

Bryan W. Shaw, Ph.D., *Chairman*
Buddy Garcia, *Commissioner*
Carlos Rubinstein, *Commissioner*



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

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

March 5, 2012

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

**RE: EAST TEXAS ELECTRIC COOPERATIVE, INC.
TCEQ DOCKET NO. 2012-0204-IWD**

Dear Ms. Bohac:

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

Sincerely,



Garrett Arthur, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

DOCKET NO. 2012-0204-IWD

APPLICATION BY	§	BEFORE THE
EAST TEXAS ELECTRIC	§	
COOPERATIVE, INC.	§	TEXAS COMMISSION ON
WATER QUALITY PERMIT	§	
NO. WQ0004949000	§	ENVIRONMENTAL QUALITY

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

To the Members of the Texas Commission on Environmental Quality:

The Office of Public Interest Counsel (OPIC) at the Texas Commission on Environmental Quality (TCEQ) files this response to the hearing requests in the above-referenced matter.

I. Introduction

On December 23, 2010, East Texas Electric Cooperative, Inc. (ETEC) applied to TCEQ for a new wastewater discharge permit. The permit would be for the proposed Woodville Renewable Power Project, a biomass-fired electric power generating facility. The proposed permit would authorize the discharge of cooling tower blowdown, previously monitored effluents, storm water from the detention pond, process area storm water, and steam condensate, at a daily average flow not to exceed 240,000 gallons per day. The proposed facility is located in Tyler County, approximately one mile south of the City of Woodville. Specifically, the plant site is west of U.S. Highway 287, at the intersection of County Roads 1020 and 1030. ETEC proposes to discharge effluent via pipeline to Turkey Creek, then to Village Creek in Segment No. 0608 of the Neches River Basin.

This application was declared administratively complete February 25, 2011. First notice was published March 11 and 18, 2011, and second notice was published September 8 and 16, 2011. The public comment period closed October 17, 2011, and the Executive Director's (ED) Response to Comments (RTC) was mailed December 22, 2011. The deadline to request a contested case hearing was January 23, 2012.

The agency timely received hearing requests from the following people: Pam Harrell; Edward and Tammy Miller; Billy and Penny Tinkle; Grady and Linda Miller; and Kristy, John, and Adrianna Miller and Jacob Webley. For the reasons stated herein, OPIC recommends all of the hearing requests be denied.

II. Applicable Law

This application was declared administratively complete after September 1, 1999, and is therefore subject to the procedural requirements adopted pursuant to House Bill 801 (76th Leg., 1999).

Under Title 30, Texas Administrative Code (TAC) § 55.201(d), a hearing request must substantially comply with the following:

- (1) give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request;
- (2) identify the person's personal justiciable interest affected by the application, including a brief, but specific, written statement explaining in plain language the requestor's location and distance relative to the proposed facility or activity that is the subject of the application and how and why the requestor believes he or she will be adversely affected by the proposed facility or activity in a manner not common to members of the general public;
- (3) request a contested case hearing;

- (4) list all relevant and material disputed issues of fact that were raised during the public comment period and that are the basis of the hearing request. To facilitate the commission's determination of the number and scope of issues to be referred to hearing, the requestor should, to the extent possible, specify any of the executive director's responses to comments that the requestor disputes and the factual basis of the dispute and list any disputed issues of law or policy; and
- (5) provide any other information specified in the public notice of application.

Under 30 TAC § 55.203(a), an affected person is one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. An interest common to members of the general public does not qualify as a personal justiciable interest. Section 55.203(c) provides relevant factors to be considered in determining whether a person is affected. These factors include:

- (1) whether the interest claimed is one protected by the law under which the application will be considered;
- (2) distance restrictions or other limitations imposed by law on the affected interest;
- (3) whether a reasonable relationship exists between the interest claimed and the activity regulated;
- (4) likely impact of the regulated activity on the health, safety, and use of property of the person;
- (5) likely impact of the regulated activity on use of the impacted natural resource by the person; and
- (6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

Under 30 TAC § 55.211(c)(2), a hearing request made by an affected person shall be granted if the request:

- (A) raises disputed issues of fact that were raised during the comment period, that were not withdrawn by the commenter by filing a withdrawal letter with the chief clerk prior to the filing of the executive director's response to comment, and that are relevant and material to the commission's decision on the application;
- (B) is timely filed with the chief clerk;

- (C) is pursuant to a right to hearing authorized by law; and
- (D) complies with the requirements of § 55.201.

III. Analysis of Hearing Requests

A. Whether the requestors are affected persons

Pam Harrell

According to a map prepared by ED staff, Pam Harrell lives on property adjacent to the ETEC site, but not adjacent to the discharge route, and over a mile from the discharge point. Ms. Harrell states the permit will allow ETEC to store toxic wastewater on the property that borders her fence. She states that granting this permit will adversely affect her livestock and family business. She does not state whether the family business is raising livestock. Finally, Ms. Harrell states that granting this permit will allow the odor in the air and the toxins to enter the streams from which her livestock drink.

We recognize Ms. Harrell's proximity to the plant site, however, we cannot find that she is an affected person. If Ms. Harrell's concern regarding wastewater storage stems from ETEC's initial request for land application of wastewater, OPIC notes this request has been removed from ETEC's application, and land application of wastewater is not allowed under the draft permit. Ms. Harrell is concerned that the proposed plant will impact water quality and this will in turn adversely affect her livestock. While the effect of the proposed discharge on water quality is a legitimate issue in this matter, Ms. Harrell's property is not on the discharge route, and it is unclear how her livestock would be affected by the proposed discharge. Ms. Harrell is concerned for her family business, but she does not state the nature of the business or how it will be affected.

Odor is an issue most often associated with domestic wastewater, not industrial wastewater, and as stated previously, ETEC has withdrawn the request for land application of wastewater. Without more information, OPIC cannot find that Pam Harrell has a personal justiciable interest which is distinguishable from the general public, and we therefore find that she does not qualify as an affected person in this matter.

Billy and Penny Tinkle

Billy and Penny Tinkle submitted a hearing request which is identical to Pam Harrell's hearing request. According to the ED's map, the Tinkles' address is approximately one-quarter mile from the ETEC site. The map also indicates that address is over a mile from the discharge point and not adjacent to the discharge route. OPIC's analysis of Pam Harrell's hearing request also applies to the Tinkles' hearing request. Therefore, we find that Billy and Penny Tinkle do not qualify as affected persons in this matter.

Edward and Tammy Miller

Edward and Tammy Miller submitted a hearing request identical to those submitted by Pam Harrell and Billy and Penny Tinkle. Like Pam Harrell, the Millers state that the ETEC property borders their fence. However, according to the ED's map, Edward and Tammy Miller's address is approximately 70 miles from the ETEC site. Without further information, OPIC must find the Millers lack the requisite proximity to the ETEC site to be affected in a way not common to the general public. For this reason, we find that Edward and Tammy Miller do not qualify as affected persons in this matter.

Grady and Linda Miller

Grady and Linda Miller state that they reside and own a business on property which borders the proposed site. The ED's map confirms the Millers' property is adjacent to the ETEC site. The map also shows that property is over a mile from the discharge point and not adjacent to the discharge route.

The Millers' concerns include odor; health effects; livestock health; damage to property, vegetation, and wildlife; and water quality. Odor is an issue most often associated with domestic wastewater, not industrial wastewater. Odor can also stem from land application of wastewater, but as stated previously, ETEC has withdrawn the request to land apply wastewater. The Millers are concerned that the proposed plant will impact water quality and this will in turn adversely affect human health and livestock health. While the effect of the proposed discharge on water quality is a legitimate issue in this matter, the Millers' property is not on the discharge route, and it is unclear how their health or their livestock's health would be affected by the proposed discharge. Regarding potential damage to property, vegetation, and wildlife, OPIC would need more information to find that these concerns constitute a personal justiciable interest for Grady and Linda Miller.

The Millers own and operate a recreational vehicle and mobile home park on their property and are concerned that the proposed plant will financially hurt this business. However, ETEC is seeking a permit to discharge industrial wastewater, and the Millers have not stated how the proposed discharge will financially impact their business.

The Millers are also concerned about groundwater and air emissions. Either of these concerns could serve as the basis for affected person status in other permitting actions, and ETEC is required to have a separate air quality permit, but groundwater and air emissions are not considered by TCEQ when permitting an industrial wastewater discharge. Therefore, concerns regarding air emissions and groundwater cannot be personal justiciable interests in this matter.

The Camp Urland Boy Scouts camp borders the ETEC property, and the Millers are concerned that the proposed plant will negatively affect the camp. Camp Urland is obviously not the Millers' property, and their concern for the camp, while understandable, does not fit the definition of a personal justiciable interest.

Finally, the Millers are concerned about property value, noise, lighting, and traffic. The TCEQ has no jurisdiction to regulate property value, noise, lighting, or traffic, meaning none of these issues can support a finding that Grady and Linda Miller are affected persons.

For all of these reasons, OPIC cannot, at this time, find that Grady and Linda Miller qualify as affected persons.

Kristy, John, and Adrianna Miller and Jacob Webley

Kristy Miller submitted a hearing request for herself and her family. She states that the plant will be built about one mile from her home. On the ED's map, the address for Kristy Miller and family is approximately one-quarter mile from the ETEC site. They are concerned that the plant will take water upon which the family depends. If this is a concern regarding groundwater usage, TCEQ does not consider an applicant's groundwater usage when permitting an industrial wastewater discharge. Without more information, OPIC cannot find that Kristy Miller and family qualify as affected persons.

B. Which issues raised in the hearing requests are disputed

All of the issues raised in the hearing requests are disputed.

C. Whether the dispute involves questions of fact or of law

All of the disputed issues involve questions of fact.

D. Whether the issues were raised during the public comment period

All of the issues were raised during the public comment period.

E. Whether the hearing requests are based on issues raised solely in a public comment which has been withdrawn

None of the hearing requests are based on issues raised solely in a public comment which has been withdrawn.

F. Whether the issues are relevant and material to the decision on the application

1. Water Quality

The hearing requestors have raised the issue of water quality. Water quality is an issue addressed by the Chapter 307 Texas Surface Water Quality Standards, and the issue is therefore relevant and material to the Commission's decision on this application.¹

2. Health Effects

The hearing requestors have raised the issue of health effects for humans and livestock. This issue concerns the Texas Surface Water Quality Standards and is therefore relevant and material to the Commission's decision on the application.²

¹ See 30 TAC Chapter 307.

² *Id.*

3. Damage to Property, Vegetation, and Wildlife

The hearing requestors have not linked potential damage to property, vegetation, and wildlife to ETEC's proposed discharge. In the context of an industrial wastewater discharge permit, the Commission's consideration is limited to issues which may result from the proposed discharge. Therefore, this issue is not relevant and material to the Commission's decision.

4. Financial Impact on Business

Some of the hearing requestors have raised the issue of the proposed plant financially hurting their business. However, these requestors have not linked potential financial impacts on their business to ETEC's proposed discharge. In the context of an industrial wastewater discharge permit, the Commission's consideration is limited to issues which may result from the activity being regulated—the discharge of industrial wastewater. Without an assertion that negative financial impact will be a direct result of the permitted discharge, this issue is not relevant and material to the Commission's decision.

5. Odor

The requestors have raised the issue of odor. Odor is specifically addressed by TCEQ regulations concerning the siting of domestic wastewater plants.³ However, ETEC is not applying to permit a domestic wastewater treatment plant, and these regulations therefore do not apply. Odor is an issue which is not relevant and material to the Commission's decision on this application.

³ See 30 TAC § 309.13.

6. Groundwater

TCEQ does not consider an applicant's groundwater usage when permitting an industrial wastewater discharge. Therefore, this issue is not relevant and material to the Commission's decision on the present application.

7. Air Emissions

TCEQ does not consider an applicant's air emissions when permitting an industrial wastewater discharge. Therefore, this issue is not relevant and material to the Commission's decision on the present application.

8. Property Value, Noise, Traffic, and Lighting

These issues have been grouped together because they are all beyond the scope of TCEQ's jurisdiction. Because TCEQ lacks the jurisdiction to regulate these issues, they are not relevant and material to the Commission's decision on this application.

G. Maximum expected duration for the contested case hearing

Should a hearing be granted, OPIC estimates a maximum duration of nine months from the first day of the preliminary hearing to issuance of the proposal for decision.

IV. Conclusion

Pending the receipt of further information in timely filed replies, OPIC must presently conclude that none of the hearing requestors qualify as affected persons. Therefore, we respectfully recommend the Commission deny all hearing requests.

Should the Commission grant a hearing, the following are relevant and material issues which could be referred to the State Office of Administrative Hearings:

- (1) Will the proposed discharge adversely impact water quality?
- (2) Will the proposed discharge adversely impact human health?
- (3) Will the proposed discharge adversely impact livestock?

Respectfully submitted,

Blas J. Coy, Jr.
Public Interest Counsel

By 
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CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2012, the foregoing document was filed with the TCEQ Chief Clerk, and copies were served to all parties on the attached mailing list via hand delivery, facsimile transmission, electronic mail, inter-agency mail, or by deposit in the U.S. Mail.


Garrett Arthur

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TCEQ DOCKET NO. 2012-0204-IWD

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