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August 8, 2011

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Office of the Chief Clerk MC-105  
P.O. Box 13087  
Austin, Texas 78711

In re: The Application of Aspen Power L.L.C. for a Water Quality Permit  
TCEQ Docket No. 2011-0794-IWD

**Suzbrekensal Investments Ltd.'s Reply To  
The Executive Director's Response to Requests for Hearing**

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COMES NOW, Suzbrekensal Investments Ltd. ("SI Ltd") by and through its representatives and files this Reply to the Executive Director's Response to SI Ltd's Request for Hearing in the above referenced matter.

SI Ltd is in general agreement with the Executive Director's ("ED") regarding Issues 3 thru 7. For this reason no reply to those issues is provided. However, SI Ltd does not entirely agree with the ED regarding Issues No. 1 and 2 for the reasons as stated below.

ISSUE #1 – The ED frames Issue No. 1 as follows:

"Does Aspen have the legal right to use the man-made watercourse on SI's Property?"

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SI Ltd would agree that the litigation of private property rights is outside the jurisdictional authority of the Texas Commission on Environmental Quality and the State Office of Administrative Hearings. However, the ED's framing of the Issue is too narrow. It is actually an issue regarding the proposed discharge route, which no reasonable person could argue is not within the jurisdiction of the TCEQ. The technical staff will tell you that any and all permits are granted based upon a specific outfall location and a specific flow route. This firm has represented Applicants in other Permit Applications where the movement of an outfall of 20 feet required that the entire notice be republished. In the instance of the location of the Aspen outfall, the Permit Application asks for the location of the outfall by longitude and latitude. (An entry that was left blank in the copy of the application on display at the Lufkin City Hall.) All of the Published and Mailed Public Notices provided the description of the specific flow route. Also, all of the technical reviews by the ED's Staff are premised on the water flowing via the route provided in the Application. As has been stated in our Public Comments and Request for Hearing, Aspen does not have and will not be receiving permission to discharge via the route in the Application. In addition, the outfall will be located where the Aspen Power property meets the tract of land owned by Neighborhood Properties, LLC of New York. (Neighborhood Properties). It should be noted that there is no water course (man made or otherwise) where the two tracts meet. Any discharge from Aspen must flow, overland, approximately 40 feet until it spills into the man made ditch located at the point where the Neighborhood Properties tract and the SI Ltd tract meet.

The Permit Application is based upon information that is pure fiction as to the route of the Aspen discharge. We would also point out that the overland flow of the Aspen discharge across the Neighborhood Properties will cause erosion and further diminish the quality of the water in any receiving stream, man made or otherwise. This improper description of the discharge route also calls into questions the Notice provided. Had the Neighborhood Properties people known that the flow is to be overland across their tract, their decision regarding participation in this process may have been significantly different. It is also a fact, that the Aspen Facility is already connected to a regional facility, so the granting of this permit is wholly unnecessary. Lastly, until the issue of an actual as opposed to a fictitious discharge route is resolved, any granting of a permit is purely a speculative exercise by the TCEQ.

For the reasons stated above the discharge route under the proposed permit is certainly an issue for the Contested Case Hearing.

ISSUE # 2 – The ED frames Issue No. 2 as follows:

“Does the Existence of a regional facility within three miles of the proposed facility violate Section 26.0282 of the Texas Water Code?”

SI Ltd asserts that this is also an extremely limited view of the Regionalization issue and completely overlooks Texas Water Code §26.081 which states:

“The legislature finds and declares that it necessary to the health, safety and welfare of the people of this state to implement the state policy to encourage and promote the development and use of regional and area-wide waste collection and treatment and disposal systems to serve the waste disposal needs of the citizens of the state and to prevent pollution and maintain and enhance the quality of the water in the state.” Tex. Water Code Ann. §26.081(a)

Since the legislature finds that it is “**necessary**” to encourage regionalization and since this proposed discharge is likely to impact a 303(d) listed stream segment, we would assert that it is incumbent upon the Commission to direct the flow from the Aspen Facility to any one of two nearby regional facilities and “**maintain or enhance**” the quality of water in segment 0615 of the Angelina River. As pointed out above, the Aspen Facility is already connected to one of those regional facilities (City of Lufkin) so it is not as if the feasibility of such a connection is an issue. It can and has been done.

For the reasons stated above, whether or not the Aspen discharge should be directed to a regional facility is an appropriate Issue for the Contested Case Hearing.

## Conclusion

For these reasons stated herein, SI Ltd. should be granted a hearing and the issues should include Issues 3 – 7 and articulated by the Executive Director, as well as Issues 1 and 2 as advocated herein.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been forwarded to those listed on the attached Mailing List, on this the 5<sup>th</sup> day of August, 2011.

Timothy J. Karpzewski  
Timothy J. Karpzewski

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