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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

November 12, 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: LOWER COLORADO RIVER AUTHORITY
TCEQ DOCKET NO. 2012-2138-AIR**

Dear Ms. Bohac:

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

Sincerely,

A handwritten signature in black ink that reads "Eli Martinez".

Eli Martinez, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2012-2138-AIR

**IN THE MATTER OF
THE APPLICATION OF
LOWER COLORADO
RIVER AUTHORITY
FOR AIR PERMIT NOS.
51770, PSD-TX-486M3**

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**BEFORE THE TEXAS
COMMISSION ON
ENVIRONMENTAL
QUALITY**

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

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

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

I. INTRODUCTION

The Lower Colorado River Authority (LCRA) applied to the TCEQ for amendments to NSR permits under Texas Clean Air Act (TCAA), § 382.0518, for facilities at its Fayette Power Project (FPP). FPP is located 7 miles east of LaGrange on Highway 71, Fayette County. The application requests amendment of both Permit No. 51770 and Permit No. PSD-TX-486M3, and the purpose of the application is to convert the existing authorization for the facilities at FPP, under Permit 51770, from a permit issued under 30 TAC Chapter 116, Subchapter G to an air quality permit issued under 30 TAC Chapter 116, Subchapter B. The permit document for FPP will include both the de-flexed minor NSR permit and Prevention of Significant Deterioration (PSD) Permit PSD-TX-486M3. FPP is also subject to Plant-Wide Applicability Limit (PAL) Permit PAL2.

FPP consists of three pulverized coal steam electric generating units currently fired with low sulfur sub-bituminous coal. The gross generating capacity of Units 1, 2, and 3 is approximately 650 megawatts (MW), 640 MW, and 470 MW respectively. All three utility boilers are equipped with low NO_x burners and over fired air systems to minimize emissions of oxides of nitrogen (NO_x). Flue gas from each of the utility boilers is routed through an electrostatic precipitator (ESP) for particulate control. Flue gas from each of the three utility boilers is also routed through a wet scrubber that removes sulfur dioxide (SO₂) and other acid gases, before the flue gas is exhausted through a stack to the atmosphere. Fly ash removed by the ESP is collected in hoppers and pneumatically conveyed to storage silos prior to loading for disposal or sales. FPP also consists of ancillary coal, limestone, and ash material handling facilities that are controlled by baghouses, foam suppression, sprays, and enclosures. Contaminants authorized under this permit include NO_x, SO₂, carbon monoxide (CO), particulate matter (PM) including particulate matter with diameters of 10 microns or less (PM₁₀) and 2.5 microns or less (PM_{2.5}), sulfuric acid (H₂SO₄), and lead (Pb).

The TCEQ received this application on January 31, 2011. On April 15, 2011, the Executive Director (ED) declared the application administratively complete. The Notice of Receipt and Intent to Obtain an Air Quality Permit (NORI) for this amendment application was published in the *Fayette County Record* on April 22, 2011. The Notice of Application and Preliminary Decision for an Air Quality Permit (NAPD) for this application was published in the *Fayette County Record* on May 15, 2012. These notices provided the opportunity to submit comment and to request a contested case hearing and a public meeting. State Representative Eddie Rodriguez and some commenters requested a public meeting, which was held in LaGrange on June 14, 2012. The public comment period ended at the close of the public meeting on June 14, 2012. The ED prepared a

response to comments, which was mailed on September 20, 2012. The period to request a contested case hearing ended on October 22, 2012.

TCEQ received eleven requests for a contested case hearing from Ilan Levin and Gabriel Clark-Leach on behalf of Environmental Integrity Project (EIP), Sierra Club, and Texas Campaign for the Environment (TCE); Raul Bustillo; Jeffrey Cook; Jeffrey Fritz-Crunk; John Mikus; Susan Pantell; Darelle Robbins; Allison Sliva; Valerie Thatcher; and Janice Van Dyke Walden. OPIC recommends granting the hearing request of EIP and referring the matter to the State Office of Administrative Hearings (SOAH) on the issue outlined below.

II. APPLICABLE LAW

This application was declared administratively complete after September 1, 1999, and is subject to the requirements of Texas Water Code (TWC) § 5.556 added by Acts 1999, 76th Leg., Ch. 1350 (commonly known as "House Bill 801"). Under the applicable statutory and regulatory requirements, a hearing request must substantially comply with the following: give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request; identify the requestor's personal justiciable interest affected by the application showing why the requestor is an "affected person" who may be adversely affected by the proposed facility or activity in a manner not common to members of the general public; request a contested case hearing; list all relevant and material disputed issues of fact that were raised during the comment period that are the basis of the hearing request; and provide any other information specified in the public notice of application. 30 TAC § 55.201(d). Under 30 TAC § 55.203(a), an

affected person is “one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application.” This justiciable interest does not include an interest common to the general public. 30 TAC § 55.203(c) also provides relevant factors that will be considered in determining whether a person is affected. These factors include:

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

The Commission shall grant an affected person’s timely filed hearing request if:

- (1) the request is made pursuant to a right to hearing authorized by law; and (2) the request raises disputed issues of fact that were raised during the comment period and that are relevant and material to the commission’s decision on the application. 30 TAC § 55.211(c).

Accordingly, pursuant to 30 TAC § 55.209(e), responses to hearing requests must specifically address:

- (1) whether the requestor is an affected person;
- (2) which issues raised in the hearing request are disputed;
- (3) whether the dispute involves questions of fact or law;
- (4) whether the issues were raised during the public comment period;
- (5) whether the hearing request is based on issues raised solely in a public comment withdrawn by the commenter in writing by filing a withdrawal letter with the chief clerk prior to the filing of the Executive Director's response to Comment;
- (6) whether the issues are relevant and material to the decision on the application; and
- (7) a maximum expected duration for the contested case hearing.

A group or association may request a contested case hearing only if the group or association meets all of the following requirements:

- (1) one or more members of the group or association would otherwise have standing to request a hearing in their own right;
- (2) the interests the group or association seeks to protect are germane to the organization's purpose; and
- (3) neither the claim asserted nor the relief requested requires the participation of the individual members in the case.¹

¹ 30 TAC § 55.205(a)

The executive director, the public interest counsel, or the applicant may request that a group or association provide an explanation of how the group or association meets the requirements of 30 TAC § 55.205(a).

III. DISCUSSION

A. Right to Hearing

a. Texas Health and Safety Code § 382.056(g)

As an initial matter, the Commission must determine whether a right to a contested case hearing exists on this application. No right to a contested case hearing exists on an amendment application under Chapter 382 of the Texas Health and Safety Code if the application would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted.² Notwithstanding THSC section 382.056(g), the Commission may hold a hearing on a permit amendment “if the commission determines that the application involves a facility for which the applicant’s compliance history is classified as unsatisfactory according to Commission standards under Section 5.753 and 5.754, Water Code, and rules adopted and procedures developed under those sections.”³ This site in this application has a rating of 0.1 and a classification of average. The company rating and classification, which is the average of the ratings for all sites the company owns, is 2.8, which is also average.

b. Increased Allowable Emissions

Under the Clean Air Act (“CAA”), EPA sets National Ambient Air Quality Standards (“NAAQS”) but states determine the specific control strategies that the

² Tex. Health & Safety Code (hereinafter “THSC”) § 382.056 (g); 30 TAC § 55.201(i)(3); 55.211(d)(2).

³ THSC § 382.056(o).

individual state will use to achieve NAAQS. 42 U.S.C. § 7410(a)(1). The states do this by formulating and administering a SIP. 42 U.S.C. § 7410(a)(2). EPA has the authority to approve or disapprove SIP language proposed by the states. 42 U.S.C. § 7410(k). In 1994, Texas revised its SIP to include a Flexible Permits Program and submitted the revisions to EPA for approval. The Flexible Permit Program allowed facilities that were minor sources for criteria pollutants to obtain a minor NSR permit setting an emissions cap for the whole facility. To determine the amount of the emissions cap, the TCEQ would first determine the corresponding emissions from each emissions unit under the cap if it had pollution controls at the BACT level. The cap amount was then set at the sum of the BACT emission values for the emission units within the facility. Facilities with flexible permits could make some modifications without the need for further agency review, as long as the resulting emissions total was still less than the emissions cap.

On July 15, 2010, EPA issued final disapproval of the program on the basis that the program did not meet the minimum federal Clean Air Act (CAA) requirements for NSR because the proposed flexible permit program allows companies in Texas to group emissions from multiple units under a single cap, rather than include unit-specific emission limits for pollution sources.

At this time, one option for permit holders to obtain a SIP-approved permit is through a de-flex application. EPA has suggested in correspondence with the TCEQ that one step in ensuring the de-flex application complies with federally-applicable requirements requires analysis as to whether changes authorized under the flexible permit should have undergone NSR review. This step is undertaken by reviewing each project that affected

or involved emissions under the flexible permit to determine whether the net emission increase of a regulated pollutant during the flex permitting permit period exceeded the significance level and would have triggered NSR/PSD review under the applicant's previously-issued, SIP-approved permit.

The hearing request submitted by EIP makes the assertion that the LCRA Fayette plant has undergone major modifications to its boilers, which would have triggered NSR-PSD review had LCRA not relied on its Flex Permit and PAL to avoid federal permitting requirements. Further, EIP asserts that the Application and Draft Permit do not set emission limits that are at least as stringent as the emission limits in effect prior to the Flexible Permit. In short, EIP asserts that this application does in fact request an increase in allowable emissions and does not fall under the no-hearing provisions of THSC § 382.056(g). OPIC agrees.

B. Determination of Affected Person Status

i. Jeff Cook

TCEQ received a letter requesting a contested case hearing on this matter from Mr. Jeffrey Fritz Crunk. Mr. Crunk requested a contested case hearing but did not identify his personal justiciable interest affected by the application in a manner not common to members of the general public or list any relevant and material disputed issues of fact raised during the comment period. Because Mr. Crunk's request does not satisfy the requirements of 30 TAC § 55.201(d), OPIC recommends that his request be denied.

ii. Paul Bustillo, Jeffrey Fritz Crunk, John Mikus, Susan Pantwell, Darelle E. Robbins, Allison Sliva, Valerie Thatcher, and Janice Van Dyke Walden

Paul Bustillo, a resident of Bay City, Texas; Jeffrey Fritz Crunk, resident of Austin, Texas; John Mikus, resident of Houston, Texas; Susan Pantwell, resident of Austin, Texas; Darelle E. Robbins, resident of Houston, Texas; Allison Sliva, resident of Bay City, Texas; Valerie Thatcher, resident of Austin, Texas; and Janice Van Dyke Walden, resident of Houston Texas, all submitted timely hearing requests. Because each of these requestors resides over 60 miles from the Fayette Power Plant, OPIC must conclude that a reasonable relationship does not exist between the interest claimed and the activity regulated and the likely impact of the regulated activity on the health, safety, and use of property of the requestors is too attenuated to support a finding of affectedness under 30 TAC § 55.203(a). OPIC therefore recommends that these requests be denied.

iii. Environmental Integrity Project, on Behalf of Sierra Club and Texas Campaign for the Environment

Gabriel Clark-Leach and Ilan Levin, counsel for the Environmental Integrity Project, submitted timely hearing requests on behalf of Sierra Club and Texas Campaign for the Environment that included relevant contact information and raised disputed, relevant and material issues of fact outlining why the requestors would be adversely affected by the proposed activity in a manner not common to members of the general public.

The requests state that Sierra club is an environmental membership organization which aims to preserve and enhance the natural environment and protect public health. The organization's goals include improving outdoor air quality. Sierra Club identifies

Ms. Carol Daniels as a member and resides “within 10 miles of the plant.” She is concerned about air quality in her home and in her community, and is specifically concerned that air pollution from the power plant harms her health and property and interferes with her normal use and enjoyment of her home. The Executive Director produced a map in response to this hearing request that indicates Ms. Daniels’ residence lies approximately 11.5 miles from the facility.

The requests state that Texas Campaign for the Environment (TCE) is a nonprofit membership organization dedicated to informing and mobilizing Texans to protect their health, their communities and the environment. TCE identifies Mrs. Maggie Rivers as a member who resides approximately six miles from facility. Mrs. Rivers states that she can see the smokestacks from her property and has observed the plant’s smoke and sooty ash plume blowing across her property and vehicles. Mrs. Rivers is concerned pollution from the plant causes or contributes to her asthma. The Executive Director’s map indicates that Mrs. Rivers’ residence lies approximately 5.1 miles from the facility.

EIP raises disputed material and relevant issues of fact relating to whether PSD/NSR review is deficient in this application. The stated purposes of Sierra Club and TCE are germane to the interests they seek to protect in this hearing request.⁴ Although the named members of the organizations reside several miles from the facility, the potential for dispersion of air contaminants from a facility as large and active as the Fayette Power Plant supports the finding that a reasonable relationship exists between the interests stated and the activity regulated.⁵ The request also states concerns that are

⁴ 30 TAC § 55.205(a)(2)

⁵ 30 TAC § 55.203(c)(3).

protected by the law under which the application will be considered.⁶ OPIC therefore recommends that Sierra Club and TCE be determined affected persons.

C. Issues Raised in the Hearing Request

The following issues have been raised in the hearing requests:

1. The Plant has undergone major modifications which require BACT and impacts analysis.
2. The Application and Draft Permit do not demonstrate how the proposed emission limits meet the best available control technology (BACT).
3. The Application and Draft Permit do not demonstrate that the emissions will not cause cancer or contribute to violations of health-based ambient air quality standards (NAAQS).
4. The Application and Draft Permit do not set emission limits that are at least as stringent as the emission limits in effect prior to the Flexible Permit.
5. LCRA misrepresented emissions and inflated capacity (annualized heat input) in order to get high Flex Permit limits that have not been corrected.
6. The Application and Draft Permit should be strengthened to reduce air toxics such as lead and mercury in light of new federal rules requiring maximum achievable control technology (MACT) to reduce toxics from boilers.
7. The de-flex application should include authorizations for planned maintenance, startup, and shutdown (MSS) emissions, LCRA's stand-alone PAL permit, and the permits by Rule (PBRs) incorporated by reference into the application.

⁶ 30 TAC § 55.203(c)(1).

D. Issues Raised in the Comment Period

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

E. Disputed Issues

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

F. Issues of Fact

If the Commission considers an issue to be one of fact, rather than one of law or policy, it is appropriate for referral to hearing if it meets all other applicable requirements. 30 TAC § 55.211(c)(2)(A).

The issues of separate applications for MSS emissions, PAL permitting, and PBR's, as well as the issue of including specific MAT requirements, are issues of law not appropriate for referral to SOAH.

G. Relevant and Material Issues

The hearing requests raise issues relevant and material to the Commission's decision under the requirements of 30 TAC §§ 55.201(d)(4) and 55.211(c)(2)(A). In order to refer an issue to SOAH, the Commission must find that the issue is relevant and material to the Commission's decision to issue or deny this permit. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–251 (1986) (in discussing the standards applicable to reviewing motions for summary judgment the Court stated “[a]s to materiality, the substantive law will identify which facts are material . . . it is the substantive law's

identification of which facts are critical and which facts are irrelevant that governs”). Relevant and material issues are those governed by the substantive law under which this permit is to be issued. *Id.*

TCEQ is responsible for the protection of air quality under the TCAA and accompanying administrative rules. The purpose of the TCAA is “to safeguard the state’s air resources from pollution by controlling or abating air pollution and emission of air contaminants, consistent with the protection of public health, general welfare, and physical property, including the esthetic enjoyment of air resources by the public and the maintenance of adequate visibility.” TEX. HEALTH & SAFETY CODE § 382.002. In addition, “[n]o person shall discharge from any source whatsoever one or more air contaminants or combinations thereof, in such concentration and of such duration as are or may tend to be injurious to or to adversely affect human health or welfare, animal life, vegetation, or property, or as to interfere with the normal use and enjoyment of animal life, vegetation, or property.” 30 TAC § 101.4.

The Commission ensures that these provisions are met by conducting PSD/NSR review, where required. Because the hearing requestors have raised a substantial question as to whether that PSD/NSR review is deficient in this application, the issues related to BACT, NAAQS impacts, and appropriate emission limits are material and relevant.

However, the issues related to misrepresentations of emissions and inflated capacities in the flex permitting process is not material and relevant to this proceeding.

H. Issues Recommended for Referral

If the Commission determines that any of the requestors are affected persons, OPIC would recommend that the following disputed issues of fact be referred to SOAH for a contested case hearing:

1. Has the LCRA Fayette plant undergone major modifications during its Flex authorization requiring PSD/NSR review under Chapter 382 of the Texas Health and Safety Code?

I. Maximum Expected Duration of Hearing

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

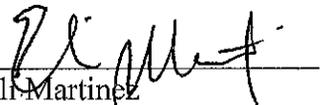
III. CONCLUSION

For the reasons discussed above, OPIC recommends that the Commission approve the hearing request of Environmental Integrity Project on behalf of Sierra Club and Texas Campaign for the Environment and refer the matter to SOAH for a contested case hearing

on the issue identified above for a maximum duration of one year. OPIC recommends that the Commission deny the remaining requests.

Respectfully submitted,

Blas J. Coy, Jr.
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CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2012 the original and seven true and correct copies of the Office of the Public Interest Counsel's Response to Hearing Requests were filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail or by deposit in the U.S. Mail.


Eli Martinez

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TCEQ DOCKET NO. 2012-2138-AIR

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