

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

September 2, 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: NAVASOTA SOUTH PEAKERS OPERATING COMPANY I, LLC  
TCEQ DOCKET NO. 2015-1170-AIR**

Dear Ms. Bohac:

Enclosed for filing is the Office of Public Interest Counsel's Amended Response to Hearing Requests in the above-entitled matter. OPIC requests an extension of the filing deadline pursuant to 30 Tex. Admin. Code § 10.3 in order to correct a clerical error contained in OPIC's original filing.

Sincerely,

A handwritten signature in black ink, appearing to read "Rudy Calderon".

Rudy Calderon, Attorney  
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

**DOCKET NO. 2015-1170-AIR**

<b>APPLICATION OF</b>	<b>§</b>	<b>BEFORE THE</b>
<b>NAVASOTA SOUTH</b>	<b>§</b>	
<b>PEAKERS OPERATING</b>	<b>§</b>	<b>TEXAS COMMISSION ON</b>
<b>COMPANY I, L.L.C.</b>	<b>§</b>	
<b>FOR</b>	<b>§</b>	<b>ENVIRONMENTAL</b>
<b>AIR QUALITY PERMIT</b>	<b>§</b>	
<b>120973/PSDTX 1420</b>	<b>§</b>	<b>QUALITY</b>

**OFFICE OF PUBLIC INTEREST COUNSEL'S**  
**AMENDED RESPONSE TO HEARING REQUESTS**

**To the Members of the Texas Commission on Environmental Quality:**

The Office of Public Interest Counsel (OPIC) at the Texas Commission on Environmental Quality (TCEQ) files this amended response to the hearing requests in the above-referenced matter.

**I. BACKGROUND**

Navasota South Peakers Operating Company I, L.L.C. (Navasota or Applicant) has applied to the TCEQ for New Source Review authorization under Texas Clean Air Act (TCAA) §382.0518. This permitting action would authorize the construction of a new facility that may emit air contaminants.

The permit would authorize Navasota to construct the Union Valley Energy Center. The plant can be reached as follows: go 4.5 miles northwest of Nixon on FM 1681 then take CR 475 south for 1

mile; the property is located on the east side of CR 475 where CR 475 turns back to the south, Nixon, Wilson County.

Before work is begun on the construction of a new facility that may emit air contaminants, the person planning the construction must obtain a permit from TCEQ. This permit application is for the initial issuance of Air Quality Permit Numbers 120973 and PSDTX1420. The application was received June 23, 2014, and declared administratively complete July 3, 2014. The Notice of Receipt and Intent to Obtain an Air Quality Permit (public notice) for this permit application was published in English on July 16, 2014, in the *Wilson County News*. The Notice of Application and Preliminary Decision for an Air Quality Permit was published on February 11, 2015, in English in the *Wilson County News*. The notice of public meeting was mailed to interested parties on February 18, 2015. A public meeting was held on March 10, 2015 in Nixon. The public comment period ended on March 13, 2015. The TCEQ Executive Director (ED) prepared a response to comments (RTC), and the RTC was mailed June 29, 2015. The period to request a contested case hearing ended August 3, 2015.

TCEQ received timely hearing requests from Patti Werley and Lornna Talley. For the reasons stated herein, OPIC recommends the Commission deny the hearing request of Lornna Talley and grant the

hearing request of Patti Werley and refer the matter to the State Office of Administrative Hearings (SOAH) on the issues outlined below.

## **II. APPLICABLE LAW**

This application was declared administratively complete after September 1, 1999, and is subject to the requirements of Texas Water Code (TWC) § 5.556 added by Acts 1999, 76<sup>th</sup> Leg., Ch. 1350 (commonly known as "House Bill 801"). 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. Section 55.203(c) provides relevant factors to 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, safety, and use of property of the person; and
- (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.

### **III. ANALYSIS OF HEARING REQUESTS**

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

##### *Lornna Talley*

According to a map prepared by ED staff, Lornna Talley resides approximately 0.5 miles from the closest boundary of the proposed facility. As stated in her hearing request, Ms. Talley's concerns include water use, air emissions, light pollution, effects on human health, and effects on wildlife.

Ms. Talley's proximity to the proposed plant, when combined with her concern regarding air emissions, effects on human health, and effects on wildlife gives her a personal justiciable interest in this matter. Her proximity also indicates she could be impacted in a manner not common to the general public, and distinguishes her

personal justiciable interest from an interest common to the general public.

Consideration of the § 55.203(c) affected person determination factors further indicates that Ms. Talley qualifies as an affected person. First, her interest concerning air emissions, effects on human health, and effects on wildlife are protected by the law under which this application will be considered. Second, a reasonable relationship exists between that interest and the regulation of air contaminants. Finally, the proximity of Ms. Talley to the proposed facility increases the likelihood of impacts to her health, safety, and use of property. OPIC finds that under § 55.203, Lornna Talley qualifies as an affected person.

*Patti Werley*

According to a map prepared by ED staff, Patti Werley resides more than 2 miles from the closest boundary of the proposed facility. As stated in her hearing request, Ms. Werley's concerns include water use, air emissions, and effects on human health.

Given the intervening distance between the proposed plant and the requestor, OPIC finds that Ms. Werley's interests cannot be distinguished from interests common to the general public. Therefore, OPIC finds that Patti Werley does not qualify as an affected person under TCEQ rules. Additionally, on May 7, 2015, Ms. Werley submitted

what appears to be a withdrawal of her hearing request. Nevertheless, out of an abundance of caution, OPIC has analyzed her request and recommends that her request be denied because she is not an affected person.

Having concluded that Lornna Talley is an affected person, OPIC in the discussion below analyzes whether the following issues raised by Ms. Talley meet the criteria for referral to hearing: impact on air quality; impact on human health; impact on wildlife; impact of light pollution; and impact on water use.

**B. Disputed Issues**

All of the issues raised in Ms. Talley's hearing requests are disputed.

**C. Disputed Questions of Fact or Law**

All of the disputed issues involve questions of fact.

**D. Issues Raised During Public Comment Period**

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

**E. Hearing Request Based on Withdrawn Public Comment**

Ms. Talley's hearing request is not based on issues raised solely in a public comment which has been withdrawn.

**F. Relevant and Material Issues**

*Air Emissions*

Ms. Talley's request raises the issue of potential adverse effects on air quality. The purpose of the Texas Clean Air Act is to safeguard the state's air resources from pollution by controlling or abating air pollution and emissions of air contaminants. TEX. HEALTH & SAFETY CODE § 382.002. The issue of air quality is therefore relevant and material to the Commission's decision on this application.

*Health Effects*

Ms. Talley's request raises the issue of impacts to human health resulting from or being exacerbated by the proposed air emissions. The Texas Clean Air Act is intended to protect public health. TEX. HEALTH & SAFETY CODE § 382.002. The issue of health effects is therefore relevant and material to the Commission's decision on this application.

*Environmental Effects*

Lornna Talley is concerned that air emissions from the proposed facility will adversely affect the wildlife in the area that she and her family enjoy, including the migratory Sandhill Crane. This concern involves the protection of natural resources. One of the purposes of the Texas Clean Air Act is to protect the general welfare of the state's

natural resources, which includes wildlife. Tex. Health & Safety Code § 382.002. The issue of effects on wildlife is therefore relevant and material to the Commission's decision on this application.

*Light Pollution*

Ms. Talley is concerned that the proposed facility will cause light pollution. TCEQ's regulatory jurisdiction is set in statute by the Texas Legislature. The Texas Legislature has not given TCEQ the authority to address light pollution. This issue is therefore not relevant and material to the Commission's decision.

*Water Use*

Ms. Talley is concerned that the proposed facility will consume large quantities of water and that groundwater levels will decrease. TCEQ's regulatory jurisdiction is set in statute by the Texas Legislature. The Texas Legislature has not given TCEQ the authority to address water usage when considering this permit application. The scope of this air quality permit application review does not include a water assessment or consideration of issues involving the quantity of water used at the proposed plant, nor the amount of water that is recycled at the proposed plant. Depending on the nature of the plant's operations, the Applicant may be required to apply for separate

permits that regulate water quality or water usage. This issue is therefore not relevant and material to the Commission's decision.

**G. Issues Recommended for Referral**

OPIC therefore recommends that the following disputed issues of fact be referred to SOAH for a contested case hearing:

1. Whether emissions from the proposed plant will adversely impact air quality for the requestor and her family?
2. Whether the proposed plant will adversely impact the health of the requestor and her family?
3. Whether the proposed plant will adversely impact wildlife enjoyed by the requestor and her family?

**H. Maximum Expected Duration of Hearing**

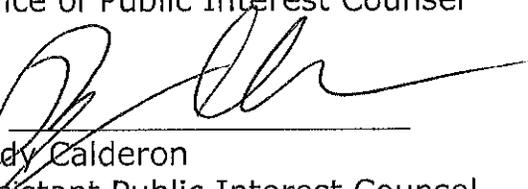
For the contested case hearing, OPIC recommends a maximum duration of nine months from the first day of the preliminary hearing to issuance of the proposal for decision.

#### **IV. CONCLUSION**

OPIC finds that Lornna Talley qualifies as an affected person and has raised at least one issue which is relevant and material to the Commission's decision on this application. Therefore, we respectfully recommend the Commission grant the hearing request of Lornna Talley.

Respectfully submitted,

Office of Public Interest Counsel

By 

Rudy Calderon

Assistant Public Interest Counsel

State Bar No. 24047209

P.O. Box 13087, MC 103

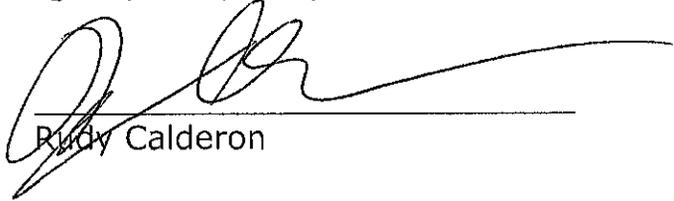
Austin, Texas 78711

512-239-3144

512-239-6377 (fax)

## CERTIFICATE OF SERVICE

I hereby certify that on September 2, 2015, the foregoing document was filed with the TCEQ Chief Clerk, and copies were served to all parties on the attached mailing list via hand delivery, facsimile transmission, electronic mail, inter-agency mail, or by deposit in the U.S. Mail.



Rudy Calderon

**MAILING LIST**  
**NAVASOTA SOUTH PEAKERS OPERATING COMPANY I, LLC**  
**TCEQ DOCKET NO. 2015-1170-AIR**

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RESOLUTION

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