

Buddy Garcia, *Chairman*  
Larry R. Soward, *Commissioner*  
Bryan W. Shaw, Ph.D., *Commissioner*



Blas J. Coy, Jr., *Public Interest Counsel*

## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

January 18, 2008

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

CHIEF CLERKS OFFICE

2008 JAN 18 PM 4:26

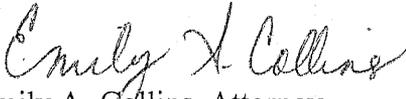
TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

RE: **TXU MINING COMPANY, L.P.**  
**TCEQ DOCKET NO. 2007-1138-WR**

Dear Ms. Castañuela:

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

Sincerely,

  
Emily A. Collins, Attorney *by file*  
Public Interest Counsel

cc: Mailing List

Enclosure

REPLY TO: PUBLIC INTEREST COUNSEL, MC 103 • P.O. BOX 13087 • AUSTIN, TEXAS 78711-3087 • 512-239-6363

P.O. Box 13087 • Austin, Texas 78711-3087 • 512-239-1000 • Internet address: [www.tceq.state.tx.us](http://www.tceq.state.tx.us)

printed on recycled paper using soy-based ink

**TCEQ DOCKET NO. 2007-1138-WR**

**IN THE MATTER OF THE  
APPLICATION OF TXU MINING  
COMPANY, L.P. FOR WATER  
RIGHTS PERMIT NO. WRPERM 5931**

§  
§  
§  
§  
§

**BEFORE THE  
TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY**

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

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 Requests for Hearing in the above-referenced matter, and would respectfully recommend referring this matter to the State Office of Administrative Hearings ("SOAH").

**I. INTRODUCTION**

TXU Mining Company, L.P., ("Applicant" or "TXU") applied to TCEQ on August 7, 2006, for a term permit to divert and use 1,000 acre-feet of water per year from five diversion points at or upstream of the Kosse Lignite Mining Area on an unnamed tributary of Willow Creek (a tributary of Steele Creek), White Branch, and unnamed tributaries of Steele Creek (a tributary of the Navasota River, which is a tributary of the Brazos River) all in the Brazos River Basin. The application also seeks to construct three dams and reservoirs (Ponds D-7, D-8, and D-9) and maintain those reservoirs in addition to two existing reservoirs (D-5 and D-6) for mining purposes. Finally, the Applicant requests to produce and pump approximately 1,935 acre-feet of groundwater into the reservoirs to treat and monitor the water under its TPDES wastewater permit and its Railroad Commission of Texas mining permits. The proposed diversion points are located in both Limestone and Robertson Counties.

The draft term permit authorizes construction and maintenance of five reservoirs impounding a total of 1,792.10 acre-feet of water for mining purposes until the year 2027 or after the cessation of mining activity, when the reservoirs must be maintained for domestic and livestock purposes. The three proposed reservoirs must be constructed within three years of issuance of the permit, and construction must begin within two years of issuance. The draft permit also allows diversion and use of up to 1,000 acre-feet of water per year for mining purposes with a maximum combined diversion rate of 13.369 cubic feet per second (6,000 gallons per minute) at the five proposed diversion points.

The Executive Director ("ED") declared TXU's application administratively complete on September 14, 2006. The Applicant published notice of its water rights application in the *Hearne Democrat*, a newspaper of general circulation in Robertson County, on November 15, 2006, and the *Mexia Daily News*, a newspaper of general circulation in Limestone County, on November 15, 2006.

The comment period ended on December 15, 2007, but was extended by an e-mail from Craig Mikes, the Project Manager in the Water Rights Permitting & Availability Section, to April 23, 2007. The hearing request period ended on December 15, 2006. TCEQ received three hearing requests prior to December 15, 2006, from water rights holders in the Brazos River Basin concerned about the potential effect of the requested appropriation on the hearing requestors' ability to divert and use their own water rights. Pursuant to the analysis provided below, OPIC recommends granting the hearing requests of the Brazos River Authority and the DOW Chemical Company, and referring this matter to SOAH to determine if TXU's application meets the requirements of applicable law.

## II. APPLICABLE LAW

Persons seeking to appropriate state water or to begin construction of work designed for the storage, taking or diversion of water must first obtain a permit from the Commission to make the appropriation. TEX. WATER CODE ("TWC") § 11.121 (2006). Applications to appropriate unappropriated state water must be made pursuant to the requirements in TWC section 11.124. In accordance with TWC section 11.134, the Commission must consider the following issues in its decision to grant or deny the application: whether unappropriated water is available; whether the proposed appropriation is intended for a beneficial use, does not impair existing water rights or vested riparian rights, is not detrimental to the public welfare, considers assessments performed under sections 11.147(d) and (e) and sections 11.150, 11.151, and 11.152, and addresses water supply needs consistent with the state and applicable regional water plans; and whether the applicant will avoid waste and achieve water conservation. TWC § 11.134(b) (2006).

### A. Requirements for Contested Case Hearing Requests

This application was declared administratively complete on September 14, 2006. As the application was declared administratively complete after September 1, 1999, it is subject to the requirements of Title 30, Chapter 55, Subchapter G, sections 55.250-55.256 of the Texas Administrative Code ("TAC"). Under those provisions, a contested case hearing may be requested by the Commission, the Executive Director, the Applicant, and affected persons. 30 TAC § 55.251(a).

A hearing requestor must make their request in writing 30 days after the publication of the notice of the application and identify the requestor's personal justiciable interest affected by

the application, specifically noting the “requestor’s location and distance relative to the activity” and “how and why the requestor believes he or she will be affected by the activity in a manner not common to members of the general public.” 30 TAC § 55.251(b), (c); 30 TAC § 295.171.

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.” 30 TAC § 55.256(a).

30 TAC section 55.256(c) provides relevant factors to be considered in determining whether a person is affected. These factors include, but are not limited to:

- (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.

30 TAC § 55.256(c). In addition, governmental entities with authority under state law over issues contemplated by the application may be considered affected persons. 30 TAC § 55.256(b).

### **III. The Hearing Requests of the Brazos River Authority and the DOW Chemical Company Demonstrate Affected Person Status and, Therefore, Entitles Them to a Hearing.**

TCEQ received timely hearing requests contesting TXU’s application from the Brazos River Authority (“BRA”), the Dow Chemical Company (“DOW”), and NRG Texas, L.P. (“NRG”). However, by letter date-stamped by the Chief Clerk’s Office on September 6, 2007,

NRG withdrew its hearing request. Therefore, OPIC has only considered the hearing requests of the BRA and DOW, below.

The BRA states in its hearing request that “one or more” of its water rights may be impaired if the application is granted. The Commission may grant an application only when the proposed use will not impair existing water rights.<sup>1</sup> Therefore, the BRA’s interest in the potential adverse effects to its existing water rights is protected by the law under which the application will be considered.<sup>2</sup> Furthermore, a reasonable relationship exists between the interest claimed and the activity regulated as the BRA states that it has senior water rights that may be impacted by the requested appropriation.<sup>3</sup> Similarly, the proposed appropriation may affect water availability<sup>4</sup> and, thereby, the regulated activity may impact BRA’s use of its water rights.<sup>5</sup> Based on this showing, OPIC recommends that the Commission find that the Brazos River Authority has demonstrated that it is an affected person entitled to a hearing.

DOW requested a hearing based on their interest in their own senior appropriative rights located on the Brazos River in Brazoria County downstream of TXU’s proposed diversion points. DOW states concern that TXU’s proposed appropriation may further exacerbate Dow’s difficulty in diverting water from the Brazos under low-flow conditions, which already allow a salt wedge upstream of DOW’s diversion points. The Commission may grant an application

---

<sup>1</sup> TWC § 11.134(b)(3)(B).

<sup>2</sup> 30 TAC § 55.256(c)(1).

<sup>3</sup> 30 TAC § 55.256(c)(3).

<sup>4</sup> 30 TAC § 297.42.

<sup>5</sup> 30 TAC § 55.256(c)(4), (5).

only when the proposed use will not impair existing water rights.<sup>6</sup> Therefore, DOW's interest in the potential adverse effects to its existing water rights is protected by the law under which the application will be considered.<sup>7</sup> Furthermore, a reasonable relationship exists between the interest claimed and the activity regulated as DOW states that it has downstream senior water rights that may be impacted by the requested appropriation.<sup>8</sup> Similarly, the proposed appropriation may affect water availability<sup>9</sup> and, thereby, the regulated activity may impact DOW's use of its water rights.<sup>10</sup> Based on this showing, OPIC recommends that the Commission find that DOW has demonstrated that it is an affected person entitled to a hearing.

#### IV. CONCLUSION

For the reasons set forth above, the Office of Public Interest Counsel respectfully recommends that the Commission grant the contested case hearing requests of the Brazos River Authority and the DOW Chemical Company and refer this matter to SOAH for a contested case hearing to determine whether TXU's application meets the requirements of applicable law.

Respectfully submitted,

Blas J. Coy, Jr.  
Public Interest Counsel

---

<sup>6</sup> TWC § 11.134(b)(3)(B).

<sup>7</sup> 30 TAC § 55.256(c)(1).

<sup>8</sup> 30 TAC § 55.256(c)(3).

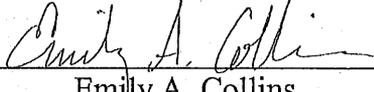
<sup>9</sup> 30 TAC § 297.42.

<sup>10</sup> 30 TAC § 55.256(c)(4), (5).

By   
Emily A. Collins  
Assistant Public Interest Counsel  
State Bar No. 24045686  
P.O. Box 13087 MC 103  
Austin, Texas 78711  
(512) 239-6363 PHONE  
(512) 239-6377 FAX

**CERTIFICATE OF SERVICE**

I hereby certify that on January 18, 2008, the original and eleven true and correct copies of the Office of Public Interest 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.

  
\_\_\_\_\_  
Emily A. Collins

**MAILING LIST**  
**TXU MINING COMPANY, L.P.**  
**TCEQ DOCKET NO. 2007-1138-WR**

FOR THE APPLICANT:

Jennifer K. Bunting  
TXU Mining Company, L.P.  
1601 Bryan St.  
Dallas, Texas 75201-3430  
Tel: (214) 812-5659  
Fax: (214) 812-5695

Sid Stroud, Environmental Mining Manager  
TXU Power  
1601 Bryan St.  
EP 22-052  
Dallas, Texas 75201-3411  
Tel: (214) 812-5603  
Fax: (214) 812-2294

FOR THE EXECUTIVE DIRECTOR:

Todd Galiga, Senior Attorney  
Texas Commission on Environmental Quality  
Environmental Law Division, MC-173  
P.O. Box 13087  
Austin, Texas 78711-3087  
Tel: (512) 239-0600  
Fax: (512) 239-0606

Craig Mikes, Technical Staff  
Texas Commission on Environmental Quality  
Water Supply Division, MC-160  
P.O. Box 13087  
Austin, Texas 78711-3087  
Tel: (512) 239-5049  
Fax: (512) 239-2214

FOR OFFICE OF PUBLIC ASSISTANCE:

Bridget Bohac, Director  
Texas Commission on Environmental Quality  
Office of Public Assistance, MC-108  
P.O. Box 13087  
Austin, Texas 78711-3087  
Tel: (512) 239-4000  
Fax: (512) 239-4007

FOR ALTERNATIVE DISPUTE

RESOLUTION:

Kyle Lucas  
Texas Commission on Environmental Quality  
Alternative Dispute Resolution, MC-222  
P.O. Box 13087  
Austin, Texas 78711-3087  
Tel: (512) 239-4010  
Fax: (512) 239-4015

FOR THE CHIEF CLERK:

LaDonna Castañuela  
Texas Commission on Environmental Quality  
Office of Chief Clerk, MC-105  
P.O. Box 13087  
Austin, Texas 78711-3087  
Tel: (512) 239-3300  
Fax: (512) 239-3311

REQUESTERS:

Douglas Caroom  
Bickerstaff Heath Pollan & Caroom  
816 Congress Ave., Ste 1700  
Austin, Texas 78701-2442

Fred B. Werkenthin, Jr.  
Booth Ahrens & Werkenthin, PC  
515 Congress Ave., Ste. 1515  
Austin, Texas 78701-3504