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March 23, 2015

Via Electronic Filing

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

Re: Docket No. 2014-1674-IWD; Application of Tenaska Roans Prairie Partners,
LLC for TPDES Permit No. WQ0005111000

Dear Ms. Bohac:

Attached for filing is Protestants Jackie and Patrick Phillips' Reply to Response to Request for Hearing in the referenced permitting matter.

Sincerely,

/s/ James D. Bradbury

James D. Bradbury

JDB:ccs

cc: Mailing List

DOCKET NO. 2014-1674-IWD

APPLICATION BY	§	BEFORE THE
TENASKA ROANS	§	TEXAS COMMISSION
PRAIRIE PARTNERS, LLC	§	ON
FOR PERMIT NO. WQ0005111000	§	ENVIRONMENTAL QUALITY

PROTESTANTS' REPLY TO RESPONSE TO REQUEST FOR HEARING

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

Protestants Jackie E. and Patrick S. Phillips (the "Phillips") are adjacent landowners and file this Reply to Response to Request for Hearing on Tenaska Roans Prairie Partners, LLC proposed TPDES Permit No. WQ0005111000 ("Tenaska Permit") and in support of the Request for Hearing states as follows:

I. INTRODUCTION

The Phillips are seeking a formal administrative review of the potential environmental and land impacts of the proposed power generation facility which seeks to newly discharge large amounts of industrial effluent through their property and the property of others. The potential discharge poses a potential threat to the Phillips' health and safety, as well as to their cattle, fish and other aquatic life. The proposed facility and its discharges further threaten the Phillips' continued use and enjoyment of their property. On April 11, 2014, the Phillips filed a timely hearing request and contest to this Application asserting multiple concerns and disputed issues of fact to be considered by the State Office of Administration Hearings ("SOAH") before approval of the Tenaska Permit by the Commission. The Phillips own over 200 acres, some of which has been in their family for over 100 years. The Phillips' land is directly adjacent to the proposed site of the Tenaska Plant. The matters of concern to the Phillips range from concerns over impacts to surrounding water bodies to impacts on cattle, fish, aquatic life, and wildlife to concerns over

continued access to their property. The proposed Tenaska Permit and discharge threatens the Phillips' continued use and enjoyment of their property, and they seek to address these issues in an administrative contested case hearing on the Tenaska Permit.

II. REPLY IN SUPPORT OF REQUEST FOR HEARING

A. The Phillips are Affected Persons

The Phillips meet the requirements of an "affected person" and are entitled a contested case hearing on the Tenaska Permit. 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 Tex. Admin. Code ("TAC") § 55.203. In determining whether a person is an affected person, all factors must be considered, including:

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; and
5. Likely impact of the regulated activity on use of the impacted natural resource by the person.

30 TAC § 55.203. The Phillips support the Executive Director's ("ED") Response recommending that the Phillips are affected persons. The Phillips are long-time adjacent landowners whose property is within one mile of the proposed discharge point. In fact, their property is adjacent on both sides of the planned discharge route. Further, the close proximity of the Phillips' property to the point of discharge prevents sufficient dilution of potential contaminants and dissipation of extreme heat ("thermal pollution") in the discharge stream that will flow directly across their property. Potential impacts to livestock, fish, aquatic life, and

wildlife are significant. Additionally, the proposed discharge route could damage the Phillips' property result in loss of use or otherwise alter it to eliminate access to their lake, cattle pens, barn, and electricity. The Phillips have experienced past discharges by Tenaska plants that resulted in abnormal levels of contaminants coming across their property that harmed livestock and caused birth defects in calves born during the time of those discharges. For these reasons, the Phillips are affected persons and support the ED's recommendation as to standing.

B. All Issues Raised by the Phillips Should be Referred to SOAH for Contested Case Hearing

In Response to the Phillips' earlier request for hearing, the ED recommended that three issues be referred to SOAH for contested case hearing, including:

1. Whether the proposed draft permit is protective of the water quality in the unnamed tributary?
2. Whether the proposed discharge will impair attainable uses of the receiving waters, including the unnamed tributary?
3. Whether the proposed discharge will have any detrimental effect on wildlife and cattle and subsequent human consumption of those animals?

The Phillips support this recommendation of the ED and agree that the foregoing three issues meet the requirements for referral in that they each involve a disputed question of fact, were raised during the comment period, and are relevant and material to the Commission's decision on the Application.

The ED's Response to Hearing Request goes further to recommend that the remaining three issues posed by the Phillips should not be referred to SOAH for contested case hearing.

These three issues are as follows:

1. Whether the proposed discharge would eliminate access to portions of the Protestant's property?
2. Whether the inability to access these areas would lead to a decrease in the Protestants' property value?

3. Whether the existing Tenaska plant (regulated under TPDES Permit No. WQ00039996000) has caused birth defects in calves in the past?

The ED contends that these three issues, while involving disputed questions of fact and raised during the public comment period, are not relevant or material to the Commission's decision on the Application. The Phillips disagree and maintain that these three issues should also be referred to SOAH for a contested case hearing.

- 1. Whether the proposed discharge would eliminate access to portions of the Protestants' property is material and relevant to the Commission's determination on the Tenaska Permit because the current discharge route of the Tenaska Permit runs afoul of TCEQ Rules.**

The ED contends that continued access to portions of Protestants' property are not matters within the Commission's jurisdiction. The ED points to the fact that "water quantity, water rights, volume, and supply are not part of a wastewater discharge permit evaluation." The Phillips, however, are not disputing any water quantity, water rights, volume, or supply issues as the ED contends. Rather, the Phillips are concerned that the proposed discharge route will effectively cut their property in half, destroying certain rights-of-way and road culverts and denying them access to half of their property that includes a lake, a barn, cattle pens, and electricity. In this event, the Phillips property and their operations will be significantly impacted, including the possibility of stranding cattle on the other side of the discharge stream, leaving the Phillips unable to care for them. The proposed discharge in the Tenaska Permit can have a tremendous impact to small low flow streams like the one that goes through the Phillips' property. This issue is very much material and relevant to the Commission's consideration of the Tenaska Permit.

First, the issue of access poses a question of fact as to whether the Tenaska Permit will allow for the continued use and enjoyment of the Phillips' property. The Commission certainly considers such factors in determining permits, especially considering impacts of the regulated

activity on the use of the Phillips' property is a consideration set out in the most basic requirements of whether the Phillips are affected persons. *See* 30 TAC § 55.203.

Further, if the Tenaska Permit is allowed to proceed as drafted it will effectively amount to a taking of the Phillips' property without compensation, which TCEQ Rules prohibit in defining characteristics of permits. Specifically, 30 TAC § 305.122 provides that:

(c) A permit issued within the scope of this subchapter does not convey any property rights of any sort, nor any exclusive privilege, and does not become a vested right in the permittee.

(d) The issuance of a permit does not authorize any injury to persons or property or an invasion of other property rights, or any infringement of state or local law or regulations.

The Office of Public Interest Counsel ("OPIC") points to these provisions as reasons why the access issue is not germane to the Commission's consideration of the permit. In the words of OPIC, the permit cannot convey any rights of access or authorize damage to the Phillips' property. The Phillips, however, contend that this is exactly what the Tenaska Permit will do.

The current discharge route set forth in the Tenaska Permit will authorize damage to the Phillips' property, loss of use, and will effectively constitute an unlawful taking of their property, in violation of these provisions. Tenaska has made no showing that an alternative discharge route is infeasible or that an impoundment for receiving the discharge on their own property cannot be constructed. These are all relevant matters that must be addressed before the Tenaska Permit can be approved. The Phillips therefore request that the issue of whether the proposed discharge would eliminate access to portions of the Protestants' property should be referred to SOAH for a contested case hearing. Further, the Phillips request that an additional issue of whether an alternative discharge route that would eliminate access to the Protestants' property is feasible should also be referred to SOAH for contested case hearing.

2. Whether the inability to access these areas would lead to a decrease in the Protestants' property value is material and relevant to the Commission's determination on the Tenaska Permit because it concerns impacts to the Phillips' use of their property.

The ED contends that the issue of property value is outside the Commission's jurisdiction and is not relevant or material to a determination on the Tenaska Permit. The Phillips disagree with the ED's recommendation and contend that impacts to the value of the Phillips' property due to damage and loss of access caused by the Tenaska Permit are highly relevant and material to a determination of the Tenaska Permit. Once again, the issue of impacts to the Phillips' property is a consideration in making the Phillips' affected persons in this matter. The impacts of the Tenaska Permit to the Phillips' property values are relevant to continued use and enjoyment of the property and are naturally interwoven with the issue of continued access to the Phillips' property and detrimental effects caused by the Tenaska Permit from industrial contaminants and thermal pollution. The Phillips request that the issue of whether the inability to access certain areas would lead to a decrease in the Protestants' property value should be referred to SOAH for a contested case hearing.

3. Whether the existing Tenaska plant (regulated under TPDES Permit No. WQ00039996000) has caused birth defects in calves in the past is material and relevant to the Commission's determination on the Tenaska Permit because it concerns the health and safety of livestock, wildlife, and the use of the Phillips' property.

The ED contends that the issue of a prior discharge by the same Tenaska Plant that resulted in contaminants on the Phillips' property and harm to the Phillips' livestock is not relevant and material to the Tenaska Permit. The Phillips disagree and contend that the issue is in fact relevant and material and should be referred to SOAH for a contested case hearing. The issue of the previous discharge involves the previous conduct of the same Tenaska Plant. It is an indicator of expected conduct and risks to the Phillips' property and livestock in the future.

Moreover, the issue of the harm to the livestock is interwoven with the issue of whether the proposed discharge will have detrimental effects on wildlife and cattle and to humans through the consumption of those animals. These past detrimental effects combined with the proposed impacts from the Tenaska Permit for undiluted industrial contaminants including solvents and oils create a stigma over the property and the cattle raised on it. The impact of past discharges by a related facility is directly relevant to potential environmental impacts of the proposed Tenaska Permit and discharge. The Phillips ask that the issue of whether the existing Tenaska plant (regulated under TPDES Permit No. WQ0003996000) has caused birth defects in calves in the past is relevant and material to the proposed Tenaska Permit and should be referred to SOAH for a contested case hearing.

4. Whether the temperature of the proposed discharge will have a detrimental effect on health and safety of the Phillips, their livestock, fish, aquatic life, or wildlife?

The Phillips contend that an additional issue should be referred to SOAH for a contested case hearing concerning the potential impacts from thermal pollution of the proposed discharge. The Tenaska Permit seeks to effectively convert the Phillips' property to a facility to dissipate heat. Additional considerations regarding the temperature of the proposed discharge and the effect of the thermal pollution on fish and aquatic life must be made before approval of this Permit. Further, an issue should be referred to SOAH for contested hearing on whether Tenaska should be required to build a holding facility or other infrastructure to remove heat or other sources of pollution. The potential impacts from thermal pollution are significant and have not been adequately addressed in this Tenaska Permit. The Phillips request that two additional issues be referred to SOAH for contested case hearing as follows: 1) whether the temperature of the proposed discharge will have a detrimental impact on health and safety of the Protestants,

livestock, fish, aquatic life, and wildlife; and 2) should Tenaska be required to build a holding facility or other infrastructure to remove heat or other sources of pollution prior to discharge.

5. Source of Water Used by Tenaska

Finally, the Phillips ask the Commission to submit an additional issue to SOAH for a contested case hearing regarding the source of the water used by Tenaska in its operations. Information on the source of the water used and the quality of that water before use by Tenaska are relevant and important questions to be considered before approval of the Tenaska Permit. The Phillips desire to know where the water comes from that Tenaska intends to use, and what potential impacts exist from using that water both in terms of amount, source, and quality. The Phillips ask the Commission to refer an additional issue to SOAH for a contested case hearing on whether the source of water used by Tenaska is protective of water quality.

III. CONCLUSION

The Phillips ask the Commissioners to consider the rights and interests of adjacent landowners facing significant and potentially harmful discharges of wastewater across their property and grant their request for hearing on the Tenaska Permit. Specifically, the Phillips ask the Commissioners to find that the Phillips are affected persons and entitled to a contested case hearing. Further, the Phillips ask the Commissioners to refer the following issues to SOAH for a contested case hearing:

1. Whether the proposed draft permit is protective of water quality in the unnamed tributary?
2. Whether the proposed discharge will impair attainable uses of the receiving waters, including the unnamed tributary?
3. Whether the proposed discharge will have any detrimental effect on wildlife and cattle and subsequent human consumption of those animals?
4. Whether the proposed discharge would eliminate access to portions of the Protestants' property?

5. Whether an alternative discharge route that would not eliminate access to the Protestants' property is feasible?
6. Whether the inability to access these areas would lead to a decrease in the Protestants' property value?
7. Whether the existing Tenaska Plant (regulated under TPDES Permit No. WQ0003996000) has caused birth defects in calves in the past?
8. Whether the temperature of the proposed discharge will have a detrimental impact on health and safety of the Protestants, livestock, fish, aquatic life, and wildlife?
9. Whether Tenaska should be required to build a holding facility or other infrastructure to remove heat or other sources of pollution prior to discharge?
10. Whether the source of water used by Tenaska is protective of water quality?

IV. PRAYER

Protestants Jackie E. and Patrick S. Phillips respectfully pray that the Commissioners of the Texas Commission on Environmental Quality grant their request for a contested case hearing on the Tenaska Roans Prairie Partners, LLC proposed TPDES Permit No. WQ0005111000.

Respectfully submitted,

/s/ James D. Bradbury

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ATTORNEYS FOR PROTESTANTS

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of March, 2015 the foregoing document was served on the following by U.S. Mail, electronic transmission, facsimile transmission or by some other method provided in 30 Tex. Admin. Code § 1.11:

MAILING LIST

<p><u>FOR THE APPLICANT:</u> Molly Cagle Paulina Williams Baker Botts L.L.P. 1500 San Jacinto Center 98 San Jacinto Boulevard Austin, Texas 78701</p> <p>Fred Strauss Tenaska Frontier Partners, Ltd. 14302 FNB Parkway Omaha, Nebraska 68154-5212</p> <p>Chris Stanford RPS 13345 Stagg Trail Road Ashland, Virginia 23005-7180</p>	<p><u>FOR PUBLIC INTEREST COUNSEL:</u> Vic McWherter, Public Interest Counsel Texas Commission on Environmental Quality Public Interest Counsel, MC-103 P.O. Box 13087 Austin, Texas 78711-3087</p> <p><u>FOR ALTERNATIVE DISPUTE RESOLUTION:</u> Kyle Lucas Texas Commission on Environmental Quality Alternative Dispute Resolution, MC-222 P.O. Box 13087 Austin, Texas 78711-3087</p>
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/s/ James D. Bradbury

James D. Bradbury