

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

October 26, 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: HALYARD ENERGY HENDERSON, LLC
TCEQ DOCKET NO. 2015-1489-AIR**

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,


Eli Martinez, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2015-1489-AIR

IN THE MATTER OF THE	§	BEFORE THE
APPLICATION BY HALYARD	§	TEXAS COMMISSION ON
ENERGY HENDERSON, LLC	§	ENVIRONMENTAL QUALITY
FOR AIR PERMIT NO. 122733	§	

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE TO
REQUEST FOR RECONSIDERATION AND REQUESTS FOR HEARING**

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

COMES NOW, the Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (the Commission or TCEQ) and files this Response to Request for Reconsideration and Requests for Hearing in the above-referenced matter.

I. INTRODUCTION

Halyard Energy Henderson, LLC (Halyard or Applicant) has applied to the TCEQ for a New Source Review Authorization under Texas Clean Air Act (TCAA), § 382.0518. This permit will authorize the construction of a new electric generating unit that may emit air contaminants.

The Applicant provided the following driving directions to the proposed site: from the intersection of Texas Farm-to-Market Road 2588 and County Road 4402, drive 0.3 miles west on County Road 4402, and the site will be on the right. The location is near Larue, in Henderson County. Contaminants authorized under this permit include organic compounds, nitrogen oxides (NOX), carbon monoxide (CO), sulfur dioxide (SO₂), sulfuric acid mist (H₂SO₄), particulate matter (PM), including PM with diameters of 10 microns or less (PM₁₀) and 2.5 microns or less (PM_{2.5}) and hazardous air pollutants.

The permit application Air Quality Permit Number 122733 was received on August 14, 2014 and declared administratively complete on August 25, 2014. The Notice of Receipt and

Intent to Obtain an Air Quality Permit (NORI or first public notice) for this permit application was published in English on September 4, 2014 in the *Athens Daily Review*. The Notice of Application and Preliminary Decision for an Air Quality Permit was published on April 15, 2015 in English in the *Athens Daily Review*. A public meeting was held on April 23, 2015 in Larue. The notice of public meeting was published in English on April 15, 2015 in the *Athens Daily Review*. The public comment period ended on May 15, 2015. The Executive Director's decision and Response to Comments was mailed August 24, 2015. The deadline for filing requests for reconsideration or a contested case hearing ended on September 23, 2015.¹ Since this application was administratively complete after September 1, 1999, it is subject to the procedural requirements of House Bill 801 (76th Legislature, 1999).

The Commission received a request for reconsideration from The King's Rein, and requests for a contested case hearing from New York, Texas Zipline Adventures and Shannon Decraene.

II. REQUEST FOR RECONSIDERATION

A. Applicable Law

The application was declared administratively complete after September 1, 1999 and is subject to the requirements of Texas Water Code Chapter 5, Subchapter M, Environmental Permitting Procedures, §§5.551 to 5.556, added by Acts 1999, 76th Leg., ch 1350 (commonly known as "House Bill 801"). House Bill 801 created the request for reconsideration as a procedural mechanism which allows the Commission to review and reconsider the Executive Director's decision on an application without a contested case hearing. Following the Executive

¹ 30 TAC §55.201(a)

Director's technical review and issuance of the Executive Director's decision and response to comments, a person may file a request for reconsideration or a request for contested case hearing, or both. TEXAS WATER CODE §5.556; 30 TEXAS ADMINISTRATIVE CODE ("TAC") §55.201(e).

Any person may file a request for reconsideration of the executive director's decision. 30 TAC 55.201(e). The request for reconsideration must state the reasons why the Executive Director's decision should be reconsidered. 30 TAC 55.201(e). Responses to requests for reconsideration should address the issues raised in the request. 30 TAC §55.209(f).

B. Discussion

A timely request for reconsideration of the Executive Director's (ED) decision was filed by Shannon Decraene and Sandra L. Bunch on behalf of The King's Rein. For the reasons discussed below, OPIC recommends that the Commission deny the pending request for reconsideration.

The King's Rein is a Texas non-profit equine-assisted outreach program designed to aid in the healing and restoration of individuals who have suffered traumatic hardships and events. The King's Rein operates on property located approximately half of a mile from the proposed plant. Many of the individuals who attend the King's Rein for therapy have serious health conditions, and the request indicates that there is concern about pollutants from the proposed plant negatively impacting the King's Rein as a program, as well as the health of participants in the program. Even if health consequences would not result from operation of the facility, the request expresses concern that the stigma of pollution could negatively impact the organization by driving away participants and financial donors. Additionally, the request asserts that the

emitted pollutants and noise from the proposed plant would interfere with the organization's use and enjoyment of the property.

Although we are sympathetic to the issues raised by the King's Rein concerning the proposed application, without further development of the record supporting findings of these issues, OPIC cannot recommend denial of the permit at this time. However, as discussed more fully below, OPIC recommends the individual request for a contested case hearing submitted by Ms. DeCraene be referred to the State Office of Administrative Hearings (SOAH) so that such a record may be developed and evaluated by the Commission.

III. REQUEST FOR HEARING

A. Applicable Law

This application was declared administratively complete after September 1, 1999, and is subject to the requirements of Texas Water Code § 5.556 added by Acts 1999, 76th 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 TEXAS ADMINISTRATIVE CODE (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).

The Commission has also set forth specific criteria for judging whether a group or organization should be considered an “affected person.” 30 TAC § 55.205(a) states that a group or association may request a 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.

Any group or association which meets all of these criteria shall be considered an “affected person.”

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. DISCUSSION

A. Determination of Affected Person Status

The Office of the Chief Clerk received timely filed requests for a contested case hearing from Shannon DeCraene and New York, Texas Zipline Adventures.

i. Shannon DeCraene

Shannon DeCraene owns a farm located at 13323 FM 2588 in Larue, Texas, where she resides and also operates an equine therapy program. Ms. DeCraene raises the concern that the proposed permitted activities could negatively impact the use and enjoyment of her property by affecting her business activities and the health of her horse due to degradation of air quality.

OPIC finds that Ms. DeCraene's concerns related to the use and enjoyment of her property are protected by the law under which the application will be considered, and her request has therefore complied with the requirements of 30 TAC §55.203(c)(1).

Ms. DeCraene states in her hearing request that she resides approximately half of a mile from the proposed facility. The executive director has created a map demonstrating that Ms. DeCraene correctly represents her location relative to the proposed facility. Because of her close

proximity to the facility and her stated concerns about air quality, OPIC finds that a reasonable relationship exists between the interests stated in the request and the activity regulated.²

ii. New York, Texas Zipline Adventures

On October 9, 2014, Carson Schultz on behalf of New York, Texas Zipline Adventures, submitted a hearing request to the Commission. The request provides an address for the business, but does not otherwise indicate where requestor's activities occur in relation to the activities to be regulated under the permit. The map produced by the executive director shows that the address provided is not close to the proposed plant. OPIC therefore finds that a reasonable relationship does not exist between the interests stated in the request and the activity regulated, and recommends that the request for a hearing be denied.

B. Issues Raised in the Hearing Request

The following issues have been raised in the hearing request of Ms. DeCraene:

1. Whether proposed emissions from the facility would cause an adverse impact to Shannon DeCraene's use and enjoyment of her property, including her livestock and the use of her property for purposes of running The King's Rein, a Texas non-profit equine-assisted outreach program.
2. Whether the facility would create a nuisance because of noise.

C. Issues raised in Comment Period

All of the issues raised in the hearing request were raised in the comment period and have not been withdrawn. 30 TAC §§55.201(c) & (d)(4), 55.211(c)(2)(A).

² 30 TAC § 55.203(c)(3).

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 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.³ 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.⁴

30 TAC § 101.4 specifically prohibits discharges of air contaminants in such concentration and of such duration that are or may tend to be injurious to or to adversely affect human health or welfare, animal life, vegetation, or property, or as to interfere with the normal use and enjoyment of animal life, vegetation, or property. Therefore, the concerns related to adverse affects on the use and enjoyment of property due to degradation of air quality are

³ See 30 TAC §55.209(e)(6)

⁴ *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.")

material and relevant to the Commission's decision on this application. Therefore, Issue 1 is appropriate for referral to State Office of Administrative Hearings.

Conversely, the concern related to nuisance noise goes beyond the jurisdiction of the Commission to regulate air quality, and OPIC cannot find that it is relevant and material to the Commission's decision. OPIC recommends that Issue 2 not be referred to hearing.

G. Issues Recommended for Referral

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

1. Whether proposed emissions from the facility would cause an adverse impact to Shannon DeCraene's use and enjoyment of her property, including her livestock and the use of her property for purposes of running The King's Rein, a Texas non-profit equine-assisted outreach program.

H. Maximum Expected Duration of Hearing

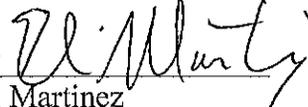
Commission Rule 30 TEX. ADMIN. CODE § 55.115(d) requires that any Commission order referring a case to SOAH specify the maximum expected duration of the hearing by stating a date by which the judge is expected to issue a proposal for decision. The rule further provides that no hearing shall be longer 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

For the reasons set forth above, the Office of Public Interest Counsel respectfully recommends that the Commission deny the request for reconsideration submitted by The King's Rein, deny the request for hearing by New York, Texas Zipline Adventures, and grant the hearing request of Shannon DeCraene. OPIC recommends referring the matter to SOAH for an evidentiary hearing on the issue recommended above for a hearing duration of nine months.

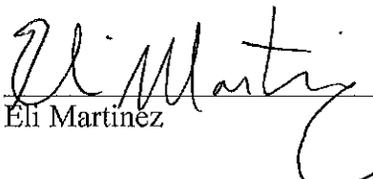
Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 26, 2015 the original and seven true and correct copies of the Office of the Public Counsel's Response to Request for Reconsideration and Requests 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 or by deposit in the U.S. Mail.


Eli Martinez

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