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APPLICATION OF SANDY CREEK
ENERGY ASSOCIATES, L.P. FOR
TPDES PERMIT NO. WQ0004755000

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CHIEF CLERK'S OFFICE
~~BEFORE THE~~ OFFICE
STATE OFFICE OF
ADMINISTRATIVE HEARINGS

**APPLICANT'S RESPONSE TO
PROTESTANTS' AND OPIC'S EXCEPTIONS TO PROPOSAL FOR DECISION**

TO THE HONORABLE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY AND THE HONORABLE ADMINISTRATIVE LAW JUDGE:

Sandy Creek Energy Associates, L.P. ("Sandy Creek"), Applicant in this proceeding, respectfully presents this Response to the Exceptions filed by the Office of Public Interest Counsel ("OPIC") and the Protestants in this case.

OPIC's exception is a procedural "Gotcha" claim associated with a maximum 0.5° F potential temperature change in the Brazos River.¹ OPIC couches its exception in regulatory cloaks, claiming that Sandy Creek did not prove that the temperature component of its discharge meets Tier 2 of TCEQ's antidegradation policy in 30 T.A.C. § 307.5(b)(2). OPIC's real complaint is that one witness rather nervously replied to one cross examination question by stating that she couldn't remember the specifics of her temperature evaluation. OPIC's claim ignores the fact that the **only** evidence in the record about whether the temperature in Sandy Creek's effluent will cause any degradation is conclusive and uncontroverted that it will **not**, thus clearly satisfying the Tier 2 requirements.

The Protestants join OPIC's position, but primarily focus their exceptions, indeed the bulk of their entire participation in this case, on the application by Judge Sullivan of a schedule adopted to be consistent with Executive Order RP49 (the "Executive Order"). The overarching claim at the exception stage, that they couldn't properly prepare to protest Sandy Creek's application, is simply too little too late—except for abstract complaints at the preliminary

¹ Sandy Creek Ex. 39 (pre-filed testimony of Lee Wilson) page 44 of 62 lines 8-12.

hearing, the Protestants never once asked Judge Sullivan for an extension of time or continuance for cause.

I.
ALLEGED ERROR CONCERNING THERMAL DEGRADATION

It is undisputed that Sandy Creek's potential worst-case² in-stream thermal impact on the Brazos River is 0.5° F.³ During the summertime, this would change the maximum average temperature in the Brazos River in the vicinity of the discharge from 82.4° F to 82.9° F.⁴ Obviously, this small change is well within TCEQ's water quality criteria for both in-stream temperature differential (5° F)⁵ and maximum in-stream temperature for Segment 1242 (95° F).⁶ OPIC concedes that the discharge meets these objective criteria,⁷ but OPIC, and now the Protestants, argue that it might nevertheless cause "degradation," and thus that Sandy Creek failed to properly prove up that it satisfied the Tier 2 antidegradation policy. The evidence confirms and the PFD correctly concludes otherwise.

TCEQ's Tier 2 antidegradation policy is set forth at 30 T.A.C. § 307.5(b)(2). It prohibits "degradation" of water exceeding fishable/swimmable quality (unless it can be shown to the commission's satisfaction that the lowering of water quality is necessary for important economic or social development). "Degradation" is defined only as a lowering of water quality by more than a *de minimis* extent, but not to the extent that an existing use is impaired.⁸ Compliance with Tier 2, therefore, cannot be determined by a using a model or mathematical calculation to quantify an impact and compare it to a numeric standard—it is a subjective, qualitative judgment

² Dr. Wilson explained that the mass balance approach used by Sandy Creek to determine its potential in-stream temperature differential is more conservative than use of a computerized temperature model, which would have yielded an even lower number. Tr. (7/27) page 251 lines 1-13.

³ Sandy Creek Ex. 39 (pre-filed testimony of Lee Wilson) page 44 of 62 lines 8-12.

⁴ Sandy Creek Ex. 3 (October 19, 2004 application) page 337 of 343. Note that in the application, Sandy Creek had calculated a maximum temperature differential of 1.2° F, but that was based on an end-of-pipe temperature of 120° F, not the revised permit limit of 95° F. Note also that Sandy Creek witness Ms. Kathy French testified that she personally reviewed the temperature information in the application and verified that it remains true and accurate. Sandy Creek Ex. 1 (pre-filed testimony of Kathy French) page 26 of 67 lines 14-26.

⁵ 30 T.A.C. § 307.4(f).

⁶ 30 T.A.C. § 307.10, Appendix A.

⁷ The Office of Public Interest Counsel's Exceptions, page 5.

⁸ 30 T.A.C. § 307.5(b)(2).

made by the staff and qualified experts.⁹ It looks at change and evaluates potential impacts of that change based on experience and knowledge of the conditions.¹⁰

In this case, Sandy Creek made the Tier 2 antidegradation demonstration through (A) the testimony of Dr. Lee Wilson, whose un-rebutted expert conclusion was that, although the effluent is likely to be slightly warmer than the receiving water, the net change in water quality in the Brazos River will not be significant; (B) documentary evidence showing that, because Sandy Creek's permit limit for temperature is equal to the not-to-exceed in-stream temperature criteria for Segment 1242 of 95° F, Sandy Creek's discharge will not cause "degradation" according to published TCEQ guidance; and (C) Ms. Lori Hamilton's Tier 2 antidegradation review of Sandy Creek's application, which included a discrete analysis of thermal impacts.

A. DR. LEE WILSON'S TESTIMONY

Dr. Lee Wilson, Sandy Creek's lead witness on in-stream impacts, is a particularly well-qualified expert in this area.¹¹ In preparing to testify, he performed a thorough evaluation of the application, related backup information, the draft permit, and other materials such as recent literature on water quality issues at coal-fired power plants.¹² He also reviewed water quality data for the Brazos River¹³ and investigated the point of discharge.¹⁴

Dr. Wilson's ultimate conclusion was that "the effluent will be slightly warmer and more saline than the receiving water, but the effluent fraction is very small **and the net change in overall water quality will not be significant.**"¹⁵ This conclusion, which expressly included

⁹ Tr. (7/27) page 80 (Ms. Hamilton's testimony that in performing a Tier 2 review, she does not use a specific number, above which there is degradation, and below which, there is not).

¹⁰ Tr. (7/27) pages 74-80 (Ms. Hamilton's testimony that in performing a Tier 2 review she used Sandy Creek's effluent analysis and information about the Brazos River).

¹¹ Dr. Wilson is a 35-year water quality consultant. He is a certified professional hydrogeologist, and has extensive experience in evaluating impacts to water quality from point sources for EPA and other clients in Texas and elsewhere. Dr. Wilson has testified on water quality issues numerous times in proceedings before the U.S. Supreme Court, other federal and state courts and administrative bodies, and has authored hundreds of technical reports and peer-reviewed articles on water quality and related subjects. He has studied water quality issues at more than a dozen coal-fired power plants over the course of his career, and has even previously studied water quality in the Brazos River water shed for EPA. Sandy Creek Ex. 39 (pre-filed testimony of Lee Wilson) pages 10-17 of 62; Sandy Creek Ex. 40 (Wilson resume); Tr. (7/27) page 183 line 24 through page 184 line 8.

¹² Tr. (7/27) page 184 lines 2-11.

¹³ Sandy Creek Ex. 39 (pre-filed testimony of Lee Wilson) page 58 of 62 lines 2-8.

¹⁴ Sandy Creek Ex. 39 (pre-filed testimony of Lee Wilson) page 54 of 62 lines 29-35.

¹⁵ Sandy Creek Ex. 39 (pre-filed testimony of Lee Wilson) page 61 of 62 lines 4-6 (emphasis added).

consideration of thermal impacts,¹⁶ is supported by Dr. Wilson's more specific findings, such as that, even at the critical low flow,¹⁷ there will be no significant impacts to aquatic life, human health, recreational use of the river, or use of the river by livestock and domestic animals.¹⁸ This analysis was not rebutted or undermined in any way in the course of the hearing.

Admittedly, Dr. Wilson did not explicitly present this analysis as a "Tier 2 antidegradation review," but that is what it was. As defined by TCEQ's rules, the term, "degradation," presumes a certain level of significance (*i.e.*, greater than *de minimis*).¹⁹ The antidegradation policy is therefore clearly *not* an absolute bar on minute, insignificant changes in water quality (which are inevitable whenever any kind of discharge is made to a stream), but a prohibition against *significant* lowering of water quality (unless the lowering of water quality is necessary for important economic or social development).²⁰ Because there must be *some* significant lowering of water quality in order for there to be "degradation," Dr. Wilson's testimony that there will be *no* significant change in water quality covers the requirement that Sandy Creek prove up that its discharge will not cause "degradation."

OPIC has one complaint about Dr. Wilson's testimony: In an unrelated section in which he expressed agreement with TCEQ's antidegradation review, Dr. Wilson misstated what is required by Tier 2. OPIC seizes this mistake, and begs the ALJ to discount not only that part of Dr. Wilson's testimony, but also Dr. Wilson's own expert opinions about the significance of impacts for all parameters.

First, this argument is not timely made. OPIC did file objections to Sandy Creek's pre-filed case, and this objection certainly was not among those filed. OPIC also did not assert an objection at the hearing regarding Dr. Wilson's qualifications to evaluate impacts to water quality. Second, as the PFD concludes, there is no basis for disregarding Dr. Wilson's

¹⁶ Sandy Creek Ex. 39 (pre-filed testimony of Lee Wilson) page 61 of 62 lines 4-6; *See also* page 44 of 62 lines 2-12.

¹⁷ Sandy Creek Ex. 39 (pre-filed testimony of Lee Wilson) page 32 of 62 line 38 through page 33 of 62 line 23. TCEQ's rules define "critical low flow" as follows: "Low-flow condition (*e.g.* 7Q2 flow) below which some standards do not apply. The impacts of permitted discharges are analyzed at critical low-flow." 30 T.A.C. § 307.3(a)(14).

¹⁸ Sandy Creek Ex. 39 (pre-filed testimony of Lee Wilson) page 61 of 62, lines 8-28.

¹⁹ "Degradation" is defined as "a lowering of water quality by more than a *de minimis* extent, but not to the extent that an existing use is impaired." 30 T.A.C. § 307.5(b)(2).

²⁰ 30 T.A.C. § 307.5(b)(2).

substantive conclusions. The mistake made by Dr. Wilson was unrelated to and did not affect Dr. Wilson's own, independent conclusion that there will be no significant change in water quality for any parameter (including thermal), which is all that is needed to prove compliance with Tier 2.

B. TCEQ GUIDANCE

As previously noted, the antidegradation rule has no numeric threshold or standard. Rather, it involves an evaluation, a study, a consideration of relevant information, and ultimately—a judgment call. TCEQ guidance provides direction on the exercise of that judgment by noting the types of impacts that should and should not be considered “degradation” under Tier 2.²¹ The example provided in the guidance for temperature directly applies to Sandy Creek's discharge. The guidance states:

The following examples are usually not considered to constitute degradation except where site-specific biological, chemical, or physical conditions in a water body create additional sensitivity or concern, or where background concentrations are adversely elevated:

...

- Increased temperature loading—if the “end-of-pipe” temperatures are not expected to be **significantly higher** than the applicable instream temperature criteria²² [*emphasis added*]

Sandy Creek's “end-of-pipe” temperature is not “significantly” higher than the applicable in-stream temperature criteria—in fact, it is **not higher at all**. The draft permit specifies an effluent limit on the discharge at Outfall 001 of 95° F.²³ This limit, with which Sandy Creek's discharge is expected to comply,²⁴ is *equal to* the in-stream temperature criteria of 95° F set by TCEQ for Segment 1242 at 30 T.A.C. § 307.10, Appendix A. Therefore, consistent with Dr. Wilson's unchallenged opinion, the TCEQ guidance supports the conclusion that Sandy Creek's discharge does *not* constitute “degradation.”

²¹ The parameter-specific examples provided at pages 30-35 of TCEQ's “Procedures to Implement the Texas Surface Water Quality Standards” (admitted into evidence as Sandy Creek Ex. 10).

²² Sandy Creek Ex. 10 (“Procedures to Implement the Texas Surface Water Quality Standards”) pages 40-42 of 198 (emphasis added).

²³ Sandy Creek Ex. 4 (revised draft permit) page 3 of 42.

²⁴ Sandy Creek Ex. 1 (pre-filed testimony of Kathy French) page 64 of 67 lines 4-12, 30-36.

The guidance also indicates that antidegradation determinations should take into account any site-specific conditions that create additional sensitivity or concern or adversely elevated background conditions. In performing her Tier 2 review of this application, Ms. Hamilton did just that by specifically considering the water quality characteristics of the Brazos River.²⁵ For example, she testified that she evaluated the “305(b) Report,” which is part of the Texas Surface Water Quality Inventory and contains information about the quality of water in Segment 1242²⁶ (note that the guidance specifically directs reviewers to use the Texas Surface Water Quality Inventory to estimate baseline conditions).²⁷ Ms. Hamilton also physically surveyed the actual location of the proposed discharge on the Brazos River,²⁸ and ultimately concluded that Sandy Creek’s discharge would not cause “degradation.”²⁹ Dr. Wilson also investigated the point of discharge, and found no site-specific conditions of concern.³⁰ In fact, as Dr. Wilson noted, the Brazos River at the point of discharge is a high-quality stream with substantial flow,³¹ and the effluent fraction for Sandy Creek’s discharge (*i.e.* the ratio of the volume of the discharge to the 7Q2 flow in the Brazos River) is only about 4.4%, which is low.³² And as for the specific issue of whether there is already an adversely elevated background condition with respect to temperature in the Brazos River, the evidence shows there is not one.³³

C. LORI HAMILTON’S TESTIMONY

Finally, Sandy Creek offered the testimony of Ms. Lori Hamilton, an Aquatic Scientist on TCEQ’s Water Quality Standards Team,³⁴ who performed the antidegradation review of Sandy Creek’s application.³⁵ When asked specifically about Tier 2 of her review, Ms. Hamilton

²⁵ Tr. (7/28) page 76 lines 6-7. Executive Director’s Ex. 5 (pre-filed testimony of Lori Hamilton) page 10 lines 4-6.

²⁶ Tr. (7/28) page 74 line 24 through page 75 line 17.

²⁷ Sandy Creek Ex. 10 (“Procedures to Implement the Texas Surface Water Quality Standards”) page 40 of 198.

²⁸ Tr. (7/28) page 78 line 15 through page 79 line 8.

²⁹ Sandy Creek Ex. 21 (Ms. Hamilton’s December 30, 2004 memo).

³⁰ Sandy Creek Ex. 39 (pre-filed testimony of Lee Wilson) page 54 of 62 lines 29-35.

³¹ Sandy Creek Ex. 39 (pre-filed testimony of Lee Wilson) page 54 of 62 lines 29-30.

³² Sandy Creek Ex. 39 (pre-filed testimony of Lee Wilson) page 40 of 62 lines 19-31, page 54 of 62 lines 29-30.

³³ Sandy Creek’s application indicated that the average water temperature in the Brazos River during summer months is 82.4° F. Sandy Creek Ex. 3 (October 19, 2004 application) page 337 of 343. This is approximately 13° cooler than the not-to-exceed in-stream temperature for Segment 1242 established in the Texas Surface Water Quality Standards of 95° F.

³⁴ Sandy Creek Ex. 46 (deposition testimony of Lori Hamilton) page 2 line 1; see Sandy Creek Ex. 21 (Ms. Hamilton’s December 30, 2004 memo) for clarification on the sub-divisions of TCEQ’s Water Quality Division.

³⁵ Sandy Creek Ex. 46 (deposition testimony of Lori Hamilton) page 5 lines 1-6; Sandy Creek Ex. 21 (Ms. Hamilton’s December 30, 2004 memo).

explained that she evaluated Sandy Creek's proposed effluent analysis (which included a discussion of thermal impacts),³⁶ information about the characteristics of Segment 1242 of the Brazos River contained in the Texas Surface Water Quality Inventory (*i.e.*, the "305(b) report"), and other available data.³⁷ She testified that she used the same methods, techniques and resources used by TCEQ in performing antidegradation reviews on all TPDES permit applications,³⁸ and, significantly, that she adhered to the methodology set forth in the TCEQ guidance document discussed earlier.³⁹ She set forth the conclusion of her Tier 2 review in an internal memorandum dated December 30, 2004:

A Tier 2 review has preliminarily determined that no significant degradation of water quality is expected in the Brazos River Above Navasota River, which has been identified as having high aquatic life uses.⁴⁰

Ms. Hamilton reiterated both in her deposition testimony⁴¹ and during live cross-examination at the hearing⁴² that she performed a Tier 2 review of Sandy Creek's application and concluded that no degradation would occur. During the hearing, Ms. Hamilton clarified that, although she had occasionally used the phrase, "significant degradation," she had intended to convey only that there would be no "degradation,"⁴³ which, as stated earlier, presumes significance (*i.e.*, greater than *de minimis*).⁴⁴ Ms. Hamilton's conclusion was not disputed by any witness.

In its Exceptions, OPIC argues that Ms. Hamilton's Tier 2 review should be discounted because of the following scrap of live cross-examination testimony, which was given at the very end of Ms. Hamilton's time on the stand:

³⁶ Sandy Creek Ex. 3 (October 19, 2004 application) page 337 of 343.

³⁷ Tr. (7/28) page 74 line 24 through page 76 line 14.

³⁸ Sandy Creek Ex. 46 (deposition testimony of Lori Hamilton) page 3 lines 8-22, page 5 lines 41-45.

³⁹ Sandy Creek Ex. 46 (deposition testimony of Lori Hamilton) page 5 lines 8-12, page 7 lines 16-19.

⁴⁰ Sandy Creek Ex. 21 (Ms. Hamilton's December 30, 2004 memo). As indicated in the memo, use of the word "preliminarily" was intended only to signify that the "determination can be reexamined and may be modified if new information is received." That limitation seems reasonable since, as in this case, more than a year may pass between the time the antidegradation review is conducted and the draft permit is prepared or considered. The format of this memo is substantially the same as that used by the Water Quality Assessment Section to document the results of the antidegradation review for all TPDES permit applications. Sandy Creek Ex. 46 (deposition testimony of Lori Hamilton) page 6 lines 26-32.

⁴¹ Sandy Creek Ex. 46 (deposition testimony of Lori Hamilton) page 5 lines 3-6.

⁴² *See, e.g.* Tr. (7/28) page 71 lines 7-10, page 74 line 8 through page 75 line 5.

⁴³ Tr. (7/28) page 86 lines 17-22.

⁴⁴ 30 T.A.C. § 307.5(b)(2).

Q. But my question was: Did you look at the proposed temperature discharge in your water quality review?

A. I don't recall. I did read through their proposed effluent analysis—that section they had on that, but that was two years ago. I don't remember the specifics.⁴⁵

First, and most importantly, there is no legitimate question about whether Ms. Hamilton performed the required review of thermal impacts. The effluent analysis referred to by Ms. Hamilton in her answer *did* contain a clear and concise discussion of in-stream thermal impacts,⁴⁶ and OPIC does not appear to seriously question whether Ms. Hamilton considered it when she performed her 2004 review, as was specifically required by the written protocol.⁴⁷ She said she followed it.⁴⁸ The fact that Ms. Hamilton could not instantly recall that aspect of her review when asked this question live on the stand is not at all surprising, given that nearly two years had passed since Ms. Hamilton had completed her analysis (which had been clearly documented in a TCEQ business record), during which she had probably reviewed more than a hundred other applications.⁴⁹

OPIC's primary complaint is that, based on the above-quoted exchange, "no party was able to challenge the particular methodology underlying Ms. Hamilton's expert conclusions."⁵⁰ That is wrong. OPIC *itself* had the opportunity to follow-up on the above-quoted exchange. For example, there were plenty of copies of Sandy Creek's application in the courtroom. OPIC could have asked Ms. Hamilton to look at the 1-page thermal impacts analysis to refresh her memory (as Counsel for the Protestants did when another TCEQ witness was unable to recall some detail of Sandy Creek's application).⁵¹ Or, OPIC could have asked her, in the abstract, whether she considers a 0.5° F impact to constitute "degradation." Or, OPIC could have asked

⁴⁵ Tr. (7/28) page 83 lines 12-18.

⁴⁶ Section 1.9 of the technical report in Sandy Creek's application was entitled, "Evaluation of Permit Temperature Limits." It contained a very clear and concise analysis of how Sandy Creek's discharge would affect in-stream temperatures, and concluded that the maximum in-stream temperature differential would be 1.2° F based on a discharge temperature of 120° F (which was later changed to 95° F). Sandy Creek Ex. 3 (October 19, 2004 application) page 337 of 343.

⁴⁷ Sandy Creek Ex. 10 ("Procedures to Implement the Texas Surface Water Quality Standards") pages 39 and 42 of 198.

⁴⁸ Tr. (7/28) page 71 lines 7-20.

⁴⁹ Ms. Hamilton testified on June 21, 2006 that she had reviewed approximately 409 wastewater discharge applications since joining TCEQ on March 1, 2002.

⁵⁰ The Office of Public Interest Counsel's Exceptions, page 4.

⁵¹ Tr. (7/28) page 62 lines 1-5.

her whether there was any reason why the example in the guidance should not apply to this discharge. Instead, OPIC quickly passed the witness after getting an answer that it perceived to be harmful to Sandy Creek's case.⁵² This style of advocacy is not consistent with OPIC's purpose in participating in contested case hearings.

OPIC further argues, based solely on the above-quoted exchange, that there is no explanation in the record for the basis of the Tier 2 conclusion with respect to thermal impacts. That is simply not true. Dr. Wilson's Tier 2 conclusion is supported by pages and pages of factors considered. Further, when asked what methodology she used in performing her Tier 2 review, Ms. Hamilton testified that she specifically applied the Tier 2 methodology set forth at pages 30-37 of the TCEQ's "Procedures to Implement the Texas Surface Water Quality Standards."⁵³ As explained earlier, this guidance explicitly states that, absent adversely elevated background conditions (which do not exist at Segment 1242, as indicated by Sandy Creek's application),⁵⁴ a discharge with a temperature limit not "significantly higher" than the in-stream water quality criteria for temperature does not cause "degradation."⁵⁵ Therefore, contrary to OPIC's assertion, the record explains *exactly* how Ms. Hamilton reached her Tier 2 conclusion with respect to thermal impacts.

Finally, and significantly, notice that OPIC never suggests any reason why the conclusion of Ms. Hamilton's Tier 2 is incorrect with respect to thermal impacts. Indeed, it would have no basis for doing so, as the totality of evidence shows that Sandy Creek's discharge will not cause "degradation" under any reasonable interpretation of that term.

D. "IMPORTANT ECONOMIC OR SOCIAL DEVELOPMENT"

There are at least three separate pieces of evidence, any one of which, by itself, supports the conclusion that the discharge will not cause "degradation" and thus meets the State's antidegradation policy in full. But even if that evidence were somehow lacking, and it is not, issuance of the permit would *still* be consistent with Tier 2 of TCEQ's antidegradation policy given the nature of this project.

⁵² Tr. (7/28) page 83 lines 12-23.

⁵³ Tr. (7/28) page 71 lines 7-20.

⁵⁴ Sandy Creek Ex. 3 (October 19, 2004 application) page 337 of 343.

⁵⁵ Sandy Creek Ex. 10 ("Procedures to Implement the Texas Surface Water Quality Standards") pages 40-42 of 198.

Under 30 T.A.C. § 307.5(b)(2), “degradation” is prohibited, “unless it can be shown to the commission’s satisfaction that the lowering of water quality is necessary for important economic or social development.” The Sandy Creek Energy Station will generate approximately 800 megawatts of electricity, which is enough to power approximately 800,000 homes in Texas.⁵⁶ Given ERCOT’s well-publicized predictions of future energy shortages in Texas and the declarations in the Executive Order, there is no question that Sandy Creek’s discharge (which has been credibly determined not to cause significant degradation or to have any significant impacts on aquatic life, recreational use or any other aspect of water quality) is necessary for important economic or social development.

III.

ALLEGED ERROR CONCERNING THE “FAST TRACKING ORDER”

The Protestants assert that the Executive Order was misapplied to this application because Sandy Creek does not propose to use any natural resources of Texas to generate electricity. The assertion is particularly ironic in this wastewater proceeding about Sandy Creek’s use of 10-12 million gallons of water each day. First, the Executive Order applies to new power plant projects that would (1) help meet Texas’ future energy demand, and (2) alleviate the State’s overdependence on natural gas.⁵⁷ The Sandy Creek Energy Station will do both. Second, the Station *will* use one of our State’s most important natural resources to generate electricity—water. Without water, there is no source of steam to turn the turbine.

Furthermore, the Protestants’ claim of prejudice under application of the Executive Order is greatly exaggerated. While it is true that the six-month hearing schedule ordered by the Governor is shorter than what might have otherwise transpired, to compensate, Sandy Creek was required to appear *at the preliminary hearing* with the final testimony of the witnesses it controlled, and its experts’ resumes and disclosure documents. This is normally not done until about three months *after* the preliminary hearing.⁵⁸ In fact, the Protestants had *more* time to

⁵⁶ Sandy Creek Ex. 1 (pre-filed testimony of Kathy French) page 12 of 67 lines 7-17.

⁵⁷ See the recitals section of Executive Order RP49: “WHEREAS, production of electricity is highly dependent on the use of natural gas; and WHEREAS, because the cost of natural gas has increased by more than 300 percent in the past five years, the cost of electricity has also increased dramatically; and WHEREAS, due to population increases, the energy demand in the State of Texas is expected to increase 31 percent by the year 2025. . .”

⁵⁸ See, e.g., Orders Nos. 3 and 5 in *Application of Sandy Creek Energy Associates, L.P., for Air Quality Flexible Permit No. 70861 and PSD Permit No. PSD-TX-1039*, SOAH Docket No. 582-05-5612, TCEQ Docket No. 2005-0781-AIR.

review these documents and prepare for hearing than they would have had under a normal SOAH hearing schedule. For example, consider the schedule ordered by SOAH in the hearing on Sandy Creek's air permit application, which predated the Executive Order. In that case, Sandy Creek pre-filed its direct case on October 3, 2005, and the Protestants pre-filed their direct case *two* weeks later on October 17, 2005.⁵⁹ The hearing on the merits began about four weeks after that on November 14, 2005.⁶⁰ In the present hearing, in accordance with the Standing Order, Sandy Creek pre-filed on May 30, 2006, and then the Protestants had about *seven* weeks to file their case.⁶¹ The evidentiary hearing began about a week and a half later on July 27, 2006.⁶²

The Protestants' suggestion that they could not have started to prepare for trial until seeing the TCEQ witnesses' deposition testimony on June 27, 2006, is disingenuous. As stated earlier, Sandy Creek had pre-filed and hand-delivered to the Protestants the vast majority of its direct case evidence at the preliminary hearing on May 30, 2006. But even before that, all of the Parties to this proceeding had notice of the application's contents since shortly after its submittal over two years ago, and of the terms and conditions of the draft permit since its development over one year ago.⁶³ And, as indicated in their hearing requests,⁶⁴ the Protestants had formed the intent to seriously contest Sandy Creek's application by participating in a hearing well before January 12, 2006, the close of the public comment period. Therefore, the Protestants had, at the very least, six months to prepare for trial, not two.

⁵⁹ Orders Nos. 3 and 5 in *Application of Sandy Creek Energy Associates, L.P., for Air Quality Flexible Permit No. 70861 and PSD Permit No. PSD-TX-1039*, SOAH Docket No. 582-05-5612, TCEQ Docket No. 2005-0781-AIR.

⁶⁰ Orders Nos. 3 and 5 in *Application of Sandy Creek Energy Associates, L.P., for Air Quality Flexible Permit No. 70861 and PSD Permit No. PSD-TX-1039*, SOAH Docket No. 582-05-5612, TCEQ Docket No. 2005-0781-AIR.

⁶¹ Order No. 3.

⁶² Order No. 3.

⁶³ Notices of the application and the Executive Director's preliminary decision were published and mailed to interested persons on or about January 7, 2005 and September 2, 2005, respectively. Sandy Creek Ex. 19 (Sandy Creek's January 18, 2005 letter transmitting proof of publication). Sandy Creek Ex. 20 (TCEQ's January 7, 2005 letter transmitting notice); Sandy Creek Ex. 26 (Sandy Creek's September 13 and 23, 2005, letters transmitting proof of publication); Sandy Creek Ex. 27 (TCEQ's August 24, 2005 letter transmitting notice). And the application and all formal subsequent submittals were made available for inspection and copying by the public at the McLennan County Courthouse, as were the Executive Director's preliminary decision (as contained in the technical summary/statement of basis), Executive Director's Response to Public Comment, and revised draft permit. Sandy Creek Ex. 1 (pre-filed testimony of Kathy French) page 14 of 67 lines 32-38, page 18 of 67 lines 6-11, page 20 of 67 lines 9-11, page 35 of 67 lines 20-22, page 37 of 67 lines 29-33.

⁶⁴ See Sandy Creek Ex. 31 (Executive Director's Response to Public Comment) page 32 of 44 (referencing TPOWER's request for a consolidated contested case hearing on Sandy Creek's air and water permit applications).

At the preliminary hearing, the Protestants made general objections about the schedule. In response, Judge Sullivan advised all the parties that he wanted to abide by the Executive Order, but he also would consider legitimate extension requests. The Protestants filed no discovery requests, but didn't ask for an extension; the Protestants also let their pre-filing deadline pass without asking the ALJ for an extension, and never even bothered approaching Sandy Creek about the need for more time.⁶⁵ The Protestants cannot now be heard to complain that they did not have enough time to meet their deadlines.⁶⁶

IV.
**ALLEGED ERROR CONCERNING THE SUPPLEMENTATION OF
SANDY CREEK'S DIRECT CASE WITH TCEQ STAFF DEPOSITION TESTIMONY**

In a related complaint, the Protestants assert that the ALJ should not have allowed Sandy Creek to supplement its direct case with the deposition upon written question testimony of the TCEQ employees who had processed the application. But this arrangement was necessitated by the Texas Rules of Civil Procedure governing the mechanics of taking depositions, and, again, the Protestants' claim of prejudice is both greatly exaggerated and unsubstantiated.

Texas Rule of Civil Procedure 200 governs depositions upon written questions. It requires that the written questions be served on "all parties" at least 20 days prior to the deposition; other parties then have an opportunity to object and serve cross-questions within 10 days of the deposition. Of course, there simply were no parties to this hearing until the preliminary hearing. Therefore, Sandy Creek couldn't have secured deposition testimony from the TCEQ staff in time to pre-file it with its direct case. In recognition of both Sandy Creek's statutory and constitutional right to depose the TCEQ employees and use their testimony as

⁶⁵ "When by . . . order of court an act is required . . . to be done at or within a specified time, the court for cause shown may. . . (a) with or without motion or notice, order the period enlarged if application therefor is made before the expiration of the period originally prescribed . . . ; or (b) upon motion permit the act to be done after the expiration of the specified period where good cause is shown for the failure to act." Tex. R. Civ. P. 5. *See also Remington Arms Co., Inc. v. Canales*, 837 S.W.2d 624, 625 (Tex. 1992) (requiring a demonstration of good cause to permit extensions of time).

⁶⁶ *See Magnuson v. Mullen*, 65 S.W.3d 815, 829 (Tex. App.—Fort Worth 2002, pet. denied) ("[A] party must have presented to the . . . court a timely request, objection, or motion *that states the specific grounds for the desired ruling*. . . . If a party fails to do this, error is not preserved, and *the complaint is waived*. The objecting party must get a ruling from the . . . court.") (emphasis added) (*citing Bushell v. Dean*, 803 S.W.2d 711, 712 (Tex. 1991) ("In order to preserve a complaint for appellate review, a party must present to the trial court a timely request, objection or motion, state the specific grounds therefor, and obtain a ruling."))

evidence in the case,⁶⁷ and the Protestants' need to have some time to consider the testimony, the ALJ required Sandy Creek to take the depositions and file the testimony by June 27, 2006, one month before the hearing on the merits began on July 27, 2006.

And note that the provision of the deposition testimony on June 27, 2006, only enhanced the Protestants' ability to prepare for trial by ensuring that, before pre-filing their own direct case, they had access to written testimony of key TCEQ witnesses. Otherwise, the Protestants might not have had access to any TCEQ witness' testimony until the Executive Director pre-filed its own direct case on July 17, 2006, the pre-filing deadline for all parties other than Sandy Creek.

V.
PARTICIPATION BY THE EXECUTIVE DIRECTOR

The Protestants assert that it was error for the ALJ to allow the Executive Director to offer testimony from TCEQ staff concerning whether the application complied with applicable law. But it was *Sandy Creek*, not the Executive Director, who took the deposition upon written questions of TCEQ staff and offered the testimony into evidence. Sandy Creek's right to depose any party and offer that testimony as part of its prima facie case is granted by statute and affirmed by case law.⁶⁸ Sandy Creek independently and individually solicited the deposition testimony of the TCEQ staff based on questions written solely by Sandy Creek. The Executive Director was required by law to either respond, object, or be sanctioned,⁶⁹ and therefore did not "assist" Sandy Creek in any way by making the TCEQ employees available for deposition.

⁶⁷ Procedural due process requires adequate notice, a hearing, and a full opportunity to present evidence. *Board of Adjustment v. Patel*, 887 S.W.2d 90, 93 (Tex. App.—Texarkana 1994, no writ). "The right to a hearing embraces . . . the right to present evidence." *Morgan v. United States*, 304 U.S. 1, 18-19 (1938). "Any party has a right to offer any part of a deposition that he desires to offer if it is admissible under the rules of evidence." *Gilcrease v. Hartford Acci. & Indem. Co.*, 252 S.W.2d 715, 719 (Tex. Civ. App.—El Paso 1952, no writ). See also TRCP 203.6(b), *Jones v. Colley*, 820 S.W.2d 863, 866 (Tex. App.—Texarkana 1991, writ denied) (stating that a party is generally entitled to offer deposition testimony into evidence in the most effective manner).

⁶⁸ *Supra*, Note 67.

⁶⁹ The rules of civil procedure provide that "[a] party must respond to written discovery in writing within the time provided by court order or these rules" and "must make a complete response, based on all information reasonably available to the responding party or its attorney at the time the response is made." TEX. R. CIV. P. 193.1

The Executive Director supplemented the deposition testimony offered by Sandy Creek with very short pre-filed testimony from some of the witnesses Sandy Creek had deposed.⁷⁰ It was strictly limited in scope to an explanation of the type of analysis, study or review performed by the various TCEQ employees in processing Sandy Creek's application.⁷¹ At the hearing, Counsel for the Executive Director explained that, because the deposition testimony offered by Sandy Creek had been admitted, there was no reason to call the TCEQ witnesses to testify.⁷² However, at the request of Judge Sullivan, he agreed to call the witnesses in order to provide the Protestants an opportunity to cross-examine them.⁷³ Again, Counsel for the Executive Director asked hardly any questions of them.

VI. ALLEGED ERROR CONCERNING THE "FINALITY OF ORDER"

Even though pollutant concentrations in the discharge are anticipated to be very low,⁷⁴ like all TPDES permits issued by the Commission, the Draft Permit requires Sandy Creek to perform initial startup testing for a comprehensive list of pollutants.⁷⁵ If the data unexpectedly indicates concentrations with the potential to exceed 70% or 85% of the concentrations at which TCEQ has determined the discharge could cause toxicity in the receiving waters, TCEQ may amend the permit to add any necessary periodic monitoring requirements and effluent limits.⁷⁶ Dr. Wilson explained that this is a very pro-active approach to protecting water quality.⁷⁷

The Protestants complain that this approach renders the Commission's issuance of the permit a non-final order, because it is (at least, theoretically) possible that startup testing could indicate the need for effluent limits in addition to those contained in the draft permit. First, if the Protestants are right (and they are not), the Commission's issuance of virtually *all* TPDES permits would be invalidated. Second, the mere possibility that a permit may be reopened to add

⁷⁰ Executive Director's exhibits 1-5.

⁷¹ See 30 T.A.C. § 80.127(h), which provides that testimony given by Agency staff relating to the documents that comprise the administrative record or any analysis, study or review that the executive director is required by statute or rule to perform shall not constitute impermissible assistance to the applicant in meeting its burden of proof.

⁷² Tr. (7/27) pages 257-258.

⁷³ Tr. (7/27) pages 263-264.

⁷⁴ Sandy Creek Ex. 39 (pre-filed testimony of Lee Wilson) page 41 of 62 lines 31-33.

⁷⁵ See Other Requirement 7 (Sandy Creek Ex. 4 (revised draft permit) page 16 of 62).

⁷⁶ Sandy Creek Ex. 44 (deposition testimony of Monica Baez) page 15 lines 3-32, page 21 lines 14-22; Sandy Creek Ex. 4 (revised draft permit) page 16 of 42, Other Requirement No. 7; Tr. (7/28) page 105 lines 16-25; Tr. (7/27) page 237 line 4 through page 238 line 13, page 240 lines 7-17.

⁷⁷ Tr. (7/27) page 184 line 21 through page 185 line 7.

new, more stringent requirements doesn't interfere with the finality of the order issuing the permit.⁷⁸

Furthermore, the Protestants' position ignores the fact that the record in this case supports the conclusion that the limits currently included in the Sandy Creek Draft Permit are all that are needed to fully protect water quality in the Brazos River.⁷⁹ Under TCEQ's long-standing approach, periodic monitoring requirements or effluent limits are included in a draft permit wherever there is an indication that they might be needed, but are not imposed where there is no such indication.⁸⁰ The requirement to conduct startup testimony is merely a safety net on the permitting process. Start-up monitoring is the first check; inspections and whole effluent toxicity testing also can provide information that new effluent parameters are needed. Are those after-the-fact insurance steps also forbidden?

What the Protestants really want is for the Commission to include in Sandy Creek's permit monitoring requirements and effluent limits for any pollutant that might be in the effluent regardless of the predicted concentration. But as Dr. Wilson explained, such an approach would result in undue and wasteful monitoring.⁸¹ Dr. Wilson was unaware of any state program that follows such an approach.⁸² Dr. Wilson further explained that, when coupled with the fail-safes provided by startup testing and whole effluent toxicity ("WET") testing requirements, TCEQ's methodology is an appropriate approach to protecting water quality of receiving streams.⁸³

VII. **CONCLUSION**

The arguments made by OPIC and the Protestants in their Exceptions have been previously made to SOAH in one form or fashion and have been properly rejected. Sandy Creek respectfully requests that the Commission adopt the PFD, approve Sandy Creek's Application for TPDES Permit No. WQ0004755000 and issue the draft permit as recommended by SOAH.

⁷⁸ See *Gene Hamon Ford, Inc. v. David McDavid Nissan, Inc.*, 997 S.W.2d 298, 310 (Tex. App.—Austin 1999, pet. denied) (stating, "Administrative orders are generally final and appealable if they impose an obligation, deny a right, or fix some legal relationship as a consummation of the administrative process.").

⁷⁹ PFD, Finding of Fact #77.

⁸⁰ Tr. (7/27) page 184 line 20 through page 185 line 16.

⁸¹ Tr. (7/27) page 180 lines 20-22.

⁸² Tr. (7/27) page 185 line 17 through page 186 lines 17-25.

⁸³ Tr. (7/27) page 184 line 20 through page 185 line 16.

Respectfully submitted,

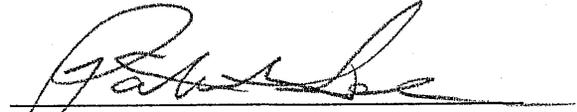
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Applicant's Response to OPIC's and Protestants' Exceptions to the Proposal for Decision has been sent by fax, email and/or hand delivery on this **16th** day of November, 2006, to the following:

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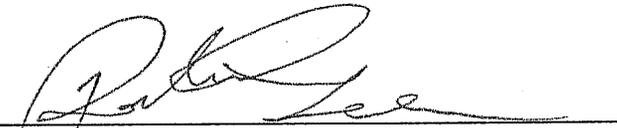
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