

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

August 29, 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: LUMINANT MINING COMPANY, LLC
TCEQ DOCKET NO. 2011-1124-IWD**

Dear Ms. Chao:

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

Sincerely,

A handwritten signature in cursive script that reads "Amy Swanholm".

Amy Swanholm, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2011-1124-IWD

IN THE MATTER OF	§	BEFORE THE TEXAS
THE APPLICATION	§	COMMISSION ON
OF	§	ENVIRONMENTAL
LUMINANT MINING	§	QUALITY
COMPANY, LLC FOR	§	
PERMIT NO.	§	
WQ0004122000	§	

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

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

COMES NOW, the Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (the Commission or TCEQ) with a Response to Requests for Hearing and Reconsideration in the above-referenced matter.

I. INTRODUCTION

A. Background of Facility

Luminant Mining Company LLC (luminant), which operates Monticello-Thermo Lignite Mining Area, has applied to the Texas Commission on Environmental Quality (TCEQ) for a major amendment to TPDES Permit No. WQ0004122000 to authorize the addition of a 286-acre Thermo A-1 Auxiliary Area located adjacent to the existing Northern Boundary of the Monticello-Thermo Lignite Mining Area. The current permit authorizes the following from Outfall 001: discharge of mine drainage and surface runoff from the active mining area, groundwater, and previously monitored effluents, including surface runoff from post-mining areas, Outfall 001 effluent on an intermittent and flow variable basis via Outfall 101 and treated domestic wastewater at a daily average flow not to exceed 2,600 gallons per day via outfall 201.

The facility is located on State Highway 11, approximately 2.5 miles southeast of the intersection of State Highway 11 and Interstate Highway 30, Hopkins County, Texas 75482.

The effluent is discharged to an unnamed tributary; thence to Rock Creek; thence to White Oak Creek; thence to Sulphur/South Sulphur River in Segment No. 0303 of the Sulphur River Basin.

B. Procedural Background

The application was received on June 30, 2010, and declared administratively complete on August 16, 2010, and declared technically complete on November 2, 2010. The Notice of Receipt of Application and Intent to Obtain Permit (NORI) was published in the *Sulphur Springs News Telegram* on September 14, 2010 and the *La Prensa Hispana* on September 15, 2010. The Notice of Application and Preliminary Decision (NAPD) was published in the *Sulphur Springs News Telegram* on January 20, 2011 and the *La Prensa Hispana* on January 12, 2011. The public comment period closed on February 22, 2011. 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, 76th Legislature, 1999.

OPIC recommends not referring this application to the State Office of Administrative Hearings (SOAH) for a contested case hearing, however should East Texans Coalition for Clean Air submit additional information, OPIC may revise this position.

II. ANALYSIS OF REQUESTS FOR CONTESTED CASE HEARINGS

A. Applicable Law

This application was declared administratively complete after September 1, 1999, and is subject to the requirements of Texas Water Code (TWC) § 5.556 added by Acts 1999, 76th Leg., ch 1350 (commonly known as "House Bill 801"). 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 application. 30 TAC § 55.201(d). 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." This justiciable interest does not include an interest common to the general public. 30 TAC § 55.203(c) also provides relevant factors that will 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.

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, pursuant to 30 TAC § 55.209(e), 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 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.

B. Determination of Affected Person Status

TCEQ received timely hearing requests from Linda Tucker on behalf of the East Texans Coalition for Clean Air (ETCCA) on February 22, 2011, before the deadline to request a contested case hearing, and before the close of the comment period.

The hearing request states that ETCCA is concerned about the lignite mining that takes place at the facility. ETCCA is concerned that the facility may be causing coalition members' illnesses such as asthma, sinus problems, stomach problems, COPD, pneumonia, bronchitis, heart trouble, and cancer, among others. Members are also concerned that Luminant is actually using machinery associated with deep mining, not surface mining, and adversely impacting human health, animals, and air quality because of this. ETCCA is also concerned about the receiving waters, whether the facility will adversely impact subsurface areas, and the specific locations where mining will occur. ETCCA would also like to ensure that appropriate testing and sampling occurs, to protect human health

and the environment. Finally, ETTCA asks whether Luminant is complying with state and federal regulations.

A group or association may request a 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.

ETTCA lists Linda Tucker as the founder and chairman of ETTCA. Her property is estimated by the ED to be located about 0.9 miles from the discharge route, and 1.8 miles away from the closest discharge point. Without further information, OPIC cannot find that Ms. Tucker would be affected, nor has ETTCA identified any other specific member who would have standing in their own right.

Despite ETTCA raising relevant issues concerning certain water quality issues that could be addressed in a hearing on this application, ETTCA has not identified a member who would have standing in their own right. Also the organization has not provided enough information in its hearing request to show that the water quality issues it seeks to protect are germane to its purpose. Therefore OPIC must conclude that ETTCA's hearing request does not meet the requirements for associational standing.

ETTCA has not met all three elements required for associational standing. Therefore OPIC cannot recommend the Commission find that the ETTCA is affected at this time. However, OPIC welcomes ETTCA to provide the Commission with more information about the organization, and may reconsider this recommendation, should it receive additional information.

C. Issues Raised in the Hearing Requests

OPIC finds that the hearing requester is not affected. However, should the Commission recommend that this matter be sent to the State Office of Administrative Hearings, OPIC provides the following analysis on what issues may be appropriate for the subsequent hearing. ETTCA raises the following issues related to water quality:

1. Whether the facility and proposed discharge would adversely impact human health and the environment.
2. Whether the receiving water are properly classified and whether the proposed discharge would degrade the receiving waters.
3. Whether the proposed facility would comply with TCEQ rules related to wastewater treatment and disposal operations.
4. Whether the proposed discharge would comply with rules governing subsurface contamination.
5. Whether the facility would comply with rules governing sampling and testing for contaminants.
6. Whether the proposed amendment and subsequent draft permit comply with applicable TCEQ and EPA rules.

D. Issues raised in Comment Period

All of the hearing requests raise issues that were also raised during the comment period.

E. Disputed Issues

There is no agreement between the hearing requestor and the Applicant or Executive Director on the issues raised in the hearing requests.

F. Issues of Fact

If the Commission considers an issue to be one of fact, rather than one of law or policy, it is appropriate for referral to hearing if it meets all other applicable requirements. All of the issues raised in timely hearing requests by affected parties are issues of fact. *See* 30 TAC §55.211(b)(3)(A) and (B).

G. Relevant and Material Issues

Hearing requests may raise issues relevant and material to the Commission's decision under 30 TAC §§ 55.201(d)(4) and 55.211(c)(2)(A). In order to refer an issue to SOAH, the Commission must find that the issue is

relevant and material to the Commission's decision to issue or deny this permit.¹ Relevant and material issues are those governed by the substantive law under which this permit is to be issued.²

TCEQ is responsible for the protection of water quality under Chapter 26 of the TWC and 30 TAC Chapters 305, 307 and 309, as well as under specific rules related to wastewater systems found at 30 TAC Chapters 30 and 217. The Texas Surface Water Quality Standards in 30 TAC Chapter 307 require the proposed permit "maintain the quality of water in the state consistent with public health and enjoyment." 30 TAC § 307.1. The Texas legislature has also found that it is the policy of Texas for "discharges of pollutants, disposal of wastes, or other activities subject to regulation by state agencies be constructed in such a manner that will maintain present uses and not impair potential uses of groundwater or pose a public health hazard..." Texas Water Code 26.401(c)(1).

Furthermore, the proposed permit must comply with 30 TAC § 305.122(c), 307.1 and 309.10, which prohibit injury to private property and invasion of property rights and require minimization of exposure to nuisance conditions.

Therefore all of the issues listed in Section II.C, above, are relevant and material. Other issues in the request related to air quality could not be addressed in a proceeding on this application and, therefore, are not relevant and material.

H. Issues Recommended for Referral

Should the Commission refer this matter to the State Office of Administrative Hearings for a contested case hearing OPIC recommends the Commission refer the following disputed issues of fact:

1. Whether the facility and proposed discharge would adversely impact human health and the environment.

¹ See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-251(1986) (in discussing the standards applicable to reviewing motions for summary judgment the Court stated "[a]s to materiality, the substantive law will identify which facts are material. ... it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs.")

² *Id.*

2. Whether the receiving water are properly classified and whether the proposed discharge would degrade the receiving waters.
3. Whether the proposed facility would comply with TCEQ rules related to wastewater treatment and disposal operations.
4. Whether the proposed discharge would comply with rules governing subsurface contamination.
5. Whether the facility would comply with rules governing sampling and testing for contaminants.
6. Whether the proposed amendment and subsequent draft permit comply with applicable TCEQ and EPA rules.

IV. MAXIMUM EXPECTED DURATION OF HEARING

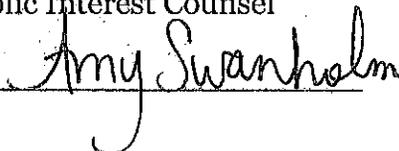
Commission Rule 30 TEX. ADMIN. CODE § 55.115(d) requires that any Commission order referring a case to SOAH specify the maximum expected duration of the hearing by stating a date by which the judge is expected to issue a proposal for decision. The rule further provides that no hearing shall be longer than one year from the first day of the preliminary hearing to the date the proposal for decision is issued. To assist the Commission in stating a date by which the judge is expected to issue a proposal for decision, and as required by 30 TEX. ADMIN. CODE §55.209(d)(7), OPIC estimates that the maximum expected duration of a hearing on this application would be one year from the first date of the preliminary hearing until the proposal for decision is issued.

V. CONCLUSION

OPIC recommends the Commission find that deny the hearing request of ETTCA. OPIC will reconsider its position based on any information provided in a timely filed reply by ETTCA.

Respectfully submitted,

Blas J. Coy, Jr.
Public Interest Counsel

By: 

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CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2011 the original and seven true and correct copies of the Office of the 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.



Amy Swanholm



**MAILING LIST
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TCEQ DOCKET NO. 2011-1124-IWD**

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