

Bryan W. Shaw, Ph.D., P.E., *Chairman*  
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*

March 9, 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: TENASKA ROAN'S PRAIRIE PARTNERS, LLC  
TCEQ DOCKET NO. 2014-1674-IWD**

Dear Ms. Bohac:

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

Sincerely,

A handwritten signature in cursive script, appearing to read "Pranjal".

Pranjal M. Mehta, Attorney  
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

**TCEQ DOCKET NO. 2014-1674-IWD**

**IN THE MATTER  
OF THE APPLICATION OF  
TENASKA ROAN'S PRAIRIE  
PARTNERS, LLC FOR TPDES  
PERMIT  
NO. WQ0005111000**

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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**

The Tenaska Roan's Prairie Partners, LLC ("Applicant") applied to the TCEQ for a new Texas Pollutant Discharge Elimination System (TPDES) permit for industrial wastewater. The facility, Tenaska Roan's Prairie Generating Station, is a 694-megawatt natural-gas fired, electrical generation station that will be operated as a peaking plant. The proposed Permit No. WQ0005111000 would authorize the discharge of evaporative cooler blowdown; previously monitored effluents (low volume waste sources, metal cleaning wastes, chemical metal cleaning wastes, water treatment wastes, and stormwater from internal Outfall 101); and uncontaminated air conditioner and compressor condensate at a daily average flow not to exceed 105,000 gallons per day (gpd) from external Outfall 001. The plant site is located on the south side of State

Highway 30, approximately 2.5 miles southwest of the City of Shiro and approximately 1.1 miles east of the intersection of State Highway 30 and State Highway 90, Grimes County, Texas.

The effluent is to be discharged to an unnamed tributary; then to Flagtail Creek; then to Lake Creek in Segment No. 1015 of the San Jacinto River Basin. The unclassified receiving waters have minimal aquatic life use for the unnamed tributary and Flagtail Creek. The designated uses for Segment No. 1015 are high aquatic life use, primary contact recreation, and public water supply.

## **B. Procedural Background**

TCEQ received Applicant's application on December 18, 2013. On March 18, 2014, 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 April 9, 2014 in Grimes County in the *Navasota Examiner*. 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 on July 2, 2014 in the *Navasota Examiner*, in Grimes County, Texas. The public comment period for this application ended on August 1, 2014. The ED filed Response to Comments on September 30, 2014. The Chief Clerk's office mailed the Executive Director's Decision and Response to Comments on October 6, 2014. The deadline to request a contested case hearing was November 5, 2014.

TCEQ received timely comments from Patrick S. Phillips and a request for a contested case hearing from Jackie E. & Patrick S. Phillips on April 11, 2014. TCEQ also received a timely request for a contested case hearing from Roy Hoffart on April 13, 2014. Roy Hoffart withdrew his hearing request on December 12, 2014. OPIC recommends granting the hearing request from Jackie E. & Patrick S. Phillips (the Phillips).

## II. APPLICABLE LAW

This application was declared administratively complete on March 18, 2014. 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).

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

Accordingly, responses to hearing requests must specifically address:

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

30 TAC § 55.209(e).

### III. DISCUSSION

#### A. Whether the Phillips are affected persons

According to the hearing request, the proposed discharge route passes through the Phillips' property. The Phillips further state that their property is adjacent to Tenaska's property. The map provided by the ED staff and the landowners map filed with the application confirm the

location of the Phillips' property adjacent to the proposed facility and the path of the discharge route across their property.

As stated in the hearing request, the Phillips are concerned that the discharge will contain unacceptable levels of iron, arsenic, mercury, and selenium because they are adjacent to the plant and discharge contaminants will not have time to dilute with fresh water. Therefore, the Phillips contend that the ditch and creek where Tenaska proposes to discharge the water will likely contaminate a lake on their property.

The Phillips are also concerned about the effect on cattle drinking such discharge water. The water, in the lake on their property, will be unfit for cattle and wildlife to drink because it will be heavy with iron, mercury, selenium and other metals. The Phillips further state that this would adversely affect fish, cattle, and wildlife raised and sold, which could then impact human consumption of these animals.

The Phillips state that the creeks are currently dry creeks and there is no water flow unless the area receives several inches of rain over a long period of time. They believe that the proposed discharge will change this condition and could wash out their right-of-way road, road culverts including a culvert crossing in the creek, and gravel. They also contend that the discharge will eliminate access to their lake, cattle pens, and barn in addition to damaging this area.

Given the Phillips' proximity to the discharge and their concerns regarding water quality, they have demonstrated a personal justiciable interest which is not common to the general public and have shown that they are affected persons. *See* 30 TAC § 55.203(a).

The factors listed in § 55.203(c) support the conclusion that the Phillips are affected persons. First, the Phillips' claimed interests are protected by the law under which this

application will be considered. *See* 30 TAC § 55.203(c)(1). Because the discharge route runs through their property, there is a reasonable relationship between the interests claimed and the regulation of industrial wastewater discharge. *See* 30 TAC § 55.203(c)(3). Finally, the activity to be regulated in this matter has the potential to adversely impact the Phillips' use of their property and the surface water on that property.

For all these reasons, OPIC finds that the Phillips are affected persons under 30 TAC § 55.203.

**B. Issues Raised in the hearing request**

1. Whether the proposed discharge will contaminate surface water on the Phillips' property with unacceptable levels of contamination including iron, arsenic, mercury, and selenium.
2. Whether the proposed discharge will have an adverse effect on cattle raised and fish caught on the Phillips' property.
3. Whether the proposed discharge will adversely affect property values.
4. Whether the proposed discharge will wash out roads, culverts and gravel.
5. Whether the proposed discharge will obstruct the Phillips' access to their property.

**C. Which issues raised in the hearing request are disputed**

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

**D. Whether the dispute involves questions of fact or of law**

The disputed issues involve questions of fact.

**E. Whether the issues were raised during the public comment period**

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

**F. Whether the hearing request is based on issues raised solely in a public comment which has been withdrawn**

The hearing request is not based on issues raised solely in a public comment which has been withdrawn.

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

In order to refer an issue to the State Office of Administrative Hearings (“SOAH”), the Commission must find that the issue is relevant and material to the Commission’s decision to issue or deny this permit. *See* 30 TAC §§ 55.201(d)(4), 55.209(e)(6) and 55.211(c)(2)(A).

Relevant and material issues are those governed by the substantive law under which this permit is to be issued. *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.”)

OPIC cannot recommend referral of issues concerning any alleged diminution in property value. While the TCEQ has jurisdiction over water quality issues governed by the law applicable to this application, the Texas Legislature has not given the agency jurisdiction to consider impact to property values. Therefore, this issue is not relevant and material to the Commission’s decision. Nor can OPIC recommend referral of issues concerning the potential washing out of roads, culverts and gravel. While the TCEQ has jurisdiction over water quality, it lacks jurisdiction over flooding issues. This issue is not relevant and material to the Commission’s decision.

OPIC further finds that the issues raised relating to obstructed property access cannot be

adjudicated by the Commission when considering this application. As noted in the Executive Director's Response to Comments at page 12, the issuance of this permit would not grant the Applicant the right to use private or public property for conveyance of wastewater along the discharge route. Nor would this permit authorize any taking of private property or any trespass against private property rights. *See* 30 TAC § 305.122(d). Therefore, the issue of obstructed property access is not relevant and material to the Commission's decision.

The remaining issues raised by the Phillips concerning the impact of contaminants on the discharge route and lake on their property and the impact on fish, cattle and wildlife concern water quality. As noted in the Executive Director's Response to Comments at page 7, Chapter 307 of the Commission's rules provides that the surface waters of Texas cannot be made toxic to aquatic or terrestrial organisms or cause endangerment to human health. One of the charges of 30 TAC Sec. 307.1 is to "maintain the quality of water in the state consistent with public health and enjoyment." Therefore, the water quality concerns raised by the Phillips are addressed by the substantive law that governs this application and these issues are relevant and material to the Commission's decision.

#### **H. Issues for Referral**

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

1. Would the proposed discharge contaminate the lake and surface water on the Phillips' property with unacceptable levels of iron, arsenic, mercury, selenium or other contaminants?
2. Will the proposed discharge have any adverse effect on wildlife or the cattle raised or the fish caught on the Phillips' property?

#### IV. MAXIMUM EXPECTED DURATION OF HEARING

Commission Rule 30 TAC § 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 TAC §55.209(d)(7), OPIC estimates that the maximum expected duration of a hearing on this application would be nine months from the first date of the preliminary hearing until the proposal for decision is issued.

#### V. CONCLUSION

For the reasons stated above, OPIC recommends granting the hearing request of Jackie E. and Patrick S. Phillips and referring this application to SOAH for a contested case hearing of no longer than nine months on the issues listed in Section III H above.

Respectfully submitted,

Vic McWherter  
Public Interest Counsel

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 9, 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.



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Pranjal M. Mehta

**MAILING LIST**  
**TENASKA ROAN'S PRAIRIE PARTNERS, LLC**  
**TCEQ DOCKET NO. 2014-1674-IWD**

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