWFUL.

The release that LDEQ proposes to grant in IV.B of the settlement is inappropriately broad. Moreover, because the release is inconsistent with LDEQ’s duty as public trustee, it is unlawful. While it may sometimes be appropriate to settle a dispute between *private* parties by releasing a party for any noncompliance “raised, or which *could have been raised* . . .” in any documents that the other party “considered, *or could have considered*,” such a broad release is wholly inappropriate and extremely unusual coming from a government enforcement agency. The effect of such a release is to relinquish LDEQ enforcement authority over an unknown array of violations that the public has not been informed about and many of which LDEQ may not even be aware of. Moreover, LDEQ proposed to grant this unlawfully broad release not only to

² St. Bernard Citizens for Environmental Quality and Louisiana Bucket Brigade successfully demonstrated this process in cooperation with the Parish.

Chalmette Refining, but also to its operator ExxonMobil, to its separate, parent corporations, to both Exxon and Chalmette Refinery's attorneys, employees, officers, directors, "affiliates," officers, and "agents." The settlement agreement does not even define the people included within the term "affiliate" and "agent." LDEQ proposes to grant this inappropriately broad release despite the fact that, under IV.C. of the agreement, Chalmette Refining admits to no wrongdoing whatsoever and despite the fact that it is unclear whether the settlement agreement imposes any significant new obligations on Chalmette Refining.

By comparison, LDEQ should examine the much more specific "resolution of liability" paragraphs (§§ 204-218) from the federal consent decree (in case number 05-CV-04662 before the U.S. District Court for the Eastern District of Louisiana). LDEQ should only grant releases in return for significant agreements and, then, only for specific pieces of equipment, for specific time periods, and for specific violations. Moreover, LDEQ's release should only cover the parties to the settlement, who are bound by the settlement, and not include attorneys, officers, parent corporations, and vague terms such as "affiliate" and "agent." Shockingly, LDEQ's release does not even contain an exception for "imminent and substantial endangerments" to public health or the environment. For comparison purposes, please see paragraph 221 of the federal consent decree.

As public trustee, LDEQ must carefully consider decisions that significantly effect the environment, such as releasing a major corporation from Clean Air Act violations at one of the nation's most significant industrial sources of pollution. LDEQ cannot perform this important task without identifying the scope of its release and, thus, without providing a specific release. As a matter of policy, therefore, LDEQ should *never* grant releases for matters that "could have been raised" for "could have been considered." Such releases are unwise and unusual in all states, but in Louisiana they are also unlawful, since they conflict with LDEQ's role as public trustee.

VI. IT IS NOT CLEAR WHETHER THE SETTLEMENT AGREEMENT PROVIDES THE PUBLIC ANYTHING OF VALUE.

The community monitoring provisions are already in place under LDEQ Order No. AE-AOA-05-0109 (5/24/05). Essentially the only "benefit" LDEQ receives under the settlement agreement is that Chalmette refining will donate the monitors to LDEQ. The value of that benefit is unclear. To clarify this issue, LDEQ must answer the following questions:

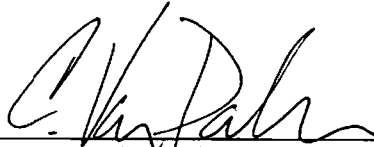
- Why does LDEQ wish to own the monitors that Chalmette Refining will donate?
- Given that LDEQ Order No. AE-AOA-05-0109 already requires Chalmette Refining to conduct the community monitoring, what is the value to LDEQ or the benefit to the public of Chalmette Refining's agreement to "donate" the monitors to the state?
- What is the market value of the monitors that Chalmette Refining has agreed to donate?

- What is the useful life of the monitors that Chalmette Refining will donate to LDEQ?
- Will ownership of the monitors be independently useful to LDEQ during the time that Chalmette Refining is conducting the community monitoring that LDEQ Order No. AE-AOA-05-0109 requires? If so, how?
- When, if ever, does LDEQ expect the community monitoring that LDEQ Order No. AE-AOA-05-0109 requires to be complete?
- What does LDEQ project that the donated monitors will be worth after Chalmette Refining has discharged its obligations under LDEQ Order No. AE-AOA-05-0109? What is the basis of that projection?
- What will LDEQ use the donated monitors for after Chalmette Refining has discharged its obligations under LDEQ Order No. AE-AOA-05-0109?
- After this donation, who will be responsible for paying to maintain the donated monitors? What will the effect be on the community monitoring that LDEQ Order No. AE-AOA-05-0109 requires if LDEQ is unable to pay to maintain the donated monitors?
- Will the agreement increase the costs to LDEQ of the community monitoring program? If so, does such an increase make sense in light of the stresses to the State's budget caused by Hurricane Katrina?
- Will the State of Louisiana lose revenue because Chalmette Refining may take a tax deduction for donating the monitors? If so, does this revenue loss make sense in light of the stresses to the State's budget caused by Hurricane Katrina?

For the foregoing reasons, St. Bernard Citizens for Environmental Quality, Louisiana Bucket Brigade, and National Refinery Reform Campaign ask that the Consent Decree be amended to accommodate their requests, and that LDEQ provide answers to their questions. If LDEQ does not amend the agreement to significantly improve the community monitoring program, St. Bernard Citizens for Environmental Quality, Louisiana Bucket Brigade, and National Refinery Reform Campaign request that LDEQ reconsider whether the settlement agreement is in the best interests of the State of Louisiana.

Respectfully submitted on November 28, 2005 by:

TULANE ENVIRONMENTAL LAW CLINIC



Adam Babich, Director
Corinne Van Dalen, Supervising Attorney
6329 Freret Street, Suite 130
New Orleans, Louisiana 70118
Phone: (504) 862-8818
Fax: (504) 862-8721

*Counsel for St. Bernard Citizens for Environmental
Quality, Louisiana Bucket Brigade, and National Refinery
Reform Campaign*

Cc:

Via E-mail (randall.stone@usdoj.gov)
Kelly A. Johnson, Assistant Attorney General
Randall M. Stone, Trial Attorney
Environment and Natural Resources Division
P.O. Box 7611
U.S. Department of Justice
Washington, D.C. 20044-7611

Via E-mail (Parrish.Robert@epamail.epa.gov)
Robert D. Parrish, Attorney-Advisor
U.S. EPA
Mail Code 2248A
1200 Pennsylvania Ave, NW
Washington, D.C. 20460

Via E-mail (jsanders@nealharwell.com)
James F. Sanders, Esq.
Neal and Harwell, PLC
Suite 2000, One Nashville Place
150 4th Ave. North
Nashville, TN 37219-2498

Via E-mail (Jane.Raiford@arlaw.com)
Jane Raiford, Esq.
Adams and Reese, LLP
One Shell Square
701 Poydras Street, Suite 4500
New Orleans, 70139