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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

August 31, 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: **LOWER COLORADO RIVER AUTHORITY
TCEQ DOCKET NO. 2015-1152-MWD**

Dear Ms. Bohac:

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

Sincerely,

A handwritten signature in cursive script, appearing to read "Isabel Segarra Treviño".

Isabel G. Segarra Treviño, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2015-1152-IWD

**IN THE MATTER
OF THE APPLICATION OF
THE LOWER COLORADO RIVER
AUTHORITY (LCRA) FOR A
RENEWAL OF TEXAS
POLLUTANT DISCHARGE
(TPDES) PERMIT
NO. WQ0002105000**

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**BEFORE THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY**

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

LCRA has applied to the TCEQ to renew TPDES Permit No. WQ0002105000, which authorizes the discharge of once-through cooling water and previously monitored effluent (from internal Outfalls 201 and 301) at a daily average flow not to exceed 1,165 million gallons per day (MGD) in Phase I and 1,509 MGD in Phase II through Outfall 001; cooling water drained from the condensers and other cooling equipment during maintenance periods at a daily average flow not to exceed 2.5 MGD through Outfall 002; low volume waste, coal pile runoff, truck wash water, previously monitored effluent (from internal Outfall 103), and stormwater from the coal pile runoff pond on an intermittent and flow-variable basis through Outfall 003; and low volume waste, truck wash water, and stormwater from the combustion byproducts landfill pond on an intermittent and flow-variable basis through Outfall 004. LCRA operates the Fayette Power

Plant, a steam electric station, which has a total generating capacity of 1,760 megawatts that it produces using three units fired by western coal. The Facility is currently operating.

Effluent limits in the proposed permit for Phases I and II for Outfall 001, based on a thirty-day average, are report °F temperature, report milligrams per liter (mg/L) total residual chlorine, report mg/L total dissolved solids, report mg/L chloride, and report mg/L sulfate. Effluent limits in the proposed permit for Outfall 002, based on a thirty-day maximum, are 100°F and 0.2 mg/L total residual chlorine. Effluent limits in the proposed permit for Outfalls 003 and 004, based on a thirty-day average, are 30 mg/L total suspended solids, 15 mg/L oil and grease, and 0.007 mg/L total selenium. For Outfalls 002, 003, and 004, the pH must be in the range of 6.0 to 9.0 standard units.

The Sam Seymour Fayette Power Project (Facility) is located at 6549 Power Plant Road, adjacent to the south shore of Cedar Creek Reservoir, approximately two miles north of State Highway 71, and seven miles east of the City of La Grange in Fayette County, Texas 78945-3714. The effluent is discharged through Outfall 001 to Cedar Creek Reservoir, then to Cedar Creek, then to the Colorado River Below La Grange in Segment No. 1402 of the Colorado River Basin and through Outfalls 002, 003, and 004 to unnamed tributaries, then to Cedar Creek, then to the Colorado River Below La Grange in Segment No. 1402 of the Colorado River Basin. The unclassified receiving water uses are no significant aquatic life use for the unnamed tributaries and high aquatic life use for Cedar Creek Reservoir and Cedar Creek. The designated uses for Segment No. 1402 are high aquatic life use, public water supply, and primary contact recreation.

B. Procedural Background

TCEQ received LCRA's application on June 4, 2014. On July 24, 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 August 15, 2014 in Fayette County in *The Fayette County Record*. 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 March 6, 2015 in Fayette County in *The Fayette County Record*. The public comment period ended on April 9, 2015. On July 26, 2015, the ED filed his decision and Response to Comments, which the Chief Clerk's office mailed on July 1, 2015. The deadline to request a contested case hearing was July 31, 2015. Alternative publication in Spanish was required on this application; however, LCRA could not locate a Spanish-language newspaper in Fayette County.

TCEQ received timely requests for a contested case hearing from: Billie Clays, Roy and Muriel Tipps, Charla A. Hengst, Robert M. Malina, The Texas Pecan Growers' Alliance, and, The Sierra Club and the Environmental Integrity Project (Public Interest Groups). OPIC recommends denying the Requesters' hearing requests.

II. APPLICABLE LAW

This application was declared administratively complete on July 24, 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).

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).

III. DISCUSSION

A. Right to Hearing

Because this application is for a permit renewal under TWC Chapter 26, the hearing requests 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.

LCRA 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).

The Requesters have not contended that any changes have will be made to the existing permit which would trigger a right to hearing under applicable law. OPIC cannot find that the proposed 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.

A public meeting was held on this application on April 9, 2015. *Id.* § 55.201(i)(5)(C). Further, OPIC is satisfied that public comments were processed in accordance to TCEQ rules. *Id.* § 55.201(i)(5)(D). The ED filed a Response to Comments in this application on July 26, 2015 which resulted in no changes to the draft permit. OPIC is persuaded that 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 proposed permit. *Id.* § 55.201(i)(5)(E). The Commission rated both the Applicant and Facility as "satisfactory" performers in their compliance history classifications developed under the criteria established by Commission rules. Given that the Facility holds over twenty permits and registrations from the TCEQ, the number and type of violations documented in Applicant's compliance history do not cause OPIC to question the Applicant's ability to comply with the proposed 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

Billie Clays, Roy Tipps, Muriel Tipps

Mr. Clays and the Tippses submitted a timely joint hearing request on September 15, 2014. While the request raises a number of issues, it does not state the requesters' location in relation to the Facility. The only address listed is for Mr. Clays in Bay City, Texas,

approximately one-hundred miles from the Facility. This group of requesters raises issues regarding groundwater quality, use and enjoyment of private property, surface water quality, and drought conditions. The request does not link the issues raised specifically to individuals named in the hearing request; OPIC cannot find how each individual will be affected in a manner not common to the general public. Therefore, if the Commission were to determine that a right to a hearing exists, OPIC finds that Mr. Clays and the Tippses are not affected persons.

Charla A. Hengst

Ms. Hengst submitted a timely hearing request on September 17, 2014. Ms. Hengst is approximately twelve miles east of the Facility. Ms. Hengst is concerned that the effluent limits may not be protective of human health and the environment, including water quality at the Cedar Creek Reservoir. Ms. Hengst is also concerned that the Facility's current discharge may have contaminated groundwater and residential drinking wells. Further, Ms. Hengst is concerned about the coal ash disposal clean-up that LCRA is currently undertaking. Because of Ms. Hengst's location in relation to the Facility, OPIC finds that she would not be an affected person if the Commission finds that there is a right to a hearing for this application.

Robert Marion Malina

Dr. Malina submitted a timely hearing request on September 15, 2014. Dr. Malina lists his address in Bay City, Texas, approximately one-hundred miles from the Facility. Dr. Malina is concerned about the adverse health effects from toxic substances and heavy metals from coal power plants. Further, Dr. Malina is concerned about pollution leachate reaching the Colorado River, and eventually Matagorda Bay. Given Dr. Malina's location relative to the Facility, OPIC cannot find how Dr. Malina will be affected in a manner not common to the general public.

Therefore, if the Commission were to determine that a right to a hearing exists, OPIC finds that Dr. Malina is not an affected person.

The Texas Pecan Growers' Alliance

The Texas Pecan Growers' Alliance submitted a timely hearing request on September 16, 2014. The hearing request states that the Alliance represents over sixty pecan orchard growers who receive water from tributaries connected to the Facility. The hearing request does not list the group's purpose or list an individual that would have standing on their own right; therefore, under 30 TAC § 55.203(c)(1), OPIC finds that the Texas Pecan Growers' Alliance has not met the requirements for associational standing.¹

Public Interest Groups

The Environmental Integrity Project and the Sierra Club submitted a timely joint hearing request on September 15, 2015. The Public Interest Groups are concerned about groundwater and surface water quality, soil contamination, and technology based effluent limits. The Public Interest Groups list their purpose as enforcing environmental laws, specifically, to ensure compliance by coal-fired power plants. The interests the Public Interest Groups seek to protect appear to be germane to their stated purpose and do not require the appearance of individual members. However, the Public Interest Groups have not identified any individual group member as required by 30 TAC § 55.203(c)(1). Therefore, if the Commission were to determine that a right to hearing exists, OPIC finds that the Public Interest Groups have not met the requirements for associational standing.²

C. Issues Raised in the Hearing Requests

The hearing requesters raise the following issues:

¹ OPIC notes that the Alliance has the ability to file a reply to this response by September 14, 2015.

² See footnote 1.

1. Whether the Facility's discharge will affect groundwater quality and residential drinking wells.
2. Whether effluent limits for the Facility are protective of human health and the environment.
3. Whether the coal ash ponds and landfill at the Facility affect the use of private property.
4. Whether the coal ash ponds and landfill at the Facility affect agriculture businesses.
5. Whether the proposed permit allows otherwise unauthorized discharges to be discharged by re-routing contaminated water to the Coal Pile Runoff Pond.
6. Whether the proposed permit should include provisions concerning drought.
7. Whether effluent limits for the Facility should include more comprehensive, technology based standards for toxic pollutants based on the TCEQ's best professional judgment.
8. Whether the proposed permit should include provisions to remediate current groundwater and soil contamination by the coal ash disposal units.

D. Issues Raised in the Comment Period

Issues must be raised during the comment period and must have not been withdrawn. 30 TAC §§ 55.201(c) & (d)(4), 55.211(c)(2)(A). All issues were raised during the comment period.

E. Disputed Issues

There is no agreement between the 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). Issues No. 1–5 are issues of fact, the remainder of the issues raised are issues of law.

G. Relevant and Material Issues

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 55.201(c)(s)(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).

The Commission is responsible for the protection of water quality under the Texas Water Code, Chapters 26 and 30, under the Texas Administrative Code, Chapters 307 and 309, and, under title 40, part 43 of the Code of Federal Regulations (CFR). The Texas Surface Water Quality Standards (TSWQS) in 30 TAC Chapter 307 require that the proposed permit “maintain the quality of water in the state consistent with public health and enjoyment.” 30 TAC § 307.1. TSWQS require the protection of surface water, groundwater, aquatic life and terrestrial life, and human health. Further, the TCEQ applies the technology-based effluent limitations found in 40 CFR part 43 to industrial wastewater discharges. Therefore, Issues No. 1–5 are relevant and material to the Commissions’ decision on this application.

Issues No. 6–7 relate to Commission rule changes to the industrial wastewater permitting process. The Commission conducts rulemaking pursuant to 30 TAC Chapter 20; therefore, these issues are not appropriate for referral on this permit application. Issue No. 8 relates to soil contamination and is beyond the Commission’s jurisdiction to review this industrial wastewater discharge application.

H. Issue Recommended for Referral

If the Commission decides there is a right to a hearing for this application and that any requester was an affected person, OPIC would recommend referring Issues No. 1–5 in § III. C to SOAH for a contested case hearing.

I. Maximum Expected Duration of Hearing

Commission Rule 30 TAC § 80.6(b)(5) requires that any Commission order referring a case to SOAH specify the maximum expected duration of the hearing. To assist the Commission

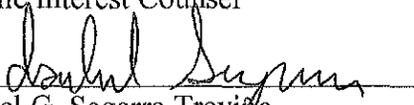
in stating a date by which the judge is expected to issue a proposal for decision, and as required by 30 TAC § 55.209(e)(7), OPIC estimates that the maximum expected duration of a hearing on this application will be nine months from the first date of the preliminary hearing until the proposal for decision is issued.

IV. CONCLUSION

OPIC recommends denying all hearing requests because there is no right to a hearing for this application. Furthermore, OPIC cannot find that any requester is an affected person. However, if the Commission finds that there is a right to hearing and an affected person, OPIC would recommend referring Issues No. 1–5 in § III. C to SOAH for a contested case hearing.

Respectfully submitted,

Vic McWherter
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CERTIFICATE OF SERVICE

I hereby certify that on August 31, 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

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TCEQ DOCKET NO. 2015-1152-MWD

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