

Bryan W. Shaw, Ph.D., *Chairman*
Buddy Garcia, *Commissioner*
Carlos Rubinstein, *Commissioner*



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

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
Protecting Texas by Reducing and Preventing Pollution

October 9, 2009

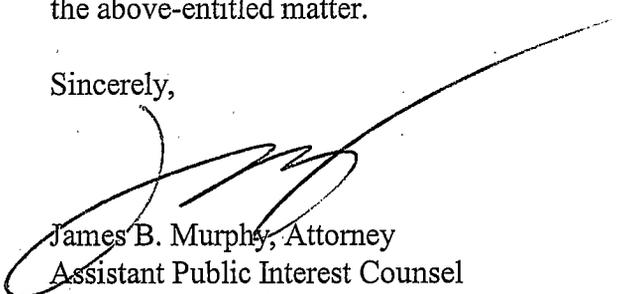
LaDonna Castañuela, Chief Clerk
Texas Commission on Environmental Quality
Office of the Chief Clerk (MC-105)
P.O. Box 13087
Austin, Texas 78711-3087

Re: NRG TEXAS POWER, LLC
TCEQ DOCKET NO. 2009-1323-IWD

Dear Ms. Castañuela:

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

Sincerely,



James B. Murphy, Attorney
Assistant 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

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TCEQ DOCKET NO. 2009-1323-IWD

**IN THE MATTER
OF THE APPLICATION OF
NRG TEXAS POWER, LLC, FOR
RENEWAL OF TPDES PERMIT
NO. WQ0002430000**

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**BEFORE THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY**

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

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

The Office of Public Interest Counsel (OPIC) of the Texas Commission on
Environmental Quality (Commission or TCEQ) files this Response to Request for Hearing in the
above-referenced matter and respectfully shows the following.

I. INTRODUCTION

A. Background of Facility

NRG Texas Power, LLC has applied to the TCEQ for a renewal of Texas Pollution
Discharge Elimination System (TPDES) Permit No. WQ0002430000 for the Limestone Steam
Electric Generating Station (facility) in Limestone County. The facility consists of two
lignite/coal fired steam electric generating units. The permit authorizes the discharge of low
volume wastewater, cooling tower blowdown, lignite pile runoff and bottom ash transport 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 005; treated domestic wastewater at a daily average flow not to exceed 60,000 gpd via Outfall 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 not to exceed a daily maximum flow of 72,000 gpd via Outfall 008.

The facility is located adjacent to and west of Farm-to-Market Road 39, approximately 2.5 miles southeast of the City of Farrar in Limestone County. The 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 Outfall 004 and Outfall 005 to unnamed tributaries of Lambs Creek; and from all outfalls thence to Lambs Creek; thence 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 unnamed tributaries of Lambs Creek. The designated uses for Segment No. 1252 are high aquatic life use, contact recreation, and public water supply.

B. Procedural Background

TCEQ received this application on May 21, 2008. On June 4, 2008, the Executive Director (ED) declared the application administratively complete. 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 ED completed the technical review of the application, and prepared a draft permit. The Notice of Application and Preliminary Decision for a Water Quality Permit (NAPD) was published on April 9, 2009 in the *Mexia Daily News*, on 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. On July 10, 2009, the

ED filed its decision and Response to Comments, which the Chief Clerk's office mailed on July 14, 2009. The deadline to request a contested case hearing was August 13, 2009.

TCEQ received timely comments and a request for a contested case hearing from Robertson County: Our Land Our Lives (Requester) on April 27, 2009. OPIC recommends denying the hearing request.

II. APPLICABLE LAW

This application was declared administratively complete on June 4, 2008. Because the application was declared administratively complete after September 1, 1999, a person may request a contested case hearing on the application pursuant to the requirements of House Bill 801, Act of May 30, 1999, 76th Leg., R.S., § 5 (codified at TEX. WATER CODE (TWC) § 5.556).

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 the application. 30 TEX. ADMIN. CODE (TAC) § 55.201(d).

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 § 55.203(a). This justiciable interest does not include an interest common to the general public.

Id. Governmental entities with authority under state law over issues contemplated by the application may be considered affected persons. 30 TAC § 55.203(b). Relevant factors considered in determining whether a person is affected 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 and safety of the person, and on the 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 § 55.203(c).

A group or association may request a contested case 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.

30 TAC § 55.205(a). The ED, OPIC, or applicant may request the group or association provide an explanation of how the group or association meets these requirements. 30 TAC § 55.205(b).

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).

Accordingly, 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 of 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.

30 TAC § 55.209(e).

There is no right to a contested case hearing for an application under TWC Chapter 26 to renew or amend a permit if:

- (A) the applicant is not applying to:
 - (i) increase significantly the quantity of waste authorized to be discharged; or
 - (ii) change materially the pattern or place of discharge;
- (B) the activity to be authorized by the renewal or amended permit will maintain or improve the quality of waste authorized to be discharged;
- (C) any required opportunity for 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).

III. DISCUSSION

A. Right to Hearing

Because this application is for a permit renewal under TWC Chapter 26, the hearing request must be evaluated to determine if there is a right to a hearing under 30 TAC § 55.201(i)(5). Based on these requirements, OPIC concludes Requester does not possess a hearing right in this matter.

First, Applicant is not applying to increase the quantity of waste to be discharged or the pattern or place of discharge. 30 TAC § 55.201(i)(5)(A). Requester raises a concern about the

renewed permit authorizing discharge from a proposed third power generating unit named Limestone 3. As stated by the ED in his Response to Comments in this matter, the renewed permit does not authorize discharges from Limestone 3, based on the definition of facility in the permit, and therefore any discharge from Limestone 3 would require a permit amendment. Thus, the renewal does not authorize a change in the quantity, pattern, or place of discharge.

Second, it appears that the standards and criteria in the renewed permit will maintain the quality of waste to be discharged. *Id.* § 55.201(i)(5)(B). Requester raises a concern about a less stringent criterion for the daily average limit for Selenium at Outfall No. 2. In his Response to Comments, the ED states that the change is a typographical error and revises the draft permit to correct the error. None of the Requester's remaining comments address permit standards and criteria less restrictive than the original permit. As a result, it appears the renewal will maintain the quality of waste to be discharged.

Third, no public meeting is required on this application. *Id.* § 55.201(i)(5)(C). Requester filed the only request for a public meeting, and the ED determined there was insufficient public interest in the application to hold a meeting. *Id.* § 55.154(c). There does not appear to be any other basis for requiring a public meeting here. Therefore, any required opportunity for a public meeting was provided on this application.

Fourth, the ED filed a Response to Comments in this matter on July 10, 2009. Thus, consultation and response to all timely received and significant public comment has been provided. *Id.* § 55.201(i)(5)(D).

Finally, Applicant's compliance history for the previous five years raises no issues regarding its ability to comply with a material term of the permit. *Id.* § 55.201(i)(5)(E). The Commission rated both the Applicant and facility as "average" performers in their compliance

history classifications developed under the criteria established by Commission rules. Given that the facility holds over 20 permits and registrations from the TCEQ, the number and type of violations documented in Applicant's compliance history does not cause OPIC to question Applicant's ability to comply with a material term of the permit. Accordingly, OPIC concludes there is no right to a contested case hearing pursuant to 30 TAC § 55.201(i)(5).

B. Determination of Affected Person Status

Requester has failed to show it meets the requirement for associational standing in 30 TAC § 55.205(a)(1). Although the interests the organization seeks to protect appear germane to its purpose in preventing pollution from coal-fired power plants and the claim does not appear to require the participation of individual members, the hearing request does not identify one or more members who would otherwise have standing to request a hearing in their own right as required by 30 TAC § 55.205(a)(1). Therefore, even if the Commission were to determine that a right to hearing exists, OPIC finds that Requester failed to meet the requirements for establishing affected person status.

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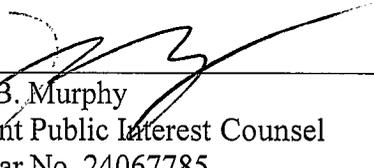
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IV. CONCLUSION

OPIC recommends denying the hearing request from Robertson County: Our Land Our Lives.

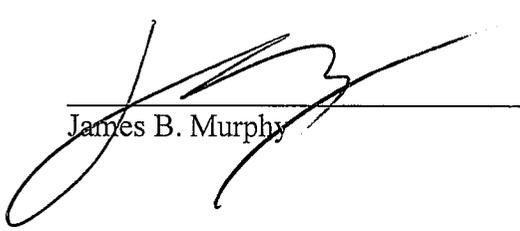
Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 9, 2009 the original and seven true and correct copies of the Office of Public Interest Counsel's Response to Request for Hearing was 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, electronic mail, or by deposit in the U.S. Mail.


James B. Murphy

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TCEQ DOCKET NO. 2009-1323-IWD

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