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Vic McWherter, Public Interest Counsel

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

May 8, 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: **FPLE FORNEY, LLC**
TCEQ DOCKET NO. 2015-0406-IWD

Dear Ms. Bohac:

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

Sincerely,

A handwritten signature in cursive script that reads "Eli Martinez".

Eli Martinez, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2015-0406-IWD

**IN THE MATTER OF THE
APPLICATION BY FPLE FORNEY,
LLC FOR TPDES PERMIT
NO. WQ0004359000**

**BEFORE THE TEXAS
COMMISSION ON
ENVIRONMENTAL QUALITY**

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE TO
REQUEST FOR RECONSIDERATION AND 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 Reconsideration and Request for Hearing in the above-referenced matter and respectfully shows the following.

I. Introduction

A. Background of Facility

FPLE Forney, LLC (FPLE or Applicant) applied for a major amendment to Texas Pollutant Discharge Elimination System (TPDES) Permit No.WQ0004359000, which would establish alternate ammonia-nitrogen limits at Outfall 001 and add new Outfall 002 to authorize discharge from the South Stormwater Pond during wet weather. The facility is the Forney Energy Center (FEC), a combined cycle steam electric power generating facility with a generating capacity of 1789 megawatts. The facility is currently in operation and is located at 13770 West U.S. Highway 80, on the south side of U.S. Highway 80, 1.3 miles northwest of the intersection of Farm-to-Market Road 740 and U.S. Highway 80, northwest of the City of Forney, Kaufman County, Texas.

The existing permit authorizes the discharge of cooling tower blowdown and previously monitored effluent (low volume waste) at a daily average flow not to exceed

4,000,000 gallons per day (gpd) via Outfall 001. The proposed permit would authorize the discharge of cooling tower blowdown and previously monitored effluent (low volume waste) at a daily average flow not to exceed 4,000,000 gpd via Outfall 001 and stormwater (commingled with dilute concentrations of low volume waste) from the South Stormwater Pond on an intermittent and flow-variable basis via Outfall 002.

In addition, the proposed permit includes a higher seasonal (April-November) daily maximum ammonia-nitrogen limit of 234 lbs/day (increased from the existing limit of 134 lbs/day) and a higher single grab ammonia-nitrogen limit of 15 mg/L (increased from the existing limit of 6 mg/L). The FEC obtains 12-18 million gallons per day (MGD) of treated domestic wastewater (reclaimed water) from the City of Garland's Duck Creek Wastewater Treatment Plant (Duck Creek WWTP), TPDES Permit No. WQ0010090001, mainly for use in its cooling towers, and has no other primary source of cooling water available.

Wastewater is routed from the Duck Creek WWTP after all biological treatment has occurred but prior to dechlorination and is stored in the raw water storage pond. Water from the raw water storage pond is pumped directly to the cooling towers at the site. Cooling tower blowdown is discharged via Outfall 001 or routed back to the Duck Creek WWTP.

Stormwater is collected through all storm drains on the site and either routed to the North and South Stormwater Ponds for subsequent use as raw water supply or discharged under the Multi-Sector General Permit (MSGP) for Storm Water Discharges Associated with Industrial Activities, TPDES Permit No. TXR050000. The North and South Stormwater Ponds may also receive leaks or spills of low volume waste.

Stormwater and low volume waste collected in the North Stormwater Pond is sent to the sidestream treatment clarifier prior to use in the cooling towers. Stormwater and low volume waste collected in the South Stormwater Pond is currently sent to the cooling towers but is proposed to be discharged via Outfall 002. Domestic wastewater, water from the oil/water separator, and filter backwash are routed to the City of Forney wastewater collection system and then to the North Texas Municipal Water District South Mesquite Creek WWTP, TPDES Permit No. WQ0010221001, for treatment and disposal. Metal cleaning wastes, which may be generated intermittently, are disposed of off-site.

If the proposed permit is issued, the treated effluent will continue to be discharged via Outfall 001 directly to the East Fork Trinity River in Segment No. 0819 of the Trinity River Basin and will also discharge stormwater (commingled with dilute concentrations of low volume waste) from the South Stormwater Pond via Outfall 002 to Buffalo Creek; then to East Fork Trinity River in Segment No. 0819 of the Trinity River Basin. The unclassified receiving water, Buffalo Creek, has limited aquatic life use. The designated uses for Segment No. 0819 are primary contact recreation and intermediate aquatic life use.

The 2012 Clean Water Act Section 303(d) list, the State's inventory of impaired and threatened waters, currently lists Segment No. 0819 for elevated levels of chloride, sulfate, and total dissolved solids (TDS). The existing permit includes monitoring requirements for chloride and sulfate and mass limits for TDS. Screening was performed during the previous application review consistent with the January 2003 *Procedures to Implement the Texas Surface Water Quality Standards (IPs)*, and no additional limits were determined to be necessary. The permit amendment request does

not include any changes to existing chloride, sulfate, or TDS permit conditions; therefore, these parameters were not screened as part of this permit action. The monitoring and reporting requirements for chloride and sulfate and the mass limits for TDS are carried forward in the draft permit.

B. Procedural Background

The TCEQ received the application on January 13, 2014, and declared it administratively complete on January 31, 2014. The Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) was published in the *Forney Messenger* on February 27, 2014. The ED completed the technical review of the application on March 26, 2014. The Notice of Application and Preliminary Decision (NAPD) for a Water Quality Permit was published in the *Forney Messenger* on June 5, 2014. The public comment period ended on July 7, 2014. On January 26, 2015, the ED filed his Response to Public Comment with the Office of the Chief Clerk. On January 27, 2015, the ED filed his decision with the Office of the Chief Clerk. The Office of the Chief Clerk mailed the ED's decision on January 27, 2015. The deadline to request reconsideration of the ED's decision or a hearing was February 26, 2015. On February 19th, 20th, 24th, and 27th, the TCEQ received timely requests for a contested case hearing from Dean Flowers on behalf of TRPB, Ltd. The filings received on February 19th and 20th also contained requests for reconsideration from Dean Flowers on behalf of TRPB, Ltd.

II. Request for Reconsideration

A. Applicable Law

The ED declared this application administratively complete on January 31, 2014. Because the application was declared administratively complete after September 1,

1999, it is subject to the requirements of Texas Water Code Chapter 5, Subchapter M, Environmental Permitting Procedures, sections 5.551 to 5.556, added by Acts 1999, 76th Leg., ch 1350 (commonly known as "House Bill 801"). Following the ED's technical review and consideration of comments, any person may file a request for reconsideration of the ED's decision. Tex. Water Code § 5.556; 30 Tex. Admin. Code ("TAC") § 55.201(e). A request for reconsideration must state the reasons why the decision should be reconsidered. *Id.*

B. Analysis of the Request for Reconsideration

Mr. Flowers raises issues pertaining to water quality, including ammonia - nitrogen concentrations, and the potential negative ecological impacts that may result from activities under the proposed permit. Mr. Flowers is also concerned about potential negative impacts on property values.

OPIC recommends denying the requests for reconsideration. To the extent that Mr. Flowers concerns raise substantive issues affecting human health or the environment that could be addressed under the TCWA, an evidentiary hearing would be required to develop a record on such issues. Furthermore, the TCEQ does not have the authority to evaluate property values under the rules and regulations pertaining to a water quality permit application. Therefore OPIC cannot recommend granting this request for reconsideration.

III. Request for Hearing

A. Applicable Law

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 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.

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.

B. Determination of Affected Person Status

The Office of the Chief Clerk received timely-filed requests for a contested case hearing from Dean Flowers on behalf of TRBP, Ltd. Mr. Flowers is concerned about potential degradation of water quality, including increased ammonia -nitrogen concentrations, as well as potential negative ecological impacts that may result from activities under the proposed permit. Additionally, Mr. Flowers is concerned about potential negative impacts on property values.

Rule 30 TAC §55.203(c)(3) requires that a reasonable relationship exist between the interests raised in a hearing request and the activity the commission is regulating.¹ The proposed activity must furthermore affect the requestor in a manner not common

¹ 30 TAC § 55.203(c)(3).

to members of the general public. Proximity to the facility or discharge route has an important bearing on whether a reasonable relationship exists between the requestor's concerns and the regulated activity, as well as the determination as to whether the requestor is affected in a manner not common to the general public.

TRBP Limited is listed on the adjacent landowner mailing list submitted by the Applicant as owner of parcels 1, 3, 5, 25, and 26. The executive director has also produced a map in this case that confirms Mr. Flowers is the registered owner of several parcels of land surrounding the FPLE site that lie well within a mile radius of the proposed outfalls. OPIC therefore finds that a reasonable relationship exists between the interests claimed by Mr. Flowers/TRBP Limited and the activity regulated due to the location of his property. OPIC therefore recommends to the Commission that Mr. Flowers/TRBP Limited be found an affected person.

C. Issues raised in Comment Period

The issues of potential degradation of water quality, including increased ammonia-nitrogen concentrations, and potential negative ecological impacts, were raised during the comment period by Mrs. Nancy Pierce. 30 TAC §§55.201(c) & (d)(4), 55.211(c)(2)(A).

D. Disputed Issues

There is no agreement between the Applicant, the Executive Director, and the Requestor on the issues presented above.

E. 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. See 30 TAC §55.211(b)(3)(A) and (B). All of the issues raised in the hearing request submitted by Mr. Flowers are issues of fact.

F. Relevant and Material Issues

The hearing request raises 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). Relevant and material issues are those that are governed by the substantive law under which this permit is to be issued.² 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.³

Pursuant to Texas Water Code sections 26.027(a) and 26.003, the Commission may issue permits for wastewater discharges based upon the draft permit's effectiveness in maintaining the water quality of the state. Water quality is therefore a relevant and material issue to the permitting process. Likewise, Mr. Flowers' concerns related to propagation and protection of terrestrial life are specifically protected by the Texas Water Code.⁴

Conversely, OPIC finds that the requestor's remaining concern over property devaluation falls outside of the scope of TCEQ jurisdiction to maintain and protect water quality of the state, as implicitly authorized by the Texas Water Code Chapter 26. Potential effects on private property values are not addressed by the substantive law governing this application and therefore cannot be considered relevant and material to

² See 30 TAC §55.209(e)(6)

³ 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.")

⁴ See Water Code §26.003.

the Commission's decision. OPIC therefore finds that this issue is inappropriate for referral to the State Office of Administrative Hearings.

G. Issues Recommended for Referral

OPIC recommends that the following disputed issues of fact be referred to the State Office of Administrative Hearings for a contested case hearing:

- 1) Will operations under the ammonia-nitrogen limitations of the proposed permit adequately protect water quality?
- 2) Will operations under the proposed permit adversely affect plant or animal life?

H. 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 application would be nine months from the first date of the preliminary hearing until the proposal for decision is issued.

IV. Conclusion

OPIC recommends denying Mr. Russell's request for reconsideration of the ED's decision. However, OPIC recommends that Mr. Flowers' request for a contested case hearing on the above issues be granted and the matter referred to SOAH for a contested case hearing for a period of nine months.

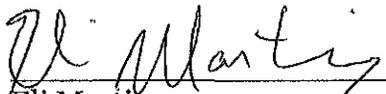
Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2015, the original and seven true and correct copies of the Office of Public Interest Counsel's Response to Request for Reconsideration and Request for Hearing 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, electronic mail, or by deposit in the U.S. Mail.


Eli Martinez

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