

TCEQ DOCKET NO. 2011-2199-IWD

IN THE MATTER OF THE	§	BEFORE THE
APPLICATION OF SOUTHWESTERN	§	TEXAS COMMISSION ON
ELECTRIC POWER COMPANY FOR	§	ENVIRONMENTAL QUALITY
WATER QUALITY PERMIT NO.	§	
WQ0002496000	§	
	§	

**SIERRA CLUB AND PUBLIC CITIZEN REPLY IN SUPPORT OF REQUEST FOR
CONTESTED CASE HEARING**

To the Honorable Members of the Texas Commission on Environmental Quality: The Sierra Club and Public Citizen file this reply in support of their request for a contested case hearing in this matter.

I. The Sierra Club Is An “Affected Person” With Standing to Seek a Contested Case Hearing

None of the parties contest the Sierra Club’s ability to seek a hearing as an organization in this matter. *See* 30 Tex. Admin. Code §55.205(a). SWEPCO and the Executive Director only dispute whether Sierra Club has members who would have standing to request a hearing in their own right, as required by 30 Tex. Admin. Code §55.203(c)(1). *See* Response Brief of the Executive Director (“ED Br.”) at 11, Response Brief of SWEPCO (“SWEPCO Br.”) at 7-10. Sierra Club relies on the standing of two of its members, Richard LeTourneau and Clint Rosborough, and submits affidavits for both with this reply brief. *See* Exhibit A (Affidavit of Richard LeTourneau) and Exhibit B (Affidavit of Clint Rosborough). Sierra Club also submits the affidavit of Bruce Wiland, a professional engineer specializing in water quality evaluations, which evaluates the draft permit and its potential effect on the receiving waterways and on these two individuals. *See* Exhibit C (Affidavit of Bruce Wiland). Both Mr. LeTourneau and Mr. Rosborough are properly considered “affected persons,” and thus the Sierra Club qualifies as an “affected person.”

A. *Mr. Richard LeTourneau Is An Affected Person*

A consideration of the factors stated in 30 Tex. Admin. Code § 55.203(c) confirms that Mr. Richard LeTourneau would have standing to request a hearing in his own right. First, Mr. LeTourneau regularly fishes and kayaks in the Sabine River, which receives discharge from the Pirkey Plant. Ex. A ¶3. Among other impacts, the degradation of the Sabine River as a result of pollution from the permitted discharges could reduce the quantity and aesthetic attractiveness of fauna and flora in and near the river in the areas that he uses. This, in turn, would negatively impact his ability to utilize the river for recreational purposes and his enjoyment in doing so. These recreational, environmental, and aesthetic interests in the Sabine River are the kinds of interests recognized under state law implementing the Texas Pollution Discharge Elimination System (“TPDES”) program.¹ Second, there is a reasonable relationship between Mr. LeTourneau’s use of the Sabine River and the TPDES permit being challenged, as the TPDES permit has the stated purpose of protecting water quality and aquatic life in the Sabine River. The numerous defects in the permit, outlined in both the hearing request and the Wiland Affidavit, show that renewal of this TPDES permit will likely affect Mr. LeTourneau’s health and safety and his use of the Sabine River.

(1) Recreational and Aesthetic Interests are Protected by the TPDES Program

The Executive Director and SWEPCO both contend that because Mr. LeTourneau does not own property, his interest is not distinct from the general public. SWEPCO Br. at 7-8; ED Br. at 13. This assertion ignores the importance of the statutory context within which this permit is being considered. Because environmental, recreational, and aesthetic interests are protected by the Texas Water Code and the Clean Water Act, Mr. LeTourneau’s recreational use of the affected portion of the Sabine River is sufficient to set his interest apart from that of the general public.

¹ The Executive Director asserts that recreational interests were not raised during the comment period and are therefore waived, ED Br. at 12 n.1. In fact, Public Citizen’s comments on the draft permit did raise recreational interests, by contending that the draft permit did not include adequate protections for the attainable and designated uses of the receiving waters, and that TCEQ had not performed an adequate anti-degradation analysis of fishable/swimmable waters. Public Citizen comments at p.3. The “fishable/swimmable” standard refers to waters that include fishing and contact recreation as designated uses, *see* 30 Tex. Admin. Code §307.5(b)(2), and the thrust of Public Citizen’s comment was that the anti-degradation analysis should include an evaluation to ensure that these uses are protected and maintained. Thus, recreation and fishing issues were raised during the comment period. In addition, the basis for standing is not an “issue” which must be raised during the comment period—that restriction applies to which merits issues can ultimately be referred for a contested case hearing. 30 Tex. Admin. Code §55.201(d)(4).

(i) *Save Our Springs Alliance* Recognized that Harm to Environmental Interests May Be Sufficient To Establish Standing In Cases Involving Statutory Environmental Protections

In *Save Our Springs Alliance, Inc. v. City of Dripping Springs*, 304 S.W.3d 871 (Tex. App. – Austin 2010, *pet. denied*), the court made a critical distinction regarding the property ownership requirement that SWEPCO and the Executive Director rely upon. In that case, the Save Our Springs Alliance (“SOS Alliance”) brought a claim under the Texas Uniform Declaratory Judgment Act challenging the city’s constitutional authority to enter into agreements with landowners to develop property, and the propriety of the procedures used by the city in approving those agreements. SOS Alliance alleged that these developments would harm its members’ environmental, scientific, and recreational interests in Barton Springs. *Id.* at 879. The court concluded that although the environmental harm alleged by SOS Alliance members was a cognizable injury, the showing of a property interest was also required in a UDJA context for their environmental harm to be sufficiently distinct from the injury sustained by the general public. *Id.* at 880-82.

SOS Alliance directed the court to federal cases in which environmental and recreational harms were sufficient to establish standing, but the court distinguished those cases because they “involve[d] the application of federal environmental-protection statutes that prohibited the types of conduct alleged by the plaintiffs in those cases to have occurred.” *Id.* at 880. Significantly, many of the cases relied upon by SOS Alliance and distinguished by the court involved rights and obligations under the federal Clean Water Act. *See id.* at 880 n.4. The court distinguished these Clean Water Act cases from the case brought by SOS Alliance based on the fact that the Clean Water Act provides for a private right of action and that in such cases “the plaintiffs possessed a legally protected interest for purposes of standing by virtue of a federal statute.” *Id.* at 881. In contrast, SOS Alliance’s claims relied on the state Uniform Declaratory Judgment Act for its cause of action, and the substantive law underlying the claims involved public notice and provisions of the Texas Constitution on local self-government and delegation of governmental functions. *Id.* at 882. SOS Alliance’s reliance on the environmental interests of its members who did not own affected property was held to be insufficient because SOS Alliance had “alleged neither an environmental interest provided for or protected by statute.” *Id.* at 882.²

² Importantly, the *SOS Alliance* court distinguished not only actions arising under federal environmental statutes, but also actions arising under Texas statutes. The court made a point to note that its ruling would be unlikely to affect the standing of persons in actions statutorily governed by Texas Water Code §5.351 and the Texas Open Meetings Act. *Id.* at 882 n.7. The standard for determining whether a hearing requester is an “affected person” is precisely the same as the standard for determining standing under Texas Water Code §5.351; both turn on the definition of “affected person” established at Texas Water Code §5.115.

This hearing request concerns a TPDES permit and therefore involves environmental interests protected by statute, specifically the federal Clean Water Act and the Texas Water Code. *See, e.g.*, Tex. Water Code §26.003 (“It is the policy of this state and the purpose of this subchapter to maintain the quality of water in the state consistent with the public health and *enjoyment*[.]”)(emphasis added); Tex. Water Code §5.012 (“The commission is the agency of the state given primary responsibility for implementing the constitution and laws of this state relating to the conservation of natural resources and the protection of the environment.”).

Because this case involves an “environmental interest provided for and protected by statute,” the recreational, aesthetic, and environmental harms alleged by Mr. LeTourneau constitute “particularized, legally protected interests.” *SOS Alliance*, 304 S.W.3d at 882. Property ownership is not necessary to distinguish his interests from those of the general public. If property ownership is not a necessary condition of standing to challenge a TPDES permit in Texas courts, then it cannot be required to participate in the administrative contested case hearing process. Indeed, as the court held in *Bosque River Coalition v. Texas Comm’n on Env’tl. Quality*, 347 S.W.3d 366, 375 (Tex. App. – Austin 2011, *pet. filed*), “the same basic principles governing whether a party has standing to challenge governmental action in court also govern whether a party is an “affected person” entitled to a contested-case hearing.”

Many of the cases cited by SWEPCO and the Executive Director for the proposition that individuals may never obtain a contested case hearing without a property interest involve claims not based on statutorily protected environmental interests. *E.g.*, *Stop the Ordinances Please v. City of New Braunfels* (“*STOP*”), 306 S.W.3d 919 (Tex.App. – Austin 2010) (challenges to city ordinances as preempted by state alcoholic beverage law); *Texas Rivers Prot. Ass’n v. Texas Natural Res. Conservation Comm’n*, 910 S.W.2d 147, 151-52 (Tex.App. – Austin 1995) (involving water rights and a contested diversion); *San Antonio Conservation Soc. v. City of San Antonio*, 250 S.W.2d 259, 261 (Tex.App. 1952) (challenge to ordinance permitting construction of bridge as having been adopted without following proper public notice procedures). Another case cited by the Executive Director, *Persons v. City of Fort Worth*, 790 S.W.2d 865, 868 (Tex.App. – Ft. Worth 1990), is distinguishable because it concerns the particular showing of “special injury” that must be made by a party seeking to enjoin the actions of a government entity. No injunction is sought here. Finally, many cases in which the court has found “affected person” status based on land ownership do not establish that landownership is a *necessary* condition, only that land ownership may serve as one basis for distinguishing the hearing requestor’s interest from that of the general public. *E.g.*, *Lake Medina Conservation Soc., Inc./Bexar-Medina Atascosa Counties WCID No. 1 v. Texas Natural Res. Conservation Comm’n*, 980 S.W.2d 511, 516 (Tex.App. – Austin 1998); *City of Waco v. Texas Comm’n on Env’tl. Quality*, 346 S.W.3d 781, 802-03 (Tex.App. – Austin 2011, *pet. filed*),

reh'g overruled, Aug. 2, 2011; *Bosque River Coalition*, 347 S.W.3d 366; *Hix v. Robinson*, 211 S.W.3d 423 (Tex.App. – Waco 2006).

(ii) Standing Based on Harm to Environmental Interests is Consistent with the Conditions of TCEQ's Delegation Permitting Authority

There is good reason for the *SOS Alliance* court to have recognized that the standing rules for Clean Water Act cases are different from the rules that might apply in Texas administrative proceedings that do not involve state or federal environmental statutes. TCEQ administers the TPDES program under delegated authority from the U.S. Environmental Protection Agency (U.S. EPA) and has committed to implementing the permitting program consistent with that federal statute.³ The Memorandum of Agreement between TCEQ and the U.S. EPA governing the delegation states:

The TNRCC shall operate the TPDES program in accordance with the Clean Water Act as amended, applicable federal regulations, applicable TNRCC legal authority, Title 30 Texas Administrative Code, and taking into consideration published EPA policy. The TNRCC has the primary responsibility to establish the TPDES program priorities, so long as they are consistent with Clean Water Act and NPDES goals and objectives.

2008 Memorandum of Agreement Between the Texas Natural Resources Conservation Commission and the U.S. Environmental Protection Agency, Region 6, Concerning the National Pollutant Discharge Elimination System, Exhibit D, at 2. TCEQ lists the Clean Water Act as one source of authority for the Texas Surface Water Quality Standards that it develops and enforces through TPDES permits.⁴

The EPA's Clean Water Act regulations require states that assume permitting authority, as Texas has, to allow for judicial review "sufficient to provide for, encourage, and assist public participation in the permitting process." More specifically, those regulations provide:

A State will meet this standard if State law allows an opportunity for judicial review that is the same as that available to obtain judicial review in federal court of a federally-issued NPDES permit (see § 509 of the Clean Water Act). A State will not meet this standard if it narrowly restricts the class of persons who may challenge the approval or denial of permits (for example, if only the permittee can obtain judicial review, if persons must demonstrate injury to a pecuniary interest in order to obtain judicial review, *or if persons must have a property interest in close proximity to a discharge or surface waters in order to obtain judicial review.*)

³ See 33 Tex. Reg. 1850 (Feb. 29, 2008) ("On September 14, 1998, TCEQ received delegation authority from the United States Environmental Protection Agency (EPA) to administer the National Pollutant Discharge Elimination System (NPDES) program under the TPDES program. As part of that delegation, TCEQ and EPA signed a Memorandum of Agreement (MOA) that authorizes the administration of the NPDES program by TCEQ as it applies to the State of Texas.")

⁴ See TCEQ, An Introduction to the Texas Surface Water Quality Standards, http://www.tceq.texas.gov/waterquality/standards/WQ_standards_intro.html (last visited Feb. 24, 2012).

40 C.F.R. § 123.30 (emphasis added). Thus, EPA’s regulations for delegated NPDES programs specifically prohibit the imposition of a property ownership requirement for access to the courts to challenge NPDES permitting decisions.

The key requirement of 40 C.F.R. §123.30 is that the availability of judicial review (and by extension, administrative remedies) under a delegated state program must be the “same as that available to obtain judicial review in federal court of a federally-issued NPDES permit.”⁵ Consistent with EPA’s requirement, the Texas Attorney General’s statement of legal authority regarding delegation of the NPDES program represents that Texas standing law is substantially the same as federal standing law in the relevant aspects. Specifically, the Attorney General stated that Texas’s requirement that “standing consists of some interest peculiar to the person individually and not as a member of the general public . . . is not unlike the limitation on standing employed in [federal law] that requires a concrete and particularized injury by the plaintiff asserting standing.” Statement of Legal Authority for the Texas National Pollutant Discharge Elimination System Program, Exhibit E, at 27-28 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)). Thus, the Section 55.203(a) requirement that a person’s interest be distinct from that of the general public can be satisfied by showing that injury to a recreational, environmental, or aesthetic interest is concrete and particularized, as required in *Lujan* and similar federal cases.

A recreational, environmental, or aesthetic interest can suffice to provide standing in federal court to enforce a water quality permit or challenge an agency decision under the Clean Water Act. In *Sierra Club, Lone Star Chapter v. Cedar Point Oil Company, Inc.*, 73 F.3d 546, 556 (5th Cir. 1996), the court held that Sierra Club members who recreated in Galveston Bay and expressed concerns that wastewater discharge would impair the quality of the bay had sufficiently alleged “injury in fact” to support standing to enforce the permit limits. The Supreme Court held in *Friends of the Earth Inc. v. Laidlaw Envtl. Svcs. (TOC), Inc.*, 528 U.S. 167, 180-83 (2000), that standing is established where plaintiffs are discouraged from recreating in a certain area due to reasonable concerns about pollution, or where their enjoyment of the resource is diminished by such concerns. See also *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 155 (4th Cir. 2000) (reasonable fear of health risks resulting from

⁵ In 1994, EPA refused to delegate Clean Air Act permitting authority to the state of Virginia because Virginia courts had denied standing to plaintiffs who would have met Article III’s standing requirements. EPA’s decision was upheld in *Commonwealth of Virginia v. Browner*, 80 F.3d 869 (4th Cir. 1996). EPA can withdraw its delegation of permitting authority to a state that imposes standing requirements more restrictive than those under federal law. See CWA § 402(c)(3), 33 U.S.C. § 1342(c)(3). “EPA may withdraw its approval of the program should the EPA determine at any point that the [delegated] program does not meet the standards mandated in the CWA.” *Akiak Native Cmty. v. U.S. E.P.A.*, 625 F.3d 1162, 1171 (9th Cir. 2010) (citing *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 650 (2007)).

recreational use of water sufficient even without evidence of actual harm to the waterway); *Am. Bottom Conservancy v. U.S. Army Corps of Engineers*, 650 F.3d 652, 658 (7th Cir. 2011) (diminution of enjoyment of birdwatching activity is enough to confer standing to challenge Army Corps of Engineers' issuance of wetland fill permit, even if plaintiffs do not stop birdwatching on the site); *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972) (holding that environmental plaintiffs adequately allege injury in fact by stating that they use the affected area and are persons "for whom the aesthetic and recreational values of the area will be lessened" by the challenged activity).

Mr. LeTourneau regularly kayaks and fishes on the Sabine River downstream of the Pirkey plant, and he eats fish that he catches. Ex. A ¶3. He has "long been concerned about the water quality in this section of the Sabine River" based on Pirkey's discharges, and "worr[ies] that Pirkey's wastewater makes the river unhealthy for contact while kayaking and fishing, and that the fish [he] eats are contaminated and unsafe to consume. This ongoing anxiety affects [his] aesthetic and recreational enjoyment of the river." Ex. A ¶4. Mr. LeTourneau's concerns are reasonable considering the well-publicized harms posed by coal combustion wastes and the history of selenium contamination caused by Pirkey. The diminishment of Mr. LeTourneau's enjoyment of these activities, which the Clean Water Act and TCEQ's regulations implementing the TPDES program are intended to protect,⁶ constitutes a harm to a legally protected interest and supports a conclusion that he is an affected person. The federal cases cited above illustrate that Mr. LeTourneau would have standing to challenge this permit in federal court based on his recreational use of the Sabine.

Mr. LeTourneau's *actual* recreational use of the Sabine River distinguishes his interest from that of the general public, notwithstanding the general public access to the river, contrary to the assertion of the Executive Director. ED Br. at 11. In addition to the federal authorities cited above, Texas case law recognizes that some individuals can have a stronger interest than others in exercising a commonly held right. In *United Copper Industries v. Grissom*, 17 S.W.3d 797, 803 (Tex. App. – Austin 2000, *pet. dismiss'd*), the court of appeals held that a petitioner had an interest affected by the emissions from a copper smelter that was distinct from that of the general public because the petitioner and his sons lived downwind of the plant and suffered from asthma that would be exacerbated by the emissions. The court stated that the petitioner and his sons were therefore "more likely than other members of the general public to be adversely affected by the facility." *Id.* The court did not dismiss the hearing request because

⁶ 30 Tex. Admin. Code §307.5(b)(2) (Commission policy is that "no activities subject to regulatory action which would cause significant degradation of waters exceeding fishable/swimmable quality will be allowed unless it can be shown to the Commission's satisfaction that the lowering of water quality is necessary for important economic or social development"); 33 U.S.C. §1251(a)(2) (stating congressional objective of achieving "water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water").

Grissom and his sons were simply exercising the commonly held right to breathe the ambient air, but rather looked at their particular exposure to the degraded air in determining whether their interests were distinct from those of the general public. Nor did the court concern itself with whether Grissom owned the property where he lived—it was the level of exposure and sensitivity that mattered.

Likewise, although Mr. LeTourneau shares with the general public the right to use the Sabine River for recreational purposes, his regular fishing and kayaking activity increases his interest in reducing the pollutants discharged by Pirkey that end up in that river and in its aquatic life. The Executive Director and SWEPCO's arguments that Mr. LeTourneau's recreational use of the Sabine is irrelevant because it is a right held by all members of the public cannot be reconciled with *Grissom*. Likewise, federal standing law, which should be considered in TPDES cases, recognizes that recreational interests in public areas can give rise to an injury in fact so long as the individual has concrete plans to engage in that activity in the reasonable future.

Finally, as the Austin Court of Appeals has noted, the underlying reason for the distinct interest requirement is to ensure that “the particular plaintiff has a sufficient personal stake in the controversy to assure the presence of an actual controversy.” *STOP*, 306 S.W.3d at 925-26. The presence of concrete plans to engage in a certain activity that renders an individual especially affected by the degradation of a resource serves the purpose of ensuring a real controversy fit for an adversarial proceeding.

In sum, the distinction made in the *SOS Alliance* opinion between cases involving substantive rights created by laws such as the Clean Water Act and the Texas Water Code, and cases not involving such rights, properly reflects the nature of TCEQ's authority under the TPDES program. In the former category of cases, the Commission should not consider property ownership as a factor when determining whether parties seeking a hearing on a TPDES permit are “affected persons.” Richard LeTourneau's “personal justiciable interest” should be assessed based on his regular contact use of the Sabine River, a resource undoubtedly affected by the wastewater discharges under Pirkey's TPDES permit.

(2) Mr. LeTourneau's Interests are Reasonably Related to the Pirkey TPDES Permit and Likely to Be Affected by the Discharges Allowed by that Permit

All of the outfalls at Pirkey, whether they discharge to Brandy Branch Reservoir or to tributaries of Hatley Creek, ultimately lead to the Sabine River. Pirkey TPDES Permit at 1. There is a reasonable relationship between Mr. LeTourneau's recreational and aesthetic interests in the Sabine River and the activities authorized, as required by 30 Tex. Admin. Code §55.203(c)(3). The designated uses of the Sabine River include contact recreation, *see* Fact Sheet at 8, and the permit limits are required to protect

that designated use. *See generally* 30 Tex. Admin. Code §307.5. As described in the hearing request and Mr. Wiland’s affidavit, there are several problems with the permit that may render it insufficiently protective of water resources including the Sabine River.

The “potential harm” or likely impact showing required at this stage of the proceeding is minimal—“it is the existence of *some* impact from a permitted activity, and not necessarily the *extent* or *amount* of impact, that is relevant to standing.” *City of Waco*, 346 S.W.3d at 823 (emphasis in original). For example, in *Grissom*, the court held that a contested case hearing should have been granted based on a showing that the petitioner lived two miles downwind of a facility and had health conditions that increased their sensitivity to the pollution—the court did not require the petitioner to submit any further evidence considering that the facility had not conclusively shown the absence of impact. *Grissom*, 17 S.W.3d at 804.

In addition, the relevant inquiry is the impact of the entire permitted activity, not just the marginal impact of the proposed changes to the permit. Therefore, SWEPCO’s assertion that that there will be “no change in the volume or makeup of the discharge from Pirkey,” SWEPCO Br. at 9, misses the point because affected person status turns on the impact of all permitted discharges, regardless of whether they are altered under the amended permit. As the court stated in *Waco*, 346 S.W.3d at 822, “[w]hat matters is that discharge, run-off, or loading is an acknowledged certainty under the amended permit, and if this injures the City’s legally protected interest, the City would possess a personal justiciable interest in the enforcement of the current laws regardless of how the harm compares to that occurring under the previous permit.”

SWEPCO contends that Pirkey discharges to the Sabine River only after significant storm events. SWEPCO Br. at 9. The potential impact of the facility must be judged by the activities authorized by the draft permit. That permit authorizes discharges on a daily basis from at least three of its outfalls, *see* Fact Sheet at 4, with one of these discharges in the amount of 600 million gallons per day, *see* Draft Permit at 2. SWEPCO’s statement that Pirkey discharges only “once or twice a year following a significant storm event” is therefore incorrect. Second, SWEPCO’s assumption that Mr. LeTourneau will not fish or kayak during or immediately after significant storm events is unsupported. SWEPCO asks the Commission to simply presume that its factual claims are true and that Sierra Club’s claims are false, an approach that entirely conflicts with the *Waco* decision. In that case, the court held that when making an affected person determination, the Commission must make every reasonable inference in favor of the hearing requestor, and resolve all doubts resolved in the requestor’s favor. *Waco*, 346 S.W.3d at 824. It would therefore be inappropriate for the Commission to assume without basis facts that would reduce Mr.

LeTourneau's exposure. *See also Fort Bend County v. Tex. Parks & Wildlife Comm'n*, 818 S.W.2d 898, 899 (Tex.App. – Austin 1991, *no writ*) (the affected person inquiry is intended to be applied liberally).

Finally, SWEPCO's arguments that stormwater dilution eliminates any risk to Mr. LeTourneau fails because many of the pollutants that Pirkey discharges are persistent and bioaccumulative, and therefore can collect in the ecosystem over time regardless of dilution.⁷ This bioaccumulation is another reason why the exact timing of Mr. LeTourneau's activity does not determine his risk. Moreover, SWEPCO's presumption that dilution will entirely negate any potential impact from its permitted activities, including a 600 million gallon daily discharge, is much the same as the Executive Director's presumption in the *Waco* case that dilution over a distance of over 80 miles would entirely negate any impact from the discharge. *Waco*, 346 S.W.3d at 825-27. The Austin Court of Appeals rejected such a presumption in *Waco*, and SWEPCO's presumption is no more defensible. Brandy Branch Reservoir, Brandy Branch Creek, Hatley Creek, and the Sabine River are therefore all natural resources that may potentially be impacted due to the lack of safeguards in this permit.

SWEPCO faults Sierra Club for failing to offer "evidence . . . that the issuance of the permit may impact the quality of water" or otherwise "adversely impact Mr. LeTourneau or other members." SWEPCO Br. at 8. The evidence that SWEPCO refers to—"that the issuance of the permit may impact the quality of water"—significantly overlaps with Sierra Club's and Public Citizen's challenges to the permit itself. Those kinds of factual disputes must be resolved by the State Office of Administrative Hearings, not by the Commission. In *Bosque River Coalition*, 347 S.W.3d at 378, the court stated that "if there are disputed questions of fact that are relevant both to affected person status and to the merits of the permit application, the Commission has no discretion to resolve those fact issues at this stage of the proceeding and must refer the hearing request to SOAH for a contested-case hearing to address those issues." In that case, the court found that questions of "whether the proposed permit complies with regulatory requirements (disputed facts implicating the merits)" were "directly related to whether issuing the permit" would cause an injury to members of the group seeking the hearing who were located downstream of the discharge point—which were "disputed facts regarding affected-person status." *Id.* at 378. Where it was alleged that a "proposed permit that is not in compliance with requirements designed to eliminate or reduce the regulated activity's environmental impact on a waterway is more likely to cause some type of injury to those downstream" the hearing request raised questions of fact relevant to both the

⁷ *See* U.S. EPA, National Pollutant Discharge Elimination System (NPDES) Permitting of Wastewater Discharges from Flue Gas Desulfurization (FGD) and Coal Combustion Residuals (CCR) Impoundments at Steam Electric Power Plants (June 2010), Attachment A: Technology-based Effluent Limits Flue Gas Desulfurization (FGD) Wastewater at Steam Electric Facilities, at 2. Available at <http://www.epa.gov/npdes/pubs/steamelectricbpjguidance.pdf>.

“affected person” inquiry and to the merits of the permit application. Thus, “the Commission was required to refer the issue to SOAH unless the agency record conclusively negated” that the discharges could cause injury. *Id.* at 379.

In the *Waco* case, the Austin Court of Appeals adopted the standard applied to the consideration of a plea to the jurisdiction in Texas courts as the standard applicable to the Commission’s consideration of a hearing request. *Waco*, 346 S.W.3d at 824, *adopting Texas Department of Parks and Wildlife v. Maria Miranda and Ray Miranda*, 133 S.W.3d 217 (Tex. 2004). *Miranda*, in turn, had simply adopted the standard applicable to the consideration of a motion for summary judgment in Texas courts. *Miranda*, 133 S.W.3d at 228. Under this standard, the following principles must be applied to the Commission’s consideration of a hearing requester’s “affected person” status:

1. The party opposing a requester’s standing has the burden of showing that there is no genuine issue of material fact related to whether a requester is an affected person.
2. Evidence favorable to the hearing requester will be taken as true.
3. Every reasonable inference must be indulged in favor of the hearing requester and any doubts resolved in its favor.

See Gaile Nixon, et al. v. Mr. Property Management Company, Inc., 690 S.W.2d 546, 548 (Tex. 1985).

SWEPCO’s insistence that Sierra Club members are not affected by the permitted activity relies on factual assumptions that go to the merits of this case. Under the standard established in the *Waco* case, the Commission is not allowed to resolve these contested factual issues against the Sierra Club or Public Citizen at this stage. *See also Grissom*, 17 S.W.3d at 803 (The Commission should not “confuse[] the preliminary question of whether an individual has standing as an affected person to *request* a contested-case hearing with the ultimate question of whether that person will *prevail* in a contested-case hearing on the merits.”).

Notwithstanding the absence of an evidentiary burden at this stage of the proceeding, Sierra Club submits the affidavit of Bruce Wiland regarding the impacts on Mr. LeTourneau and Mr. Rosborough, as a good faith demonstration of the existence of such impacts. Mr. Wiland notes numerous defects in the permit, including the treatment of external outfalls as internal and the resulting absence of water-quality based effluent limits and biomonitoring requirements on these outfalls. Wiland Aff., Ex. C ¶8. He also notes the absence of any information about discharges, overflow, or groundwater seepage from the surge ponds, which appear to receive wastewater containing toxic pollutants from various sources at the plant, but about which the permit contains virtually no information. *Id.* ¶9. Mr. Wiland states that there may be a risk of overflow or untreated discharge from other ponds on site, based on the lack of documentation

that the ponds are adequately sized to accommodate all of the stormwater and process water at the site. *Id.* ¶10. Finally, he notes that the permit purports to exempt the facility from all effluent limits at Outfall 003 in certain storm events, including the selenium limit. *Id.* ¶11. Overall, Mr. Wiland’s conclusion is that these defects in the permit present a risk of impact to downstream users of Brandy Branch Reservoir, Hatley Creek, and the Sabine River, such as Mr. LeTourneau and Clint Rosborough.

SWEPCO is also incorrect in asserting that evidence must be presenting in the hearing request itself to be considered, rather than in a reply brief. As an initial matter, neither statute nor rule requires the submission of evidence to support a hearing request prior to the preliminary hearing at SOAH. Furthermore, neither the statutes nor TCEQ rules limits the Commission to consideration of information or “evidence” presented in the hearing request.⁸ As recently as February 22, 2012, TCEQ has rejected SWEPCO’s position. In the matter of the application by Upper Trinity Regional Water District for Water Rights Permit No. 5821, the requests of the National Wildlife Federation and Texas Conservation Alliance were both granted based on members first identified in the hearing request replies filed by those organizations.

The Austin Court of Appeals has held that “nothing in the rules explicitly limits the Commission’s inquiry solely to the factual allegations in the hearing request or otherwise prohibits presentation or consideration of evidence.” *Waco*, 346 S.W.3d at 812. The *Waco* decision followed precedent established in *Grissom*, 17 S.W.3d at 804, where the Austin Court of Appeals held that an individual who had requested a contested case hearing should have been granted an opportunity to present evidence at a preliminary hearing in support of his request—his request should not have been denied based on a lack of evidence in the request itself. If the presentation of evidence at a preliminary hearing is permitted, then the presentation of evidence in a reply brief should present no problem.

In short, the proper venue for determining questions of fact is the contested case hearing—not the process by which the Commission makes referrals for such hearings. This is particularly true for factual issues that overlap with the merits of the case, such as how and whether Pirkey’s discharges under this permit would affect water quality. Sierra Club and Public Citizen therefore request that any issues of fact relevant to the affected person determination be considered by the SOAH.

⁸ “[T]he parties involved should be provided fair notice and a meaningful opportunity to present their evidence. “ *Grissom*, 17 S.W.3d at 805. Such notice does not exist where the regulations and TCEQ’s own rules expressly do not clearly state that evidence must be presented in the hearing request, or the opportunity is otherwise forfeited.

B. Mr. Clint Rosborough is an affected person

Sierra Club member Clint Rosborough owns 169 acres bordered by Hatley Creek, near where that creek runs into the Sabine River. Rosborough Aff. ¶2. Mr. Rosborough estimates that his property is approximately four miles downstream of the Pirkey plant. *Id.* Mr. Rosborough frequently hunts and camps on this property, which experiences regular flooding from Hatley Creek. *Id.* ¶¶4-5. Mr. Rosborough is concerned about the effects of Pirkey's discharge on the quality of the water in the creek and on his property. *Id.* ¶6. Mr. Rosborough and his wife are also members of a bass fishing club that uses Brandy Branch Reservoir. *Id.* ¶7. Mr. Rosborough will not eat the fish that he catches there due to concerns about pollution from Pirkey. *Id.*

Pirkey has three outfalls that discharge to a tributary of Hatley Creek. One of these, Outfall 004, discharges wastewater held in the Landfill Pond, which is runoff from the area holding various coal combustion wastes such as dewatered scrubber sludge and fly ash, which the U.S. EPA has stated typically contain a variety of toxic and bioaccumulative heavy metals. *See supra* n.8. The Landfill Pond also sometimes receives water that has run off the plant's lignite storage pile. This kind of coal pile runoff is usually highly acidic and contains copper, iron, aluminum, nickel, and selenium. As noted in the hearing request, the treatment method currently used for this pond does not reflect the best available technology for removing dissolved metals. In addition, the reduction in the freeboard requirement on this pond allowed by this amended permit would increase the risk of premature discharge in heavy storm events. The contamination of Mr. Rosborough's property by pollutants discharged from the Pirkey facility could adversely impact the quantity of flora and fauna on his property, which would negatively impact his ability to use the property for the purposes of hunting and camping. *See Wiland Aff., Ex. C, ¶¶8-12.*

Sierra Club did not identify Mr. Rosborough at the time that it filed this hearing request because the short period of time in which Sierra Club and Public Citizen had to prepare that hearing request did not allow for full outreach to the community and their respective memberships. SWEPCO contends that Sierra Club and Public Citizen should not be permitted to identify additional members in the reply brief in order to satisfy the first prong of 30 Tex. Admin. Code §55.205(a). SWEPCO cites no authority for this position, and as noted earlier, TCEQ has an established practice of considering members identified in a reply filed by a hearing requester.

This approach is not only consistent with the law governing TCEQ's decision; there are strong policy reasons why organizations requesting contested case hearings should be permitted to identify additional members in a reply. First, there is often significant delay between the time the hearing request is filed and the Commission's decision on that request. Yet the Commission's decision is to be based on

the facts as they exist at the time the decision is made, just as a court ruling on a plea to the jurisdiction based on standing would consider evidence not contained in the plaintiff's pleadings. *See Waco*, 346 S.W.3d at 812 (noting that “trial courts, when determining jurisdictional issues, including standing, are not bound by pleading allegations but may—and, indeed, must—consider evidence to the extent necessary to decide the issue”). Therefore, the party requesting the hearing should be allowed to submit evidence about any previously unidentified members to demonstrate that the party's “affected person” status is current. The parties opposing the request have the opportunity to develop evidence or even influence the participation of the specific members in question during the delay between submission of the hearing request and its consideration, so permitting the requestor to identify new members in the reply simply puts the parties on equal footing. Finally, an organization may wish to maintain the confidentiality of certain members to prevent their harassment during settlement negotiations, and this interest would be thwarted if the organization were prevented from identifying additional members in its reply. And because the parties opposing the hearing request will have an opportunity to address the interests of any newly identified members at the preliminary hearing, it is not unfair for the requestor to identify these members for the first time in the reply brief.

II. Public Citizen is an “Affected Person” With Standing to Seek a Contested Case Hearing

Mr. Richard LeTourneau is also a member of Public Citizen. For the reasons described above, he would have standing to request a hearing in his own right. As such, Public Citizen should be considered an affected person. As described in the hearing request previously filed, the purposes of Public Citizen include the protection of its members from the environmental harms caused by coal-fired power plants, including impacts on water quantity and quality. As Public Citizen has one or more members who would otherwise have standing to request a hearing in their own right, the interests Public Citizen seeks to protect by seeking a hearing are germane to the organization's purpose, and participation in the hearing does not require the participation of any particular member, Public Citizen should be found to be an affected person.

III. Issues for Referral

The Sierra Club and Public Citizen generally agree with the issues that the Office of Public Interest Counsel (OPIC) has recommended for referral, except that we believe the issue of whether the reconstructed ponds are subject to new source performance standards should also be referred. Several of these issues are addressed in more detail below.

A. *Landfill Pond Reconstruction*

The permit application states that the Landfill Pond will be reconstructed by increasing the lateral extent and height of the berms and by re-excavating and lowering the bottom of the pond. Technical Report App'x F. Whether this degree of reconstruction amounts to the “total[] replace[ment] [of] the process or production equipment that causes the discharge of pollutants at an existing source,” 40 C.F.R. §122.29, and thereby makes the reconstructed pond subject to new source performance standards for pond liners, involves issues of fact that are appropriate for referral. The Executive Director notes that the foundation for the retention pond (presumably the Landfill Pond) was built in 1979, before EPA adopted standards for such ponds (ED Br. at 19), but from the description in the application, it appears that it is this very foundation being replaced. The application also indicates that “the facility will submit plans and specifications to TCEQ for the proposed enlarged pond for purposes of review and approval.” Technical Report App'x F. These plans will be essential to TCEQ's evaluation of whether the reconstructed pond is in fact a new source. This issue should be referred either independently, or as a part of the first issue listed by OPIC—whether the permit adequately protects groundwater and surface water resources.

B. *Cooling Water Intake Structures*

As SWEPCO concedes (SWEPCO Br. at 14), whether the pump station on Lake O' the Pines is a cooling water intake structure is partly a question of fact. SWEPCO contends that this pump station is independently operated, but there is evidence that SWEPCO itself operates this pump under a contract with the Northeast Texas Municipal Water District, which also states that the water is provided expressly for cooling water purposes.⁹ Furthermore, the extent to which this pump station is independently operated by either SWEPCO or another entity is not necessarily determinative of whether it should be considered a cooling water intake structure associated with the Pirkey facility. A contested case hearing is the proper venue for consideration of evidence bearing on the “independent operation” of the pump and associated intake structures, the ultimate use of the transported water, and whether this intake structure meets the applicable requirements of Clean Water Act §316(b).

⁹ A 1977 contract between SWEPCO and the Northeast Texas Municipal Water District (“NETMWD”) states that the water sold under the contract is for the operation of the power plant and that Pirkey will buy all its water for that purpose from the water district. *See* Exhibit F, Attachment 1 ¶1.2. The contract also grants SWEPCO the “right and privilege, at its sole cost and expense, of taking water,” and that the water will be pumped at “such rates of flow as in the sole option of SWEPCO may be best suited for SWEPCO's purposes and operations.” *Id.* ¶1.4. An invoice submitted by SWEPCO to NETMWD from January 2007 shows that SWEPCO reports to NETMWD the number of hours that the pumps ran and at what rate. *See* Exhibit F, Attachment 2. Sierra Club obtained these documents via email from the Northeast Texas Municipal Water District. Exhibit F.

This hearing request does not insist that TCEQ must adhere to EPA's draft rules for cooling water intake structures. Instead, Sierra Club and Public Citizen contend that this proposed rule on cooling water intake structures illustrates what EPA considers to be the best available technologies for minimizing the adverse environmental impacts of the cooling water intake structures, based on its extensive review of the existing technologies around the country. Whether the Executive Director's decision reflects use of the appropriate cooling water intake structure technologies is a factual issue appropriate for referral.

C. Technology-Based Effluent Limits for Flue Gas Desulphurization Wastewater and Other Coal Combustion Wastes

Sierra Club and Public Citizen seek a contested case hearing on the issue of what effluent limits should be imposed on outfalls discharging coal combustion wastes. The Clean Water Act requires technology-based effluent limits (TBELs) to be established for each waste stream. 33 U.S.C. §1311(b)(1)(A); 40 C.F.R. §125.3(a); *see also* 30 Tex. Admin. Code §308.1 (incorporating the entirety of 40 C.F.R. §125 by reference). The fact that EPA has not yet finalized TBELs for flue gas desulphurization wastes does not mean that no TBELs are required—it simply means that the TBELs should be established based on best professional judgment about what constitutes the best available technology for treating toxic pollutants. 40 C.F.R. §125.3(c)-(d). Whether the draft permit reflects implementation of the appropriate technology to meet all applicable requirements is a factual question appropriate for referral. EPA recently issued a NPDES permit for the Merrimack Station coal-burning power plant in New Hampshire.¹⁰ Following a thorough analysis of the best available technologies for control of pollution from the plant's scrubber system, EPA established a maximum daily TBEL of 19 ug/L for selenium. *Id.* at 48. In contrast, the Pirkey TPDES permit has a daily effluent limit of 36µg/L at Outfall 004 (Pirkey Draft TPDES Permit at 2e), and the effluent characterization shows levels of 28 µg/L (Technical Report at 7-4). The Merrimack Station selenium limit is offered simply to demonstrate that a TBEL based on TCEQ's best professional judgment might well result in a dramatically lower effluent limit for selenium, among other pollutants of concern in this waste stream. This type of inquiry is ideal for referral to the SOAH.

IV. Duration of the Hearing

Sierra Club and Public Citizen request that the expected duration for the contested case hearing be no less than twelve months—which is also the amount of time recommended by the Office of Public Interest

¹⁰ *See* U.S. EPA, Merrimack Station Fact Sheet, Attachment E: Determination of Technology-Based Effluent Limits for the Flue Gas Desulfurization Wastewater at Merrimack Station in Bow, New Hampshire, available at <http://www.epa.gov/region1/npdes/merrimackstation/pdfs/MerrimackStationAttachE.pdf>. (last visited Feb. 22, 2012).

Counsel. We do not seek to unduly delay resolution of its challenge to this permit. However, this matter involves a complex facility that presents numerous issues, and twelve months is necessary in order to allow adequate time for the preliminary hearing, for the parties to conduct discovery, prepare testimony, and to provide the pre- and post-hearing written arguments that will assist the administrative law judge (ALJ) in its decision, as well as to allot a reasonable amount of time for the ALJ to draft that decision.

V. Conclusion

Sierra Club and Public Citizen respectfully request that the Commission recognize their status as affected persons based on the likely impacts of the Pirkey's amended TPDES permit on their members' recreational and property interests, and refer this matter to the State Office of Administrative Hearings for a contested case hearing on the issues raised in the hearing request. Sierra Club and Public Citizen request that any factual questions concerning their affected person status be referred as well, for resolution by the SOAH.

Respectfully submitted,



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Counsel for the Sierra Club



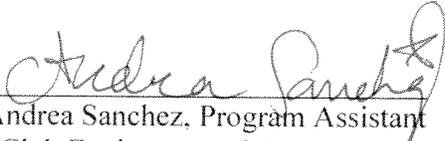
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Counsel for Public Citizen

CERTIFICATE OF SERVICE

I, Andrea Sanchez, certify that on February 27, 2012, the original and seven copies of the Sierra Club and Public Citizen Reply in Support of Request for Contested Case Hearing on the application for major amendment with renewal by Southwestern Electric Power Company, were filed electronically with the TCEQ's Office of the Chief Clerk and a complete copy was forwarded to all persons listed on the attached mailing list via U.S. Mail.


Andrea Sanchez, Program Assistant
Sierra Club Environmental Law Program
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San Francisco, CA 94105
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Fax (415) 977-5793

MAILING LIST
SOUTHWESTERN ELECTRIC POWER COMPANY DOCKET
NO. 2011-2199-IWD; PERMIT NO. WQ0002496000

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INTERESTED PERSON(S):

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Coastal Fisheries Division
Texas Parks & Wildlife Department
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Austin, Texas 78744-3218
Cindy.contreras@tpwd.state.tx.us

EXHIBIT A

AFFIDAVIT of RICHARD LETOURNEAU
IN SUPPORT OF SIERRA CLUB

STATE OF TEXAS

COUNTY OF GREGG

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BEFORE ME, the undersigned notary public, on this day personally appeared Richard LeTourneau who being by me duly sworn on his oath stated that he has read the following Affidavit, and it is true and correct, and that every statement contained herein is within his personal knowledge.

I, Mr. Richard LeTourneau, hereby declare as follows:

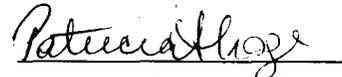
1. My name is Richard LeTourneau. I am over the age of 21 and am competent to testify to the following based on my own personal knowledge.
2. I live approximately eight miles north of Hallsville, Texas, or about 12-15 miles north of the Pirkey plant.
3. For many years I have regularly kayaked and fished in a section of the Sabine River between State Highways 149 and 43. That section of the Sabine River receives inflow from both Brandy Branch Creek and Hatley Creek, two discharge sinks for materials from the Pirkey Plant. I fish and kayak in the Sabine River at least eight times a year, and I typically eat the catfish that I catch.
4. I have long been concerned about the water quality in this section of the Sabine River, and in particular, how industrial discharge from Pirkey affects the water quality. I worry that Pirkey's wastewater makes the river unhealthy for contact while kayaking and fishing, and that the fish I eat are contaminated and unsafe to consume. This ongoing anxiety affects my aesthetic and recreational enjoyment of the river.
5. Although I believe that the water in this section of the Sabine is always compromised by Pirkey, I am especially concerned about the quality of the water during the low-water summer months and droughts, when there is less water in the river and its tributary streams to dilute the wastewater from Pirkey.
6. I am a current member of the Sierra Club in good standing.

FURTHER AFFIANT SAYETH NOT



Richard LeTourneau, Affiant

SWORN TO and SUBSCRIBED before the undersigned on this 17th day of February, 2012.



Notary Public, State of Texas

My commission expires: 4-27-13

EXHIBIT B

AFFIDAVIT of CLINT ROSBOROUGH
IN SUPPORT OF SIERRA CLUB

STATE OF TEXAS

COUNTY OF HARRISON

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BEFORE ME, the undersigned notary public, on this day personally appeared Clint Rosborough who being by me duly sworn on his oath stated that he has read the following Affidavit, and it is true and correct, and that every statement contained herein is within his personal knowledge.

I, Mr. Clint Rosborough, hereby declare as follows:

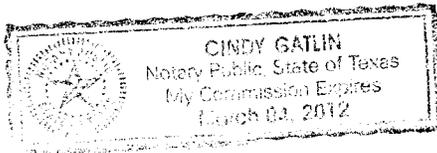
1. My name is Clint Rosborough. I am over the age of 21 and am competent to testify to the following based on my own personal knowledge.
2. I own a 169-acre tract along Hatley Creek between the Pirkey plant and the Sabine River. I estimate that my property is approximately 4 miles downstream of Pirkey along Hatley Creek. Hatley Creek runs year-round except in period of extreme drought.
3. I also own and reside on property on Prairie Branch Creek, a few miles to the west of the Hatley Creek property.
4. I regularly hunt and camp on the Hatley Creek property. During the hunting season, from October to January of each year, I visit the property about 15-20 times. During the rest of the year, I visit on at least a monthly basis.
5. Most of the property is in the floodplain of Hatley Creek, which typically floods at least once a year when the area is not in drought conditions. This flooding causes the deposition of sediments from the creek onto the property where I hunt and camp.
6. I am concerned about pollutants like selenium that Pirkey discharges to Hatley Creek and which are deposited on my land through flooding.
7. In January of this year, my wife and I rejoined the Sportsman Bass Club, a fishing club based in Longview that holds regular fishing tournaments in local lakes. During the winter, these tournaments are held at Brandy Branch Reservoir because of its warmer water temperatures. I have heard that the water in Brandy Branch Reservoir is polluted by the Pirkey plant and so I will not eat any of the fish that I catch there, though I would like to do so.

8. I also used to snorkle with my wife in Brandy Branch Reservoir but no longer do so in part because of my concern about the pollution. I have several cousins who do dive in Brandy Branch Reservoir and I worry about the cleanliness of the water on their behalf.
9. I am a current member of the Sierra Club in good standing.

FURTHER AFFIANT SAYETH NOT


Clint Rosborough, Affiant

SWORN TO and SUBSCRIBED before the undersigned on this 22 day of February, 2012.




Notary Public, State of Texas
My commission expires: 3-4-12

EXHIBIT C

AFFIDAVIT of BRUCE WILAND
IN SUPPORT OF SIERRA CLUB

*

STATE OF TEXAS

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*

COUNTY OF TRAVIS

*

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BEFORE ME, the undersigned notary public, on this day personally appeared Bruce Wiland who being by me duly sworn on his oath stated that he has read the following Affidavit, and it is true and correct, and that every statement contained herein is within his personal knowledge.

I, Mr. Bruce Wiland, hereby declare as follows:

1. My name is Bruce Wiland. I am over the age of 21 and am competent to testify to the following based on my own personal knowledge.
2. I have a Bachelor of Engineering Science from the University of Texas at Austin which I received in January, 1974. I have a Master of Science in Environmental Health Engineering from the University of Texas at Austin which I received in December, 1975. I have been registered as a Professional Engineer in the State of Texas since 1979. I am currently president of Wiland Consulting and specialize in water quality evaluations. Over the course of my career, I have reviewed over a hundred water quality permits and testified over 10 times. Prior to my consulting experience, I was employed by the Texas Water Commission, Texas Department of Water Resources, and Texas Water Quality Board from September, 1976 through February, 1986. My resume is attached as Exhibit A.
3. I have participated in the preparation of industrial permit applications and provided permit application assistance for various industries including several power plants, a reverse osmosis system, and a hazardous waste incinerator.
4. I have reviewed the current and draft Texas Pollution Discharge Elimination System permits for the SWEPCO Henry W. Pirkey power plant. I have also reviewed the application, and various TCEQ memoranda and correspondence between the applicant and TCEQ that were obtained by the Sierra Club through a Texas Public Information Act request and then provided to me.

5. Two local residents have submitted affidavits in support of the request for a contested case hearing. Based on those affidavits, it is my understanding that Mr. Clint Rosborough owns and uses property on Hatley Creek, approximately four miles downstream of the three outfalls discharging to an unnamed tributary of that creek. I also understand that he plans to fish for bass on Brandy Branch Reservoir in the near future. Based on the affidavit of Mr. Richard LeTourneau, a Hallsville resident, I understand that he regularly kayaks and fishes on the Sabine River downstream of the confluence of that river with Hatley Creek and Brandy Branch Creek.
6. Sierra Club asked me to review the Draft Permit and associated materials for the purpose of developing an opinion about how the wastewater discharges from the Pirkey plant might affect these members.
7. My review of these materials reveals several problems with the application and draft permit, discussed in the following paragraphs. In addition, much of the information that would be critical for evaluating the adequacy of the permit is not contained in these materials, and it is possible that this information was not available to or considered by the permit writer. In my opinion, the potential exists that the effluent limits, and monitoring and structural requirements contained in this permit will not prevent negative impacts on downstream aquatic environments and users.
8. The water flow diagram provided in the application is incomplete and unclear. The left side of the diagram appears to indicate that Outfalls 102, 202, and 302 discharge directly to Brandy Branch Reservoir, while the upper right hand corner indicates that Outfall 102 is instead an internal outfall that ultimately discharges to Brandy Branch Reservoir only through Outfall 002. Throughout the application there are statements that Outfalls 102, 202, and 302 are internal. However, my review of the site plan of the facility leads me to believe that these outfalls discharge directly to Brandy Branch Reservoir, and that a portion of this discharge may be drawn into the adjacent cooling water intake system when that system is operating. If in fact these outfalls are external, then the permit should contain biomonitoring requirements for Outfall 202, and the permit limitations for all three outfalls should be based on water quality-based limits if they are more stringent than the technology-based limits. These requirements would be necessary to ensure that these discharges do not have adverse effects on the aquatic environment of Brandy Branch Reservoir as well as downstream receiving waters, which may occur when the discharges happen at times the cooling water intake system is not operating. Based solely on the effluent limitations imposed on these outfalls, Outfall 102 discharges water containing suspended solids, oil and grease, and selenium, Outfall 202 discharges water containing these pollutants and also iron and copper, and Outfall 302 discharges suspended solids, chlorine, and sources of biological oxygen demand to Brandy Branch Reservoir.

9. The water flow diagram also shows the surge ponds receiving water from the FGD/Fly Ash Landfill Retention Pond, the Lignite Runoff Pond, Metal Cleaning Wastes, and directly from the scrubber. However, there is no apparent outfall for the surge ponds, and no indication whether these ponds could discharge or overflow. Nor does the application's impoundment table contain any information about how the surge ponds were constructed and sized, including how they are lined. Depending on the location of the existing groundwater monitoring wells, there may not be sufficient data to determine whether the surge ponds are leaking, and there may be a risk that the wastewaters sent to the surge ponds are infiltrating the soil and migrating to the ground water and eventually to Brandy Branch Reservoir, Hatley Creek, or other local creeks.
10. None of the permit documents that I have seen provide engineering calculations or documentation that the ponds are adequately sized to accommodate the stormwater onsite. In addition, one of the amendments sought in this renewal is the reduction of the freeboard requirement for all ponds during storm events. This change creates a heightened risk that, during stormwater events, the facility will release wastewater that does not flow through an authorized outfall and has not been fully treated. Given the nature and quantity of the wastewaters contained in these ponds, such a release could potentially impact the downstream waters of Hatley Creek and the Sabine River used by Mr. Rosborough and Mr. LeTourneau.
11. The permit exempts untreated overflow from Outfall 003 in certain storm events from all of the effluent limits established for that outfall, which include limits for total suspended solids (TSS), oil and grease, and selenium. The corresponding regulation at 40 C.F.R. §423.12(b)(9) provides an exemption under these circumstances only from the TSS limit, not all other effluent limits. By making the effluent limit for a toxic pollutant such as selenium inapplicable during large storm events, this permit may pose a risk to users of Brandy Branch Reservoir such as Mr. Rosborough, and ultimately to users further downstream such as Mr. LeTourneau.
12. The information made available to the Sierra Club through its requests does not permit full analysis of downstream impacts. Nevertheless, the permit problems stated above are sufficient to justify a concern that there may be downstream impacts on Mr. Rosborough and Mr. LeTourneau, including elevated levels of toxic pollutants such as selenium, iron, copper, and total suspended solids.

FURTHER AFFLIANT SAYETH NOT

Bruce Wiland

Bruce Wiland, Affiant

SWORN TO and SUBSCRIBED before the undersigned on this 27 day of February, 2012.



Shari D Straight

Notary Public, State of Texas

My commission expires: 4/4/15

Bruce Wiland Affidavit, Exhibit A

BRUCE L. WILAND, P.E.

Education

Master of Science in Environmental Health Engineering; The University of Texas at Austin, Austin, Texas; December, 1975.

Bachelor of Engineering Science with Highest Honors; The University of Texas at Austin, Austin, Texas; January, 1974.

Continuing Education

Dairy Outreach Program Area Environmental Training, Texas Cooperative Extension, Sulphur Springs, Texas, October 2007.

Nutrient Management Short Course, Texas Cooperative Extension/Natural Resources Conservation Service, College Station, Texas, October 2005.

Design Criteria for Sewerage Systems, Central Texas Section of the Water Environment Association of Texas in cooperation with TNRCC, Austin, Texas, March 2000.

Innovations and New Horizons in Livestock and Poultry Manure Management; Texas Agricultural Extension Service, Austin, Texas, September 1995.

Urban Storm Water Quality Management; American Society of Civil Engineers, Austin, Texas; May 1991.

Industrial Wastewater Pretreatment Short Course; The University of Toledo, San Antonio, Texas; September 1989.

USCE-EPA CAPDET Workshop; USAE Waterways Experiment Station, Dallas, Texas; June 1978.

Water Quality Management Short Course; Vanderbilt University, Nashville, Tennessee; June 1978.

Institute of Mathematical Modeling of Natural Water Systems; Manhattan College, New York, New York; May 1977.

Experience

President, Wiland Consulting, Inc., Austin, Texas; October, 1991 - present.

Division Director/Chief Engineer; Jones and Neuse, Inc., Austin, Texas; September, 1988 - October, 1991.

Project Manager/Project Engineer; Jones and Neuse, Inc., Austin, Texas; February, 1986 - October, 1988.

Engineer/Hydrologist/Engineering Technician; Texas Water Commission/Texas Department of Water Resources/Texas Water Quality Board, Austin, Texas; September, 1976 - February, 1986.

Associate Research Scientist; Environmental Health Engineering Department, The University of Texas at Austin; April, 1975- August, 1976.

Registration

Licensed Professional Engineer, State of Texas; No. 45700.

Licensed Professional Engineer, State of Louisiana; No. 31981.

Certified Texas Nutrient Management Specialist, TCE/USDA/NRCS; No. TX20167

Passed Principles and Practices Examination; April, 1978.

Passed Engineer-in-Training Examination; November, 1973.

Affiliations

Water Environment Federation

Water Environment Association of Texas, Past President of the Central Texas Section

American Society of Civil Engineers

American Society of Agricultural and Biological Engineers

Honors

Tau Beta Pi, National Engineering Honor Society

Detailed Experience Record

As an Independent Consultant, Mr. Wiland conducts engineering and environmental studies and evaluations for water quality, air quality, and hazardous and solid waste projects. Projects have included the following:

- Development and programming of the water quality model LA-QUAL for the Louisiana Department of Environmental Quality including the preparation of short-courses and instruction in the use of LA-QUAL.
- Technical assistance to the City of Waco in evaluating the potential water quality impacts from confined animal feeding operations in the Lake Waco watershed (Erath County, Hamilton County, Bosque County) including soil sampling, evaluation of hydrology and nutrient management plans, review and comment on proposed dairy permits, preparation of affidavits, and expert witness testimony.
- Technical assistance in evaluating the potential water quality impacts from proposed permits for land disposal of municipal biosolids and industrial wastewater (Bell County, Colorado County, Wharton County, Moore County) including evaluation of the nutrient management plans and expert witness testimony.
- Evaluation of potential air and water quality impacts from numerous dairies, feedlot operations, swine facilities, and other confined animal feeding operations in Erath County, the Texas Panhandle, and other counties in Texas. Preparation of affidavits and expert witness testimony in State permit hearings.
- Preparation of industrial permit applications and permit application assistance for various industries including several power plants, a reverse osmosis system for the City of Electra, and a hazardous waste incinerator operated by Rollins Environmental
- Dissolved oxygen modeling of various water bodies and evaluation of wastewater discharges including the following:
 - Arroyo Colorado canal system (Pelican Pointe Development).
 - Bear Creek (Hays County WCID #1)
 - Blanco River
 - Cowleech Fork of Lake Tawokoni (Cobisa)
 - Eckert Bayou (Galveston County MUD #1)
 - Hackberry Creek/Aquilla Reservoir (City of Hillsboro)
 - Lake Conroe (Far Hills UD)
 - Lake Conroe (UA Holdings)
 - Lake Conroe (Point Aquarius MUD)
 - Little Cleveland Creek (City of Jacksboro WWTP)
 - Nueces Bay (Valero)
 - Padera Lake/Newton Branch (City of Midlothian)
 - Rio Grande (City of Brownsville)
 - San Marcos River (City of San Marcos)
 - South San Gabriel River (private developer)
 - Still Creek/Thompson Creek (City of Bryan)
 - Taylor Bayou (Motiva)
 - Texas Ship Channel tributary (Marathon Oil)
- Temperature modeling of a tributary to the Calcasieu River in Louisiana to determine impacts of a low temperature discharge (Trunkline LNG) and of the Comal River to determine the effects of reduced flows from Comal Springs (City of San Antonio).
- Preparation and implementation of water quality surveys and hydraulic/dye studies to determine impacts from wastewater discharges including the following:
 - Bear Creek (Hays County WCID #1)
 - Little Cleveland Creek (City of Jacksboro WWTP)
 - Nine Mile Creek (City of Mineola WWTP)
 - Post Oak Creek/Choctaw Creek (City of Sherman)
 - Rio Grande (City of Brownsville)
 - San Marcos River (City of San Marcos WWTP).
 - Still Creek and Thompson Creek (City of Bryan WWTP)
 - Texas Ship Channel tributary (Marathon Oil)
- Evaluation of discharge alternatives for proposed power plants in Panola County, Henderson County, Upshur County, and Johnson County.
- Investigation, sampling, and evaluation of various wastewater/permit issues including a raw sewage discharge from a lift station upstream of a horse breeding operation in Bowie County (included expert witness testimony in State District Court) and contaminated wastewater from a sewer line that was part of the wastewater system at an abandoned Air Force Base in Maverick County.
- Preparation of comments to the TNRCC on proposed composting regulations. Evaluation of various proposed composting facilities (Tarrant County, Travis County) and expert witness testimony in a State permit hearing.

- Outfall diffuser design and modeling using Cormix.
- Evaluation of air emissions from a proposed cement batch plant and expert witness testimony in a TNRCC permit hearing.
- Evaluation of a 9.7 MGD industrial wastewater discharge to Lavaca Bay. The work included review of the water quality impacts, wastewater treatment system design, and compliance with State and Federal water quality standards and effluent limitations. Expert witness testimony was provided in a TWC permit hearing.
- Preliminary engineering design of a lift station and force main to serve a maintenance facility at a county club.
- Evaluation of a proposed wastewater permits and permit renewals to determine adherence with normal permitting procedures and water quality standards including the Longhorn Army Depot on Caddo Lake, a uranium mill reclamation site, and limestone quarries (Limestone County, Burnet County).
- Evaluation of the City of Austin's South Austin Outfall (Phase II) Project to determine if feasible alternatives existed. The work included review of existing wastewater lines and lift stations, existing and projected wastewater flows, and the proposed 48-inch wastewater line including a three-barrel siphon under Barton Creek. The work was performed for the Save Barton Creek Association and included deposition testimony.
- Participation as the quality control/quality assurance officer in a trial burn at a cement kiln incinerating hazardous wastes. The trial burn for Texas Industries, Inc. (TXI) was required as part of the new boiler and industrial furnace (BIF) permitting regulations.

As Division Director of the Water Quality and Environmental Impacts Division for Jones and Neuse, Inc. (JN), Mr. Wiland directed a staff of engineers and biologists responsible for water quality projects, environmental site assessments, environmental audits, evaluation of regulatory impacts, and preliminary engineering assistance in industrial wastewater design. Mr. Wiland was also Director of the Air and Water Quality Division during the initial development of JN's air program. Due to the success of this program, a separate Air Quality Division was eventually created. Specific projects and areas of responsibility and engineering application included the following:

- Development of procedures, execution, and review of environmental site assessments and audits for over 100 sites and facilities in numerous states, Mexico, and Central America. Investigations involved solid and hazardous waste, water quality, and air quality issues. Types of properties and facilities including office buildings, apartments, hospitals, oil field service facilities, pipeline terminals, refineries, electroplaters, manufacturing facilities, iron and steel smelters, and numerous other industrial properties.
- Preparation of environmental impact documents involving issues related to air quality, water quality, solid and hazardous waste, and other natural resources (wetlands and endangered species). Clients included AES Corporation, American General Insurance Corporation, and the Port of Corpus Christi.
- Review of Federal and State environmental regulations and preparation of recommendations to various industrial clients with particular attention to the RCRA toxicity characteristic, RCRA primary sludge issues, SARA Title III requirements, and the State of Texas Water Quality Standards. Clients included Fina Oil and Chemical, La Gloria Oil and Gas, Mobil Oil, and Texaco.
- Wastewater system evaluations of industrial treatment facilities for Fina Oil and Chemical, Alcoa, and RTF Industries. Types of facilities have included electroplaters, petroleum refiners, and chemical manufacturers.
- Performance of industrial wastewater treatability studies for Alcoa in Point Comfort, Texas.
- Preliminary engineering and design of wastewater collection and treatment facilities for several petroleum refineries, including Fina Oil and Chemical Company in Big Spring, Texas, Howell Hydrocarbon in San Antonio, Texas, and Trifinery in Corpus Christi, Texas. Processes have included caustic and acid neutralization, oil/water separation, and biological treatment.
- Development of procedures and review of dye dispersion studies for Alcoa, Koppers Industries, Empak, Inc., Champion International Corporation, and Gulf Coast Waste Disposal Authority.
- Development of NPDES stormwater permitting strategies for Pride Refining, Quantum Chemical, and Central Tractor.
- Preparation of NPDES and TWC industrial wastewater permit applications and supporting information for industries, including Carrier Corporation, Alcoa, Tex-Trac, Inc., Hoechst-Celanese, Fina Oil and Chemical Company, and Howell Hydrocarbon. Types of facilities have included refineries, bulk handling terminals, and manufacturing plants.
- Preparation of NPDES and TWC municipal wastewater permit applications, technical representation before the TWC, and expert witness testimony at public hearings for several cities and private developers.
- Development of procedures and review of benzene NESHAP studies for Fina Oil and Chemical Company, Shell Oil Company, and Howell Hydrocarbons.

- Preparation of TACB air permit applications and supporting technical information for industries including Tex-Trac, Inc., Kenaf International, H. B. Zachary, Great Lakes Carbon, and Fina Oil and Chemical Company. Types of facilities have included bulk handling terminals, petroleum coke storage facilities, asphalt plants, kilns, cogeneration units, landfills, and wastewater treatment units.
- Preparation of responses to TACB Notices of Violation (NOVs) and assistance in enforcement negotiations.
- Evaluation of computer programs and mathematical models used to predict water quality for the Lower Colorado River Authority.
- Development of permit applications for water appropriation, including irrigation and off-channel reservoirs for the City of Robinson, Texas.
- Water and wastewater rate studies and evaluations, including expert witness testimony for the City of Mission, City of Copperas Cove, Williamson County MUD #3, and Hidalgo County Irrigation District #7.

In addition to his duties as Division Director, Mr. Wiland served as Chief Engineer for Jones and Neuse, Inc. In this position, Mr. Wiland was responsible for non-project related administrative and technical duties including the following:

- Preparation and presentation of technical seminars on such subjects as environmental site assessments, the RCRA Toxicity Characteristic rule, the RCRA primary sludge rule for refineries, the benzene NESHAP rule, and the NPDES industrial stormwater regulations.
- Development of JN's professional services agreement and contract procedures and review of all contracts.
- Development of JN's project accounting and billing system.
- Development of standard proposal procedures/formats and preparation of major project proposals.

As an Engineer for the Texas Water Commission and predecessor agencies, Mr. Wiland was responsible for performing work in water resource analysis and mathematical modeling of water quality. His responsibilities included the following:

- Analysis of existing water quality data, design and execution of water quality surveys, and assessment of the impact of wastewater discharges upon the receiving waters.
- Design, development, and modification of various computer programs used to predict the water quality of natural and man-made systems including the steady-state stream model, QUAL-TX, used by the State of Texas to evaluate all discharge permits and determine all wasteload allocations.
- Development of a detailed methodology manual describing data requirements and modeling techniques for the evaluation and performance of wasteload allocations.
- Performance of wasteload evaluations and AST/AWT justifications including performance of economic analyses and cost-benefit justifications.
- Review of wasteload evaluations performed by the Modeling Unit for technical accuracy and consistency.
- Review and evaluation of the technical aspects of the Houston Ship Channel instream aeration studies and nonpoint source studies.
- Participation in a major hydrodynamic study of Laguna Madre involving measurement of currents and tidal dispersion.
- Participation as representative to the TDWR Executive Review Committee, which entailed reviewing and evaluating all injection well, solid waste, municipal and industrial discharge permits to be certain they were in compliance with wasteload evaluations and would not seriously degrade water quality in the receiving water.
- Coordination between the Construction Grants and Water Quality Management Division and the Permits Division to ensure consistency between grant projects and discharge permits. Participation as a member of the Innovative Alternative Technology Ad Hoc Support Group to resolve issues pertaining to specific Construction Grants projects proposed for funding as IA technology.
- Performance of wasteload evaluations including data collection and computer modeling for the Houston Ship Channel, West Fork San Jacinto River, Spring Creek, Cypress Creek, Clear Creek, and the San Jacinto River Tidal.
- Development of a methodology and nomograph for evaluating discharges into undesignated stream segments and tributaries.
- Assistance in the development of the water quality ranking system for the State of Texas.

- Design of water quality surveys and evaluation of results to determine the necessity of nutrient limitations in the Clear Lake watershed to prevent eutrophication.
- Administration of a contract for the development of an apparatus and methodology to measure benthic demand in stream sediments.
- Development of steady-state and stormwater models for the State's "208" Designated and Non-Designated Area Planning activities as required by PL 92-500.
- Analysis of hydrologic data and performance of a comprehensive hydraulic balance on the Edwards Aquifer to support water quality regulations over the Edwards Aquifer.
- Review of the EPA policy on land application and determination of its effects on Texas

While employed as an Associate Research Scientist for the Environmental Health Engineering Department at The University of Texas, Mr. Wiland conducted laboratory analyses and evaluations including the following:

- Determination of quantities of certain contaminants in stormwater runoff from highways using analytical techniques of infrared spectrophotometry and atomic absorption, and assessment of the impact of highway stormwater runoff on the environment.
- Characterization of various wastewaters for typical pollution parameters, such as COD, BOD, TOC, suspended solids, TKN, phosphates, TDS, and MPN.
- Performance of wastewater treatability studies for Texas Eastman and Kerr-McGee utilizing bench-scale biological treatment processes, including oxidation ponds, activated sludge, aerated lagoons, and anaerobic columns and physical-chemical processes such as lime coagulation, carbon absorption, and ozonation.

EXHIBIT D

**CHAPTER 1
MEMORANDUM OF AGREEMENT
BETWEEN THE
TEXAS NATURAL RESOURCE CONSERVATION COMMISSION
AND THE
U.S. ENVIRONMENTAL PROTECTION AGENCY, REGION 6
CONCERNING THE NATIONAL POLLUTANT DISCHARGE ELIMINATION
SYSTEM**

I. GENERAL

The purpose of this Memorandum of Agreement, hereafter "MOA" is to establish policies, responsibilities and procedures pursuant to Title 40 Code of Federal Regulations (40 CFR) Parts 123, 501 and 503 for program commitments between the Texas Natural Resource Conservation Commission (TNRCC) and the Environmental Protection Agency, Region 6 (EPA) for assumption of the National Pollutant Discharge Elimination System (NPDES) program by the TNRCC. This MOA shall constitute the agreement between the TNRCC and EPA.

The TNRCC has primary responsibility for implementing the NPDES program for Texas, herein called the Texas Pollutant Discharge Elimination System (TPDES), for facilities within its jurisdiction. The TNRCC has authority under Section §26.121 of the Texas Water Code to regulate discharges from industrial facilities covered by all Standard Industrial Classification (SIC) codes except for those facilities classified as 1311, 1321, 1381, 1382, 1389, 4922, and 4925, which are regulated by the Texas Railroad Commission, as identified in §26.131 of the Texas Water Code. The TNRCC will not regulate those discharges under the Texas Railroad Commission jurisdiction, including oil and gas construction site runoff. Some activities within these SIC codes are regulated by the TNRCC, and a list of these activities is included in Appendix 2-A. The TNRCC has authority to regulate discharges from publicly owned and privately owned treatment works and concentrated animal feeding operations (Section §26.121 of the Texas Water Code). The TNRCC has authority to regulate discharges of storm water associated with industrial activity and discharges of storm water from municipal separate storm sewer systems, as identified in the Attorney General's Statement (Chapter 8). The TNRCC has primary responsibility for implementing a Pretreatment Program in accordance with §26.047 of the Texas Water Code and TNRCC rules contained in Title 30, Chapter 315 of the Texas Administrative Code, and a Sewage Sludge Program in accordance with §§361.011 and 361.024, Texas Health and Safety Code and TNRCC rules contained in 30 TAC Chapter 312. TNRCC's authority for these programs is discussed in detail in the Attorney General's

MOA between TNRCC and U.S. EPA

STATE OF TEXAS
COUNTY OF TRAVIS **JUN 12 2008**

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I hereby certify this is a true and correct copy of a
Texas Commission on Environmental Quality (TCEQ)
document, which is filed in the Records of the Commission
Given under my hand and the seal of office.

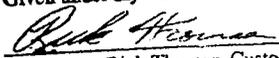

Rick Thomas, Custodian of Records
Texas Commission on Environmental Quality

Exhibit PS- 2

Statement (Chapter 8).

The TNRCC shall operate the TPDES program in accordance with the Clean Water Act as amended, applicable federal regulations, applicable TNRCC legal authority, Title 30 Texas Administrative Code, and taking into consideration published EPA policy. The TNRCC has the primary responsibility to establish the TPDES program priorities, so long as they are consistent with Clean Water Act and NPDES goals and objectives.

The strategies for issuance, compliance monitoring and enforcement of permits, as established by this MOA, may be set forth in more detail in the TNRCC Clean Water Act (CWA) Section 106 program grant and other TNRCC/EPA agreements. The CWA §106 program grant document contains terms and conditions regarding appropriate use of grant funds. This MOA and the TNRCC CWA §106 program grant shall be consistent with each other. Either the EPA or the TNRCC may initiate action to modify this MOA at any time, but this MOA may be modified only by the written consent of both agencies.

II. SCOPE OF AUTHORIZATION

The TNRCC and the EPA agree that the TNRCC has requested EPA to grant the TNRCC authority to administer NPDES permitting, compliance monitoring and enforcement activities, NPDES pretreatment activities, and NPDES sewage sludge program activities in Texas. TNRCC is not seeking authorization to issue TPDES discharge permits in Indian Country (federally established Indian reservations, etc.).

III. STATE AND FEDERAL RESPONSIBILITIES

The TNRCC program equivalent to NPDES under section 402 of the CWA is the TPDES, adopted under Chapter 26, Texas Water Code, and implemented through Chapter 26, Texas Water Code, Chapter 361, Texas Health and Safety Code, and applicable TNRCC rules contained in Title 30 of the Texas Administrative Code (30 TAC).

A. TNRCC RESPONSIBILITIES

TNRCC shall:

1. Exercise the legal authority through TNRCC regulations and the state statutes required by the CWA to carry out the TPDES, Pretreatment, and Sewage Sludge programs. The legal authority to carry out the requirements of permitting (40 CFR §123.25), for compliance evaluation (§123.26), for enforcement authority (§123.27), for the pretreatment program (§403.10), and for the sewage sludge program (40 CFR §§122.21, referencing 501.15(a)(2), and 123.27) are described in more detail in the Attorney General's Statement;
2. Process all incoming applications for new and amended TPDES permits in accordance with processing time standards as specified in 30 TAC Chapter 281; process all applications for renewals of existing permits in a manner which coincides with either the basin permitting rule (30 TAC §305.71) in accordance with §26.0285, Texas Water Code, or a five-year cycle of renewal for the following categories of applicants:
 - a. non-domestic wastewater discharges, including industrial, commercial, silviculture, concentrated animal production, and concentrated aquatic animal production activities;
 - b. domestic wastewater discharges, including publicly owned treatment works and privately owned treatment works;
 - c. sewage sludge management, including use, processing and disposal; and
 - d. storm water discharges regulated under NPDES, including municipal separate storm sewer systems and storm water associated with industrial activity, except that EPA shall process any necessary modifications for a storm water permit EPA issued.
3. Process an EPA request for issuance or reissuance of a specified permit that will be addressed by TNRCC within six (6) months of the written request;
4. Process Pretreatment program requests and modifications, including local limit modifications, and conduct pretreatment audits, performing technical evaluations of all

- pretreatment programs (described in detail in Section VI. of this MOA);
5. Evaluate and assess compliance with enforcement documents including permits, registrations, administrative orders, consent orders, and court orders which deal with CWA issues including effluent limitations reporting, compliance schedules, operation and maintenance, pretreatment, and sewage sludge, except as provided for by Section III.B.8. of this MOA;
 6. Monitor compliance with approved pretreatment programs and with pretreatment standards, including industrial users outside approved POTW pretreatment programs;
 7. Maintain an effective enforcement program by taking timely and appropriate actions for wastewater permit violations, unpermitted discharges, sewage sludge and pretreatment violations in accordance with Texas statutes, Title 30 of the Texas Administrative Code, federal NPDES requirements, and Clean Water Act. TNRCC will utilize EPA national and regional policies and guidance to the extent there is no conflict with Texas statutes, a specific state policy, or guidance adopted by TNRCC. TNRCC agrees to consider EPA national and regional policies and guidance when adopting corresponding or related state policies and guidance and will avoid state policies or guidance that would conflict with §402(b) of the CWA or applicable federal regulations or limit TNRCC's ability to implement the NPDES program;
 8. Maintain adequate file information relating to each TPDES permit. This information will be readily available to EPA and shall include the following information:
 - a. Permit application;
 - b. Current issued permit;
 - c. Draft permit submitted for public notice;
 - d. Public notice;
 - e. Public comments received orally and in writing;
 - f. Fact sheet or statement of basis, including effluent data;
 - g. Inspection reports and compliance information;
 - h. Enforcement orders and documents related to other enforcement actions;
 - I. Discharge monitoring reports, including whole effluent toxicity (WET) and toxicity reduction evaluation (TRE) information;
 - j. Documents related to pretreatment;

- k. Sewage sludge related documents;
 - l. Storm water related documents, including Storm Water Management Plans (SWMPs) and Pollution Prevention Plans (SWPPPs) submitted to TNRCC;
 - m. Requests for hearing, motions for reconsideration and rehearing, and any order issued by the commission; and
 - n. Other pertinent information, memoranda, and correspondence;
9. Make available to the public all permit applications, permits, effluent data, inspection reports and other documents pertaining to the TPDES program consistent with the Texas Public Information Act (Local Government Code Chapter 552) and 30 TAC §§305.45 - 305.46 describing in detail the contents of applications and those materials which may be considered confidential;
 10. Except as identified in Section III.B.8. of this MOA, regulate by rule or general permit in accordance with §26.040 of the Texas Water Code certain categories of discharges, including concentrated animal feeding operations (as defined in 40 CFR §§122.23-122.24), while preserving the ability to require individual permits for particular facilities as needed;
 11. Direct input of permit and enforcement data into the National Permit Compliance System (PCS) in accordance with 40 CFR §123.26(e)(4);
 12. Submit to EPA the information described in the CWA Section 106 program grant (Performance Partnership Grant or PPG) between the TNRCC and EPA or other related TNRCC/EPA agreements and submit information specified in applicable portions of 40 CFR Parts 123 and 503. Additionally, upon request by the EPA, the TNRCC shall submit information and allow access to files for evaluating the TNRCC administration of the TPDES program;
 13. Provide statistical information needed by EPA for the Reporting for Enforcement and Compliance Assurance Priorities (RECAP) in accordance with 40 CFR §123.45;
 14. Maintain an approved Continuing Planning Process (CPP) adopted by the Commission in accordance with 40 CFR §130.5(c). Within the CPP adopted by the Commission on October 15, 1997, is included a separate document describing how Texas water quality standards are implemented. This document is titled the Water Quality Standards Implementation Procedures (IPs), which is maintained consistent with 40 CFR §130.5(b)(6). The IPs are revised, as necessary, after triennial review of the Texas surface water quality standards and

EXHIBIT E

STATEMENT OF LEGAL AUTHORITY FOR THE TEXAS NATIONAL
POLLUTANT DISCHARGE ELIMINATION SYSTEM PROGRAM

As attorney general of the State of Texas, I certify, pursuant to § 402(b) of the Federal Water Pollution Control Act, as amended, 33 U.S.C. §§ 1251-1387 (“CWA”), that in my opinion the laws of the State of Texas provide adequate authority to carry out the program set forth in the “Program Description” submitted by the Texas Natural Resources Conservation Commission (“Commission”). The specific authorities discussed below are contained in lawfully enacted statutes or promulgated regulations, which are in effect as of the date of this statement. In some cases a citation to the current Texas Water Code (“Code”) section is accompanied by a parallel citation to a provision with the same section number and title, which includes language that comports with federal requirements, noting “Text of section effective upon delegation of NPDES permit authority.” NPDES permits issued by the State of Texas are designated “TPDES” (Texas Pollutant Discharge Elimination System).

Where provisions of the Code of Federal Regulations (“C.F.R.”) have been incorporated into the Texas Administrative Code, they are characterized as adopted by reference; adopted by incorporation with full text (meaning that the exact language of the C.F.R. provision has been repeated in the applicable Texas Administrative Code section); or adopted with amendments (meaning that the language of the C.F.R. provision has been repeated in the applicable Texas Administrative Code section with some changes, generally explained in the “Remarks” section). Where no remarks are provided, the state and Federal statutes or regulations have identical or substantially the same language.

1. PARTIAL PROGRAM SCOPE – COMMISSION AND RAILROAD COMMISSION OF TEXAS

State law provides authority for the Commission to regulate a major category partial permit program, consistent with § 402(n)(3) of the CWA. The Commission’s program is a complete permit program that covers all of the discharges under the Commission’s jurisdiction and represents a significant and identifiable part of the state program required by § 402(b) of the CWA. The TPDES program administered by the Commission covers all discharges except for those beyond the Commission's statutory authority or territorial

provide written comment; an opportunity also may be afforded to make oral comment at the agenda meeting.

See generally, e.g., 30 TEXAS ADMIN. CODE Chapter 10; *id.* § 80.263.

Judicial Enforcement: Texas complies with 40 C.F.R. § 123.27(d)(2)(ii) in the judicial enforcement context.

Under Code § 7.110(d), the Office of the Attorney General may not oppose intervention by a person who has standing to intervene as provided by Rule 60, Texas Rules of Civil Procedure.

The MOU between the Commission and EPA provides that the Office of the Attorney General will not oppose intervention by any citizen when permissive intervention may be authorized by statute, rule, or regulation.

Rule 60 and common law doctrines of associational and individual standing create meaningful opportunities for citizen participation in civil penalty enforcement actions in court. In the case of *Guaranty Federal Savings Bank v. Horseshoe Operating Co.*, 793 S.W.2d 652, 657 (Tex. 1990), the Texas Supreme Court outlined the requirements and operation of Rule 60:

Rule 60 of the Texas Rules of Civil Procedure provides that “[a]ny party may intervene, subject to being stricken out by the court for sufficient cause on the motion of the opposite party” Tex. R. Civ. P. 60. An intervenor is not required to secure the court’s permission to intervene; the party who opposes the intervention has the burden to challenge it by a motion to strike. *See In re Nation*, 694 S.W.2d 588 (Tex. App.--Texarkana 1985, no writ); *Jones v. Springs Ranch Co.*, 642 S.W.2d 551 (Tex. App.--Amarillo 1982, no writ).

Furthermore, under Rule 60, a person or entity has the right to intervene if the intervenor could have brought the same action, or any part thereof, in his own name, or, if the action had been brought against him, he would be able to defeat recovery, or some part thereof. *Inter-Continental Corp. v. Moody*, 411 S.W.2d 578, 589 (Tex. Civ. App.--Houston [1st Dist.] 1966, writ ref’d n.r.e.); *Texas Supply Center, Inc. v. Daon Corp.*, 641 S.W.2d 335, 337 (Tex. App.--Dallas 1982, writ ref’d n.r.e.). The interest asserted by the intervenor may be legal or equitable. *Moody*, 411 S.W.2d at 589. Although the trial court has broad discretion in determining whether an intervention should be stricken, it is an abuse of discretion to strike a plea in intervention if (1) the intervenor meets the above test, (2) the intervention will not complicate the case by an excessive multiplication of the issues, and (3) the intervention is almost essential to effectively protect the intervenor’s interest. *Moody*, 411 S.W.2d at 589; *Daon Corp.*, 641 S.W.2d at 337.

Because an intervenor must have been able to have brought an action originally in order to withstand a motion to strike the plea in intervention, it is necessary to review the Texas law of standing for associations

and individuals. It is also instructive to note the similarities between the standing doctrine as applied by federal courts under Article III of the U.S. Constitution and as applied by Texas state courts.

Texas employs the same standard for associational standing as used by the federal courts in construing standing under Article III of the U.S. Constitution. *Texas Association of Business v. Air Control Board*, 852 S.W.2d 440 (Tex. 1993).

Although the Texas Supreme Court has not expressly adopted the federal standard for individual standing, there are numerous cases from lower courts of appeal that indicate that the two standards are very similar. A person has standing to sue in Texas if:

he has sustained, or is immediately in danger of sustaining, some direct injury as a result of the wrongful act of which he complains; . . . he has a personal stake in the controversy; . . . the challenged action has caused the plaintiff some injury in fact, either economic, recreational, environmental or otherwise; . . . or he is an appropriate party to assert the public's interest in the matter, as well as his own.

Cedar Chest Funeral Home v. Lashley, 889 S.W.2d 325, 329 (Tex. App.--Dallas 1993, no writ); *Precision Sheet Metal Mfg. Co. v. Yates*, 794 S.W.2d 545, 551 (Tex. App.--Dallas 1990, writ denied); *Dresser Industries, Inc. v. Snell*, 847 S.W.2d 367, 376 (Tex. App.--El Paso 1993, no writ); *Billy B., Inc. v. Board of Trustees of the Galveston Wharves*, 717 S.W.2d 156, 158 (Tex. App.--Houston [1st Dist.]1986, no writ).

This standard closely follows the federal requirements for individual standing announced in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130 (1992)(to have standing a plaintiff must show an injury in fact, a causal connection between the injury and the action complained of, and that the injury will be addressed by a favorable decision).

It also has long been the law in Texas that “standing consists of some interest peculiar to the person individually and not as a member of the general public.” *Hunt v. Bass*, 664 S.W.2d 323 (Tex. 1984); *Mitchell v. Dixon*, 140 Tex. 520, 168 S.W.2d 654 (1943); *Yett v. Cook*, 115 Tex. 205, 281 S.W. 837 (1926); *City of San Antonio v. Stumberg*, 70 Tex. 366, 7 S.W. 754 (1888). This “special injury” rule is not unlike

the limitation on standing employed in the *Defenders of Wildlife* case cited above that requires a concrete and particularized injury by the plaintiff asserting standing.

Notice and Comment On Proposed Settlements: In the administrative and judicial enforcement contexts, Texas complies with 40 C.F.R. § 123.27(d)(2)(iii). That provision requires the state to “[p]ublish notice of and provide at least 30 days for public comment on any proposed settlement of a State enforcement action.”

Under 30 TEXAS ADMIN. CODE § 80.254, when the Executive Director and the respondent in an enforcement case that has gone to State Office of Administrative Hearings (“SOAH”) have reached an agreed settlement of an enforcement case, they shall submit the agreement to the ALJ in writing. The ALJ shall forward the proposed settlement to the Commission for consideration. If a party to the case dissents from the proposed settlement, the ALJ shall give such party a reasonable time to file comments, and shall forward all timely filed comments to the Commission. After any required public notice and opportunity for comment on proposed settlements (see the next paragraph) and consideration of the record, the Commission may either approve it or disapprove it and remand the case for hearing.

Under Code § 7.075, before the Commission approves an administrative order or proposed agreement to settle an administrative enforcement action, the Commission shall allow the public to comment in writing on the proposed order or agreement. Notice of the opportunity to comment shall be published in the Texas Register not later than the 30th day before the date on which the public comment period closes. The Commission shall consider any written comments and may withdraw or withhold consent to the proposed order or agreement. Code § 7.075 applies to all settlements of administrative enforcement cases, regardless of whether or not they were referred to SOAH.

Under Code § 7.110(a), before the court in a judicial enforcement action signs a judgment or other agreement settling a case, the Office of the Attorney General shall permit the public to comment in writing on the proposed order, judgment, or other agreement. Notice of the comment opportunity will be published in the Texas Register not later than the 30th day before the date on which the public comment period closes.

Code § 7.110(b). The Office of the Attorney General shall promptly consider any written comment and may withdraw or withhold consent to the proposed order, judgment, or other agreement if the comments disclose facts or considerations that indicate that the consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the Commission's statutes, rules, or permits. Code § 7.110(c).

13. AUTHORITY TO ISSUE GENERAL PERMITS

State law provides the authority to issue and enforce general permits in accordance with the federal general permits regulation at 40 C.F.R. § 122.28.

Federal Authority: CWA § 402(a); 40 C.F.R. §§ 122.28, 123.23, and 123.27.

State statutory and regulatory authority: TEXAS WATER CODE ANN. §§ 7.002, 7.032, 7.051, 7.053, 7.066, 7.101, 7.102, 7.103, 7.105, 7.109, 7.141, 7.142-.155, 7.173, 7.187, 7.188, 7.196, 7.198, 26.040 (Vernon 1988 & Supp. 1998); 30 TEXAS ADMIN. CODE Chapter 321; *id.* §§ 70.2, 70.5, 70.51, 80.269, 332.31 -.38.

Remarks: Code § 26.040 authorizes the Commission to issue general permits. Section 26.040, as well as Chapter 321 of the Commission rules which delineate the criteria and conditions for such discharges, show that the state and federal provisions are equivalent and consistent with federal law. (The category of discharges covered by a general permit under § 26.040 must not include a discharge of more than 500,000 gallons into surface waters during any 24-hour period.) Most significant, 40 C.F.R. § 122.28 is adopted by reference into 30 TEXAS ADMIN. CODE § 321.141, as described in Section 2.a., *supra*.

The types of discharges regulated by Code § 26.040 and 30 TEXAS ADMIN. CODE Chapter 321 meet the criteria of 40 C.F.R. § 122.28(a). In some situations, the state regulations are more stringent than the federal regulations because they prohibit any discharge. Violations of those chapters are also subject to the full range of Commission enforcement actions, pursuant to Chapters 70 and 80 as cited above. (The 1997 legislation amending Code § 26.040 allows the Commission to amend rules promulgated pursuant to that section's old version, to adopt and conform to federal NPDES requirements. *See* Footnote 4.)

14. AUTHORITY TO APPLY CATEGORICAL PRETREATMENT STANDARDS TO INDUSTRIAL USERS OF POTWS

EXHIBIT F



David Abell <david.abell@sierraclub.org>

Pirkey Power Plant

1 message

jmckinney@netmwd.com <jmckinney@netmwd.com>

Tue, Nov 29, 2011 at 11:46 AM

To: david.abell@sierraclub.org

Cc: netmwd@aol.com

Mr. Abell,

Please find attached the contracts between AEP and Northeast Texas Municipal Water District, with Ammendments. Also find pumping reports for Pirkey Power Plant from January 2008 to present. If you need further assistance after review, please contact Walt Sears, Jr. at [\(903\) 639-7538](tel:9036397538).

Sincerely,
Jenny McKinney
NETMWD

4 attachments

 **Swepco - Dec 5,1977.pdf**
506K

 **Swepco - Jan 9,1973.pdf**
895K

 **Pirkey Pumping Reports.xls**
51K

 **Pirkey Jan 2007.pdf**
75K

EXHIBIT F ATTACHMENT 1

AGREEMENT

BETWEEN

NORTHEAST TEXAS MUNICIPAL WATER DISTRICT

and

SOUTHWESTERN ELECTRIC POWER COMPANY

THIS AGREEMENT, made and entered into this the 5th day of December 1977, by and between NORTHEAST TEXAS MUNICIPAL WATER DISTRICT (hereinafter called DISTRICT), a body politic and corporate, created and existing under and by virtue of a special act of the Legislature of the State of Texas (Acts 1953; 53rd Legislature, Page 114, Chapter 78), being Article 8280 - 147 of V.A.T.S., acting herein by Uvalde Stoermer, its Vice President, and B. B. Waldrop, its Secretary, both of whom are duly hereunto authorized by proper resolution of the Board of Directors of DISTRICT, and SOUTHWESTERN ELECTRIC POWER COMPANY, a Delaware corporation, having its principal place of business at 428 Travis Street, Shreveport, Louisiana (hereinafter called SWEPCO), being the owner and holder of a valid permit to do, and doing, a general business in northeast Texas of generating, transmitting, distributing, and selling electric power and energy, acting herein by James Lamar Stall, its President, and W. Henry Jackson, its Secretary, both of whom are duly hereunto authorized by proper resolution of the Board of Directors of SWEPCO,

WITNESSETH:

That for and in consideration of the mutual covenants and agreements hereinafter set forth to be done, kept and performed by the parties hereto respectively, DISTRICT and SWEPCO have and do hereby contract and agree, each with the other, as follows:

1.1 SWEPCO contemplates the construction of a new steam electric generating station in Harrison County, Texas, upon land to be owned in fee by SWEPCO, and anticipates, without being obligated to do so, that it may eventually install therein steam turbine driven electric generating facilities of a capacity of approximately 1,400,000 Kilowatts name plate rating.

1.2 DISTRICT proposes to provide for SWEPCO the necessary water for the generating of electric power and energy in said new steam electric generating station and water for other uses incidental to said station and SWEPCO agrees to purchase all of its water, other than that from the natural inflow and drainage of the reservoir water shed and available from mining operations for the plant, for said station from DISTRICT subject to the conditions hereof. In connection with this proposal, DISTRICT represents that it is the owner and holder of a permit granted by the Board of Water Engineers of the State of Texas, dated November 22, 1957, bearing No. 1897, and File No. 2236, under the terms of which DISTRICT is authorized and empowered to appropriate, impound, divert and use unappropriated public water of Cypress Creek, a stream in the Red River Watershed in Titus and Marion Counties, Texas, said water to be stored in Lake O' the Pines (formerly Ferrell's Bridge Reservoir) created by Ferrell's Bridge Dam, constructed by the Corps of Engineers, United States Army. Said permit authorizes and permits DISTRICT to appropriate and use not more than 42,000 acre feet of water per annum for municipal and domestic purposes and not more than 161,800 acre feet of water per annum for industrial use purposes.

DISTRICT further represents that it has, by contract with the United States of America, acquired rights and privileges of storing water in the conservation pool of said

reservoir to the extent of 251,000 acre feet between elevations 201 feet and 228-1/2 feet.

DISTRICT expressly covenants with and warrants to SWEPCO that the water permit and storage rights and privileges described in this paragraph are valid and subsisting and that DISTRICT has taken all actions required by, and complied with all the terms, provisions and conditions of, said permit and said contract with the United States of America and that the rights and privileges of DISTRICT under and pursuant to said permit and said contract are in all things firm and effectual.

1.3 DISTRICT agrees that it will, acting in concert with SWEPCO cause to be filed an appropriate joint application or other pleading addressed to the Texas Water Commission, praying for an order of said Commission awarding SWEPCO, in its own right and for its own use and benefit, a contractual permit under the permit from the Board of Water Engineers of the State of Texas owned and held by DISTRICT, dated November 22, 1957, and described in Paragraph 1.2 hereof, insofar and to the extent that it may be necessary to effect and allow the award by said Texas Water Commission of the contractual permit in favor of SWEPCO described in this paragraph. The water rights under such permit will be assigned by SWEPCO to DISTRICT upon SWEPCO's determination it has no further use for said water.

1.4 DISTRICT agrees that insofar and to the extent that it may lawfully do so pursuant to Section 5.024 and allied and related sections of V.T.C.A. Water Code, it has and does hereby reserve water for the exclusive use and benefit of SWEPCO, to the extent of a maximum diversion of 18,000 acre feet in any one calendar year, of water stored by and permitted to DISTRICT in the conservation portion of Lake O' the Pines Reservoir, and does grant to SWEPCO the right and privilege, at its sole

cost and expense, of taking water permitted to DISTRICT from that stored in Lake O' the Pines, and transmitting it to the lake to be built. It is expressly understood and agreed that the rate at which water is to be taken by SWEPCO need not be uniform but may vary from time to time and shall be at such rates of flow as in the sole option of SWEPCO may be best suited for SWEPCO's purposes and operations, except as may be modified by the requirements of prior permit holders, including Lone Star Steel Company.

1.5 If at any time during the term of this agreement, SWEPCO desires the reservation for use and consumption, in its steam electric generating station described in Paragraph 1.1 hereof, of water in addition to the maximum set out in preceding Paragraph 1.4 hereof, DISTRICT agrees that it will negotiate with SWEPCO to contract for such additional water as may be desired, if such water is available.

1.6 For the rights and privileges granted and accorded to SWEPCO in respect of the reservation of water stored and permitted to DISTRICT in the conservation portion of the Lake O' the Pines reservoir, SWEPCO covenants and agrees to pay to DISTRICT the sum of FIVE DOLLARS (\$5.00) per acre foot per year (the sum of \$90,000.00 per year) for the water reserved in accordance with Paragraph 1.4 hereof, which sum is in addition to the payments provided under Paragraph 1.7 following.

Said charge shall not commence until after the contractual permit has been issued, and said payment will be made by SWEPCO to DISTRICT in equal quarterly installments of \$22,500.00, the first installment to be due and payable within the first twenty (20) days of the calendar quarter succeeding the date of issuance of a contractual permit by the Texas Water Commission, with a similar quarterly payment to be due and payable within the same period of each succeeding calendar quarter.

1.7 SWEPCO shall have the right to pump the water reserved in accordance with Paragraph 1.4 and 1.5 hereof from Lake O' the Pines, and/or Cypress Creek, and shall pay for such amounts of water in quarterly payments at the rate of fifteen dollars (\$15.00) per acre foot, per calendar year. Payments shall begin with the pumping of water or no later than January 1, 1983, whichever occurs first.

For the first ten calendar years after payments begin of the duration of this agreement, payment for water pumped by SWEPCO from Lake O' the Pines will be based upon the greater of (a) the actual number of acre feet pumped by SWEPCO pursuant to this contract from Lake O' the Pines or Cypress Creek in any full calendar year or (b) the maximum number of acre feet pumped by SWEPCO from Lake O' the Pines or Cypress Creek in any previous full calendar year within the ten calendar year period, (c) a minimum of 12,000 acre feet per full calendar year.

After the first ten full calendar years after payments begin, payment for water pumped by SWEPCO from Lake O' the Pines or Cypress Creek pursuant to this contract in succeeding ten contract year periods which follow immediately after the last calendar year in the preceding ten calendar year period shall be based upon the greater of (a) actual acre feet pumped by SWEPCO from Lake O' the Pines in any contract year within the then appropriate ten year period, or (b) the maximum number of acre feet pumped by SWEPCO pursuant to this contract from Lake O' the Pines in any previous contract year within the then applicable ten calendar year period, (c) a minimum of 12,000 acre feet per full calendar year.

Water pumped under the provisions of Paragraph 1.7 shall be metered by calculating the flow from the Capacity-Head Test curve of the pump and by use of an hourly operation

clock, or such other method as may be mutually agreed upon; SWEPCO shall furnish pump records to DISTRICT prior to the tenth day of each month, and payments for water pumped by SWEPCO under terms of this Paragraph 1.7 shall be due and payable quarterly within twenty days following the end of each calendar quarter.

Not later than 60 days after the elapse of each full five calendar year periods that this agreement may be in effect, the parties shall review all payments and water rates as set forth herein. The compensation due the DISTRICT under the terms of this agreement shall be adjusted if the review indicates there has been an increase or decrease in costs and the adjusted payments and water rates shall apply to the next ensuing five (5) year period following an adjustment of said payments and water rates. Such adjustments shall apply to the \$5.00 per acre foot for water reserved, and shall not apply to the price for water actually diverted, provided, however, that the adjusted rate shall never be less than \$5.00 per acre foot per annum.

The review of compensation of the DISTRICT shall be based upon the following matters:

(a) The base factor for determination of increases or decreases in cost shall be the average annual payment by the DISTRICT to the Corps of Engineers for maintenance and operation charges during the five (5) year period, 1972-1976, which amount is \$34,674.01.

(b) The average annual payment by the DISTRICT to the Corps of Engineers for maintenance and operation charges during the five years immediately preceding the time of review shall be divided by the base factor to determine the cost increase or decrease ratio.

(c) If there has been an increase or decrease in costs as reflected by the above cost ratio, the payments for the

reservation of water under Paragraph 1.6 of this agreement shall be adjusted by multiplying the cost change ratio times five (\$5.00) dollars.

In the event that either party during the period for review is of the opinion that the foregoing formula is unfair or prejudicial and wants changes or revisions thereof, then said party shall endeavor to negotiate with the other party a new procedure and methods for the redetermination of payments and water rates.

1.8 SWEPCO agrees that it will, upon written request of DISTRICT, transmit water for DISTRICT's account through SWEPCO's facilities, if, at the time of such request and for so long thereafter as SWEPCO has in its sole judgement, facilities installed of sufficient unused and uncommitted capacity and kind to effect such transmission without interfering with SWEPCO's then operations or planned operations, the cost of which is to be paid by DISTRICT to SWEPCO on a basis to be mutually agreed upon by both parties.

1.9 Each of the parties hereto has and does hereby give, grant and convey unto the other, all such easements on, over and across their respective lands and premises as may be necessary or convenient for effecting the withdrawal of water from Lake O' the Pines or the flowing water of Cypress Creek and transmission thereof across property owned or controlled by SWEPCO or DISTRICT for delivery to SWEPCO or to DISTRICT's other customers. The reciprocal rights granted herein shall include the right of ingress and egress and the right to construct, operate and maintain such intake towers, conduits, pumps, pipelines, and other instrumentalities and facilities as shall be convenient or necessary to effect the transfer of water allowed or required under the terms of this agreement.

1.10 This agreement shall be for a term of thirty (30)

years, and thereafter shall be extended automatically from year to year unless cancelled by SWEPCO by giving at least twelve months written notice of such cancellation prior to any anniversary date.

1.11 It is agreed that when DISTRICT's sales or commitments for sale of water in Lake O' the Pines reach an average of approximately 100,000,000 gallons per day, including the usage of Lone Star Steel Company and others, DISTRICT will notify SWEPCO in writing before DISTRICT sells any more water. SWEPCO shall have forty-five (45) days after receipt of such notice to exercise its option under Paragraph 1.5 hereof to purchase additional water at a price mutually agreeable. In the event SWEPCO does exercise its option to purchase additional water, payment for such water shall be made in equal quarterly payments beginning with the first calendar quarter after receipt of written notice by DISTRICT from SWEPCO of its intent to purchase additional water. In the event that SWEPCO elects not to purchase such additional water within the 45 days, or does not exercise its option, the DISTRICT is released from its obligation under Paragraph 1.5.

1.12 SWEPCO reserves the right to cancel this contract in its entirety by written notice twelve (12) months in advance should SWEPCO determine that the steam electric generating plant contemplated in Paragraph 1.1 hereof will not be constructed.

1.13 This agreement shall not become binding or effective, except for the reservation of water under Paragraph 1.4 pending the processing and approval by the Texas Water Commission, nor any water delivered unless and until:

(a) The Texas Water Commission shall have issued a

contract permit in favor of SWEPCO covering the taking of water from Lake O' the Pines so that the right of SWEPCO to receive water under the terms of this agreement shall be in all things firm and effectual.

1.14 If by reason of force majeure beyond the control and without the fault or negligence of the party failing to perform, either party is rendered unable to carry out its obligations under this agreement, then on such party's giving notice and full particulars of such reasons in writing to the other party within a reasonable time after the occurrence of the cause relied on, then the obligation of the party giving such notice, so far as it is affected by such force majeure, shall be suspended during the continuance of any inability so caused, but for no longer period and such cause shall, so far as possible, be remedied with all reasonable dispatch:

"Force Majeure" as used herein shall mean acts of God, strikes, or other industrial disturbances, acts of public enemy, orders, laws, or actions of any kind of the government of the United States or of the State of Texas, or any civil or military authority, insurrections, riots, epidemics, landslides, lightning, earthquakes, fires, hurricanes, storms, floods, wash-outs, droughts, arrests, explosions, breakage or accident to dams, machinery, pipelines, or canals or other structures or machinery, partial or entire failure of water supply and inability on the part of DISTRICT to deliver water hereunder, or of SWEPCO to transport or receive water, on account of any other cause not within the control of the party claiming such inability. The above requirement that any force majeure shall be remedied with all reasonable dispatch shall not require the settlement of strikes and lock-outs by acceding to the demands of the opposing

parties when settlement is unfavorable in the judgment of the party having the difficulty.

No damage shall be recoverable from DISTRICT or SWEPCO by reason of the suspension of the delivery of water, or acceptance of water, due to any of the causes above-mentioned. Force majeure shall not relieve SWEPCO of its obligation to make payments for water as provided herein, EXCEPT, HOWEVER, that if force majeure should cause a failure of the water supply, prevent DISTRICT from reserving, delivering or selling all or part of the water herein contracted for, or prevent SWEPCO from purchasing, reserving, storing or utilizing in whole or in part the water herein contracted for, then the obligation of SWEPCO to make payments for such water during such time shall be suspended, or if such force majeure causes an inability to deliver, reserve, or receive only partial amounts of the water herein contracted for, said obligation of SWEPCO to pay for water as provided herein shall be proportionately adjusted in a fair and equitable manner.

WITNESS the hands of the parties hereto.

NORTHEAST TEXAS MUNICIPAL WATER DISTRICT

ATTEST:

B. B. Waldrop
B. B. Waldrop

By Uvalde Stobermer
Uvalde Stobermer

SOUTHWESTERN ELECTRIC POWER COMPANY

ATTEST:

W. Henry Jackson
SECRETARY

By J. Lamar Stalle
PRESIDENT

MODIFICATION OF AGREEMENT
BETWEEN
NORTHEAST TEXAS MUNICIPAL WATER DISTRICT
AND
SOUTHWESTERN ELECTRIC POWER COMPANY

The agreement entered by and between the parties dated
the 5th of December, 1977, by the addition to Section 1.7 of
the following:

"The District shall bear channel losses resulting
from the conveyance of the water to the point
of delivery, as described in the Application
for Permit Based on Contract, filed with the
Texas Department of Water Resources by South-
western Power Company."

Dated this 22nd day of May, 1978.

NORTHEAST TEXAS MUNICIPAL WATER
DISTRICT

ATTEST:

B.B. Waldrop By Walter Thomas

SOUTHWESTERN ELECTRIC POWER COMPANY

ATTEST:

Wesley Jackson By John W. Tully
SECRETARY VICE PRESIDENT

EXHIBIT F ATTACHMENT 2

Northeast Texas Municipal Water District

Executive Office □ P. O. Box 955

Hughes Springs, Texas 75656

January 8, 2007

STATEMENT

Southwestern Electric Power Company
2400 Farm Road No. 3251
Hallsville, Texas 75650

Pirkey Power Plant

Contract Agreement dated 12-5-77, Paragraph 1.7:

4th Quarter 2006 - Pumping –

September 2006	-	1272.9 acre feet	\$ 19,093.50
October 2006	-	1318.9 acre feet	\$ 19,783.50
November 2006	-	309.9 acre feet	\$ 4,648.50
December 2006	-	623.9 acre feet	<u>\$ 9,358.50</u>
TOTAL AMOUNT DUE			\$ 52,884.00

**Southwestern Electric Power
Company**

H.W. Pirkey Power Plant
2400 Farm Road 3251
Hallsville, TX 75650



January 3, 2006

Northeast Texas Water District
P. O. Box 955
Hughes Springs, Texas 75656

In accordance with our contract we report the amount of water pumped from the Lake O'The Pines during the month of December 2006 to be as follows:

Meter #1 Present Meter Reading 13,557.0
 Previous Meter Reading 13,555.2
 Difference 0

Meter #2 Present Meter Reading 13,243.9
 Previous Meter Reading 12,891.0
 Difference 352.9

Hours both pumps run 0 Gallons 0 Acre Feet 0

Hours only one pump run 352.9 Gallons 203,270,400 Acre Feet 623.9

Total Gallons 203,270,400 Total Acre Feet 623.9

Accumulative total to date this year: 4,439,175,120 Acre Feet 13,625

Report submitted by Oliver Jefferson

To the attention of _____

Note:
Using a rate of 9,600 g.p.m. when only one pump runs.