

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*

July 25, 2011

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

**RE: ASPEN POWER, LLC**  
**TCEQ DOCKET NO. 2011-0794-IWD**

Dear Ms. Chao:

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

Sincerely,

  
Garrett Arthur, Attorney  
Assistant Public Interest Counsel

cc: Mailing List

Enclosure



**DOCKET NO. 2011-0794-IWD**

<b>APPLICATION BY</b>	<b>§</b>	<b>BEFORE THE</b>
<b>ASPEN POWER, L.L.C.</b>	<b>§</b>	<b>TEXAS COMMISSION ON</b>
<b>PROPOSED TPDES</b>	<b>§</b>	<b>ENVIRONMENTAL QUALITY</b>
<b>PERMIT NO. WQ0004921000</b>	<b>§</b>	

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

**To the Members of the Texas Commission on Environmental Quality:**

The Office of Public Interest Counsel (OPIC) at the Texas Commission on Environmental Quality (TCEQ) files this response to a hearing request in the above-referenced matter.

**I. Introduction**

On March 5, 2010, Aspen Power LLC ("Aspen" or "Applicant") applied to the TCEQ for a water quality Texas Pollutant Discharge Elimination System (TPDES) permit for industrial wastewater. Proposed Permit No. WQ0004921000 would authorize Aspen's Lufkin Generating Plant to discharge cooling tower blowdown commingled with low volume wastewater at a daily average flow not to exceed 214,560 gallons per day. The Lufkin Generating Plant is a biomass-fired steam electric generating facility located in the City of Lufkin, Angelina County.

The effluent would be discharged to an unnamed tributary, then to Ellen Trout Lake, then to Mill Creek, then to Paper Mill Creek, then to Sam Rayburn Reservoir on the Angelina River in Segment No. 0615 of the Neches River Basin. The unclassified receiving waters have no significant aquatic life use for the unnamed tributary and high

aquatic life use for Ellen Trout Lake. The designated uses for Segment No. 0615 are contact recreation, intermediate aquatic life use, and public water supply.

The application was declared administratively complete April 20, 2010. Applicant published the first newspaper notice on May 5, 2010 in the *Lufkin Daily News* and *La Lengua Spanish Newspaper*. The second newspaper notice was published October 31, 2010 in the *Lufkin Daily News* and November 3, 2010 in *La Lengua Spanish Newspaper*. The Executive Director's (ED) Response to Comments (RTC) was mailed out April 20, 2011, and the hearing request period closed May 20, 2011.

The agency timely received two hearing requests from Timothy J. Karczewski on behalf of Suzbrekensal Investments, Ltd. and its General Partner, Kenneth Rogers ("SI Ltd). For the reasons stated herein, OPIC recommends a hearing be granted.

## **II. Applicable Law**

This application was declared administratively complete after September 1, 1999, and is therefore subject to the procedural requirements adopted pursuant to House Bill 801 (76th Leg., 1999).

Under Title 30, Texas Administrative Code (TAC) § 55.201(d), a hearing request must substantially comply with the following:

- (1) give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request;
- (2) 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;
- (3) request a contested case hearing;

- (4) 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 executive director's responses to comments that the requestor disputes and the factual basis of the dispute and list any disputed issues of law or policy; and
- (5) provide any other information specified in the public notice of application.

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. An interest common to members of the general public does not qualify as a personal justiciable interest. Section 55.203(c) provides relevant factors to 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.

Under 30 TAC § 55.211(c)(2), a hearing request made by an affected person shall be granted if the request:

- (A) raises disputed issues of fact that were raised during the comment period, that were not withdrawn by the commenter by filing a withdrawal letter with the chief clerk prior to the filing of the executive director's response to comment, and that are relevant and material to the commission's decision on the application;
- (B) is timely filed with the chief clerk;

- (C) is pursuant to a right to hearing authorized by law; and
- (D) complies with the requirements of § 55.201.

### **III. Analysis of Hearing Request**

#### **A. Whether the requestor is affected person**

According to the hearing requests, the proposed discharge route passes through a tract of land owned by SI Ltd. The hearing requestor further states that the SI Ltd tract is adjacent to and immediately downstream of the Aspen tract. A map prepared by ED staff (attached hereto) confirms the location of the SI Ltd tract and its proximity to the proposed discharge route and the Aspen tract.

As stated in the hearing requests, SI Ltd is concerned that the temperature of Aspen's discharge will cause excessive production of bacteria and pathogens, which in turn will pose a health risk to persons using the SI Ltd tract. The hearing requestor is also concerned about the discharge of dissolved solids and oil and grease. SI Ltd states that the accumulation of solids and oil and grease on its tract is inevitable.

The proposed discharge route crosses the SI Ltd tract approximately 1/4 mile from the Aspen outfall, and SI Ltd is concerned about human health effects and water quality. In combination, these factors make SI Ltd an affected person in this matter. Given SI Ltd's proximity to the discharge, its concerns regarding water quality and human health effects translate to personal justiciable interests which are not common to the general public. SI Ltd therefore meets the definition of an affected person. See 30 TAC § 55.203(a).

In determining whether SI Ltd qualifies as an affected person, the factors listed in § 55.203(c) provide further support for the conclusion that SI Ltd is an affected person. See 30 TAC § 55.203(c). First, the hearing requestor's claimed interests are protected by the law under which this application will be considered. Second, a reasonable relationship exists between human health effects and water quality and the regulation of industrial wastewater discharge. Finally, the activity to be regulated in this matter has the potential to adversely impact SI Ltd's use of its property and the surface water on that property.

For all these reasons, OPIC finds that SI Ltd qualifies as an affected person under 30 TAC § 55.203.

**B. Which issues raised in the hearing requests are disputed**

All of the issues raised in the hearing requests are disputed.

**C. Whether the dispute involves questions of fact or of law**

Of the six disputed issues, five involve questions of fact, and one involves a mixed question of fact and law.

**D. Whether the issues were raised during the public comment period**

All of the issues were raised during the public comment period.

**E. Whether the hearing requests are based on issues raised solely in a public comment which has been withdrawn**

The hearing requests are not based on issues raised solely in a public comment which has been withdrawn.

**F. Whether the issues are relevant and material to the decision on the application**

In its hearing requests, SI Ltd has raised the following issues, some of which are relevant and material, and some of which are not.

**1. Property Rights along the Discharge Route**

SI Ltd states that the draft permit is based upon the presumption of a discharge route across the SI Ltd tract, but Aspen does not have the authority to discharge across SI Ltd land, and Aspen cannot compel SI Ltd to grant permission for such a discharge. SI Ltd asserts the draft permit is based on an incorrect assumption and cannot be issued as is. SI Ltd also maintains that the failure of Aspen to have the right to discharge across SI Ltd land is fatal to the permit application.

Issuance of a discharge permit does not convey any property rights and does not authorize any injury to property or an invasion of other property rights. 30 TAC § 305.122(b) and (c). Therefore, Aspen is responsible for procuring the necessary property rights for the proposed discharge route. However, whether Aspen has or can acquire the necessary property rights is not a question for the Commission. The Commission must determine whether Aspen's application and the draft permit meet all laws applicable to issuance of a discharge permit. The issue is therefore not relevant and material to the Commission's decision in this matter.

**2. Property Value**

The hearing requestor asserts that diminution in value of the SI Ltd tract is a contested issue of fact. The Texas Legislature has not given the TCEQ jurisdiction to consider a facility's effect on property values. Therefore, this issue is not relevant and material to the Commission's decision.

### **3. Water Quality and Health Effects**

SI Ltd states that because the water to be discharged will have a higher temperature than the receiving stream, it will contribute to an excessive production of bacteria and pathogens, resulting in health risks to humans and aquatic life. The hearing requestor also states that certain solvents and chemicals used to maintain cooling coils contain hazardous substances which may accumulate and negatively impact vegetation and human health. Water quality and resulting vegetation or health effects are addressed by the Chapter 307 Texas Surface Water Quality Standards, and this issue is therefore relevant and material to the Commission's decision on the application. *See* 30 TAC Chapter 307.

### **4. Discharge of Solids and Oil and Grease**

SI Ltd is concerned that the discharge of solids and oil and grease from Aspen will negatively impact SI Ltd property. The TCEQ regulates the discharge of solids and oil and grease under the Texas Surface Water Quality Standards. *See* 30 TAC § 307.4(b). This issue is therefore relevant and material to the Commission's decision.

### **5. Impaired Stream Segment under Clean Water Act §303(d)**

Segment No. 0615 of the Neches River Basin is an impaired stream segment under the Clean Water Act § 303(d). The hearing requestor is concerned that Aspen's discharge will flow into a stream segment which is already impaired. Texas has a delegated National Pollutant Discharge Elimination System (NPDES) program, and as such, is responsible for implementing § 303(d). Therefore, the issue is relevant and material to the Commission's decision on this application.

## **6. Regionalization**

SI Ltd cited Texas Water Code § 26.0282 and raised the possibility of Aspen discharging to a regional wastewater treatment facility. However, as acknowledged by the hearing requestor, § 26.0282 is applicable to domestic wastewater, not industrial wastewater. Therefore, the issue of regionalization is not relevant and material to the Commission's decision in this matter.

## **G. Maximum expected duration for the contested case hearing**

For the contested case hearing, OPIC estimates a maximum duration of nine months from the first day of the preliminary hearing to issuance of the proposal for decision.

## **IV. Conclusion**

OPIC finds that SI Ltd qualifies as an affected person under applicable law. We also find that the hearing requestor has raised disputed issues of fact that are relevant and material to the Commission's decision on this application. Therefore, OPIC respectfully recommends the Commission grant SI Ltd's hearing requests.

OPIC further recommends that the following issues be referred to the State Office of Administrative Hearings for a contested case hearing:

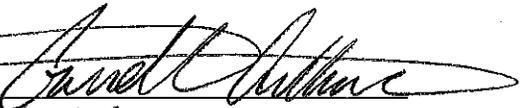
1. Whether the proposed facility will negatively impact surface water quality?
2. Whether the proposed facility will negatively impact human or animal health?
3. Whether the proposed discharge of solids and oil and grease will negatively impact the SI Ltd tract?

4. Whether the proposed facility will negatively affect the existing impairment of Segment No. 0615 of the Neches River Basin under Clean Water Act § 303(d)?

For the contested case hearing, OPIC recommends a duration of nine months from the first day of the preliminary hearing to issuance of the proposal for decision.

Respectfully submitted,

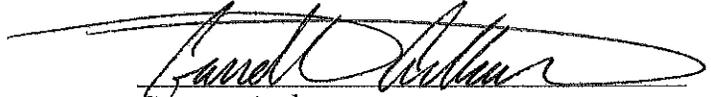
Blas J. Coy, Jr.  
Public Interest Counsel

By 

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## CERTIFICATE OF SERVICE

I hereby certify that on July 25, 2011, the foregoing document was filed with the TCEQ Chief Clerk, and copies were served to all parties on the attached mailing list via hand delivery, facsimile transmission, electronic mail, inter-agency mail, or by deposit in the U.S. Mail.



Garrett Arthur

# Aspen Power

Map Requested by TCEQ Office of Legal Services



Texas Commission on Environmental Quality  
GIS Team (Mail Code 197)  
P.O. Box 13087  
Austin, Texas 78711-3087

July 19, 2011

0 0.125 0.25 0.5 0.75 1 1.25 Miles

Projection: Texas Statewide Mapping System (TSM5)

Scale 1:62,000

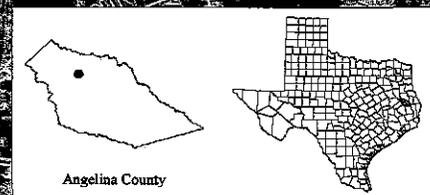
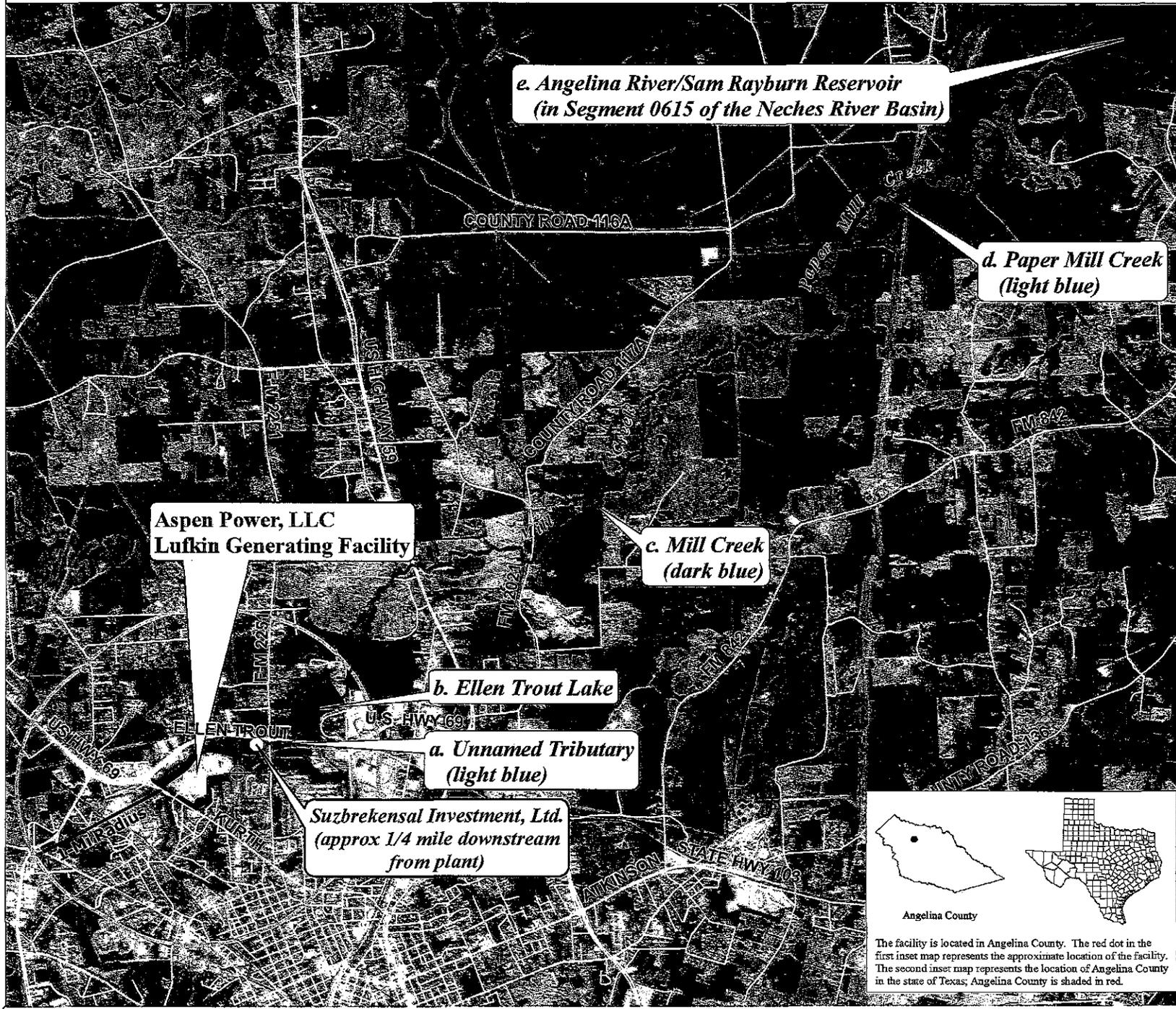
### Legend

- Requestor Address (Estimated)
- Facility
- ⊕ Effluent Discharge (Outfall)
- 1-Mile Radius Around Facility Property Boundary

Source: The location of the facility was provided by the TCEQ Office of Legal Services (OLS). OLS obtained the site location information from the applicant and the requestor information from the requestor. The street data are GDI/TeleAtlas Data (1:100,000). The river segments are 2011 NHD. The background of this map is a one-half meter resolution aerial photograph mosaic from the 2010 Texas Orthoimagery Project.

### This map depicts the following:

- (1) The approximate location of the facility. This is labeled "Aspen Power, LLC, Lufkin Generating Facility"
- (2) The approximate location of the hearing requestor. This is labeled "Suzbrekensal Investment, Ltd."
- (3) The effluent discharge route. This is labeled along the river segment depicted in blue:
  - a. Unnamed tributary
  - b. Ellen Trout Lake
  - c. Mill Creek
  - d. Paper Mill Creek
  - e. Angelina River/Sam Rayburn Reservoir, in Segment No. 0615 of the Neches River Basin
- (4) One-mile radius around the facility property boundary.



The facility is located in Angelina County. The red dot in the first inset map represents the approximate location of the facility. The second inset map represents the location of Angelina County in the state of Texas; Angelina County is shaded in red.

This map was generated by the Information Resources Division of the Texas Commission on Environmental Quality. This product is for informational purposes and may not have been prepared for or be suitable for legal, engineering, or surveying purposes. It does not represent an on-the-ground survey and represents only the approximate relative location of property boundaries. For more information concerning this map, contact the Information Resource Division at (512) 239-0800.



**MAILING LIST**  
**ASPEN POWER, LLC**  
**TCEQ DOCKET NO. 2011-0794-IWD**

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