

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA**

ST. BERNARD CITIZENS FOR)	
ENVIRONMENTAL QUALITY, INC., and)	
LOUISIANA BUCKET BRIGADE)	Case No.: 04-0398
)	Section: R
<i>Plaintiffs,</i>)	Judge: Vance; Magistrate: 1
)	
v.)	
)	
CHALMETTE REFINING, L.L.C.)	
)	
<i>Defendant.</i>)	

**PLAINTIFFS’ MEMORANDUM IN SUPPORT OF SECOND MOTION FOR
PARTIAL SUMMARY JUDGMENT AND FOR INJUNCTIVE RELIEF**

Plaintiffs St. Bernard Citizens for Environmental Quality and Louisiana Bucket Brigade respectfully submit this Memorandum in Support of their Second Motion for Partial Summary Judgment and for Injunctive Relief against Defendant Chalmette Refining, L.L.C. (“Chalmette Refining”). Based on facts that are beyond dispute, Plaintiffs are entitled to judgment as a matter of law that Chalmette Refining is liable for at least two thousand, six hundred and twenty-nine (2,629) violations of the Clean Air Act. Specifically, Chalmette Refining is liable for (1) exceeding benzene limits on tank emissions at least 1,273 times since 2003, (2) exceeding sulfur dioxide limits on flares at least 536 times since 2002, and (3) violating “new source performance

standards” for flares at least 820 times since 1999. Also, because Chalmette Refining continues to operate three benzene storage tanks in a manner that consistently exceeds its benzene permit limits, Plaintiffs request an order enjoining defendant to either conform its operation of those tanks to its permit limits, or close them within 30 days.

INTRODUCTION

Despite the fact that Chalmette Refining is only permitted to emit a total of 17.04 pounds per day of benzene collectively from three storage tanks, it continuously emits more than 67 pounds per day collectively from these tanks. Similarly, Chalmette Refining is only permitted to emit 102.24 pounds per day of sulfur dioxide (“SO₂”) from its flares, but it routinely emits up to 25,862 pounds of SO₂ per day from its No.1 and No.2 flares as part of its normal operation, and it has emitted even more in the past. Chalmette Refining is aware that it operates in violation of its air permit limitations. Indeed, Chalmette Refining certified to LDEQ that the continuous releases of benzene and SO₂ exceed the daily permitted emissions imposed pursuant to its Clean Air Act permit.

Chalmette Refining has admitted that its ongoing violations are not related to any upsets or emergency conditions, yet it continues to operate without regard to the rule of law or federally enforceable permit conditions. Chalmette Refining has also admitted that it has not taken any response or mitigation steps. It is beyond dispute, therefore, that Chalmette Refining operates in continuous violation of the Clean Air Act, ignoring its “duty to comply” with permit limits See, e.g., 45 Fed. Reg. 59,874, 59,877 (Sept. 11, 1980) (“The burden is clearly on the source to do *whatever is necessary* to assure compliance.”) (emphasis added). In addition, Chalmette

Refining has certified to LDEQ that it operates its flares in violation of applicable New Source Performance Standards (“NSPS”).

Because no genuine issue of material fact exists as to the illegality of these violations, Plaintiffs respectfully ask this Court to grant summary judgment holding Chalmette Refining liable for at least two thousand, six hundred and twenty-two (2,629) Clean Air Act violations over and above the 34 “preventable” unauthorized discharges” for which this Court previously held Defendant liable. St. Bernard Citizens for Environmental Quality, Inc. v. Chalmette Refining, L.L.C., 354 F. Supp. 2d 697, 707 (E.D. La. 2005). Plaintiffs also ask the Court to enjoin Chalmette Refining from operating benzene storage tanks 200, D-13001, and D-13002 in violation of the Clean Air Act.

BACKGROUND

Procedural Background

On February 20, 2004, Plaintiffs sued Chalmette Refining for violations of the Clean Air Act and the Emergency Planning and Community Right to Know Act (“EPCRA”). Defendant filed its Answer on May 14, 2004. On February 3, 2005, this Court granted the Plaintiffs’ First Motion For Partial Summary Judgment. This Court found that Plaintiffs have standing to bring this lawsuit and that Chalmette Refining is liable under the Clean Air Act for 34 “preventable” permit violations. 354 F. Supp. 2d at 707.

On April 20, 2005, Plaintiffs filed their Unopposed Motion for Leave to File A Second Amended Complaint. That Second Amended Complaint clarifies, *inter alia*, Plaintiffs’ allegations regarding Chalmette Refining’s benzene storage tanks. See Proposed Second Amended Complaint at ¶¶ 54-62 (submitted April 20, 2005).

This case is set for trial on February 13, 2006. Minute Order (Jan. 20, 2005). The Plaintiffs submit that summary judgment can significantly narrow the issues for trial.

Statutory Framework

As this Court has recognized, Congress crafted the Clean Air Act and created national ambient air quality standards (“NAAQS”) “to protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare.” St. Bernard Citizens for Environmental Quality, Inc. v. Chalmette Refining, L.L.C., 354 F. Supp. 2d 697, 699 (E.D. La. 2005); CAA § 101(b)(1), 42 U.S.C. § 7401(b)(1); CAA § 108(a), 42 U.S.C. § 7408(a). States implement and enforce these national standards through state implementation plans (“SIPs”) and permits. CAA § 110, 42 U.S.C. § 7410; [CAA §§ 502-506, 42 U.S.C. § 7661(a)-(e)]. Once EPA approves a SIP, its requirements and commitments become binding as a matter of federal law upon the state. CAA § 113(a)(2), 42 U.S.C. § 7413(a)(2). Louisiana’s SIP requires permits for discharges of air pollutants. La. R.S. 30:2055. Consistent with applicable state and federal law, the Secretary of the LDEQ issues these permits in accordance with LDEQ regulations. Id.; La. Rev. Stat. § 30:2054; 354 F. Supp. 2d at 699-700.

In addition to national ambient air quality standards, the Clean Air Act requires the EPA to develop New Source Performance Standards (“NSPS”). CAA § 111, 42 U.S.C. § 7411. After these standards become effective “it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.” CAA § 111(e), 42 U.S.C. § 7411(e). Louisiana’s SIP incorporates by reference EPA’s New Source Performance Standards codified at 40 C.F.R. Part 60. See La. Admin. Code tit. 33.III § 3003.

Louisiana’s plan for implementing the Clean Air Act provides that any “discharge [of] air contaminants...into the air of this state in violation of regulations of the secretary or the terms of any *permit*, license, or variance” is unlawful. La. Rev. Stat. § 30:2057. (emphasis added). As EPA has explained, “excess emissions might aggravate air quality so as to prevent attainment or interfere with maintenance of the ambient air quality standards.” EPA, Memorandum on State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown, 1 (Sept. 20, 1999).¹ Therefore “*all excess emissions* [are] violations of the applicable emission limitation.” Id. (emphasis added). Regulated entities have a mandatory “duty to comply” with the emission limitations in their permits and “to do whatever is necessary to assure compliance.” See 45 Fed. Reg. 59,874, 59,877 (Sept. 11, 1980); La. Admin. Code tit. 33.III § 501.C.4 (“The source shall be operated in accordance with all terms and conditions of the permit. Noncompliance with any term or condition of the permit shall constitute a violation of this Chapter and shall be grounds for enforcement action, for permit revision or termination, or for denial of a permit renewal application.”).

Louisiana’s plan for implementing the Clean Air Act requires Chalmette Refining to file a written report with LDEQ each time the refinery has an “unauthorized discharge.” La. Admin. Code tit. 33.III § 927.A; cf. 40 C.F.R. § 70.6(a)(3)(iii)(B). An “unauthorized discharge” is “a continuous, intermittent, or one-time discharge, whether intentional or unintentional, anticipated or unanticipated, from any permitted or unpermitted source which is in contravention of any provision of the Louisiana Environmental Quality Act (La. Rev. Stat. § 30:2001 et seq.) or of any permit . . .” La. Admin Code tit. 31.I § 3905.

¹ Available at <http://www.epa.gov/ttn/nsr/gen/excessem.pdf>.

The Clean Air Act includes a citizen suit provision, granting citizens independent authority to enforce legal standards to protect their own health and to encourage more active enforcement by governmental agencies. 354 F. Supp. 2d at 700; CAA § 304, 42 U.S.C. § 7604; Baughman v. Bradford Coal Co., Inc., 592 F.2d 215, 218 (3d Cir. 1979) (“Congress intended citizen suits to both goad the responsible agencies to more vigorous enforcement of the anti-pollution standards and, if the agencies remain inert, to provide an alternate enforcement mechanism”); S. Rep. No. 1196, 91st Cong. 2nd Sess. 36-39, reprinted in NRDC v. Train, 510 F.2d 692, 723 (D.C. Cir. 1975) (noting that “[g]overnment initiative in seeking enforcement under the Clean Air Act has been restrained. Authorizing citizens to bring suits for violations of standards should motivate governmental agencies charged with the responsibility to bring enforcement and abatement proceedings.”).

The citizen suit provision authorizes citizens to act as private attorneys general in situations where government fails to diligently prosecute violators in court. CAA § 304(a), 42 U.S.C. § 7604(a). Citizen suit authority extends to current violations and past violations where there is evidence that those violations have been repeated. CAA § 304(a), 42 U.S.C. § 7604(a). Under section 304(a) of the Act, citizens may file suit for injunctive relief and for civil penalties of up to \$32,500 per violation per day,² payable to the United States Treasury, for violation of any “emission standard or limitation” under the Act. Id. “Emission standards or limitations” include: (1) any condition or requirement of a Clean Air Act permit (such as the emissions limitations for benzene and SO₂), and (2) any requirement of Clean Air Act section 111 (“NSPS”). CAA § 304(f), 42 U.S.C. § 7604(f).

² 40 C.F.R. § 19.4 (2004).

Health Effects

The primary pollutants at issue in this motion cause discomfort at small doses and are dangerous to breathe. EPA classifies benzene as a Group A, human carcinogen.³ Group A, human carcinogens are agents that cause cancer in humans.⁴ Chronic inhalation exposure to benzene has caused various blood disorders, and in occupational settings, aplastic anemia and increased incidences of leukemia.⁵ Other health effects of long-term exposure include drying and scaling of the skin.⁶ Short term inhalation exposure to benzene “may cause drowsiness, dizziness, headaches, as well as eye, skin, and respiratory tract irritation, and, at high levels, unconsciousness.”⁷ Benzene has been ranked in the worst 10% of the most hazardous compounds to ecosystems and human health.⁸ In 1990, Congress listed benzene as a “hazardous air pollutant.” CAA § 112(b)(1), 42 U.S.C. § 7412(b)(1). In 2002, data from the EPA’s Toxic Release Inventory ranked Chalmette Refining *second in the entire United States* for benzene air releases by producers of petroleum and coal, emitting 121,000 pounds.⁹

³ See EPA, Consumer Factsheet on Benzene, available at http://www.epa.gov/safewater/contaminants/dw_contamfs/benzene.html (last updated on Feb. 22, 2005).

⁴ See EPA, Risk Assessment for Carcinogens, available at <http://www.epa.gov/ttn/atw/toxsource/carcinogens.html> (last updated Apr. 29, 2004).

⁵ See EPA, Consumer Factsheet on Benzene, *supra* note 3.

⁶ See EPA, Benzene Chemical Background, available at <http://www.nsc.org/ehc/chemical/benzene.htm>

⁷ See EPA, Consumer Factsheet on Benzene, *supra* note 3.

⁸ See Chemical Profile for Benzene, http://scorecard.org/chemical-profiles/summary.tcl?edf_substance_id=71-43-2

⁹ See Chemical Profiles by Facility, available at http://scorecard.org/chemical-profiles/rank-facilities.tcl?edf_chem_name=BENZENE&edf_substance_id=71-43-2&how_many=100&drop_down_name=Air+releases&fips_state_code=Entire+United+States&sic_2=29 (2004); The Toxics Release Inventory (TRI), established by Section 313 of EPCRA, collects information about chemical releases and waste management reported by major industrial facilities in the U.S. See http://scorecard.org/general/tri/tri_gen.html.

Sulfur dioxide (“SO₂”) is “[a] colorless gas with a strong, suffocating odor.”¹⁰ “It may cause death or permanent injury after very short exposure to small quantities. 1,000 ppm causes death in from 10 minutes to several hours by respiratory depression. It is an eye and respiratory tract irritant.”¹¹ In addition, when released into the atmosphere sulfur dioxide “reacts with other chemicals in the air to form tiny sulfate particles. When these are breathed, they gather in the lungs and are associated with increased respiratory symptoms and disease, difficulty in breathing, and premature death.”¹² Consequently, EPCRA lists sulfur dioxide as an “Extremely Hazardous Substance” and requires Chalmette Refining to notify the neighboring community when it releases more than 500 pounds.¹³

As dangerous as sulfur dioxide is, hydrogen sulfide is more so. It smells like rotten eggs and “death or permanent injury may occur after very short exposure to small quantities. It acts directly upon the nervous system resulting in paralysis of respiratory centers.”¹⁴ Consequently, EPCRA requires that the community be alerted when 100 pounds of hydrogen sulfide are released. When Chalmette Refining fails to properly operate and maintain its flares they emit hydrogen sulfide, rather than the usual sulfur dioxide, into the ambient air over nearby neighborhoods in violation of the Clean Air Act, endangering the health of whoever breathes it.

STANDARD OF REVIEW

¹⁰ EPA, Chemical Profile: Sulfur Dioxide, available at <http://yosemite.epa.gov/oswer/CeppoEHS.nsf/Profiles/7446-09-5> (last updated April 8, 2005).

¹¹ Id.

¹² EPA, SO₂ - How Sulfur Dioxide Affects the Way We Live & Breathe, available at <http://www.epa.gov/air/urbanair/so2/index.html> (last updated Dec. 20, 2004).

¹³ See 40 C.F.R. Pt. 355, App. A.

¹⁴ EPA, Chemical Profile: Hydrogen Sulfide, available at <http://yosemite.epa.gov/oswer/CeppoEHS.nsf/Profiles/7783-06-4> (last updated April 8, 2005).

Summary judgment is appropriate “if the pleadings...show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c); see Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); St. Bernard Citizens for Environmental Quality, Inc. v. Chalmette Refining, L.L.C., 354 F. Supp. 2d 697, 699 (E.D. La. 2005). Summary judgment is not a “disfavored procedural shortcut, but rather an integral part of the Federal Rules as a whole, which are designed ‘to secure the just, speedy and inexpensive determination of every action.’” Id. at 327. Chalmette Refining “may not rest upon . . . mere allegations or denials” but rather “must set forth specific facts showing that there is a genuine issue of material fact for trial.” Fed. R. Civ. P. 56(e); see Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986); Taita Chem. Co. v. Westlake Styrene Corp., 246 F.3d 377, 385 (5th Cir. 2001). Otherwise, summary judgment should be entered. O’Hare v. Global Natural Res., Inc., 898 F.2d 1015, 1017 (5th Cir. 1990).

As this court has recognized, mandatory, certified compliance reports can provide conclusive evidence of violations for summary judgment purposes. 354 F. Supp. 2d at 707 (“The unauthorized discharge reports demonstrate that Chalmette violated emission standards or limitations promulgated under the Clean Air Act and Louisiana’s implementation plan.”).

ARGUMENT

I. CHALMETTE REFINING OPERATES ITS BENZENE TANKS IN VIOLATION OF THE CLEAN AIR ACT.

Since at least July 17, 2003, Chalmette Refining has been discharging benzene from three storage tanks in quantities that exceed the permitted emission levels allowed by its permits.

Chalmette Refining is therefore consistently violating the Clean Air Act.

A. Chalmette Refining Violates the Clean Air Act by Continuously Releasing More Benzene than its Air Permits Allow.

1. Chalmette Refining's Admissions Establish Its Violations.

It is beyond dispute that Chalmette Refining emits excessive quantities of benzene, in violation of permit limits. The emissions at issue are from benzene storage tanks 200, D-13001, and D-13002. Permit # 2500-00005-02 and Permit # 2226 (M-3) regulate emissions from those tanks and specify that data sheets, attached to the permits, "establish the emission and operating limitations and are part of the permit." Permit # 2500-00005-02, at 18, Ex. 1; Permit # 2226 (M-3), at 9, Ex. 2.

Chalmette Refining originally verbally notified LDEQ of a continuous release of excess benzene from these tanks on July 10, 2003. See Chalmette Refining Letter to LDEQ of 7/17/03 (hereinafter "Defendant's 7/17/03 Benzene Letter"), Ex. 3. On July 17, 2003, Chalmette Refining submitted an initial written "unauthorized discharge notification report" to LDEQ acknowledging that its continuous release of benzene exceeds the refinery's daily permitted benzene emissions imposed by the Clean Air Act permits. Id. In the unauthorized discharge report Chalmette Refining states that "[t]he preliminary emission estimate is 51 lb/day above the LDEQ permit limit [of 17.04 pounds of benzene per day]." Id. at 2. Chalmette Refining goes on to state, "this is an ongoing, continuous release as defined by the CERCLA [¹⁵] regulations. It is not related to any upset or emergency condition."¹⁶ Defendant's 7/17/03 Benzene Letter, at 2,

¹⁵ "CERCLA" is the Comprehensive Environmental Response, Liability, and Compensation Act (CERCLA), 42 U.S.C. §§ 9601-9675, and contains provisions governing releases of "hazardous substances." See 42 U.S.C. § 9603.

¹⁶ CERCLA regulations define "continuous release" as a "release that occurs without interruption or abatement or that is routine, anticipated, and intermittent and incidental to normal operations or treatment processes." 40 C.F.R. § 302.8(b).

Ex. 3. Additionally, Chalmette Refining reports that it is not taking any remedial actions to stop the discharge “[b]ecause these releases are associated with normal refinery operations, [and therefore] no incident response or mitigation has been necessary.” Id.

On July 18, 2003, Chalmette Refining submitted emissions calculations for the continuous release of benzene. See Chalmette Refining Letter to LDEQ of 7/18/03 (hereinafter “Defendant’s 7/18/03 Calculations Letter”), Ex. 4. The calculations confirm that Chalmette Refining releases 67.7 pounds of benzene per day from the three storage tanks, which is 50.7 more pounds of benzene per day than permitted. Id. at 2. Additionally, the calculations report each benzene storage tank’s daily and hourly emissions. Id.

On August 8, 2003, Chalmette Refining sent an “Initial Written Notification” letter to LDEQ in order to satisfy its continuous release reporting provisions under 40 C.F.R. § 302.8(e), a regulation that implements the Comprehensive Environmental Response, Liability, and Compensation Act (CERCLA). See Chalmette Refining Letter to LDEQ of 8/8/03 (hereinafter “Defendant’s 8/8/03 Benzene Letter”) Ex. 5. In the notification letter, Chalmette Refining reported the upper and lower bounds of the benzene emissions from *each* tank for the duration of the continuous release. Id. at 5.

Since August 8, 2003, Chalmette Refining only filed one additional report regarding its continuous release of benzene. See Chalmette Refining Letter to LDEQ of 8/3/04 (hereinafter “Defendant’s 8/3/04 Benzene Letter”), Ex. 6. In that letter Chalmette Refining reported its 2003 benzene emission rates to satisfy continuous release reporting provisions under 40 C.F.R. § 302.8(c)(3), which implements CERCLA. Ex. 6. Section 302.8(c)(3) requires Chalmette

Refining to submit a one-year anniversary follow-up report to Defendant's 7/17/03 Benzene Letter. See 40 C.F.R. § 302.8(c)(3); Defendant's 7/17/03 Benzene Letter Ex. 3.

As detailed below, these reports constitute admissions that establish beyond dispute that Chalmette Refining continuously violates its permit limitations on benzene emissions from benzene storage tanks.

2. Defendant Violates Annual and Hourly Permitted Benzene Emission Levels at Benzene Tanks D-13001 and D-13002.

Permit # 2226 (M-3) establishes permitted emission levels for tanks D-13001 and D-13002 in terms of both tons per year and pounds per hour. Ex. 2, at 3, 4. The Defendant has violated both limitations for both tanks.

i. Defendant Violates Permit No. 2226 (M-3)'s Annual Emission Limits and Has Violated Those Limits at Least Four (4) Times.

The permit limits each tank to emissions of 0.43 tons of benzene per year. Ex. 2, at 4. However, the total benzene emissions from storage tanks D-13001 and D-13002 exceed these permitted emission levels. The total annual emissions, *excluding* malfunctions and upsets, from tank D-13001 were 1622 pounds of benzene per year, or 0.81 tons of benzene per year. See Defendant's 8/3/04 Benzene Letter, Ex. 6. Total annual emissions, *excluding* malfunctions and upsets, from tank D-13002 were 1701 pounds of benzene per year, or 0.85 tons of benzene per year. Id. Thus, in 2003, Defendant emitted more than 1.8 times the permitted amounts from both tanks D-13001 and D-13002. Because these are continuing emissions, as to which Defendant has taken "no incident response or mitigation steps," it is clear that the Defendant

again violated its annual limits for both tanks in 2004. See Defendant's 8/3/04 Benzene Letter, Ex. 6; Defendant's 7/17/03 Benzene Letter, at 2, Ex. 3. Plaintiffs therefore ask for a ruling that Chalmette Refining violated the Clean Air Act by exceeding its permitted annual benzene emissions for tanks D-13001 and D-13002 for the years of 2003 and 2004 — a total of four Clean Air Act violations.

ii. Defendant Violates Permit No. 2226 (M-3)'s Hourly Emission Limits and Has Violated Those Limits At Least Twelve Hundred (1246) Times.

Chalmette Refining also violates its hourly permitted benzene emission limitations at tanks D-13001 and D-13002. LDEQ permitted both tanks to emit 0.1 pound per hour, or 2.4 pounds per day. Permit 2226 (M-3), Ex. 2, at 3. Chalmette Refining admits that tanks D-13001 and D-13002 each emitted 0.89 pounds of benzene per hour, or 21.24 pounds of benzene per day for the 23 day period from July 17, 2003 to August 8, 2003. See Defendant's 7/18/03 Calculations Letter, Ex. 4; Defendant's 8/8/03 Benzene Letter, Ex. 5.

In addition, Chalmette Refining's updated "lower bound" calculations of benzene emissions are 3.88 pounds per 24 hours for tank D-13001 and 4.2 pounds per 24 hours for tank D-13002. See Defendant's 8/3/04 Benzene Letter, Ex. 6. Dividing the 24-hour emissions by 24 (to determine hourly emissions) shows that at the "lower bound," the Defendant emits 0.16 pounds per hour from tank D-13001 and 0.175 pounds per hour from tank D-13002. Therefore, tanks D-13001 and D-13002 operate in constant, continuing violation of Chalmette Refining's hourly air permit limitations.

From July 17, 2003 to the present, Chalmette Refining violated the Clean Air Act by exceeding its permitted hourly emissions at least 623 times for tank D-13001 and at least 623

times for tank D-13002, amounting to twelve hundred (1246) Clean Air Act violations. This number is the sum of the 23 day period between July 17, 2003 to August 8, 2003 and the 658 day period from August 8, 2003 to the present, however Plaintiffs conservatively round down to 600 violations for that period.

3. Defendant Routinely Violates Hourly Permitted Benzene Emission Limits at Tank 200 and Has Engaged in More Than Twenty-Three (23) Violations.

Permit # 2500-00005-02 permits tank 200 to emit 0.51 pounds of benzene per hour. Ex. 1. Chalmette Refining admits that tank emitted 1.05 pounds of benzene per hour for the 23 day period from July 17, 2003 to August 8, 2003. See Defendant's 7/18/03 Calculations Letter, Ex. 4; Defendant's 8/8/03 Benzene Letter, Ex. 5. Additionally, the updated lower bound level of emissions for tank 200 is 11.82 pounds of benzene per 24 hours, which is within the tank's maximum permitted emission level of 12.24 pounds of benzene per day. See Defendant's 8/3/04 Benzene Letter, Ex. 6. However, the upper bound level is 93.01 pounds per 24 hours. Id. Because the upper and lower bounds represent a range within which emissions fall, on any given day, if not most days, tank 200 could be emitting as much as 93.01 pounds of benzene per day, or 3.87 pounds of benzene per hour – which is *more than six times* its permitted emission level of 0.51 pounds per hour.¹⁷ See Permit # 2500-00005-02, Ex. 1.

Chalmette Refining concedes that tank 200 could be emitting at least six times its permitted amount of benzene on a daily basis, and has in fact exceeded its permitted emission limits for at least 23 days in 2003.

¹⁷ Chalmette Refining calculates actual hourly emissions by dividing actual daily emissions by 24, as represented Defendant's 7/18/03 Calculations Letter, Ex. 4.

B. This Court Should Issue An Injunction That Requires Chalmette Refining to Conform its Operation of Tanks 200, D-13001, and D-13002 to the Law or Close Those Tanks Within 30 Days.

The plain language of the law requires Defendant to operate its facility “in accordance with all terms and conditions of the permit.” La. Admin. Code tit. 33.III § 501.C.4. As EPA has recognized: “The burden is clearly on the source to do *whatever is necessary* to assure compliance.” 45 Fed. Reg. 59,874, 59,877 (Sept. 11, 1980) (emphasis added). Where, as here, there can be “no factual dispute as to the ground[s]” for injunctive relief, issuance of an injunction is appropriate on summary judgment. See U.S. v. McGee, 714 F.2d 607, 613 (6th Cir. 1983). This is because federal courts “fit each equitable remedy ordered to the nature of the violation found.” State of New Mexico v. Watkins, 969 F.2d 1122, 1136 (D.C. Cir. 1992). For example, the appropriate “fit” in the Watkins case was to “hold [government agencies] to the precisely limited permission they sought and received, and to the pledge . . . they made – to construct a facility, but not to deposit waste until new authority so allows.” 969 F.2d at 1137. Similarly, the appropriate fit in this case is for an injunction to require Chalmette Refining to cease purposeful and continuing emissions of benzene in violation of the permit that the Defendant applied for and received, and with which it has a duty to comply.

An injunction is necessary to protect Plaintiffs’ members from illegal risks. Benzene is “a highly toxic petroleum derivative and a potent carcinogen and teratogen.” U.S. v. Price, 688 F.2d 204, 209 (3d Cir. 1982). EPA has listed benzene among chemicals that “are presently not considered to have thresholds for cancer effects.” 68 Fed. Reg. 1276, 1297 (Jan. 9, 2003). In other words, no amount of excess benzene emissions can be considered risk-free because “[c]urrent scientific knowledge does not permit a finding that there is a completely safe level of

human exposure to carcinogenic agents.” Natural Resources Defense Council, Inc. v. EPA, 824 F.2d 1146, 1147 (D.C. Cir. 1987). Nonetheless, the Defendant routinely emits benzene into the neighborhood of Plaintiffs’ members in amounts greatly exceeding permit limits.

Based on facts that are beyond dispute, this Court should enjoin the defendant to conform operations at Tanks 200, D-13001, and D-13002 to permit limits within 30 days, or to close those tanks. See Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 545 (1987) (“Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable.”); cf. Ethyl Corp. v. EPA, 541 F.2d 1, 13 (D.C. Cir. 1976) (“[T]he very existence of . . . precautionary legislation would seem to demand that regulatory action precede, and, optimally, prevent, the perceived threat.”).

II. CHALMETTE REFINING VIOLATES THE PERMITTED SO₂ LIMITS FOR ITS FLARES.

A. Chalmette Refining Violates Hourly Maximum SO₂ Limits.

Chalmette Refining routinely emits more SO₂ from its flares than its Clean Air Act permit allows. The most current permit regulating SO₂ emissions from Chalmette Refining’s flares is Permit # 2500-00005-02”.¹⁸ Ex. 1. As Chalmette Refining has admitted, this permit “speaks for itself and constitutes the best evidence of its terms, conditions and limitations.” Def. Answer ¶ 51. The General Conditions of the permit specify that “[t]he permit application and the attached data sheets establish the emission and operating limitations and are part of the permit. Permit # 2500-00005-02, Ex. 1 at 18. The provision entitled “Maximum Firing Rate

¹⁸ The permit refers to a previous operator “Tenneco Oil Company.” However, change of ownership does not necessarily require a new permit. La. Admin. Code tit. 33.III § 517(G).

Enforceability” specifies that: “Average hourly emissions shown in [the permit application] may vary up to the maximum shown in Table A-1 on any given day without causing non-compliance.” Id. at 13. Appendix A to the permit, entitled “Provisions for Enforceability,” outlines the following requirements:

In order to assure an overall SO₂ emissions rate of 1280.00 lb/hr, while allowing individual unit firing rates and emissions rates to vary about average rates up to the maximum allowable individual unit emission rates (of Table A-1), [the refinery] will:

(1) Meet the specific maximum emission rates for each unit given in Table A-1; in particular this will assure that the process unit SO₂ emissions are collectively less than or equal to 290.00 lb/hr....

Condition (1) is rendered enforceable by assuring that the maximum point source SO₂ emission rates of Table A-1 for all units will not be exceeded.

Id. at 68.

Table A-1 indicates that the maximum SO₂ emission rate for the No.1 flare (Source Number 28) is 2.13 pounds per hour. Id. at 14. The maximum rate for the No.2 flare (Source Number 29) is also 2.13 pounds per hour. Id. Therefore, if a flare emits more than the maximum 2.13 pounds per hour of sulfur dioxide on any given day, then Chalmette Refining has violated its permit for that flare on that day. See La. Admin. Code tit. 33.III § 501.C.4. (“The source shall be operated in accordance with all terms and conditions of the permit. Noncompliance with any term or condition of the permit shall constitute a violation of this Chapter and shall be grounds for enforcement action, for permit revision or termination, or for denial of a permit renewal application.”)

On October 14, 2002, Chalmette Refining notified LDEQ that for the preceding year, from September 1, 2001 through August 31, 2002, it had been continuously releasing sulfur dioxide into the atmosphere from the No.1 and No.2 flares. See Chalmette Refining Letter to

LERC of 10/21/02 (hereinafter “Defendant’s 10/21/02 SO₂ Letter”), Ex. 7. Follow-up written notifications on October 21, 2002 and November 13, 2002 confirmed the “Hazardous Substance Release” as follows: “The upper and lower bounds of SO₂ emissions at the #1 Flare are estimated at 16,642 and 5,045 pounds per day, respectively. The upper and lower bounds of SO₂ emissions at the #2 Flare are estimated at 12,503 and 2,318 pounds per day, respectively.” Chalmette Refining letter to LERC of 11/13/02 (hereinafter “Defendant’s 11/13/02 SO₂ Letter”), Ex. 8 at 4. Chalmette Refining admits that this release “is not related to any upset or emergency condition.” Defendant’s 10/21/02 SO₂ Letter, Ex. 7 at 2. Rather, the release results from “[a] routine refinery operation known as ‘coker blowdown.’” Id. at 2. Chalmette Refining estimates that the No.1 and No.2 flares combined emit up to 29,145 pounds of sulfur dioxide every day.¹⁹ Defendant’s 11/13/02 SO₂ Letter, Ex. 8 at 5. Finally, Chalmette Refining certified that the hazardous releases “are continuous and stable in quantity and rate...and that all submitted information is accurate and current to the best of [the Refinery Manager’s] knowledge.” Id.

Making all assumptions in Chalmette Refining’s favor, even if the flares emitted the lowest estimated amount, spread evenly throughout the 24 hours of a day, the No.2 flare would emit no less than 96 pounds of sulfur dioxide per hour, *more than 45 times* the permitted rate of 2.13 pounds per hour. The No.1 flare would emit no less than 210 pounds of sulfur dioxide per hour, *more than 98 times* the permitted amount. The actual emissions, of course, do not occur evenly throughout the day, but happen all at once during “coker blowdown” and so are much more concentrated and egregious violations. Also, routine upper-bound emissions can easily

¹⁹ It is worth remembering that, because this is an extremely hazardous pollutant, EPCRA sets the threshold for alerting the community at 500 pounds of unpermitted SO₂.

triple the lowest estimated amounts. The EPA has made it clear that “[a]cid gas flaring is not a federally permitted operation and should typically only occur during a malfunction.”²⁰

On November 13, 2003, Chalmette Refining sent an “SO₂ Continuous Release Update,” as required by EPCRA²¹ and CERCLA,²² covering the period from September 1, 2002 through August 31, 2003. Chalmette Refining Letter to LDEQ of 11/13/03 (hereinafter “Defendant’s 11/13/03 SO₂ Letter”), Ex 9. This is the latest update on file with LDEQ and represents Chalmette Refining’s most current admission of continuous release of hazardous sulfur dioxide. This notification assesses the emissions for SO₂ from the No.1 flare at up to 19,328 pounds per day. *Id.* at 1. The emissions from the No.2 flare are assessed at up to 6,534 pounds per day. *Id.* The total for both flares is up to 25,862 pounds of SO₂ per day. *Id.* The total annual emissions from the flares were 2,559,957 pounds of SO₂. *Id.* This notification demonstrates the repeated and continuing nature of Chalmette Refining’s violations.

Although the No.1 and No.2 flares normally operate 24 hours per day, 7 days per week, 52 weeks per year, see Permit # 2500-00005-02, Ex. 1, at 23, there may be days during the year when the refinery does not operate, or operates under a variance from its permitted limits. Recognizing this possibility, Plaintiffs ask for a very conservative ruling that from September 1, 2001 through August 31, 2002, Chalmette Refining violated the Clean Air Act by exceeding its permitted hourly emissions limit for the No.1 flare 265 times and for the No.2 flare 265 times, for a total of 530 Clean Air Act violations. Unless Chalmette Refining comes forward with

²⁰ EPA, Enforcement Alert: Frequent Routine Flaring May Cause Excessive, Uncontrolled Sulfur Dioxide Releases (Oct. 2000) available at <http://www.epa.gov/Compliance/resources/newsletters/civil/enfalert/flaring.pdf>.

²¹ 40 C.F.R. § 355.40.

²² 40 C.F.R. § 302.8.

evidence that there were more than 100 days during this period when the refinery did not operate or when a variance for SO₂ emissions from the flares had been granted, summary judgment on liability for these violations is appropriate. Fed. R. Civ. P. 56(e).

B. Chalmette Refining Violates Annual Maximum SO₂ Emission Rates.

In addition to hourly emission rates, Chalmette Refining has maximum annual emission rates that it must not exceed. The flare permit specifies that “when the sum of the calculated annual emissions exceed the sum of those shown in [the application] such will be reported to the agency as a non-compliance.” Permit # 2500-00005-02, Ex. 1, at 13. Each flare is limited to 9.33 tons of SO₂ per year. Id. at 28. Chalmette Refining admits in a certified notice that it emitted 2,441,550 pounds of SO₂ from the No. 1 flare between September 2001 and August 2002. Defendant’s 11/13/02 SO₂ Letter, Ex. 8, at 5. This equals 1220.775 tons; ***more than 130 times*** the permitted annual emission. Chalmette Refining admits in the same notice that it emitted 1,119,660 pounds of SO₂ from the No.2 flare during the same time period. Id. This is equals 559.83 tons; ***more than 60 times*** the permitted annual emission.

According to Chalmette Refining’s certified admission, in the period from September 2002 through August 2003, and continuously since that time to the present, the facility emits approximately 2,030,476 pounds of SO₂ per year from the No.1 flare. Defendant’s 11/13/03 SO₂ Letter, Ex. 9, at 1. This equals 1015.238 tons per year; ***more than 108 times*** the permitted annual emission. Chalmette Refining admits in the same notice that it emits approximately 569,481 pounds per year from the No. 2 Flare. Id. This equals 284.7405 tons per year; ***more than 30 times*** the permitted annual emission. Therefore, Chalmette Refining admits to violating the

Clean Air Act by exceeding its permitted annual SO₂ emission rate for the No.1 flare and the No.2 flare for the years of 2002, 2003, and 2004, for a total of 6 Clean Air Act violations.

III. CHALMETTE REFINING VIOLATES CLEAN AIR ACT PERFORMANCE STANDARDS FOR ITS FLARES.

Chalmette Refining violates new source performance standards by (1) failing to operate its flares with a flame at all times, and (2) failing to consistently monitor its flares.

A. Chalmette Refining Fails to Keep Its Flare Pilot Flames Present At All Times.

The New Source Performance Standards (“NSPS”) for flares found at 40 C.F.R. Part 60 Subpart J “Standards of Performance for Petroleum Refineries,” apply to Chalmette Refining’s No.1 flare and No.2 flare. See, Permit # 2500-00005-02, Ex. 1, at 10. According to these regulations, Chalmette Refining is required to operate its flares “with a flame present at all times, as determined by methods specified in paragraph (f).” 40 C.F.R. § 60.18(c)(2). Paragraph (f) requires that “[t]he presence of a flare pilot flame shall be monitored using a thermocouple²³ or any other equivalent device to detect the presence of a flame.” 40 C.F.R. § 60.18(f)(2).

Chalmette Refining has admitted that on at least six occasions the pilot flame for one or the other of its flares has been extinguished. See Defendant’s MACT Periodic Reports, Exs. 15, 18, 19, 10. For example, on April 14, 2004 Chalmette Refining released about 23.1 pounds of hydrogen sulfide (H₂S) from its No.2 flare because the pilot flame was extinguished by operator error. Chalmette Refining Letter to LDEQ of 4/21/04 (hereinafter “Defendant’s 4/21/04 Discharge Letter”), Ex. 10. As discussed above, hydrogen sulfide is an extremely hazardous chemical, and

²³ A thermocouple is a device that converts a change in temperature into an electrical signal that can be monitored. It continuously tracks fluctuations in temperature and will fail to send a signal when the temperature drops below a threshold level. See “How Does a Thermocouple Work?” at <http://hvacwebtech.com/thermocouple.htm>.

Chalmette Refining is not permitted to release any hydrogen sulfide from its flares. See Permit # 2500-00005-02, Ex. 1, at 14. The flare is supposed to incinerate hydrogen sulfide, thereby converting it to sulfur dioxide. When the flame is extinguished as it was on April 14, 2004, the flare cannot work and extremely hazardous chemicals are pumped into the ambient air over the community in clear violation of the law.

Along with these six incidents singled out for individual reporting, Chalmette Refining admits to LDEQ that it has failed to keep a flame present at all times as verified by a thermocouple or other equivalent device for the No.1 flare for at least 382 days during the period from July 15, 1999 to July 15, 2004. See Defendant's MACT Periodic Reports, Exs. 11-20. In addition, Chalmette Refining failed to keep a flame present at all times as verified by a thermocouple or other equivalent device for the No.2 flare for at least 197 days during this period. See id. The regulations are clear that a thermocouple or other equivalent device must verify the presence of the flame at all times. 40 C.F.R. §§ 60.18(c)(2), 60.18(f)(2). When the thermocouple cannot verify the presence of a flame, Chalmette Refining has violated the NSPS regulations and the Clean Air Act. Therefore, Chalmette Refining is liable for 579 violations of performance standards required under the Clean Air Act.

B. Chalmette Refining Fails To Monitor Its Flares Consistently.

NSPS also require that Chalmette Refining monitor its flares to assure that they are operated with a flame present at all times. 40 C.F.R. § 60.18(d).²⁴ As noted above, 40 C.F.R. §

²⁴ 40 C.F.R. § 60.18(d) reads: "Owners or operators of flares used to comply with the provisions of this subpart shall monitor these control devices to ensure that they are operated and

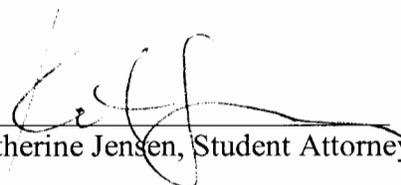
60.18(c)(2) and (f)(2) require Chalmette Refining to monitor its flares with a thermocouple or other equivalent device. Chalmette Refining admits to LDEQ in certified reports that it has failed to continuously monitor the presence of the flame for the No.1 flare for at least 230 days during the period from July 15, 1999 to July 15, 2004. Defendant's MACT Periodic Reports, Ex. 11-20. In addition, Chalmette Refining failed to continuously monitor the presence of the flame for the No.2 flare for at least 11 days during the period from July 15, 1999 to July 15, 2004. Id. Therefore Chalmette refining is liable for at least 241 monitoring violations of the Clean Air Act.

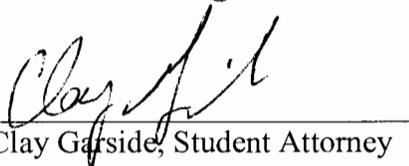
CONCLUSION

Plaintiffs respectfully request that this Court grant judgment that Chalmette Refining is liable for violating the Clean Air Act 2,629 times since July 15, 1999 and enjoin the defendant from operating tanks 200, D-13001, and D-13002 in violation of the Clean Air Act.

Respectfully submitted on April 26, 2005,

TULANE ENVIRONMENTAL LAW CLINIC


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maintained in conformance with their designs. Applicable subparts will provide provisions stating how owners or operators of flares shall monitor these control devices.”



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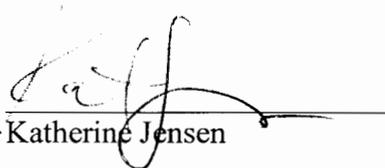
CERTIFICATE OF SERVICE

I, Katherine Jensen, hereby certify that on this the 26th day of April, 2005, a copy of Plaintiffs' Memo in Support of their Second Motion for Partial Summary Judgment and Injunctive Relief has been served upon all counsel of record by U.S. mail, postage prepaid.

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