

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

January 13, 2012

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

**RE: U.S. DEPARTMENT OF ENERGY AND BABCOCK &
WILCOX TECHNICAL SERVICES PANTEX, L.L.C.
TCEQ DOCKET NO. 2011-2107-IWD**

Dear Ms. Bohac:

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

Sincerely,

A handwritten signature in black ink, appearing to read "Garrett Arthur".

Garrett Arthur, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

DOCKET NO. 2011-2107-IWD

**U.S. DEPARTMENT OF ENERGY § BEFORE THE
AND BABCOCK & WILCOX §
TECHNICAL SERVICES § TEXAS COMMISSION ON
PANTEX, L.L.C. §
WATER QUALITY PERMIT § ENVIRONMENTAL QUALITY
NO. WQ0002296000 §**

**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 the hearing request in the above-referenced matter.

I. Introduction

On June 1, 2010, the U.S. Department of Energy and Babcock & Wilcox Technical Services Pantex, L.L.C. ("Pantex") applied to the TCEQ to renew their industrial wastewater discharge permit. The Pantex permit authorizes the discharge of domestic and industrial effluent at a daily average flow not to exceed 560,000 gallons per day, and a maximum flow of 820,000 gallons per day.

The renewal application was declared administratively complete July 19, 2010. First notice was published August 5, 2010 in the *Amarillo Globe News* and the *Panhandle Herald*, and second notice was published June 23, 2011 in the same newspapers. The public comment period closed July 25, 2011, and the Executive

Director's (ED) Response to Comments (RTC) was mailed October 14, 2011. The deadline to request a contested case hearing was November 14, 2011.

The agency timely received a hearing request from Ralph Guajardo on June 29, 2011. For the reasons stated herein, OPIC recommends Mr. Guajardo's hearing request be denied.

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

In his hearing request, Mr. Guajardo states concerns regarding air emissions from Pantex. He suggests that waste ponds be covered so escaping fumes will not harm local residents or wildlife. Mr. Guajardo states that activities at Pantex produce dangerous, harmful, toxic, and radioactive waste. He also states that TCEQ's job is to protect the health and well being of local residents, and Pantex has adversely affected his health. Finally, Mr. Guajardo asks whether a study has been done to assess the public health risks from Pantex.

Under 30 TAC § 55.211(c)(2)(C), a hearing request shall be granted if the request is made pursuant to a right to hearing authorized by law. Therefore, the Commission must determine as an initial matter whether a right to hearing exists on this application. As provided by 30 TAC § 55.201(i)(5), there is no right to a contested case hearing on a renewal application under Texas Water Code Chapter 26 if:

- (A) the applicant is not applying to increase significantly the quantity of waste authorized to be discharged or change materially the pattern or place of discharge;
- (B) the activity to be authorized by the renewal will maintain or improve the quality of waste authorized to be discharged;
- (C) any required opportunity for public meeting has been given;
- (D) consideration 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.

According to the information reviewed by OPIC, this renewal application satisfies each of these requirements. If all of these criteria are met, Texas Water Code § 26.028(d) allows the Commission to approve this renewal application without holding a hearing.

Pantex is not seeking to significantly increase the quantity of discharged wastewater, and is not seeking to change the pattern or place of discharge. The renewal application therefore satisfies the first requirement of 30 TAC § 55.201(i)(5).

The current permitting action is for renewal only, meaning the quality of the wastewater discharge should be maintained, as required by § 55.201(i)(5)(B).

The published notices regarding this application informed the public of the opportunity for a public meeting, and stated that the TCEQ holds a public meeting if the ED determines that there is a significant degree of public interest. Although Mr. Guajardo requested a public meeting, his was the only request, and the ED declined to hold a public meeting, presumably due to an apparent lack of public interest. As required by § 55.201(i)(5)(C), it appears that the required opportunity for a public meeting has been given.

Section 55.201(i)(5)(D) requires TCEQ to consider and respond to all timely received and significant public comment. The ED's RTC indicates that this criterion has been met.

Finally, § 55.201(i)(5)(E) requires that Pantex's compliance history for the previous five years must raise no issues regarding Pantex's ability to comply with a material term of this permit. For the previous five years, TCEQ rates the U.S. Department of Energy's compliance history as "Average". The Pantex site is also rated "Average". According to 30 TAC § 60.2, an "Average" performer generally complies with environmental regulations. Given this definition, it appears that Pantex's compliance history raises no issues regarding its ability to comply with a material term of this permit and satisfies § 55.201(i)(5)(E).

OPIC finds that Pantex's permit renewal application satisfies the requirements of Texas Water Code § 26.028(d) and 30 TAC § 55.201(i)(5), no right to a contested case hearing exists on this application, and the Commission may approve the application without a hearing.

IV. Conclusion

Pantex's application seeks renewal of an existing permit with no changes. As a result, there is no right to a contested case hearing on this application. In accordance with Texas Water Code § 26.028(d) and 30 TAC § 55.201(i)(5), OPIC concludes the Commission may approve this permit renewal without holding a hearing. Therefore, OPIC respectfully recommends the Commission deny Mr. Guajardo's hearing request.

Respectfully submitted,

Blas J. Coy, Jr.
Public Interest Counsel

By 

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CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2012, 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

MAILING LIST
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TCEQ DOCKET NO. 2011-2107-IWD

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