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

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

February 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: **SOUTHWESTERN ELECTRIC POWER COMPANY**
TCEQ DOCKET NO. 2011-2199-IWD

Dear Ms. Bohac:

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

Sincerely,


Eli Martinez, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2011-2199-IWD

**IN THE MATTER OF THE
APPLICATION OF
SOUTHWESTERN ELECTRIC
POWER COMPANY FOR WATER
QUALITY PERMIT
NO. WQ0002496000**

**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

Southwestern Electric Power Company (Applicant or SWEPCO) has applied to the TCEQ for the renewal of Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0002496000, with a major amendment that would authorize (a) an increase in the capacity of the Flue Gas Desulfurization (FGD) & Fly Ash Landfill Retention Pond (Landfill Pond), (b) the diversion of wastewater from the Ash Pond into the Landfill Pond, (c) a reduction in the monitoring frequency for total suspended solids (TSS) at Outfalls 004 and 005 from once per month to once per quarter, (d) a reduction in the monitoring frequency for oil and grease (O&G) at Outfall 006 from once per month to once per quarter, (e) a reduction in the monitoring frequency for O&G at Outfall 102 from once per quarter to once per year, (f) a reduction in the monitoring frequency for biochemical oxygen demand, 5-day (BOD₅) at Outfall 302 from once per

two months to once per quarter, and (g) a temporary reduction in the two-foot freeboard requirement for ponds during storm events.

The existing permit authorizes the discharge of once-through cooling water and previously monitored effluent (low volume wastewater on an intermittent and flow variable basis via Outfall 102; treated effluent from Plant "X" at a daily average flow not to exceed 800,000 gallons per day via Outfall 202; and domestic wastewater at a daily average flow not to exceed 15,000 gallons per day via Outfall 302) at a daily average flow not to exceed 600,000 gallons per day via Outfall 002; storm water from the Lignite Runoff Pond on an intermittent and flow variable basis via Outfall 003; storm water from the Landfill Pond on an intermittent and flow variable basis via Outfall 004; storm water from the Limestone Runoff Pond on an intermittent and flow variable basis via Outfall 005; and wastewater from the Ash Pond on an intermittent and flow variable basis via Outfall 006.

Once-through condenser cooling water and once-through miscellaneous cooling water (collectively referred to as "once-through water" in the permit) receive no treatment prior to discharge at Outfall 002. Low volume wastes (demineralizer regenerant, floor drains, and yard drains) are routed to the Ecology Pit for settling, precipitation, and flocculation prior to discharge via Outfall 102.

Additionally, demineralizer regenerant is routed to a chemical sump and neutralization tank prior to being routed to the Ecology Pit. The Applicant may route metal cleaning wastes, chemical metal cleaning wastes, wastewater from the Ash Pond, and wastewater from the Lignite Runoff Pond to Plant "X."

Plant "X" provides pH neutralization, filtration, settling, and clarifier solids separation, chlorination, and chemical wastewater treatment prior to discharge via Outfall 302.

Storm water from the lignite storage area is routed to the Lignite Runoff Pond where it is subject to settling, precipitation, and flocculation prior to discharge via Outfall 003. Storm water runoff from the flue gas desulfurization & fly ash sludge landfill (the landfill) is routed to the Landfill Pond where it is subject to settling, precipitation, and flocculation prior to discharge via Outfall 004. The Applicant may transfer wastewater from the Lignite Runoff Pond to the Landfill Pond for treatment and discharge via Outfall 004. The Applicant may divert wastewater from the Ash Pond in the Landfill Pond on an infrequent basis, in compliance with the technology-based effluent limitations at internal Outfall 004.

Storm water from the limestone storage area is routed to the Limestone Runoff Pond where it is subject to settling, precipitation, and flocculation prior to discharge via Outfall 005. Low volume wastes (boiler blowdown and demineralizer regenerant) and ash transport water are routed to the Ash Pond where there are subject to oil-water separation, pH adjustment, settling, precipitation, and flocculation prior to discharge via Outfall 006.

Effluent limitations for discharges via Outfall 002 include: 600 million gallons per day (MGD) daily average and daily maximum flow, 122 degrees Fahrenheit daily maximum temperature, 0.2 milligrams per liter (mg/L) and 75.6 pounds per day (lbs/day) daily maximum total residual chlorine (TRC), and a report requirement for the daily average and the daily maximum dissolved oxygen (DO) concentrations.

Effluent limitations for discharges via Outfall 102 include: 30 mg/L for the daily average and 100 mg/L daily maximum for TSS, 15 mg/L daily average and 20 mg/L daily maximum for O&G, 0.012 mg/L daily average and 0.025 mg/L daily maximum for total selenium, a range of 6.0 to 9.0 standard units for pH, and a report requirement for the daily average and the daily maximum flow volumes.

Effluent limitations for discharges via Outfall 202 include: 0.8 MGD daily average and daily maximum flow, 30 mg/L daily average and 50 mg/L daily maximum for TSS, 15 mg/L daily average and 20 mg/L daily maximum for O&G, 0.016 mg/L daily average and 0.033 mg/L daily maximum for total selenium, 1.0 mg/L daily average and daily maximum for total iron, 0.5 mg/L daily average and 1.0 mg/L daily maximum for total copper, and a range of 6.0 to 9.0 standard units for pH.

Effluent limitations for discharges via Outfall 302 include: 0.015 MGD daily average and 0.030 MGD daily maximum flow, 20 mg/L and 2.5 lbs/day daily average and 65 mg/L daily maximum for BOD₅, 20 mg/L and 2.5 lbs/day daily average and 65 mg/L daily maximum for TSS, a minimum of 1.0 mg/L for TRC, a range of 6.0 to 9.0 standard units for pH, and a report requirement for the daily maximum concentration of the TRC.

Effluent limitations for discharges via Outfall 003 include: 50 mg/L daily maximum for TSS, 20 mg/L daily maximum for O&G, 0.033 mg/L daily maximum for total selenium, a range of 6.0 to 9.0 standard units for pH, and a report requirement for the daily average and the daily maximum flow volumes.

Effluent limitations for discharges via Outfall 004 include: 50 mg/L daily maximum for TSS, 20 mg/L daily maximum for O&G, 0.036 mg/L daily maximum for

total selenium, a range of 6.0 to 9.0 standard units for pH, and a report requirement for the daily average and the daily maximum flow volumes.

Effluent limitations for discharges via Outfall 104 include: 30 mg/L daily average and 100mg/L daily maximum for TSS, 15 mg/L daily average and 20 mg/L daily maximum for O&G, and a report requirement for the daily average and the daily maximum flow volumes.

Effluent limitations for discharges via Outfall 005 include: 50 mg/L daily maximum for TSS, 20 mg/L daily maximum for O&G, a range of 6.0 to 9.0 standard units for pH, and a report requirement for the daily average and the daily maximum flow volumes.

Effluent limitations for discharges via Outfall 006 include: 30 mg/L daily average and 100 mg/L daily maximum for TSS, 15 mg/L daily average and 20 mg/L daily maximum for O&G, 0.006 mg/L daily average and 0.013 mg/L daily maximum for total selenium, a range of 6.0 to 9.0 standards units for pH, and a report requirement for the daily average and the daily maximum flow volumes.

The effluent is discharged via Outfalls 002 and 003 to the Brandy Branch Reservoir; thence to Brandy Branch Creek; via Outfalls 004, 005 and 006 to unnamed tributaries of Hatley Creek; thence to Hatley Creek; thence all to Sabine River above Toledo Bend Reservoir in Segment No. 0505 of the Sabine River Basin.

The unclassified receiving waters have high aquatic life use for the Brandy Branch Reservoir and Hatley Creek and no significant aquatic life use for Brandy Branch Creek and the unnamed tributaries of Hatley Creek. The designated uses for Segment No. 0505 are high aquatic life use, contact recreation, and public water supply.

Segment No. 0505 is currently listed on the State's inventory of impaired and threatened waters (the 2008 Clean Water Act 303(d) list). The listing is specifically for elevated levels of bacteria in a 22-mile reach near SH 149.

B. Procedural Background

TCEQ received this application on August 31, 2010. The Executive Director (ED) declared the application administratively complete on October 25, 2010. The Notice of Receipt of Application and Intent to Obtain a Water Quality Permit Amendment (NORI) was published on October 29, 2010 in *The Marshall News Messenger* in English and in Spanish on November 3, 2010 in *La Opinion*. The ED completed the technical review of the application on May 11, 2011 and prepared a draft permit. The Notice of Application and Preliminary Decision for Water Quality TPDES Permit Amendment and Renewal (NAPD) was published on July 13, 2011 in *The Marshall News Messenger* and in Spanish on the same day in *La Opinion*. The public comment period ended on August 12, 2011. On October 5, 2011, the ED filed his decision and Response to Public Comment, which the Office of Chief Clerk mailed on October 7, 2011. The deadline to request a contested case hearing was November 7, 2011.

TCEQ received timely comments and a joint request for a contested case hearing from the Sierra Club and Public Citizen on November 4, 2011. After reviewing the file and other available information, OPIC recommends granting the hearing request.

II. Applicable Law

The ED declared this application administratively complete on October 25, 2010. 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. 30 TAC § 55.203(a). 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).

III. Discussion

A. Determination of Affected Person Status

As a preliminary issue, the Commission must determine whether the requesting associations (Requestors) have standing under the Texas Administrative Code to be granted a hearing. The Sierra Club is a prominent environmental organization with approximately 24,000 members in Texas. The stated purpose of the organization is to "protect water quality, the health of its members, and the affected environment."¹ Public Citizen is a nonprofit membership organization that has "long advocated on behalf of citizens on environmental and energy issues."² The request goes on to state that, due to the likelihood of extended drought, the organization is focused on protecting water supplies from "the harms posed by existing energy sources."³ The states purpose of these organizations is germane to the interests they seek to protect, and OPIC finds the request has therefore substantially complied with 30 TAC §55.205(a)(2).

¹ "Request for a Contested Case Hearing on the Application of Henry W. Pirkey Power Plant for a Renewed Texas Pollution Discharge Elimination System Permit," at 2.

² *Id.*

³ *Id.*

30 TAC §55.205(a)(1) additionally requires a group or association requesting a hearing to name one or more members of the group or association who would otherwise have standing to request a hearing in their own right. Sierra Club identifies Richard LeTourneau as one such member. Mr. LeTourneau is a member of Sierra Club and a resident of Hallsville, Texas, approximately six miles northwest of the Pirkey Plant. Mr. LeTourneau kayaks and fishes in a segment of the Sabine River approximately four miles downstream of the Brandy Branch Reservoir that receives inflow from Brandy Branch Creek and Hatley Creek—“two discharge sinks for materials from the Pirkey Plant.”⁴ Mr. LeTourneau concerned waste from the Pirkey may render contact recreation in this segment of the river unsafe, as well as consumption of the catfish he catches. OPIC finds therefore finds that the request substantially complies with 30 TAC §55.205(a)(1).

The Requestors included relevant contact information and raised disputed issues outlining why they would be adversely affected by the proposed activity in a manner not common to members of the general public. These issues include protectiveness of permit limits, adequacy of the Pirkey Plant’s pond system, adequacy of monitoring requirements, protection of aquatic life, adequacy of the conducted anti-degradation analysis, protection of attainable and designated uses, and protection of surface and groundwater. These concerns are protected by the law under which the application will be considered.⁵ Further, a reasonable relationship exists between the interests stated and the activity regulated given the proximity and frequency of Mr. LeTourneau’s recreational activities.⁶

⁴ *Id.*

⁵ 30 TAC § 55.203(c)(1).

⁶ 30 TAC § 55.203(c)(3).

B. Issues Raised in the Hearing Request

The following issues have been raised in the hearing requests:

- (1) Do the proposed changes to the Landfill Pond constitute a new source subject to new source performance standards?
- (2) Does the Lone Star Publically Owned Treatment Works have adequate capacity to properly treat the solids produced at the Pirkey Plant?
- (3) Will the proposed flue gas desulphurization wastewater discharges at Outfall 004 comply with all applicable legal requirements and appropriately limit toxic substances, including selenium and barium?
- (4) Will the proposed pond system adequately protect against overflow during storm events?
- (5) Are the proposed monitoring requirements sufficient to ensure enforcement of all effluent limitations?
- (6) Will the proposed cooling water intake structures comply with all applicable legal requirements to minimize adverse environmental impacts, including harmful impacts on aquatic life?
- (7) Will the proposed permit protect attainable and designated uses?
- (8) Does the proposed permit comport with a complete, adequate, and appropriate anti-degradation analysis conducted in compliance with applicable statutory requirements?
- (9) Does the proposed permit adequately protect ground and surface water?

C. Issues Raised in the Comment Period

All of the issues raised in the hearing request were raised in the comment period and have not been withdrawn. 30 TAC §§ 55.201(c) and (d)(4), 55.211(c)(2)(A).

D. Disputed Issues

There is no agreement between the hearing requesters and the ED on the issues raised in the hearing requests.

E. 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. 30 TAC § 55.211(c)(2)(A). The issue of whether the New Source Performance Standards should apply to the modifications that will take place to the Landfill Pond is not an issue of fact. As stated in the Executive Director's Response to Comments, increasing the capacity of the retention pond would not trigger new source requirements because the standard of performance for the steam electric power generating point source category was adopted in 1982 and the facility commenced construction in 1979. The foundations for the ponds were built in 1979 before the rules for steam electric power generating point source category were promulgated. Further, construction at a site where an existing source is located "results in a modification subject to §122.62 rather than a new source...if the construction does not create a new building, structure, facility or installation...but otherwise alters, replaces, or adds to existing process or production equipment." 40 CFR §122.29(b)(3). Because it constitutes a question of law, this issue is not appropriate for referral to SOAH.

F. Relevant and Material Issues

The hearing requests raise issues relevant and material to the Commission's decision under the requirements of 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. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–51 (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”). Relevant and material issues are those governed by the substantive law under which this permit is to be issued. 477 U.S. at 248–51.

TCEQ is responsible for the protection of water quality under Chapter 26 of the TWC and 30 TAC Chapters 305, 307 and 309. The Texas Surface Water Quality Standards (TSWQS) 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. Further, the TSWQS state that surface waters will not be toxic to man from ingestion of water, consumption of aquatic organisms, or contact with skin, or to terrestrial or aquatic life. 30 TAC § 307.4(d). Therefore, the issues raised concerning protection of surface and groundwater, protection of aquatic life, toxicity of wastewater discharges, protectiveness of the pond system, monitoring requirements, antidegradation, and attainable and designated uses are material and relevant and should be referred to SOAH for a contested case hearing.

Conversely, the issue of whether the Lone Star Publically Owned Treatment Works have adequate capacity to properly treat the solids produced at the Pirkey Plant is an operational, logistics issue not relevant to whether the proposed permit will be protective of human health and the environment. This issue is therefore not relevant to a contested case hearing on the proposed permit amendment and should not be referred to SOAH.

G. Issues Recommended for Referral

OPIC recommends that the following disputed issues of fact be referred to SOAH for a contested case hearing:

- (1) Does the proposed permit adequately protect ground and surface water?
- (2) Will the proposed flue gas desulphurization wastewater discharges at Outfall 004 comply with all applicable legal requirements and appropriately limit toxic substances, including selenium and barium?
- (3) Does the proposed permit comport with a complete, adequate, and appropriate anti-degradation analysis conducted in compliance with applicable statutory requirements?
- (4) Will the proposed cooling water intake structures comply with all applicable legal requirements to minimize adverse environmental impacts, including harmful impacts on aquatic life?
- (5) Are the proposed monitoring requirements sufficient to ensure enforcement of all effluent limitations?
- (6) Will the proposed permit protect attainable and designated uses?
- (7) Will the proposed pond system adequately protect against overflow during storm events?

H. Maximum Expected Duration of Hearing

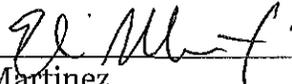
Commission Rule 30 TAC § 50.115(d) requires that any Commission order referring a case to SOAH specify the maximum expected duration of the hearing by stating a date by which the judge is expected to issue a proposal for decision. The rule further provides that no hearing shall be longer than one year 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 TAC § 55.209(d)(7), OPIC estimates that the maximum expected duration of a hearing on this application would be twelve months from the first date of the preliminary hearing until the proposal for decision is issued.

IV. Conclusion

OPIC recommends granting the joint hearing request from Sierra Club and Public Citizen on the issues referenced in Section III.G above. OPIC further recommends a hearing duration of twelve months.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2012 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.


Eli Martinez

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TCEQ DOCKET NO. 2011-2199-IWD

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