

US EPA ARCHIVE DOCUMENT



**PROGRAMMATIC AGREEMENT
 REGARDING COMPLIANCE WITH SECTION 106 OF THE NATIONAL
 HISTORIC PRESERVATION ACT FOR THE
 OCCIDENTAL CHEMICAL CORPORATION, INGLESIDE CHEMICAL PLANT NEW
 ETHYLENE PRODUCTION UNIT
 SAN PATRICIO COUNTY, TEXAS
 AMONG
 THE U.S. ENVIRONMENTAL PROTECTION AGENCY, REGION 6,
 THE TEXAS STATE HISTORIC PRESERVATION OFFICER,
 AND
 OCCIDENTAL CHEMICAL CORPORATION**

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WHEREAS, Occidental Chemical Corporation (“OxyChem” or “Applicant”) Ingleside Chemical Plant submitted to the U.S. Environmental Protection Agency, Region 6, Multimedia Permitting Division (“EPA”) a Prevention of Significant Deterioration (“PSD”) permit application for Greenhouse Gas (“GHG”) emissions for a proposed construction project to install a new ethylene production unit consisting of five ethane cracking furnaces and recovery equipment to produce ethylene at an existing major stationary source of criteria pollutants (hereinafter “Project”); and

WHEREAS, OxyChem is independently and for its own purposes acquiring all lands, easements, rights-of-way, relocations, removals, and upland placement areas necessary for project construction and operation; and

WHEREAS, the EPA has determined that issuance of a GHG PSD permit allowing the construction of the Project pursuant to its authority in the Subchapter I, Part C of the Clean Air Act (“CAA”), and implementing regulations at 40 CFR § 52.21, constitutes an Undertaking for purposes of Section 106 of the National Historic Preservation Act (“NHPA”) (16.U.S.C. § 470) and its implementing regulations, at 36 § CFR Part 800 (“Protection of Historic Properties”) (hereinafter “Undertaking”); and

WHEREAS, the EPA has determined the Area of Potential Effect (“APE”) for the Undertaking to be the location of the proposed construction site of a new ethylene production unit on a 260-acre property and a proposed 114-mile pipeline; and

WHEREAS, the EPA has determined that the 114-mile pipeline corridor, covering approximately 3,459 acres, that will be constructed for this new Project (“Pipeline”) should be considered within the Area of Potential Effect (“APE”) for this Undertaking; and

WHEREAS, OxyChem has agreed to assist the EPA with Section 106 compliance by providing all relevant cultural resource survey work and report preparation for EPA’s use and adoption; and

WHEREAS, although OxyChem has been able to conduct cultural resource surveys on a majority of the project site and pipeline area, there remain three (3) tracts of land (approximately

1.86 miles total in length and identified more clearly in Attachment A) to which OxyChem has been unable to secure access for purposes of conducting survey work that will require cultural resource surveys prior to start of construction of the Pipeline; and

WHEREAS, the EPA has determined that, with the exception of these three tracts, the Undertaking will not have an effect on properties included in or eligible for inclusion in the National Register of Historic Places (“NRHP”) (hereinafter “historic properties”); and

WHEREAS, the EPA has reached out to Native American Indian tribes that may potentially have an interest in San Patricio, Refugio, Aransas, Calhoun, Victoria, Jackson, and Matagorda Counties, and has received no responses; and

WHEREAS, failure to obtain access to these three tracts makes it necessary to defer final identification and evaluation of historic properties until easements are obtained by Applicant; and

WHEREAS, the EPA, the Texas State Historic Preservation Officer (“SHPO”) and the Applicant agree that it is advisable to accomplish compliance with Section 106 through the development and execution of this Programmatic Agreement (“PA”) in accordance with 36 CFR § 800.14(b) to address the three remaining properties for which surveys are not yet possible; and

WHEREAS, the EPA has consulted with the Advisory Council on Historic Preservation (“Council”) to determine whether the Council wished to enter into the Section 106 process, to which it declined by letter dated April 15; and

NOW, THEREFORE, the EPA and the SHPO agree that the proposed Undertaking may only proceed in accordance with the following stipulations in order to take into account the effects of the Undertaking on historic properties and to satisfy the EPA's Section 106 responsibilities for all individual aspects of the Undertaking.

STIPULATIONS

I. INVENTORY, EVALUATION, EFFECT DETERMINATION AND RESOLUTION FOR UNSURVEYED TRACTS ALONG THE PIPELINE ROUTE

A. *Scope*: Stipulation I shall be applicable only to all new construction activities related to Section 106 Review for the three tracts identified in Attachment A along the associated Pipeline route. The EPA has established the APE for these specific tracts as a 200-foot corridor along and including the 50-foot pipeline right-of-way and all other areas to be directly affected by new Pipeline. This 200-foot wide APE includes construction staging and access areas.

B. *Qualifications and Standards*. OxyChem shall ensure that all work conducted in conjunction with this PA is performed in a manner consistent with the Secretary of Interior's "Standards and Guidelines for Archeology and Historic Preservation" (48 Federal Register 44716-44740;

September 23, 1983), as amended, or the Secretary of the Interior's Standards for the Treatment of Historic Properties (36 CFR Part 68), as appropriate. All cultural surveys and report preparation will be conducted by HRA Gray and Pape under the direction of professional archeologists Tony Scott and/or David Treichel.

C. *Definitions.* The definitions set forth in 36 CFR § 800.16 are incorporated herein by reference and apply throughout this PA.

D. *Identification of Historic Properties:* Prior to the initiation of construction or maintenance activities related to the three unsurveyed parcels described in Attachment A, OxyChem shall make a reasonable and good faith effort to identify historic properties located in the APE. These steps may include, but are not limited to, background research, consultation, oral history interviews, sample field investigation, and field survey. The level of effort for these activities shall be determined in consultation with the SHPO and any Native American Indian tribe that attaches religious and/or cultural significance to identified properties. At a minimum, OxyChem consistent with the Texas Historical Commission's *Archeological Survey Standards for Texas*, will conduct sixteen shovel tests every mile or approximately 30 total shovel tests along the 1.86 miles of survey area.

E. *Evaluation of National Register Eligibility.* If historic properties are identified within the APE, OxyChem, on behalf of EPA, shall determine their eligibility for the NRHP in accordance with the process described in 36 CFR § 800.4(c) and criteria established in 36 CFR Part 60. The determination of cultural significance shall be conducted in consultation with the SHPO and Native American Indian tribes that attach religious and cultural significance to identified properties. Should OxyChem and SHPO, and any tribe as applicable, agree that a property is or is not eligible, such consensus shall be deemed conclusive for the purposes of the PA. Should OxyChem, SHPO, or any tribe not agree regarding the eligibility of a property, the EPA shall obtain a determination of eligibility from the Keeper of the National Register pursuant to 36 CFR Part 63.

F. *Assessment of Effect.*

1. *No Historic Properties Affected.* OxyChem, on behalf of EPA, shall make a reasonable and good faith effort to evaluate the effect of the Undertaking on historic properties in the APE. OxyChem may conclude that no historic properties are affected by the Undertaking if no historic properties are present in the APE, or the Undertaking will have no effect as defined in 36 CFR § 800.16(i). This finding shall be documented in compliance with 36 CFR § 800.11 (d) and submitted to the EPA and to the SHPO for concurrence within one week of completion of the field surveys. The EPA shall provide information on the finding to the public upon request, consistent with the confidentiality requirements of 36 CFR § 800.11(c).

2. *Finding of No Adverse Effect.* OxyChem, in consultation with the EPA, the SHPO and any tribe as applicable, shall apply the criteria of adverse effect to historic properties within the APE in accordance with 36 CFR § 800.5. OxyChem may propose a finding of no adverse effect if the Undertaking's effects do not meet the criteria of 36 CFR § 800.5(a)(1). OxyChem shall provide to the SHPO and EPA documentation of this finding in a letter report meeting the

requirements of 36 CFR § 800.11(e) within one week of the completion of the field surveys. The SHPO shall have 30 calendar days in which to review the findings and provide a written response to the OxyChem. The SHPO shall provide a copy of the concurrence to EPA. OxyChem may proceed upon receipt of written concurrence from the SHPO. Failure of the SHPO to respond within 30 days of receipt of the finding shall be considered agreement with the finding. The EPA shall maintain a record of the finding and provide information on the finding to the public upon request, consistent with the confidentiality requirements of 36 CFR § 800.11 (c).

3. *Resolution of Adverse Effect.* If OxyChem, on behalf of EPA, determines that the Undertaking will have an adverse effect on historic properties as measured by criteria in 36 CFR § 800.5.(a)(1), EPA shall consult with the OxyChem, SHPO, and Native American Indian tribes that attach religious and cultural significance to identified historic properties to resolve adverse effects in the following manner:

a. For historic properties that EPA, OxyChem, and the SHPO agree will be adversely affected, EPA shall:

(1) Consult with the SHPO to identify other individuals or organizations to be invited to become consulting parties. If additional consulting parties are identified, EPA shall provide them copies of documentation specified in 36 CFR § 800.11 (e) subject to confidentiality provisions of 36 CFR § 800.11 (c).

(2) Afford the public an opportunity to express its views on resolving adverse effects in a manner appropriate to the magnitude of the project and its likely effects on historic properties.

(3) Consult with the SHPO, Native American tribes which have indicated an interest in the Undertaking, and consulting parties to seek ways to avoid, minimize or mitigate adverse effects; and

(4) Prepare an historic property treatment plan which describes mitigation measures OxyChem proposes to resolve the Undertaking's adverse effects and provide this plan for review and comment to the SHPO, consulting parties and Native American tribes which have indicated an interest in the Undertaking. All parties shall have 30 calendar days in which to provide a written response to the EPA. Treatment plans will consider the use of horizontal directional drilling ("HDD"), rerouting, or other prudent pipeline design or construction methods intended to preserve any substantial archaeological sites discovered.

b. If the EPA and SHPO fail to agree on how adverse effects will be resolved, the EPA shall request that the Advisory Council on Historic Preservation (Council) join the consultation and provide the Council with documentation pursuant to 36 CFR § 800.11 (e).

(1) If the Council agrees to join the consultation, the EPA shall proceed in accordance with the dispute resolution process under Stipulation V, part B, *Disputes*.

(2) If, after consulting to resolve adverse effects pursuant to Stipulations I, II, or IV of this PA, the Council, EPA or SHPO determines that further consultation will not be productive, then any party may terminate consultation in accordance with the notification requirements and process prescribed by 36 CFR § 800.7.

II. POST-REVIEW DISCOVERIES

A. *Scope*: Stipulation II shall be applicable to the entire Undertaking including all areas within the APE as described in the January 13, 2014, Cultural Resources Management Survey and Consultation for the Proposed Occidental Chemical Corporation Ingleside Fractionator Site in San Patricio Pipeline in San Patricio County, Texas; the February 24, 2014, Revised Draft-Pedestrian Cultural Resources Survey for the Proposed Markham Ethylene Pipeline Project in San Patricio, Refugio, Aransas, Calhoun, Victoria, Jackson, and Matagorda Counties, Texas; and the three tracts surveyed under Stipulation I.

B. *Unanticipated Discoveries or Effects*. Pursuant to 36 CFR § 800.13(a)(2), if historic properties are discovered or unanticipated effects on historic properties are found after construction on the Project and Pipeline have commenced, OxyChem shall develop a treatment plan to resolve adverse effects and notify the EPA, SHPO and Native American tribes that might attach religious and cultural significance to the affected property within 48 hours of the discovery. The notification shall include OxyChem's assessment of National Register eligibility of affected properties and proposed actions to resolve the adverse effects. Comments received from the SHPO and/or Native American tribes within 48 hours of the notification shall be taken into account by OxyChem in carrying out the proposed treatment plan. The EPA and OxyChem may assume SHPO concurrence in its eligibility assessment unless otherwise notified by the SHPO. OxyChem shall provide the SHPO and Native American tribes which have expressed an interest in the Undertaking a report of its actions when completed.

III. MONITORING AND REPORTING

Each six months following the execution of this PA until it expires or is terminated, OxyChem shall provide all parties to this PA a summary report detailing work undertaken pursuant to its terms. Such report shall include any scheduling changes proposed, any problems encountered, and any disputes and objections received in OxyChem's efforts to carry out the terms of this PA.

IV. CURATION AND DISPOSITION OF RECOVERED MATERIALS AND RECORDS

Except as specified in Stipulation IV for human remains, OxyChem shall ensure that all archeological materials from privately-owned lands are returned to their owners upon completion of analyses required for Section 106 compliance under this PA.

V. TREATMENT OF NATIVE AMERICAN HUMAN REMAINS

A. Prior Consultation. Prior investigations conducted by OxyChem on behalf of EPA do not indicate a high likelihood that Native American Indian human remains may be encountered. In addition, prior to public notice on the proposed GHG PSD permit, EPA notified Native American Indian tribes of the Undertaking and inquired whether any would be interested in participating in the Section 106 consultation. EPA did not receive any responses from those tribes indicating an interest in the Undertaking. However, should any tribes express an interest in any post-review discoveries, EPA shall ensure that those tribes are afforded a reasonable opportunity to identify concerns, advise on identification and evaluation, and participate in the resolution of adverse effects in compliance with the terms of this PA.

B. Inadvertent Discovery. Immediately upon the inadvertent discovery of human remains during historic properties investigations or construction activities conducted pursuant to this PA, OxyChem shall ensure that all ground disturbing activities cease in the vicinity of the human remains and any associated grave goods. Immediately upon discovery, or at a minimum within 48 hours, OxyChem shall initiate consultation with the EPA, SHPO and Native American Indian tribes that might attach religious and cultural significance to identified historic properties.

C. Dispute Resolution. If, during consultations conducted under paragraphs A and B of this stipulation, all consulting parties cannot agree upon a consensus plan for resolving adverse effects, the matter shall be referred to the Council for resolution in accordance with the procedures outlined in 36 CFR § 800.9.

VI. PA AMENDMENTS, DISPUTES AND TERMINATION

A. Amendments. Any party to this Agreement may propose to the other parties that it be amended, whereupon the parties will consult in accordance with 36 CFR § 800.6(c)(7) to consider such an amendment.

B. Disputes. Disputes regarding the completion of the terms of this agreement shall be resolved by the signatories. If the signatories cannot agree regarding a dispute, EPA or the SHPO may request the participation of the Council in resolving the dispute in accordance with the procedures outlined in 36 CFR § 800.9.

C. Termination of PA. EPA or the SHPO may terminate this PA it by providing (60) days notice to the other parties, provided that the parties will consult during the period prior to termination to seek agreement on amendments or other actions that will avoid termination. In the event of termination of this PA by the SHPO, EPA and OxyChem shall comply with the provisions of 36 CFR § Part 800, Subpart B.


VII. TERMINATION OF CONSULTATION

If, after consulting to resolve adverse effects pursuant to Stipulations I, II or IV of this PA, the EPA or SHPO determines that further consultation will not be productive, then either party may terminate consultation in accordance with the notification requirements and process prescribed by 36 CFR § 800.7.

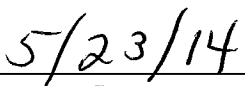
VIII. TERM OF THIS AGREEMENT

This PA shall remain in effect for three (3) years from the date of its execution by all signatories (the "Term"); provided, following the completion of all construction activities related to this Undertaking, if completion occurs prior to the end of the Term, OxyChem may notify all signatories in writing and request termination of the PA. If there are no objections received within 60-days of the notice, the PA shall terminate.

U.S. ENVIRONMENTAL PROTECTION AGENCY, REGION 6 DALLAS



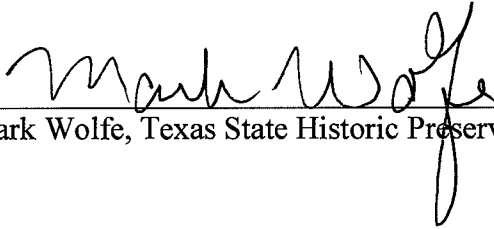
Wren Stenger, Director, Multimedia Planning and Permitting Division



Date

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TEXAS STATE HISTORIC PRESERVATION OFFICER




Mark Wolfe, Texas State Historic Preservation Officer

4/17/14
Date

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OCCIDENTAL CHEMICAL CORPORATION



Paul Thomas, Plant Manager, Occidental Chemical Corporation

4/17/2014
Date

Attachment A

Approximately 1.86 miles of pipeline route will require cultural resource surveys prior to start of construction of the Occidental Chemical ethylene pipeline. The tracts of land along the 114 mile pipeline route that remain to be surveyed for cultural resources are:

- Tract TX-JA-005.000 (0.87 miles of pipeline), a 982.67 acre tract located 6 miles North of Point Comfort on FM1593 in Jackson County Texas, Lat/long of Southwest corner 28°45'49.73"N, 96°34'15.69"W
- Tract TX-JA-004.000 (0.65 miles of pipeline), a 985.50 acre tract located 5.75 miles North of Point Comfort on FM1593 in Jackson County Texas, Lat/long of Southwest corner 28°45'29.04"N, 96°34'26.05"W
- Tract TX-JA-014.000 (0.34 miles of pipeline), a 77.63 acre tract located 0.6 miles East of SH 172, 1.2 miles South of La Ward in Jackson County Texas, Lat/long of Southwest corner 28°49'28.12"N, 96°27'18.70"W