TELEPHONE: 713.658.2323
FACSIMILE: 713.658.1921
DIRECT LINE: 713.752.8677

MICHAEL F. NORTHCUTT, JR.
ASSOCIATE

CRAIN
CATON
&
JAMES

A PROFESSIONAL CORPORATION
ATTORNEYS AND COUNSELORS
SINCE 1912

17TH FLOOR
FIVE HOUSTON CENTER
1401 MCKINNEY STREET
HOUSTON, TEXAS 77010-4035

EMAIL: MNORTHCUTT@CRAINCATON.COM

September 4, 2008

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
2008 SEP -5 PM 12:51
CHIEF CLERKS OFFICE

Via Federal Express
Ms. LaDonna Castañuela
Attn: Agenda Docket Clerk
Texas Commission on Environmental Quality
Office of Chief Clerk MC-105
12100 Park 35 Circle, Bldg. F
Austin, Texas 78753

RE: Application by Aspen Power, L.L.C., for proposed Air Quality Permit Numbers: 81706, PSD-TX 1089, HAP 12; TCEQ Docket No. 2008-1145-AIR; TCEQ Docket No. 2008-1145-AIR

Dear Ms. Castañuela:

Enclosed please find an original and 11 copies of Aspen Power, L.L.C.'s Reply to the Office of Public Interest Counsel's Response to Motions to Overturn the Decision of the Executive Director of the Texas Commission on Environmental Quality.

Thank you for your attention to this matter.

Sincerely,

CRAIN, CATON & JAMES, P.C.

By: Michael F. Northcutt, Jr.
Michael F. Northcutt, Jr.

MFN/nm
Enclosure

cc: Mr. Blas Coy
Texas Commission on Environmental Quality
Office of Public Interest, MC-103
P.O. Box 13087
Austin, Texas 78711-3087

Via Regular U.S. Mail

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005486/000001

cc: Ms. Bridget Bohac — ***Via Regular U.S. Mail***
Texas Commission on Environmental Quality
Office of Public Assistance MC-108
P.O. Box 13087
Austin, Texas 78711-3087

Ms. Amy Browning — ***Via E-mail***
Texas Commission on Environmental Quality
Environmental Law Division MC-173
P.O. Box 13087
Austin, Texas 78711-3087

Mr. Richard Hughes, P.E. — ***Via E-mail***
Texas Commission on Environmental Quality
Office of Permitting, Remediation, and Registration
Air Permits Division (MC-163)
P.O. Box 13087
Austin, Texas 78711-3087

Aaron and Willie Jean Hartsfield — ***Via CM/RRR***
2219 Jimmie St.
Lufkin, Texas 75904-1127

Dr. Dallas Pierre — ***Via CM/RRR***
106 McMullen St
Lufkin, Texas 75904-1405

TCEQ DOCKET NO. 2008-1145-AIR
TCEQ AIR QUALITY PERMIT NO. 81706
PREVENTION OF SIGNIFICANT DETERIORATION (PSD)
AIR QUALITY PERMIT NO. PSD-TX-1089
HAZARDOUS AIR POLLUTANT MAJOR SOURCE [FCAA § 112(g)]
DETERMINATION NO. HAP12

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
CHIEF CLERKS OFFICE

APPLICATION OF	§	**BEFORE THE**
ASPEN POWER, L.L.C. for	§	**TEXAS COMMISSION ON**
LUFKIN GENERATING PLANT	§	**ENVIRONMENTAL QUALITY**
LUFKIN, ANGELINA COUNTY	§	

ASPEN POWER, L.L.C.'S REPLY TO THE OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE TO MOTIONS TO OVERTURN

TO THE HONORABLE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITYAND ALL PERSONS ON THE ATTACHED SERVICE LIST:

COMES NOW Aspen Power, L.L.C. ("Aspen") and files this Reply to the Office of Public Interest Counsel's Response to Motions to Overturn the Decision of the Executive Director of the TCEQ.

The Texas Commission on Environmental Quality's ("TCEQ") Office of the Chief Clerk received two Motions to Overturn ("MTO") the Decision of the Executive Director of the TCEQ. General Counsel of the TCEQ invited the Executive Director, Office of Public Interest Counsel ("OPIC") and Aspen to submit Responses to the MTO. Please consider this Aspen's reply to OPIC's Response to the MTO.

Hearing Request Withdrawal Letters

In its Response to the MTO, OPIC asserted that the MTO should be granted because Aaron Hartsfield and Dallas Pierre are still against this permit, and there is some question about the legitimacy of their withdrawal letters. Dr. Pierre has not denied signing his hearing request withdrawal letter. Apparently he has now changed his mind, citing an allegation that his withdrawal was motivated by employment concerns which he no longer recognizes. Dr. Pierre's

change of heart is untimely and there is no lawful basis to reinstate his protest status. Aaron and Willie Jean Hartsfield base their MTO solely on the unsupported contention that Aaron Hartsfield's signature on the withdrawal letter was forged. On its face, this claim appears very unlikely. In its Response to the MTO, Aspen produced the affidavit of Mr. George Harris. Mr. Harris' affidavit stated that Mr. Hartsfield admitted signing the hearing request withdrawal letter, and that he did not want others to find out. In addition, Aspen has now obtained the affidavit of Leroy McGrew, who actually saw Mr. Hartsfield sign his withdrawal letter. (See attached affidavit of Mr. Leroy McGrew.) Mr. Hartsfield's contention of forgery is simply not credible in view of these independent witnesses.

The Commission and Aspen relied on the withdrawal letters of Dr. Pierre and Mr. Hartsfield. For whatever reason, Dr. Pierre and Mr. Hartsfield have since changed their minds. The MTO should not be granted because Dr. Pierre and Mr. Hartsfield now have second thoughts about withdrawing their hearing requests.

Granting the Motions to Overturn would prejudice Aspen

OPIC states on p. 3 of its response to the MTO:

> Aspen would not be prejudiced or harmed by the granting of these motions. The applicant had previously requested a direct referral to SOAH. Until at least July 17, 2008, Aspen had fully expected to proceed through contested case proceeding on this application.

The statement by OPIC is simply not accurate. The granting of the MTO would prejudice Aspen. Aspen was prepared for a contested case hearing at the State Office of Administrative Hearings ("SOAH"), but the two remaining hearing requestors withdrew and Aspen was issued its permit. Mr. Neil Leibman of Aspen can verify the extent to which Aspen relied on the uncontested permit issuance. (See attached affidavit of Mr. Neil Leibman.) Based upon the uncontested permit issuance, Aspen moved forward with its contractual obligations, which included ordering a boiler system. This boiler system is being designed specifically for Aspen

and costs in excess of $22 million. Additionally, Aspen is paying 6.5% - 9% interest on $53 million in taxable and non taxable revenue bonds issued by the Angelina Neches River Authority in May 2007. If the MTO were granted, the project would be delayed and it would take Aspen that much longer to generate revenue to retire the $53 million in bonds. Also, if the MTO were granted, Aspen would have additional expenses related to the Contested Case Hearing at SOAH. Aspen relied on the uncontested issuance of this permit and should not be prejudiced by granting the MTO.

Respectfully submitted,

CRAIN, CATON & JAMES, P.C.

By: Michael F. Northcutt, Jr.

Robert E. "Robin" Morse, III
State Bar No. 14552500
Michael F. Northcutt, Jr.
State Bar No. 24037194
1401 McKinney, Suite 1700
Houston, Texas 77010
Telephone: (713) 658-2323
Facsimile: (713) 658-1921

ATTORNEYS FOR ASPEN POWER, LLC

CERTIFICATE OF SERVICE

I certify that on September 4, 2008, a true and correct copy of "Aspen Power, L.L.C.'s Reply to the Office of Public Interest Counsel's Response to Motions to Overturn" in the Application of Aspen Power, L.L.C., for Permit Nos. 81706. PSD-TX 1089, and HAP 12 was forwarded via first-class mail and/or facsimile and/or certified mail, return receipt requested and/or electronic mail to all parties on the attached mailing list.

Michael F. Northcutt, Jr.

MAILING LIST
ASPEN POWER, L.L.C.
DOCKET NO. 2008-1145-AIR
PERMIT NOS. 81706, PSD-TX 1089, HAP 12

Mr. Blas Coy
Texas Commission on Environmental Quality
Office of Public Interest, MC-103
P.O. Box 13087
Austin, Texas 78711-3087
Fax: (512) 239-6377

Ms. LaDonna Castañuela
Texas Commission on Environmental Quality
Office of Chief Clerk MC-105
P.O. Box 13087
Austin, Texas 78711-3087
Fax: (512) 239-3311

Ms. Bridget Bohac
Texas Commission on Environmental Quality
Office of Public Assistance MC-108
P.O. Box 13087
Austin, Texas 78711-3087
Fax: (512) 239-4007

Ms. Amy Browning
Texas Commission on Environmental Quality
Environmental Law Division MC-173
P.O. Box 13087
Austin, Texas 78711-3087
Fax: (512) 239-0606

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Aaron and Willie Jean Hartsfield
2219 Jimmie St.
Lufkin, Texas 75904-1127

Dallas Pierre
106 McMullen St
Lufkin, Texas 75904-1405

STATE OF TEXAS §
§
COUNTY OF ANGELINA §

AFFIDAVIT

BEFORE ME on this day personally appeared Leroy McGrew, known to me to be a credible person of lawful age, who, upon oath, deposed and stated the following:

"My name is Leroy McGrew, and I reside at 3400 Old Union Road in Lufkin, Texas 75904. I am over 21 years of age, and I have personal knowledge of the facts stated herein.

I know Mr. Aaron Hartsfield who lives on Jimmie Street in Lufkin, Texas 75904. I was present when Mr. Aaron Hartsfield signed the letter dated July 17, 2008 withdrawing his opposition to the Aspen Power proposed permit from the Texas Commission on Environmental Quality. Mr. Aaron Hartsfield signed the letter on Sunday, July 20, 2008.

I am not employed directly, or indirectly in a consulting capacity, by Aspen Power, LLC, nor have I received any form of compensation to make this affidavit. Nor is anyone in my family employed directly, or indirectly in a consulting capacity, by Aspen Power, LLC.

Further affiant sayeth not."

LeRoy McGrew
Leroy McGrew

SWORN TO AND SUBSCRIBED BEFORE ME on this the 2nd day of September 2008, to which witness my hand and seal of office.

Nelda Holcomb
Notary Public In and For the State of Texas

NELDA HOLCOMB
NOTARY PUBLIC
STATE OF TEXAS
EXPIRES
12-19-2008

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STATE OF TEXAS §
§
COUNTY OF ANGELINA §

AFFIDAVIT

BEFORE ME on this day personally appeared Neil Leibman, known to me to be a credible person of lawful age, who, upon oath, deposed and stated the following:

"My name is Neil Leibman, and I work at 800 Bering Drive, Suite 250 in Houston, Texas 77057. I am over 21 years of age, and I have personal knowledge of the facts stated herein.

I am Chairman of the Managing General Partner of Aspen Power, L.L.C. ("Aspen"). After Aspen was issued its uncontested air permit from the Texas Commission on Environmental Quality, it moved forward with equipment contractual obligations. One of those contractual obligations is for the plant's boiler system. The boiler system Aspen contracted for costs over $22,000,000. Aspen would not have moved forward with ordering this boiler system where it not for the uncontested issuance of its air permit. Additionally, Aspen is currently paying 6 ½ -9 percent interest on $53,000,000 in revenue bonds both taxable and nontaxable issued by the Angelina Neches River Authority, which will continue to be paid until the bonds are retired by revenue generated from plant operations.

Further affiant sayeth not."

Neil Leibman

SWORN TO AND SUBSCRIBED BEFORE ME on this the 4th day of September 2008, to which witness my hand and seal of office.

TOM DAVIS O'LEARY
Notary Public, State of Texas
My Commission Expires
June 22, 2011

Notary Public In and For the State of Texas

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