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Toby Baker, *Commissioner*  
Zak Covar, *Commissioner*  
Richard A. Hyde, P.E., *Executive Director*



*Vic McWherter, Public Interest Counsel*

## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

April 6, 2015

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: NRG TEXAS POWER, LLC  
TCEQ DOCKET NO. 2014-1371-MWD**

Dear Ms. Bohac:

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

Sincerely,

A handwritten signature in cursive script, reading "Isabel Segarra Treviño".

Isabel G. Segarra Treviño, Attorney  
Assistant Public Interest Counsel

cc: Mailing List

Enclosure



**TCEQ DOCKET NO. 2014-1371-IWD**

**IN THE MATTER  
OF THE APPLICATION OF  
NRG TEXAS POWER, LLC, FOR  
RENEWAL OF TPDES PERMIT  
NO. WQ0002430000**

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**BEFORE THE  
TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY**

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

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

The Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (Commission or TCEQ) files this Response to Request for Hearing in the above-referenced matter and respectfully submits the following.

**I. INTRODUCTION**

**A. Background of Facility**

NRG Texas Power, LLC (NRG) has applied to the TCEQ for a renewal of Texas Pollution Discharge Elimination System (TPDES) Permit No. WQ0002430000 for the Limestone Electric Generating Station (Facility) in Limestone County. The draft permit authorizes distinct discharge limits for each of the Facility's eight outfalls. Outfall 001 is authorized to discharge low volume waste, cooling tower blowdown, lignite pile runoff, and bottom ash transport water at a daily maximum flow not to exceed 2.304 million gallons per day (MGD). Outfall 002 is authorized to discharge material handling area runoff, washdown and bottom ash transport water, and low volume waste on an intermittent and flow-variable basis. Outfall 003 and Outfall 004 are authorized to discharge bottom ash transport water, low volume waste, and stormwater runoff at a daily maximum flow not to exceed 0.51 MGD and 0.432 MGD, respectively. Outfall 005 is authorized to discharge low volume waste, metal cleaning

waste, bottom ash transport water, and utility wastewater at a daily maximum flow not to exceed 0.216 MGD. Outfall 006 and Outfall 007 are authorized to discharge treated domestic wastewater at a daily average flow not to exceed 0.06 MGD and 0.003 MGD, respectively. Outfall 008 is authorized to discharge bottom ash transport water and low volume waste at a daily maximum flow not to exceed 0.072 MGD.

The Facility is located adjacent to and west of Farm-to-Market Road 39, approximately 2.5 miles southeast of the City of Farrar, in Limestone County, Texas. Outfalls 001, 003, and 006 discharge into the original channel of Lynn Creek; Outfalls 002, 007, and 008 discharge into the relocated channel of Lynn Creek; Outfall 004 and Outfall 005 discharge into unnamed tributaries of Lambs Creek. The outfalls then discharge into Lambs Creek, and finally, into Lake Limestone in Segment No. 1252 of the Brazos River Basin. The receiving streams of Lynn Creek original, Lynn Creek relocated, and the unnamed tributaries of Lambs Creek are unclassified receiving waters and have minimal aquatic life use. The designated uses for Segment No. 1252 of the Brazos River Basin are primary contact recreation, public water supply, and high aquatic life use.

## **B. Procedural Background**

TCEQ received NRG's application on May 23, 2013. On July 1, 2013, the Executive Director (ED) declared the application administratively complete. The Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) was published in English on July 25, 2013 in Freestone County in *The Teague Chronicle*, and on July 30, 2013 in Limestone County and Freestone County in *The Mexia Daily News*. The NORI was published in Spanish on July 26, 2013 in Limestone County in *La Cara* newspaper. The ED completed the technical review of the application and prepared a draft permit. The Notice of Application and Preliminary Decision

for a Water Quality Permit (NAPD) was published in English on April 17, 2014 in Freestone County in *The Teague Chronicle*, and in Limestone County and Freestone County in *The Mexia Daily News*. The NAPD was published in Spanish on April 18, 2014 in Limestone County in *La Cara* newspaper. The public comment period ended on May 19, 2014. On August 11, 2014, the ED filed his decision and Response to Comments, which the Chief Clerk's office mailed on August 14, 2014. The deadline to request a contested case hearing was September 15, 2014.

TCEQ received timely comments and a request for a contested case hearing from The Sierra Club (Requester) on May 22, 2014. The hearing request and the Executive Director's Response to Comments were originally set for the Commission's consideration on the December 10, 2014 agenda. However, on December 5, 2014, the matter was remanded to the ED so that the Executive Director's Response to Comments could be amended. The Amended Response to Comments was filed on January 7, 2015 and the public comment period ended on February 19, 2015. After the Amended Response to Comments was filed, no further hearing requests were filed. OPIC recommends denying the Requester's hearing request.

## II. APPLICABLE LAW

This application was declared administratively complete on July 1, 2013. Because the application was declared administratively complete after September 1, 1999, a person may request a contested case hearing on the application pursuant to the requirements of House Bill 801, Act of May 30, 1999, 76th Leg., R.S., § 5 (codified at TEX. WATER CODE (TWC) § 5.556).

Under the applicable statutory and regulatory requirements, a hearing request must substantially comply with the following: give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request; identify the requestor's personal

justiciable interest affected by the application showing why the requestor is an “affected person” who may be adversely affected by the proposed facility or activity in a manner not common to members of the general public; request a contested case hearing; list all relevant and material disputed issues of fact that were raised during the comment period that are the basis of the hearing request; and provide any other information specified in the public notice of the application. 30 TEX. ADMIN. CODE (TAC) § 55.201(d).

An “affected person” is “one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application.” 30 TAC § 55.203(a). This justiciable interest does not include an interest common to the general public. *Id.* Governmental entities with authority under state law over issues contemplated by the application may be considered affected persons. 30 TAC § 55.203(b). Relevant factors considered in determining whether a person is affected include:

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

30 TAC § 55.203(c).

Further, a group or association may request a contested case hearing if:

- (1) one or more members of the group or association would otherwise have standing to request a hearing in their own right;
- (2) the interests the group or association seeks to protect are germane to the organization’s purpose; and

- (3) neither the claim asserted nor the relief requested requires the participation of the individual members in the case.

30 TAC § 55.205(a). The ED, OPIC, or applicant may request the group or association provide an explanation of how the group or association meets these requirements. 30 TAC § 55.205(b).

The Commission shall grant an affected person's timely filed hearing request if: (1) the request is made pursuant to a right to hearing authorized by law; and (2) the request raises disputed issues of fact that were raised during the comment period and that are relevant and material to the Commission's decision on the application. 30 TAC § 55.211(c).

Accordingly, responses to hearing requests must specifically address:

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

30 TAC § 55.209(e).

There is no right to a contested case hearing for an application under TWC Chapter 26 to renew or amend a permit if:

- (A) the applicant is not applying to:
  - (i) increase significantly the quantity of waste authorized to be discharged; or
  - (ii) change materially the pattern or place of discharge;
- (B) the activity to be authorized by the renewal or amended permit will maintain or improve the quality of waste authorized to be discharged;
- (C) any required opportunity for public meeting has been given;
- (D) consultation and response to all timely received and significant public comment has been given; and
- (E) the applicant's compliance history for the previous five years raises no issues regarding the applicant's ability to comply with a material term of the permit.

30 TAC § 55.201(i)(5).

### III. DISCUSSION

#### A. Right to Hearing

Because this application is for a permit renewal under TWC Chapter 26, the hearing request must be evaluated to determine if there is a right to a hearing under 30 TAC § 55.201(i)(5). Based on these requirements, OPIC concludes that there is no right to a contested case hearing in this matter.

NRG is not applying to increase the quantity of waste to be discharged or the pattern or place of discharge. 30 TAC § 55.201(i)(5)(A). Further, it appears that the standards and criteria in the renewed permit will maintain the quality of waste to be discharged. *Id.* § 55.201(i)(5)(B). Requester raises concerns about the renewed permit's failure to: (1) establish technology-based effluent limits for toxic metals in coal combustion wastewaters, (2) establish selenium discharge limits to protect water quality at Outfalls 003, 006, and 007, (3) establish appropriate thermal limits, (4) establish bacteria discharge limits for the impacted segment of the Brazos River Basin, and (5) address whether the Facility's cooling water intake structures represent the best technology available for minimizing adverse environmental impacts. However, the Requester has not contended that any changes have been made to the permit which would trigger a right to hearing under applicable law. OPIC cannot find that the draft permit changes the Facility's operation in a manner that increases the quantity of waste being discharged, or, materially changes the pattern or place of discharge.

OPIC cannot find that a public meeting is required on this application. *Id.* § 55.201(i)(5)(C). Requester filed the only request for a public meeting, and on May 28, 2014 the ED determined there was insufficient public interest in the application to hold a meeting. *Id.*

§ 55.154(c). There does not appear to be any other basis for requiring a public meeting. Therefore, any required opportunity for a public meeting was provided for this application.

OPIC is satisfied that public comments were processed in accordance to TCEQ rules. *Id.* § 55.201(i)(5)(D). The Requester is concerned that the TCEQ permit renewal process is internally inconsistent, unclear, and thwarts effective public review. However, the ED filed a Response to Comments in this matter on August 11, 2014 and an Amended Response to Comments on January 7, 2015. In the Response to Comments, the ED responded to comments made by the Environmental Integrity Project. In doing so, the ED also recommended the addition of discharge monitoring tables to the draft permit. The TCEQ provided the required consultation and response to all timely received and significant public comment.

Finally, Applicant's compliance history for the previous five years raises no issues regarding its ability to comply with a material term of the permit. *Id.* § 55.201(i)(5)(E). The Commission rated both the Applicant and facility as "high" performers in their compliance history classifications developed under the criteria established by Commission rules. Given that the facility holds over 20 permits and registrations from the TCEQ, the number and type of violations documented in Applicant's compliance history does not cause OPIC to question Applicant's ability to comply with a material term of the permit. Accordingly, OPIC concludes there is no right to a contested case hearing pursuant to 30 TAC § 55.201(i)(5).

#### **B. Determination of Affected Person Status**

Requester has failed to show it meets the requirement for associational standing in 30 TAC § 55.205(a)(1). Although the interests the organization seeks to protect appear germane to its purpose in preventing pollution from coal-fired power plants and the claim does not appear to require the participation of individual members, the hearing request does not identify one or

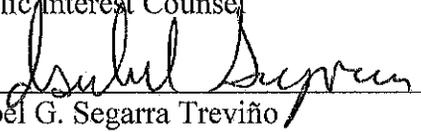
more members who would otherwise have standing to request a hearing in their own right as required by 30 TAC § 55.205(a)(1). Therefore, even if the Commission were to determine that a right to hearing exists, OPIC finds that Requester failed to meet the requirements for establishing affected person status.

#### IV. CONCLUSION

OPIC recommends denying the hearing request from The Sierra Club.

Respectfully submitted,

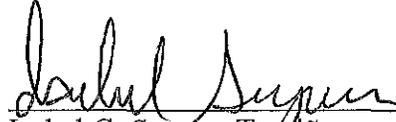
Vic McWherter  
Public Interest Counsel

By:   
Isabel G. Segarra Treviño

Assistant Public Interest Counsel  
State Bar No. 24075857  
P.O. Box 13087, MC 103  
Austin, Texas 78711-3087  
(512) 239-4014 Phone  
(512) 239-6377 Fax

**CERTIFICATE OF SERVICE**

I hereby certify that on April 6, 2015 the original and seven true and correct copies of the Office of Public Interest Counsel's Response to Request for Hearing was filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail, electronic mail, or by deposit in the U.S. Mail.

  
Isabel G. Segarra Treviño



**MAILING LIST**  
**NRG TEXAS POWER, LLC**  
**TCEQ DOCKET NO. 2014-1371-MWD**

FOR THE APPLICANT:

Robert Eyeington  
Environmental Compliance Specialist  
NRG Texas Power, LLC  
3964 FM Road 39  
Jewett, Texas 75846  
Tel: 903/626-9512 Fax: 903/626-9501

Ted Long  
Manager, Water Resources  
NRG Texas Power, LLC  
1201 Fannin Street, NRG Tower  
Houston, Texas 77002-6929  
Tel: 713/795-6213 Fax: 713/705-7431

FOR THE EXECUTIVE DIRECTOR

Michael Parr, Staff Attorney  
TCEQ Environmental Law Division  
MC-173  
P.O. Box 13087  
Austin, Texas 78711-3087  
Tel: 512/239-0600 Fax: 512/239-0606

Gordon Cooper, Technical Staff  
TCEQ Water Quality Division, MC- 148  
P.O. Box 13087  
Austin, Texas 78711-3087  
Tel: 512/239-1963 Fax: 512/239-4430

Brian Christian, Director  
TCEQ Environmental Assistance  
Division, MC-108  
P.O. Box 13087  
Austin, Texas 78711-3087  
Tel: 512/239-4000 Fax: 512/239-5678

FOR ALTERNATIVE DISPUTE  
RESOLUTION

Kyle Lucas  
TCEQ Alternative Dispute Resolution,  
MC-222  
P.O. Box 13087  
Austin, Texas 78711-3087  
Tel: 512/239-4010 Fax: 512/239-4015

FOR THE CHIEF CLERK:

Bridget Bohac  
Texas Commission On Environmental  
Quality  
Office Of Chief Clerk, MC-105  
P.O. Box 13087  
Austin, Texas 78711-3087  
Tel: 512/239-3300 Fax: 512/239-3311

REQUESTER:

Joshua Smith  
Sierra Club  
85 2nd Street, Floor 2  
San Francisco, California 94105-3456

