TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

April 16, 2007

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

RE: **CALHOUN COUNTY NAVIGATION INDUSTRIAL DEVELOPMENT AUTHORITY**
TCEQ DOCKET NO. 2007-0168-AIR

Dear Ms. Castañuela:

Enclosed for filing is the Public Interest Counsel's Response to Hearing Requests in the above-entitled matter.

Sincerely,

Christina Mann

Christina Mann, Attorney
Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2007-0168-AIR

IN THE MATTER OF THE APPLICATION OF CALHOUN COUNTY NAVIGATION INDUSTRIAL DEVELOPMENT AUTHORITY FOR AIR QUALITY PERMIT NOS. 45586 AND PSD-TX-1055	§ § § § § § § § §	BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

THE OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE TO HEARING REQUESTS

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

COMES NOW, the Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (the Commission or TCEQ) and files this Response to Hearing Requests in the above-referenced matter.

I. INTRODUCTION

Calhoun County Navigation Industrial Development Authority (Calhoun or Applicant) applied to the TCEQ for Air Quality Permit Nos. 45586 and PSD-TX-1055, which would allow the re-powering and upgrading of the existing E. S. Joslin Power Station in Point Comfort, Calhoun County, Texas. As part of the upgrade, Calhoun would construct a 303 MegaWatt (gross) circulating fluidized bed (CFB) boiler fired by petroleum coke to replace a natural gas fired boiler shut down in 2002.

The application was received on July 11, 2005, and declared administratively complete on July 22, 2005. The Notice of Receipt and Intent to Obtain an Air Quality Permit (NORI) for this permit application was published on August 13, 2005, in the *Port*

Lavaca Wave. Spanish language notice of the NORI was published in *Revista de Victoria* on September 1, 2005. The Notice of Application and Preliminary Decision (NAPD) was published on March 1, 2006, in the *Port Lavaca Wave.* Spanish language notice of the NAPD was published in *Revista de Victoria* on March 1, 2006. The comment period ended on March 31, 2006.

The chief clerk of the TCEQ mailed the Decision of the Executive Director and the Executive Director's Response to Comments (RTC) on January 3, 2007. After publication of the NORI, the TCEQ received a hearing request dated September 12, 2005 (2005 Request). It was filed by several individuals, on behalf of the following organizations: Public Citizen's Texas Office, the Sustainable Energy and Economic Development Coalition (SEED), Texas Black Bass Unlimited, Sierra Club's Lone Star Chapter, Sierra Club's Coastal Bend Regional Group, Alamo Sierra Club Regional Group, Dallas Sierra Club Regional Group, Greater Fort Worth Sierra Club Regional Group, Sierra Club's Cross Timbers Regional Group, and Blue Skies Alliance. The individuals submitting the hearing request on behalf of the above mentioned groups are Tom Smith (Public Citizen), Karen Hadden (SEED), Becky Bornhorst (Blue Skies), Dr. Neil Carmen (Sierra Club groups), and Ed Parton (Texas Black Bass Unlimited).

On March 31, 2006, David Frederick submitted comments and a hearing request on behalf of SEED (2006 Request). In this request, Mr. Frederick identifies multiple individual members of SEED.

II. REQUIREMENTS OF APPLICABLE LAW

This application was declared administratively complete after September 1, 1999, and is subject to the requirements of Texas Water Code § 5.556 added by Acts 1999, 76th

Leg., ch 1350 (commonly known as "House Bill 801"). Under the applicable statutory and regulatory requirements, a hearing request must substantially comply with the following: give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request; identify the requestor's personal justiciable interest affected by the application showing why the requestor is an "affected person" who may be adversely affected by the proposed facility or activity in a manner not common to members of the general public; request a contested case hearing; list all relevant and material disputed issues of fact that were raised during the comment period that are the basis of the hearing request; and provide any other information specified in the public notice of application. 30 TEXAS ADMINISTRATIVE CODE (TAC) § 55.201(d). Under 30 TAC § 55.203(a), an affected person is "one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application." This justiciable interest does not include an interest common to the general public. 30 TAC § 55.203(c) also provides relevant factors that will be considered in determining whether a person is affected. These factors include:

(1) whether the interest claimed is one protected by the law under which the application will be considered;
(2) distance restrictions or other limitations imposed by law on the affected interest;
(3) whether a reasonable relationship exists between the interest claimed and the activity regulated;
(4) likely impact of the regulated activity on the health, safety, and use of property of the person;
(5) likely impact of the regulated activity on use of the impacted natural resource by the person; and
(6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

The Commission shall grant an affected person's timely filed hearing request if: (1) the request is made pursuant to a right to hearing authorized by law; and (2) the request raises

disputed issues of fact that were raised during the comment period and that are relevant and material to the commission's decision on the application. 30 TAC §55.211(c).

The Commission has also set forth specific criteria for judging whether a group or organization should be considered an "affected person." 30 TAC § 55.205(a) states that a group or association may request a hearing if:

(1) one or more members of the group or association would otherwise have standing to request a hearing in their own right;

(2) the interests the group or association seeks to protect are germane to the organization's purpose; and

(3) neither the claim asserted nor the relief requested requires the participation of the individual members in the case.

Any group or association which meets all of these criteria shall be considered an "affected person."

Accordingly, pursuant to 30 TAC § 55.209(e), responses to hearing requests must specifically address:

(1) whether the requestor is an affected person;
(2) which issues raised in the hearing request are disputed;
(3) whether the dispute involves questions of fact or law;
(4) whether the issues were raised during the public comment period;
(5) whether the hearing request is based on issues raised solely in a public comment withdrawn by the commenter in writing by filing a withdrawal letter with the chief clerk prior to the filing of the Executive Director's response to Comment;
(6) whether the issues are relevant and material to the decision on the application; and
(7) a maximum expected duration for the contested case hearing.

III. DISCUSSION

The 2005 Request does not identify any specific individuals who might be members of the group or association and would otherwise have standing to request a

hearing in their own right. Therefore, OPIC must recommend the Commission deny the hearing requests of Public Citizen's Texas Office, Texas Black Bass Unlimited, Sierra Club's Lone Star Chapter, Sierra Club's Coastal Bend Regional Group, Alamo Sierra Club Regional Group, Dallas Sierra Club Regional Group, Greater Fort Worth Sierra Club Regional Group, Sierra Club's Cross Timbers Regional Group, and Blue Skies Alliance. The Executive Director (ED) appears to identify the individual signatories as individual requesters. However, OPIC notes that each of the individuals who signed the 2005 Request merely represents the groups seeking a contested case hearing and these group representatives do not seek a hearing their individual capacities.

However, SEED's 2006 Request identifies several individuals as members of SEED who would otherwise have standing to request a hearing in their own right. Therefore, OPIC provides analysis of both the 2005 Request and 2006 Request, with respect to SEED.

A. Determination of Affected Person Status

In order to demonstrate that SEED should be considered an "affected person," the 2006 Request identifies members of SEED that would have standing in their own right. The 2005 Request describes the purposes of the SEED. These purposes include promotion of economic development in Texas through clean energy and public education regarding the economic, environmental and health benefits of a sustainable energy strategy. OPIC notes that the individual participation of SEED's members is not required for the claims asserted and relief requested.

According to the 2006 Request, Ms. Ruby Williams, a member of SEED, lives within 2 miles of the plant with her family. Ms. Williams is concerned about the health

consequences of the plant's emissions for herself and her family.[1] Clay Maxwell, a member of SEED, works within close proximity of the plant, indeed within modeled ESL execeedances of vanadium, and is concerned about health impacts from the emissions which would be authorized by the permit. Because of the proximity of the identified members' residences and work locations to the plant and the health concerns raised by SEED on behalf of its members, there is a reasonable relationship between the interests claimed and the activity regulated.

SEED's purposes include promotion of clean energy. Therefore, the public health and environmental interests that SEED seeks to protect are germane to the purpose of the SEED. Neither the claims asserted nor the relief requested by SEED requires the individual participation of any of its members in the case. Therefore, OPIC recommends that the commission find SEED to be an "affected person" in accordance with 30 TAC § 55.205(a).

B. Issues Raised in the Hearing Requests[2]

1. Are the emission limits for NO_x particulate matter (PM), and sulfur pollution protective of public health?
2. Should the application and draft permit require offsets? NO_x, SO_2, and carbon pollution are of particular concern.
3. Will the NO_x, emissions affect the ability of the DFW area to achieve attainment with the ozone standards (NAAQS)?
4. Was the BACT analysis incomplete because it did not fully explore other technologies?
5. Do sulfur controls in the application represent BACT, as established in City Public Service's application filed prior to this application?
6. Did the application and draft permit adequately examine the impacts NO_x, SO_2, and PM emissions on Class 1 areas?
7. Does the application and draft permit evaluate whether coal washing treatments would reduce sulfur and mercury emissions?

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[1] See 2006 Request, Page 1.
[2] Issues 1-18 are from the 2005 Request, Issues 19-28 are the non-duplicative issues from the 2006 Request.

8. Does the application and draft permit evaluate whether lower emissions fuels would reduce emissions?
9. (a) Should the application and draft permit address global warming gasses, which TCEQ has previously declined to regulate? (b) Does the application and draft permit adequately address carbon dioxide as an air contaminant as defined in Texas Health and Safety Code § 382.003?
10. Does the application and draft permit adequately address emissions during shut-down and start-up?
11. Does the application and draft permit adequately address fugitive emissions from coal and ash handling during shut-down and start-up?
12. Do the mercury emissions for this plant meet BACT standards?
13. Should TCEQ implement more comprehensive baseline ambient air monitoring in Point Comfort, Texas?
14. Should TCEQ consider the diesel and particulate pollution resulting from the train traffic bringing coal to the plant?
15. Are the emissions of air toxics adequately addressed in the application and draft permit?
16. Does the toxicology review adequately address short-term SO_2 spikes?
17. Does the application and draft permit appropriately require the specific equipment which will be utilized by Applicant to achieve the emission levels required?
18. Have Texas Effects Screening Levels been appropriately defined by the TCEQ to facilitate a review of the impact of the emission on human health?
19. Does the draft permit adequately address the need to include limits on emissions of radon and carcinogenic radon by-products?
20. Did the dispersion modeling accurately model SO_2 impacts during start-up and shut-down?
21. Did the dispersion modeling accurately model H_2SO_4 emissions?
22. Did the dispersion modeling accurately model NO_x, emissions?
23. Should TCEQ be required to conduct additional analysis based upon the projected vanadium exceedance of the ESL standard?
24. Were the impacts of mercury and other heavy metal emissions adequately considered?
25. Were all on-site sources modeled accurately?
26. Was transport of ozone pre-cursors to remote locales properly evaluated?
27. Was the compliance history of the applicant properly evaluated?
28. Was the technical review of this application conducted consistent with the requirements of the Texas PSD program, as approved by EPA?

C. Issues raised in Comment Period

All of the issues raised in the hearing requests were raised in the comment period and have not been withdrawn. 30 TAC §§55.201(c)and (d)(4), 55.211(c)(2)(A).

D. Disputed Issues

There is no agreement between SEED and the applicant or Executive Director on the issues raised in the hearing requests.

E. Issues of Fact

If the Commission considers an issue to be one of fact, rather than one of law or policy, it is appropriate for referral to hearing if it meets all other applicable requirements. *See* 30 TAC §55.211(b)(3)(A) and (B). SEED's hearing requests raise many issues of fact. However, OPIC cannot find the following issues to be issues of fact:

Issue 2 relates to a request for a general requirement for Calhoun to perform offsets for emissions at its facility. SEED recommends this as a policy requirement, but does not propose an issue of fact which would be appropriate for referral to hearing.

Issue 9 (a) raises the issue of whether the TCEQ is required to evaluate greenhouse gasses in its review of permit applications. In this form, this issue is clearly an issue of law, not of fact. However, SEED later raises the issue of whether the application and draft permit adequately address carbon dioxide as an air contaminant as defined in Texas Health and Safety Code § 382.003 (See issue 9(b)). This issue is an issue of fact appropriate for referral.

Issue 13 asks whether TCEQ should implement more comprehensive baseline ambient air monitoring in Point Comfort, Texas. This is an issue of policy for TCEQ and the Commissioners to consider, and is not appropriate for referral to hearing.

Issue 14 asks whether TCEQ should consider the diesel and particulate pollution resulting from the train traffic bringing coal to the plant. Whether or not train traffic

emissions should be evaluated is an issue of law for the Commissioners to consider, and is not appropriate for referral to hearing.

F. Relevant and Material Issues

The hearing requests raise issues relevant and material to the Commission's decision under the requirements of 30 TAC §§ 55.201(d)(4) and 55.211(c)(2)(A). In order to refer an issue to SOAH, the Commission must find that the issue is relevant and material to the Commission's decision to issue or deny this permit.[3] Relevant and material issues are those that are governed by the substantive law under which this permit is to be issued.[4] OPIC notes that SEED occasionally uses the word "coal" in the issues it raises. The applicant actually proposes to use petroleum coke, not coal as a fuel source. Therefore, OPIC will substitute the word "fuel" or "petroleum coke" for "coal" in its analysis. SEED raises multiple issues related to the ED's evaluation of the Applicant's BACT proposal and the ED's impacts and toxicological review.[5] Issues related to the proposed emission limitations (or BACT) are relevant and material.[6] Issues related to whether all appropriate emission sources have been categorized are related to both BACT and the impacts review.

The following issues relate to BACT requirements and proposed emission rates

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[3] *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-251(1986) (in discussing the standards applicable to reviewing motions for summary judgment the Court stated "[a]s to materiality, the substantive law will identify which facts are material. ... it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs.")

[4] *Id.*

[5] OPIC notes that several of these issues have been addressed by the Commission in the Sandy Creek contested case hearing. However,OPIC has evaluated these issues based on its own interpretation of the legal requirements applied to referring specific issues to hearing, which may not be consistent with past Commission decisions. Furthermore OPIC notes that there is no final judicial decision on several of these issues. Therefore, OPIC finds it prudent to refer these issues to hearing, in an effort to preserve potential time and resources.

[6] See generally 30 TAC § 116

1) Was the BACT analysis incomplete because it did not fully explore other technologies?
2) Do sulfur controls in the application represent BACT, as established in City Public Service's application filed prior to this application?
3) Does the application and draft permit evaluate whether fuel washing treatments would reduce sulfur and mercury emissions?
4) Does the application and draft permit evaluate whether lower emissions fuels would reduce emissions?
5) Does the application and draft permit adequately address carbon dioxide as an air contaminant as defined in Texas Health and Safety Code § 382.003?
6) Does the application and draft permit adequately address emissions during shut-down and start-up?
7) Does the application and draft permit adequately address fugitive emissions from petroleum coke and ash handling during shut-down and start-up?
8) Do the mercury emissions for this plant meet BACT standards?
9) Does the application and draft permit appropriately require the specific equipment which will be utilized by Applicant to achieve the emission levels required?

Likewise, issues related to human health and environmental impacts (including accuracy of modeling performed) of the proposed emissions are relevant and material to the Commission's decision on the application.[7]

10) Are the emission limits for NO_x particulate matter (PM), and sulfur pollution protective of public health?
11) Will the NO_x, emissions affect the ability of the DFW area to achieve attainment with the ozone standards (NAAQS)?
12) Did the application and draft permit adequately examine the impacts of NO_x, SO_2, and PM emissions on Class 1 areas?
13) Are the emissions of air toxics adequately addressed in the application and draft permit?
14) Does the toxicology review adequately address short-term SO_2 spikes?
15) Have Texas Effects Screening Levels been appropriately defined by the TCEQ to facilitate a review of the impact of the emission on human health?
16) Does the draft permit adequately address the emissions of radon and carcinogenic radon by-products?
17) Did the dispersion modeling accurately model SO_2 impacts during start-up and shut-down?
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19) Did the dispersion modeling accurately model NO_x, emissions?
20) Should TCEQ be required to conduct additional analysis based upon the projected vanadium exceedance of the ESL standard?

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[7] *Id.*

21) Were the impacts of mercury and other heavy metal emissions adequately considered?
22) Were all on-site sources modeled accurately?
23) Was transport of ozone pre-cursors to remote locales properly evaluated?

Texas Water Code Section 5.754(1) provides that notwithstanding any other statutory provisions, "the commission , after an opportunity for a hearing, shall deny a regulated entity's application for a permit ... if the regulated entity's compliance history is unacceptable based on violations constituting a recurring pattern of conduct that demonstrates a consistent disregard for the regulatory process ..." Therefore, the following issue of compliance history relates directly to whether the Applicant will meet the requirements of applicable substantive law:

24) Was the compliance history of the applicant properly evaluated?

The ED must evaluate Calhoun's application for a major, new stationary source and issue a PSD permit in a manner consistent with the EPA-approved state implementation plan for the PSD program. Therefore the following issue is relevant and material to the Commission:

25) Was the technical review of this application conducted consistent with the requirements of the Texas PSD program, as approved by EPA?

G. Issues Recommended for Referral

OPIC recommends that the disputed issues of fact described above in Section F (Relevant and Material) be referred to the State Office of Administrative Hearings for a contested case hearing.

H. Maximum Expected Duration of Hearing

Commission Rule 30 TEX. ADMIN. CODE § 55.115(d) requires that any Commission order referring a case to SOAH specify the maximum expected duration of

the hearing by stating a date by which the judge is expected to issue a proposal for decision. The rule further provides that no hearing shall be longer than one year from the first day of the preliminary hearing to the date the proposal for decision is issued. To assist the Commission in stating a date by which the judge is expected to issue a proposal for decision, and as required by 30 TEX. ADMIN. CODE §55.209(d)(7), OPIC estimates that the maximum expected duration of a hearing on this application would be twelve months from the first date of the preliminary hearing until the proposal for decision is issued.

IV. CONCLUSION

OPIC recommends referring the matter to SOAH for an evidentiary hearing on the issues recommended above. OPIC further recommends a hearing duration of twelve months.

Respectfully submitted,
Blas Coy, Jr.
Public Interest Counsel

By Christina Mann

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CERTIFICATE OF SERVICE

I hereby certify that on April 16, the original and eleven true and correct copies of the Office of the Public Counsel's Response to Requests for Hearing were filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail or by deposit in the U.S. Mail.

Christina Mann

Christina Mann, Assistant Public Interest Counsel

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TCEQ DOCKET NO. 2007-0168-AIR

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