

TCEQ DOCKET NO. 2009-1323-IWD

APPLICATION BY  
NRG TEXAS POWER, LLC  
FOR TPDES PERMIT NO.  
WQ0002430000

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BEFORE THE  
TEXAS COMMISSION  
ON ENVIRONMENTAL QUALITY

2009 OCT -9 PM 4: 19  
CHIEF CLERKS OFFICE

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

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EXECUTIVE DIRECTOR'S RESPONSE TO HEARING REQUEST

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I. INTRODUCTION

The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) files this Response to Hearing Request (Response) on the application of NRG Texas Power, LLC (Applicant) for the renewal of Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0002430000. Eric Allmon, of Lowerre, Fredrick, Perales, Allmon, & Rockwell, timely filed a request for a contested case hearing on behalf of the non-profit citizens' organization Robertson County: Our Land Our Lives.

Attached for Commission consideration are the following:

- Attachment A – Technical Summary and Draft Permit
- Attachment B – ED's Response to Public Comment
- Attachment C – Compliance History
- Attachment D – TPDES Permit No. WQ0002430000
- Attachment E – GIS Map

II. DESCRIPTION OF FACILITY

The Applicant currently operates the Limestone Steam Electric Generating Station (Facility). The facility consists of two lignite/coal fired steam electric generating units. The Applicant has applied to the TCEQ for a renewal of its TPDES permit, which authorizes the discharge of low volume wastewater, cooling tower blowdown, lignite pile runoff, and bottom ash transport water at a daily maximum flow not to exceed 2,304,000 gallons per day (GPD) via Outfall 001; material handling area runoff, washdown and bottom ash transport water, and low volume wastewater on an intermittent and flow variable basis via Outfall 002; bottom ash transport water, low volume wastewater and storm water runoff at a daily maximum flow not to exceed 510,000 GPD via Outfall 003; bottom ash transport water, low volume wastewater, and storm water runoff at a daily maximum flow not to exceed 432,000 GPD via Outfall 004; low volume wastewater, metal cleaning waste, bottom ash transport water, and utility wastewater at a daily maximum flow not to exceed 216,000 GPD via Outfall Number 005; treated domestic

wastewater at a daily average flow not to exceed 60,000 GPD via Outfall Number 006; treated domestic wastewater at a daily average flow not to exceed 3,000 GPD via Outfall 007; and bottom ash transport water and low volume wastewater at a daily maximum flow not to exceed 72,000 GPD via Outfall 008.

The treated effluent is discharged via Outfalls 001, 003, and 006 to the original channel of Lynn Creek; via Outfalls 002, 007, and 008 to the relocated channel of Lynn Creek; via Outfalls 004 and 005 to unnamed tributaries of Lambs Creek; then from all outfalls to Lambs Creek; then to Lake Limestone in Segment No. 1252 of the Brazos River Basin. The unclassified receiving waters have no significant aquatic life use for Lambs Creek, Lynn Creek, and the unnamed tributaries of Lambs Creek. The designated uses for Segment No. 1252 are high aquatic life use, contact recreation, and public water supply. The facility is located adjacent to and west of Farm-to-Market Road 39, approximately 2.5 miles southeast of the City of Farrar, Limestone County, Texas.

### **III. PROCEDURAL BACKGROUND**

The permit renewal application was received on May 21, 2008 and declared administratively complete on June 4, 2008. The Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) was published on June 24, 2008 in the *Mexia Daily News* and on June 26, 2008 in the *Teague Chronicle*. The Notice of Application and Preliminary Decision for a Water Quality Permit (NAPD) was published on April 9, 2009 in the *Mexia Daily News*, April 15, 2009 in the *Jewett Messenger*, and on April 16, 2009 in the *Teague Chronicle*. The public comment period ended on May 11, 2009. The ED's Response to Public Comment (RTC) was filed on July 10, 2009. The ED's Final Decision Letter was mailed on July 14, 2009, and the period for filing a Request for Reconsideration or Contested Case Hearing ended on August 13, 2009. This application was administratively complete on or after September 1, 1999; therefore, this application is subject to the procedural requirements adopted pursuant to House Bill 801 (76<sup>th</sup> Legislature, 1999).

### **IV. THE EVALUATION PROCESS FOR HEARING REQUESTS**

House Bill 801 established statutory procedures for public participation in certain environmental permitting proceedings. For those applications declared administratively complete on or after September 1, 1999, it established new procedures for providing public notice and public comment, and for the Commission's consideration of hearing requests. The Commission implemented House Bill 801 by adopting procedural rules in 30 Texas Administrative Code (30 TAC) Chapters 39, 50, and 55. The application was declared administratively complete on June 4, 2008; therefore, it is subject to the procedural requirements of HB 801.

#### **A. Right to a Contested Case Hearing**

TCEQ rules state that there is no right to a contested case hearing for the renewal of a water quality permit if:

- a) the Applicant is not applying to:

- 1) increase significantly the quantity of waste authorized to be discharged; or
- 2) change materially the pattern or place of discharge;
- b) the activity authorized by the renewal will maintain or improve the quality of waste authorized to be discharged;
- c) any required opportunity for a public meeting has been given;
- d) consultation and response to all timely received and significant public comment has been given; and
- e) the Applicant's compliance history for the previous five years raises no issues regarding the Applicant's ability to comply with a material term of the permit.

30 TAC § 55.201(i)(5).

## **B. Response to Request**

The ED, the Public Interest Counsel, and the Applicant may each submit written responses to a hearing request. 30 TAC § 55.209(d).

Responses to hearing requests must specifically address:

- a) whether the requestor is an affected person;
- b) whether issues raised in the hearing request are disputed;
- c) whether the dispute involves questions of fact or of law;
- d) whether the issues were raised during the public comment period;
- e) 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 ED's Response to Comment;
- f) whether the issues are relevant and material to the decision on the application; and
- g) a maximum expected duration for the contested case hearing.

30 TAC § 55.209(e).

## **C. Hearing Request Requirements**

In order for the Commission to consider a hearing request, the Commission must first determine whether the request meets certain requirements.

“A request for a contested case hearing by an affected person must be in writing, must be filed with the chief clerk within the time provided...and may not be based on an issue that was 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.”

30 TAC § 55.201(c).

A hearing request must substantially comply with the following:

- a) give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request. If the request is made by a group or association, the request must identify one person by name, address, daytime telephone number, and, where possible fax number, who shall be responsible for receiving all official communications and documents for the group;
- b) identify the person's personal justiciable interest affected by the application, including a brief, but specific, written statement explaining in plain language the requestor's location and distance relative to the proposed facility or activity that is the subject of the application and how and why the requestor believes he or she will be adversely affected by the proposed facility or activity in a manner not common to members of the general public;
- c) request a contested case hearing;
- d) list all relevant and material disputed issues of fact that were raised during the public comment period and that are the basis of the hearing request. To facilitate the commission's determination of the number and scope of issues to be referred to hearing, the requestor should, to the extent possible, specify any of the ED's response to comments that the requestor disputes and the factual basis of the dispute and list any disputed issues of law or policy; and
- e) provide any other information specified in the public notice of application.

30 TAC § 55.201(d).

#### **D. "Affected Person" Status**

In order to grant a contested case hearing, the Commission must determine that a requestor is an "affected person." Section 55.203 sets out who may be considered an affected person.

- a) For any application, 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. An interest common to members of the general public does not qualify as a personal justiciable interest.
- b) Governmental entities, including local governments and public agencies, with authority under state law over issues raised by the application may be considered affected persons.
- c) In determining whether a person is an affected person, all factors shall be considered, including, but not limited to, the following:
  - 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 and safety of the person, and on the use of property of the person;
  - 5) likely impact of the regulated activity on the 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 § 50.203.

**E. Additional Requirements if Requestor is a Group or Association**

A group or association may request a contested case hearing only if the group or association meets all of the following requirements:

- 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.

30 TAC § 55.205.

Additionally, “[i]f the request is made by a group or association, the request must identify one person by name, address, daytime telephone number, and, where possible fax number, who shall be responsible for receiving all official communications and documents for the group.” 30 TAC § 55.201(d)(1).

**F. Referral to the State Office of Administrative Hearings (SOAH)**

When the Commission grants a request for a contested case hearing, the Commission is required to issue an order specifying the number and scope of the issues to be referred to SOAH for a hearing. 30 TAC § 50.115(b). Subsection 50.115(c) sets out the test for determining whether an issue may be referred to SOAH. “The commission may not refer an issue to SOAH for a contested case hearing unless the commission determines that the issue: 1) involves a disputed question of fact; 2) was raised during the public comment period; and 3) is relevant and material to the decision on the application.” 30 TAC § 50.115(c).

**V. ANALYSIS OF THE REQUESTS**

**A. Analysis of the Hearing Requests**

The ED has analyzed the hearing requests to determine whether they comply with Commission rules, who qualifies as an affected person, what issues may be referred for a contested case hearing, and what is the appropriate length of the hearing.

**1. Whether There is a Right to a Contested Case Hearing in Accordance with 30 TAC § 55.201(i)(5).**

The Applicant has applied for a renewal of TPDES Permit No. WQ0002430000. As stated in the Permit Fact Sheet, the only changes made from the existing permit are as follows: First, the name and address listed on the permit was changed from NRG Texas, L.P., P.O. Box 4710

Houston, Texas 77210 to NRG Texas Power, LLC, 1301 McKinney Street, Suite 2300, Houston, Texas 77010-3035. Second, the Standard Permit Conditions, Other Requirements, and Biomonitoring sections of the draft permit were updated based on current TCEQ practices and policies. These updates were staff-initiated changes. Finally, definitions were added to the Other Requirements section and the Other Requirements section has been renumbered.<sup>1</sup>

The Applicant is not applying to increase significantly the quantity of waste authorized to be discharged or to materially change the pattern or place of discharge. The renewal of the permit will maintain the quality of the waste discharged. On April 27, 2009, Eric Allmon, of Lowerre, Fredrick, Perales, Allmon, & Rockwell, requested a public meeting on behalf of Public Citizen, SEED Coalition, Sierra Club (Lone Star Chapter), and Robertson County: Our Land Our Lives. Pursuant to 30 TAC § 55.154, the ED decided not to hold a public meeting on the renewal application. The ED sent a public meeting denial letter to Mr. Allmon on June 16, 2009. The ED filed his RTC on July 10, 2009. The Applicant's compliance history classifies the customer as average with a numeric rating of 1.34, and the site as average with a numeric rating of 1.02. Therefore, pursuant to 30 TAC § 55.201(i)(5) there is no right to a contested case hearing in this case.

The ED recommends that the Commission find that there is no right to a contested case hearing on this matter pursuant to 30 TAC § 55.201(i)(5).

## **2. Whether the Requestors Complied with 30 TAC §§ 55.201(c) and (d).**

Mr. Allmon filed a written request for a contested case hearing on behalf of Robertson County: Our Land Our Lives with the TCEQ's Office of the Chief Clerk on April 27, 2009; before the period for filing a Request for a Contested Case Hearing ended on August 13, 2009. The request was not based solely on issues raised during the comment period that were withdrawn by the commenter prior to the filing of the ED's RTC. The request provided Mr. Allmon's name, address, daytime telephone number, and fax number. However, the request failed to identify a member of the group whose personal justiciable interest will be affected by the application, or include a written statement explaining in plain language a member's location and distance relative to the facility and why they believe they will be adversely affected by the facility in a manner not common to members of the general public.

The ED recommends that the Commission find that Robertson County: Our Land Our Lives failed to substantially comply with 55.201(d)(2) because their request fails to identify a member of the group whose personal justiciable interest will be affected by the application or a written statement explaining in plain language a member's location and distance relative to the facility and why they believe they will be adversely affected by the facility in a manner not common to members of the general public.

## **3. Whether Robertson County: Our Land Our Lives' Hearing Request Complied with 30 TAC § 55.205.**

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<sup>1</sup> See Fact Sheet and Executive Director's Preliminary Decision, Draft TPDES Permit No. WQ0002430000, p. 5.

The hearing request filed by Mr. Allmon on behalf of Robertson County: Our Land Our Lives' states that the group is one of several "non-profit organizations with purposes including seeking clean, safe and sustainable energy sources and promoting strong health, safety, and environmental protections for its members."<sup>2</sup> None of the claims asserted nor the relief requested requires the participation of individual members of the group in the case. However, the request fails to identify one or more members of the group that would otherwise have standing to request a hearing in their own right as required by 30 TAC § 205(a)(1).

The ED recommends that the Commission find that Robertson County: Our Land Our Lives does not meet the associational standing requirements of 30 TAC § 55.205 because no members who would have standing to request a hearing in their own right were identified in their request.

## **B. Whether the Issues Raised are Referable to SOAH for a Contested Case Hearing**

In addition to recommending to the Commission those persons who qualify as affected persons, the ED analyzes issues raised in accordance with the regulatory criteria. Unless otherwise noted, the issues discussed below were all raised during the public comment period. None of the issues were raised solely in a comment which has been withdrawn. All the identified issues in the response are considered disputed, unless otherwise noted.

### **Issue 1: Whether the draft permit authorizes a discharge from a new coal fired power plant at the facility (ED's RTC #1).**

The draft permit does not authorize any discharge from a newly constructed coal-fired power plant at the facility. The Applicant filed its renewal application with the TCEQ on May 21, 2008, requesting a continuation of the same requirements and conditions in the existing permit. The renewal application describes the facility as consisting of two-lignite/coal fired steam electric generating units. Draft Permit Condition 4(a) states that the permittee is required to give the ED notice of any planned physical alterations or additions to the permitted facility that would require a permit amendment. Also, Draft Permit Condition 4(d) requires that, before accepting or generating wastes that are not described in the permit application or that would result in a significant change in the quantity or quality of a permitted discharge, the permittee must report the proposed changes to the Commission and apply for a permit amendment reflecting any necessary changes in permit conditions; including effluent limitations not identified by the permit. Should the draft permit be issued, the Applicant would be required to follow the appropriate permit amendment procedures before discharging from a new unit at the facility.

The ED concludes that this issue is **not relevant and material** to the Commission's decision on the application and **does not recommend** referral to SOAH.

### **Issue 2: Whether the draft permit authorizes a mixing zone at Outfall 007 (ED's RTC #2).**

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<sup>2</sup> See Robertson County: Our Land Our Lives' Hearing Request, p. 1.

The draft permit does not authorize a mixing zone at Outfall 007. 30 TAC § 307.3(34) defines “mixing zone” as the area contiguous to a discharge where mixing with receiving waters takes place and where specified criteria, as listed in 30 TAC § 307.8(b)(1), can be exceeded. Other Requirement No. 9 in the existing permit reads, “There is no mixing zone established for discharges to an intermittent stream. Acute toxic criteria apply at the points of discharge.”<sup>3</sup> Other Requirement No. 6 in the draft permit reads, “There is no mixing zone established for discharges via Outfalls 001, 002, 003, 004, 005, and 008 to an intermittent stream. Acute toxic criteria apply at the point of discharge.”<sup>4</sup> The *Procedures to Implement the Texas Surface Water Quality Standards* provide that mixing zones are defined in domestic discharge permits with a flow of one million GPD or greater.<sup>5</sup> Outfall 006 is authorized to discharge treated domestic wastewater at a daily average flow not to exceed 60,000 GPD, while Outfall 007 is authorized to discharge treated domestic wastewater at a daily average flow not to exceed 3,000 GPD.<sup>6</sup> The listing of Outfalls in Other Requirement No. 6 in the draft permit was done to clarify which outfalls underwent a mixing zone review. Pursuant to the Implementation Procedures, a mixing zone review was not conducted for Outfalls 006 or 007 because the authorized discharges of treated domestic wastewater from both outfalls are substantially less than one million GPD. Other Requirement No. 6 does not constitute a change in a substantive term, provision, requirement or limiting parameter of the permit requiring a major amendment to the permit rather than a permit renewal.<sup>7</sup>

The ED concludes that this issue is relevant and material to the Commission’s decision on the application and recommends referral to SOAH.

**Issue 3: Whether the draft permit authorizes a relaxation of the applicable point to determine compliance with acute toxic criteria (ED’s RTC #2).**

The draft permit does not authorize a relaxation of the applicable point to determine compliance with acute toxic criteria. Other Requirement No. 9 in the existing permit reads, “There is no mixing zone established for discharges to an intermittent stream. *Acute toxic criteria apply at the points of discharge.*” (Emphasis added).<sup>8</sup> Other Requirement No. 6 in the draft permit reads, “There is no mixing zone established for discharges via Outfalls 001, 002, 003, 004, 005, and 008 to an intermittent stream. *Acute toxic criteria apply at the point of discharge.*” (Emphasis added).<sup>9</sup> The listing of outfalls in Other Requirement No. 6 in the draft permit was a staff-initiated change, done to clarify which outfalls underwent a mixing zone review. Other Requirement No. 6 does not alter the point where acute toxic criteria are applied.

The ED concludes that this issue is not relevant and material to the Commission’s decision on the application and does not recommend referral to SOAH.

<sup>3</sup> See TPDES Permit No. WQ0002430000, issued October 22, 2004, p. 13 (Attachment D).

<sup>4</sup> See Draft TPDES Permit No. WQ0002430000, p. 13 (Attachment A).

<sup>5</sup> See RG-194, TCEQ, p. 39 (January 2003).

<sup>6</sup> FN 3 at p. 2e & 2f.

<sup>7</sup> See 30 TAC § 305.62(c)(1)(Definition of “major amendment”).

<sup>8</sup> See TPDES Permit No. WQ0002430000, issued October 22, 2004, p. 13 (Attachment D).

<sup>9</sup> See Draft TPDES Permit No. WQ0002430000, p. 13 (Attachment A).

**Issue 4: Whether the draft permit relaxes the effluent limitation for Selenium (ED's RTC #3).**

The daily average limit for Total Selenium at Outfall 002 in the existing permit is 0.0168 mg/L.<sup>10</sup> The draft permit initially read that the daily average limit for Total Selenium at Outfall 002 was 0.168 mg/L. This was a typographical error, which was corrected in response to public comment. The draft permit provides that the daily average limit for Total Selenium at Outfall 002 is 0.0168.<sup>11</sup>

The ED concludes that this issue is not relevant and material to the Commission's decision on the application and does not recommend referral to SOAH.

**Issue 5: Whether the draft permit adequately accounts for airborne contaminants entering the receiving water (ED's RTC # 4).**

The TPDES permitting process is limited to controlling the discharge of pollutants into water in the state and protecting the water quality of the state's rivers, lakes, and coastal waters. Air quality issues are outside of the scope of normal evaluations for a wastewater discharge permit application. The Limestone Electric Generating Station is currently operated pursuant to State Air Quality Permit Number 8576 and Prevention of Significant Deterioration (PSD) Air Quality Permit PSD-TX-371M.

The ED concludes that this issue is not relevant and material to the Commission's decision on the application and does not recommend referral to SOAH.

**Issue 6: Whether the issuance of the draft permit will adversely impact groundwater quality, including violating 30 TAC § 319.27 (ED's RTC #5).**

Robertson County: Our Land Our Lives' hearing request states that the issuance of the draft permit would violate 30 TAC §§ 309.12 and 319.27.<sup>12</sup> However, 30 TAC § 309.12 prohibits the Commission from issuing a permit for a new facility or for the substantial change of an existing facility unless it finds that the proposed site, when evaluated in light of the proposed design, construction or operational features, minimizes possible contamination of surface water and groundwater. Since Limestone Steam Electric Generating Station is an existing facility and no substantial changes are proposed with this renewal application Section 309.12 is not applicable. 30 TAC § 319.27 deals with general regulations to be incorporated into the permit to control hazardous metals. Hazardous metals include Arsenic, Barium, Cadmium, Chromium, Copper, Lead, Manganese, Mercury, Nickel, Selenium, Silver, and Zinc.<sup>13</sup> 30 TAC § 319.22 prohibits the discharge of Selenium to inland waters from exceeding the daily average of 0.05 mg/L, and the discharge of Copper to inland waters from exceeding the daily average of 0.5 mg/L. The final and interim effluent limitations for Selenium in the draft permit are well below the daily

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<sup>10</sup> See FN 8 at p. 2a.

<sup>11</sup> See FN 9 at p. 2a.

<sup>12</sup> Robertson County: Our Land Our Lives Hearing Request, p. 3.

<sup>13</sup> 30 TAC § 319.21(4).

average of 0.05 mg/L, while the final and interim effluent limitations for Copper are well below the daily average of 0.5 mg/l.<sup>14</sup> No analytical data was provided for screening against water quality based effluent limitations since the facility has not discharged for the last two years. The facility reuses its wastewater for its cooling water systems, its Flue Gas Desulfurization (FGD) system, and/or bottom ash transport system. An interim three-year compliance period is included in the draft permit for Total Selenium at Outfalls 001, 004, and 005, and Total Copper at Outfall 005 pursuant to 30 TAC § 307.2(f).

The Water Quality Division has determined that the draft permit has been developed in accordance with the Texas Surface Water Quality Standards (TSWQS), which ensure that the effluent discharge is protective of aquatic life, human health, and the environment. The review process for surface water quality is conducted by the Standards Implementation Team and Water Quality Assessment Team surface water modelers. The Water Quality Division has determined that if the surface water quality is protected, then the groundwater quality in the vicinity will not be impacted by the discharge.

The ED concludes that this issue is relevant and material to the Commission's decision on the application and recommends referral to SOAH.

**Issue 7: Whether the draft permit adequately incorporates technology based effluent limitations, as required by 30 TAC § 308.1 (ED's RTC #6).**

Technology-based effluent limitations are national standards that are developed by the U.S. Environmental Protection Agency (EPA) on an industry-by-industry basis, and are intended to represent the greatest pollutant reductions that are economically achievable for an industry. To develop these technology-based regulations, the EPA gathers information on a particular industry, identifies the best available technology that is economically achievable for that industry, and sets regulatory requirements based on the performance of that technology.

The draft permit was developed in accordance with 40 C.F.R. Part 423 (relating to Steam Electric Power Generating Point Source Category). 40 C.F.R. § 423.12 establishes effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available (BPT), while 40 C.F.R. § 423.13 establishes effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best available technology economically achievable (BAT). The effluent limitations contained in the draft permit adequately incorporate the technology-based effluent limitations guidelines promulgated by the EPA. Finally, as part of the TCEQ's coordination efforts, the EPA was furnished with a copy of the draft permit and given an opportunity to object to its issuance. The EPA did not register any objection to the issuance of the draft permit.

The ED concludes that this issue is relevant and material to the Commission's decision on the application and recommends referral to SOAH.

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<sup>14</sup> See Draft TPDES Permit No. WQ0002430000, p. 2, 2d, and 2c (Attachment A).

**Issue 8: Whether the draft permit contains enforceable limitations of the maximum allowable flow from each Outfall (ED's RTC #7).**

The facility reuses its wastewater for cooling water systems, its FGD system, and/or bottom ash transport system. Because any discharge from the facility is predicted to be intermittent, the ED has determined that a daily maximum flow limit is appropriate and enforceable. In the permit application, the permittee states the engineering practices used to estimate the discharges at each outfall which include weirs and pump curve data.

The ED concludes that this issue is not relevant and material to the Commission's decision on the application and does not recommend referral to SOAH.

**Issue 9: Whether the effluent limitation for free available chlorine at Outfall 001 contained in the draft permit complies with 40 CFR Part 423 (RTC #8).**

As previously mentioned, the draft permit was developed in accordance with 40 C.F.R. Part 423 (relating to Steam Electric Power Generating Point Source Category). The effluent limitations contained in the draft permit for free available chlorine at Outfall 001 are consistent with the federal technology-based guidelines for free available chlorine at 40 C.F.R. § 423.12 (effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available (BPT)) and 40 C.F.R. § 423.13 (effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best available technology economically achievable (BAT)). Specifically, these limits are required for discharges of cooling tower blowdown and apply after treatment.

In addition to these technology-based effluent limits and as an additional protection against any chlorine toxicity to the receiving stream, the draft permit also requires whole effluent toxicity biomonitoring at Outfall 001 to assess whether the effluent has the potential to cause toxic conditions in the receiving stream.

The ED concludes that this issue is relevant and material to the Commission's decision on the application and recommends referral to SOAH.

**Issue 10: Whether the sampling requirements at Outfall 002 contained in the draft permit comply with 30 TAC Chapter 319 (ED's RTC #9).**

Material handling area runoff, washdown and bottom ash transport water, and low volume wastewater are discharged at Outfall 002 on an intermittent and flow variable basis. The wastewater is either collected in a sedimentation pond and routed to an equalization pond before being discharged, or is reused in the facility's FGD system. As such, the ED has determined that the sampling requirements at Outfall 002 contained in the draft permit are sufficient to protect water quality.

The ED concludes that this issue is relevant and material to the Commission's decision on the application and recommends referral to SOAH.

**Issue 11: Whether the issuance of the draft permit will violate TCEQ's antidegradation policy (ED's RTC #5 & #10).**

TCEQ rules and Implementation Procedures mandate that the TCEQ's antidegradation policy applies to actions regulated under state and federal authority that would authorize the increase in pollution of water in the state.<sup>15</sup> Since the permit action at issue is a permit renewal with no increases in pollutant loading, TCEQ rules do not require an antidegradation review to be performed.

The ED concludes that this issue is **not relevant and material** to the Commission's decision on the application and **does not recommend** referral to SOAH.

**Issue 12: Whether the issuance of the draft permit will violate general and numeric criteria set forth in 30 TAC §§ 307.1 – 307.10 (ED's RTC #11).**

The TSWQS specify narrative and general criteria for the protection of aquatic life and human health in water in the state.<sup>16</sup> The draft permit includes effluent provisions designed to ensure the effluent meets the TSWQS, including narrative criteria to protect and maintain the aesthetics, aquatic life, and habitat. The dissolved oxygen modeling analysis is performed to ensure that the numeric criteria for the dissolved oxygen stream standards in the receiving waters will not be violated.

Because the facility has not discharged in two years, no effluent data was available for screening against the numeric toxic criteria. However, the draft permit contains a provision requiring the permittee to sample and analyze their effluent when discharge commences and to submit this data to the agency. When this occurs, the data will be screened against the applicable criteria and the permit will be reopened if the data shows that additional effluent limits are required.

The ED concludes that this issue is **relevant and material** to the Commission's decision on the application and **recommends** referral to SOAH.

**Issue 13: Whether the draft permit adequately addresses thermal impacts on receiving waters pursuant to 30 TAC § 307.4(f) (ED's RTC #12).**

30 TAC § 307.4(f) mandates that the temperature of surface water in the state be maintained so as not to interfere with the reasonable use of such waters. Section 307.4(f) establishes temperature criteria, expressed as a maximum temperature differential from ambient conditions, for certain types of waterbodies. Section 307.4(f) states that additional temperature criteria (expressed as maximum temperatures) for classified segments are specified in Appendix A of 30 TAC § 307.10.

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<sup>15</sup> See 30 TAC § 307.5(a); Procedures to Implement the Texas Surface Water Quality Standards, RG-194, TCEQ, p. 23 (January 2003).

<sup>16</sup> See 30 TAC §§ 307.1 – 307.10.

Cooling towers are used to remove waste heat from effluent before it is discharged. The draft permit authorizes the discharge of cooling tower blowdown at Outfall 001 at a daily maximum temperature of 93°F. Outfall 001 discharges to the original channel of Lynn Creek, then to Lambs Creek, then to Lake Limestone in Segment No. 1252 of the Brazos River Basin. Appendix A of 30 TAC § 307.10 establishes the maximum temperature criterion for Lake Limestone at 90 °F. The ED does not anticipate that the temperature of the discharge from Outfall 001 will exceed applicable temperature criteria or interfere with the reasonable use of the receiving waters.

The ED concludes that this issue is relevant and material to the Commission's decision on the application and recommends referral to SOAH.

**Issue 14: Whether the monitoring requirements contained in the draft permit comply with 30 TAC Chapter 319 (ED's RTC #13).**

The draft permit was developed in accordance with the TSWQS. These standards are designed to maintain the quality of water in the state and to be protective of human health and the environment. The proposed discharge will be monitored pursuant to the conditions set out in the "Monitoring and Reporting Requirements" section of the draft permit and 30 TAC Chapter 319.

The ED concludes that this issue is relevant and material to the Commission's decision on the application and recommends referral to SOAH.

**Issue 15: Whether the draft permit allows the level of some contaminants produced at the facility to be reduced merely by means of dilution in violation of 30 TAC § 319.24 (ED's RTC #14).**

Subchapter B of 30 TAC Chapter 319 deals with general regulations to be incorporated into permits to control hazardous metals. Hazardous metals include Arsenic, Barium, Cadmium, Chromium, Copper, Lead, Manganese, Mercury, Nickel, Selenium, Silver, and Zinc.<sup>17</sup> 30 TAC § 319.22 establishes allowable concentrations of hazardous metals for discharges to inland waters. 30 TAC § 319.24 prohibits permittees from attaining an allowable concentration of hazardous metals through dilution in lieu of treatment.

The draft permit requires that samples be taken after final treatment and prior to mixing with other water; therefore, no dilution of the samples will occur. Additionally, the final and interim effluent limitations for Selenium and Copper contained in the draft permit are well below the concentrations established by 30 TAC § 319.22.<sup>18</sup>

The ED concludes that this issue is relevant and material to the Commission's decision on the application and recommends referral to SOAH.

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<sup>17</sup> 30 TAC § 319.21(4).

<sup>18</sup> See Draft TPDES Permit No. WQ0002430000, p. 2, 2d, and 2c (Attachment A).

**Issue 16: Whether the draft permit meet the requirements of Subchapter I of 30 TAC Chapter 308 (ED's RTC #15).**

Subchapter I of 30 TAC Chapter 308 establishes requirements that apply to the location, design, construction, and capacity of cooling water intake structures at new facilities. Since the permit action at issue is a permit renewal at an existing facility, Subchapter I of 30 TAC Chapter 308 is not applicable.

The ED concludes that this issue is not relevant and material to the Commission's decision on the application and does not recommend referral to SOAH.

**Issue 17: Whether the draft permit meets the applicable requirements of 30 TAC Chapter 309 (ED's RTC #16).**

The draft permit was developed in accordance with 30 TAC Chapter 309. 30 TAC § 309.3 requires domestic wastewater to achieve secondary treatment before being discharged. In order to achieve secondary treatment, domestic wastewater must meet the following effluent set: 20 mg/L 5-day biochemical oxygen demand (BOD<sub>5</sub>), 20 mg/L total suspended solids (TSS), and 2.0 mg/L minimum dissolved oxygen (DO). The effluent limits in the draft permit for Outfalls 006 and 007 are 10 mg/L BOD<sub>5</sub>, 15 mg/L TSS, and 4.0 mg/L minimum DO. Furthermore, the effluent limits for Outfalls 006 and 007 in the draft permit are consistent with the requirements of 30 TAC § 309.3(c), which requires that any discharge made within five miles upstream of a reservoir or lake ... which may be used as a source for public drinking water supply shall achieve, at a minimum, Effluent Set 2 in § 309.4..." Effluent Set 2 (enhanced secondary treatment) in § 309.4 stipulates effluent limitations for domestic treatment plants of 10 mg/L BOD<sub>5</sub>, 15 mg/L TSS, and 4.0 mg/L minimum DO. The ED has determined that the effluent limits contained in the draft permit are consistent with 30 TAC Chapter 309.

The ED concludes that this issue is relevant and material to the Commission's decision on the application and recommends referral to SOAH.

**Issue 18: Whether the issuance of the draft permit will adversely impact endangered and threatened species (ED's RTC #17).**

The discharge from the facility is not expected to have an effect on any federal endangered or threatened aquatic or aquatic dependent species, proposed species, or their critical habitat. This determination is based on the United States Fish and Wildlife Service's (USFWS) biological opinion on the State of Texas' authorization to administer the Texas Pollutant Discharge Elimination System (TPDES; September 14, 1998; October 21, 1998 update).

The Memorandum of Agreement (MOA) between the Commission and the United States Environmental Protection Agency (U.S. EPA), Region 6 requires the Commission to address endangered species issues through interagency coordination. The following excerpts from the MOA delineate the Commission's role with respect to endangered species concerns:

The Commission will involve “the United States Fish and Wildlife Service (USFWS), National Marine Fisheries Service (NMFS), and Texas Parks and Wildlife Department (TPWD) during the permitting process to address endangered species issues in the TPDES permit.”

The Commission “will address the effects on endangered species...through setting and enforcing water quality standards which undergo EPA approval with USFWS, NMFS...and TPWD consultation.” The Commission will “consider endangered species... issues identified by NMFS, USFWS...”

If USFWS, NMFS, or TPWD comments during the public comment period to express endangered species concerns, the Commission will coordinate with the commenting agency “in an attempt to resolve the relevant issues(s).”

Finally, [n]otification, receipt of comments, or discussion with the various agencies over endangered species...issues shall not automatically result in a [Commission] or SOAH hearing on a permit application or entitle...NMFS, USFWS... or other persons to become a party to any hearing conveyed.”<sup>19</sup>

The Commission, acting through the ED, fulfilled its obligations under the MOA with respect to endangered species concerns in this case. Neither USFWS nor the TPWD commented on this permit application. Any issues regarding endangered species should be resolved through USFWS or TPWD.

The ED concludes that this issue is relevant and material to the Commission’s decision on the application and recommends referral to SOAH.

**Issue 19: Whether the issuance of the draft permit is consistent with the Coastal Management Program’s goals and policies (ED’s RTC #18).**

One of the goals of the Texas Coastal Management Program is to coordinate agency and subdivision decision-making affecting Coastal Natural Resource Areas (CNRA) by establishing clear, objective policies for the management of CNRAs.<sup>20</sup> A CNRA is a coastal barrier, coastal historic area, coastal preserve, coastal shore area, coastal wetland, critical dune area, critical erosion area, gulf beach, hard substrate reef, oyster reef, submerged land, special hazard area, submerged aquatic vegetation, tidal sand or mud flat, water of the open Gulf of Mexico, or water under tidal influence that is located within the Coastal Zone.<sup>21</sup> The Coastal Zone is defined by 31 TAC § 503.1. 31 TAC § 505.11 sets out an exclusive list of proposed individual agency actions that may adversely affect a CNRA and that therefore must be consistent with Coastal Management Program goals and policies. Before issuing a wastewater discharge permit for a facility that is located within the Coastal Zone, the TCEQ is required to review the issuance of

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<sup>19</sup> See Memorandum of Agreement (MOA) between the Texas Natural Resource Conservation Commission and the U.S Environmental Protection Agency, Region 6 Concerning the National Pollutant Discharge Elimination System, p. 27, 33 – 35 (Executed September 14, 1998).

<sup>20</sup> 31 TAC § 501.12(6).

<sup>21</sup> 31 TAC § 501.3(a)(5); *Also see* TEX. NAT. RES. CODE § 33.203(1).

wastewater discharge permits for consistency with Coastal Management Program goals and policies.<sup>22</sup> The facility that is the subject of this permitting action is not located within the Coastal Zone, therefore this renewal is not subject to the Coastal Management Program.

The ED concludes that this issue is not relevant and material to the Commission's decision on the application and does not recommend referral to SOAH.

## VI. DURATION OF THE CONTESTED CASE HEARING

The Executive Director recommends that a contested case hearing, should the Commission decide to refer this matter to SOAH, last approximately six months. This time period begins with the preliminary hearing and concludes with presentation of a proposal for decision before the Commission.

## VII. EXECUTIVE DIRECTOR'S RECOMMENDATION

The Executive Director recommends the following actions by the Commission:

- a) Find that there is no right to a contested case hearing on this matter pursuant to 30 TAC § 55.201(i)(5).
- b) Find that Robertson County: Our Land Our Lives' hearing request failed to substantially comply with 55.201(d)(2).
- c) Find that Robertson County: Our Land Our Lives does not meet the associational standing requirements of 30 TAC § 55.205 because no members who would have standing to request a hearing in their own right were identified in their request.
- d) Should the Commission find that there is a right to a contested case hearing in this matter, and that Robertson County: Our Land Our Lives is affected by the permit application and has satisfied the regulatory requirements for group or associational standing, the following issues should be referred to SOAH for a Contested Case Hearing for a duration of nine months:

Issue 1: Whether the draft permit authorizes a mixing zone at Outfall 007.

Issue 2: Whether the issuance of the draft permit will adversely impact groundwater quality, including violating 30 TAC § 319.27.

Issue 3: Whether the draft permit adequately incorporates technology based effluent limitations, as required by 30 TAC § 308.1.

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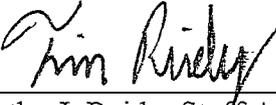
<sup>22</sup> 31 TAC § 505.11(a)(6)(A).

- Issue 4: Whether the effluent limitation for free available chlorine at Outfall 001 contained in the draft permit complies with 40 CFR Part 423
- Issue 5: Whether the sampling requirements at Outfall 002 contained in the draft permit comply with 30 TAC Chapter 319.
- Issue 6: Whether the issuance of the draft permit will violate general and numeric criteria set forth in 30 TAC §§ 307.1 – 307.10.
- Issue 7: Whether the draft permit adequately addresses thermal impacts on receiving waters pursuant to 30 TAC § 307.4(f).
- Issue 8: Whether the monitoring requirements contained in the draft permit comply with 30 TAC Chapter 319.
- Issue 9: Whether the draft permit allows the level of some contaminants produced at the facility to be reduced merely by means of dilution in violation of 30 TAC § 319.24.
- Issue 10: Whether the draft permit meets the applicable requirements of 30 TAC Chapter 309.
- Issue 11: Whether the issuance of the draft permit will adversely impact endangered and threatened species.

Respectfully submitted,  
Texas Commission on Environmental Quality

Mark R. Vickery, P.G.  
Executive Director

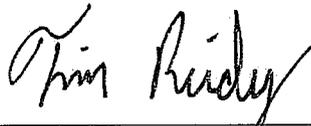
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REPRESENTING THE EXECUTIVE  
DIRECTOR OF THE TEXAS  
COMMISSION ON ENVIRONMENTAL  
QUALITY

CERTIFICATE OF SERVICE

I certify that on October 9, 2009, an original and seven copies of the "Executive Director's Response to Hearing Request" relating to the application of NRG Texas Power, LLC for Permit No. WQ0002430000 was filed with the Texas Commission on Environmental Quality's Office of the Chief Clerk, and a complete copy was transmitted by mail, facsimile, hand-delivery to all persons on the attached mailing list.



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Timothy J. Reidy, Staff Attorney  
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TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY  
2009 OCT -9 PM 4: 19  
CHIEF CLERKS OFFICE

Mailing List  
Executive Director's Response to Hearing Request  
NRG Texas Power, L.L.C.  
TCEQ Docket No. 2009-1323-IWD  
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