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Blas J. Coy, Jr., *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

November 6, 2006

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
2006 NOV -6 PM 2:05
CHIEF CLERKS OFFICE

LaDonna Castañuela, Chief Clerk
Texas Commission on Environmental Quality
Office of the Chief Clerk (MC-105)
P.O. Box 13087
Austin, Texas 78711-3087

RE: Sandy Creek Energy Associates, L.P.
SOAH Docket No. 582-06-2038; TCEQ Docket No. 2006-0402-IWD

Dear Ms. Castañuela:

Enclosed for filing is the Public Interest Counsel's Exceptions in the above-entitled matter.

Sincerely,

Emily A. Collins

Emily A. Collins, Attorney
Public Interest Counsel

cc: Mailing List

Enclosure

SOAH DOCKET NO. 582-06-2038
TCEQ DOCKET NO. 2006-0402-IWD

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
2006 NOV -6 P 2:
CHIEF CLERKS OFFICE

APPLICATION OF SANDY CREEK ENERGY ASSOCIATES, L.L.P FOR TPDES PERMIT NO. WQ0004755000	§ § § §	BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS

THE OFFICE OF PUBLIC INTEREST COUNSEL'S EXCEPTIONS

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

COMES NOW, the Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (TCEQ or Commission), and submits the following Exceptions to Proposed Finding of Fact numbers 55, 80 and Proposed Conclusions of Law numbers 10, 15 in the above-captioned matter and would respectfully show the following:

I. THE APPLICANT FAILED TO MEET ITS BURDEN OF PROOF THAT ITS APPLICATION COMPLIES WITH THE COMMISSION'S ANTIDEGRADATION POLICY.

Tier 2 antidegradation reviews ensure that where water quality is *better than* the minimum level necessary to support fishable/swimmable water quality, the high water quality of such waters will be maintained and protected unless a lowering of water quality is necessary to allow the occurrence of important economic or social development.[1] Dr. Wilson, Applicant's expert on water quality matters, testified that TCEQ staff performed a Tier 1 and Tier 2

[1] 30 TAC § 307.5(b)(2), (c)(2)(B); TCEQ Implementation Procedures, ED Ex. 6, page 30; Water Quality Standards Regulation, 63 Fed. Reg. 36742, 36782 (proposed July 7, 1998).

antidegradation review that was documented during technical review.[2] Dr. Wilson then states that he agrees with the outcome of staff's Tier 2 antidegradation review. He reasons that since Segment 1242 of the Brazos is only impaired for bacteria, and "domestic wastewater is not part of the discharge, the appropriate conclusion was reached that the SCES discharge would not contribute to further impairment."[3] The Commission's Tier 2 antidegradation policy applies where a water body is exceeding (meaning "better than" rather than impairing) water quality criteria.[4] As detailed in OPIC's Closing brief (Attachment A), Dr. Wilson's testimony was flawed because he assumed Tier 2 reviews applied only to impaired waters. The ALJ decided to "discount" Dr. Wilson's opinion "on this aspect of the degradation issue" due to a clear lack of knowledge of applicability of the Tier 2 standard.

The Judge made his decision to discount Dr. Wilson's antidegradation opinion, rather than find that the Applicant failed to meet its burden of proof on the antidegradation issue, based on the fact that "Dr. Wilson has extensive experience as a water quality consultant" and because Dr. Wilson's "overall conclusion that 'the net change in overall water quality will not be significant' was consistent with [the ED's] assessment, and no other witnesses questioned the findings of these experts."[5] OPIC respectfully asserts, however, that Dr. Wilson's faulty interpretation of the Commission's rules do not simply go to the weight of his opinion on the Applicant's ability to meet the Tier 2 antidegradation standard. Dr. Wilson's clear lack of knowledge of the Commission's (and EPA's) Tier 2 antidegradation rules presents the

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[2] Wilson Pre-filed Testimony, Sandy Creek Ex. 39, page 38 of 62, lines 32-34, page 39 of 62, lines 1-14.

[3] *Id.* at page 39 of 62, lines 9-14.

[4] 30 TAC § 307.5(b)(2), (c)(2)(B); TCEQ Implementation Procedures, ED Ex. 6, page 30; Water Quality Standards Regulation, 63 Fed. Reg. 36742, 36782 (proposed July 7, 1998).

[5] PFD, page 11, fn 25.

Commission with a record demonstrating that Dr. Wilson did not, in fact, know what he should be assessing. The Applicant's only evidence on Tier 2 antidegradation consists of Dr. Wilson's opinion that the Applicant's contribution to bacteria loading will not impair Segment 1242. Clearly, the Applicant failed to meet its burden of proof on Tier 2 antidegradation.

Similarly, Dr. Wilson's conclusory statement that "the net change in overall water quality will not be significant"[6] combined with his numerous years of work as a water quality consultant do not, somehow, rehabilitate him as a witness. Indeed, the Texas Supreme Court has held that "[w]hen the expert 'brings to court little more than his credentials and a subjective opinion,' this is not evidence that would support a judgment....If for some reason such testimony were admitted in a trial without objection, would a reviewing court be obliged to accept it as some evidence? The answer is no." *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 712 (Tex. 1997).[7]

II. EVEN IF THE RECORD SHOWS THAT THE ED CONDUCTED AN ANTIDEGRADATION REVIEW, THE ED'S WATER QUALITY REVIEWER COULD NOT RECALL SPECIFICALLY REVIEWING THE APPLICANT'S TEMPERATURE DISCHARGE, AND THEREFORE, WAS NOT AVAILABLE TO ANSWER QUESTIONS ON THE DETAILS OF HER REVIEW.

OPIC strongly disagrees with the apparent weight the ALJ has given to the ED's antidegradation review. The ED's evidence on this point demonstrated nothing other than the ED's water quality reviewer's memory failed on the details of her review. In response to the question "...did you look at the proposed temperature discharge in your water quality review?"

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[6] Direct Pre-filed Testimony of Lee Wilson, Ph.D. for Sandy Creek Energy Associates, L.P., Sandy Creek Ex. 39, page 61 of 62, lines 6-8.

[7] *See also Coastal Transport Company, Inc. v. Crown Central Petroleum Corp.*, 136 S.W.3d 227, 231-233 (Tex. 2004); *Burrow v. Arce*, 997 S.W.2d 229, 235 (Tex. 1999); *Cas. Underwriters v. Rhone*, 132 S.W.2d 97, 99 (Tex. 1939); *Dallas Ry. & Terminal Co. v. Gossett*, 294 S.W.2d 377, 380 (Tex. 1956).

Ms. Hamilton responded "I don't recall. I did read through [Sandy Creek's] proposed effluent analysis – that section they had on that, but that was two years ago. I don't remember the specifics."[8] Even if reference to reading through the proposed effluent analysis allows the rational extraction of a conclusion that an antidegradation review was done, Ms. Hamilton demonstrated in her answer to this single question that she could not answer any further questions on how she conducted her antidegradation review with respect to temperature, how she reached her conclusion that the Applicant's temperature discharge would comply with the Commission's Tier 2 antidegradation policy, and her application of TCEQ Tier 2 antidegradation guidance to this particular application for temperature. The ALJ's proposed holding allows the ED to establish his case (and in this case, the Applicant's case) by simply not preparing to testify on specifics and the provision of documentation of the same expert's conclusions. No party was able to challenge the particular methodology underlying Ms. Hamilton's expert conclusions due to her forgetfulness or lack of preparation. While the ALJ uses water quality criteria testimony to conclude that no degradation will occur because the increased temperature loading will not result in a discharge temperature "significantly higher" than the instream criteria, neither OPIC nor any other party could ask Ms. Hamilton how she determined that Sandy Creek's discharge would not be significantly higher because she could not recall the details of her antidegradation review.

In addition, the ALJ's discussion of the "Evaluation of Permit Temperature Limits" and the mass balance equation in that evaluation refers specifically to water quality criteria rather

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[8] Collins cross-examination of Lori Hamilton, July 28, 2006, Transcript page 83, lines 12-18.

than antidegradation.[9] OPIC agrees that the Applicant has met its burden of proof on water quality criteria, including temperature. However, evaluation of Applicant's temperature discharge in relation to the 95 degree Fahrenheit criteria and 5 degree Fahrenheit differential criteria do not fulfill the Applicant's burden to establish the compliance of the temperature of its discharge with antidegradation requirements. While the ALJ opines that a lack of clarity exists on whether the temperature permit limit relates to Ms. Hamilton's antidegradation concerns, the Commission's rules and Implementation Procedures distinguish between water quality criterion, which provide standards which may be incorporated into a permit,[10] and antidegradation implementation, which focuses on alternatives to the proposed discharge if the Commission anticipates any sort of degradation.[11] Once again, water quality criteria and antidegradation are distinct legal requirements, and the Commission has established rules and guidance in which its water quality reviewers must conduct separate reviews of an application in light of those requirements. Therefore, Ms. Hamilton's testimony simply cannot establish that the Applicant will comply with the Commission's antidegradation policy.

The ALJ also appears to find probative value in Ms. Hamilton's conclusory testimony regarding her antidegradation assessment. The ALJ cites to the following three pieces of evidence that persuaded him to find that the Applicant met its burden of proof through an ED antidegradation review:

(1) an interoffice memorandum from Lori McElroy to the Industrial Permits Team stating that "[a] Tier 2 review has preliminarily determined that no significant

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[9] *See* OPIC's Closing Argument, Attachment A, at pages 4-8 (discussing the differences between water quality criteria and antidegradation).

[10] 30 TAC §§ 307.4, 307.10.

[11] TCEQ Implementation Procedures, ED Ex. 6, page 35.

degradation of water quality is expected in the Brazos River Above Navasota River, which has been identified as having high aquatic life uses";[12]

(2) a statement in deposition testimony that "[t]he Tier 2 antidegradation review preliminarily determined that no significant degradation of water quality is expected in the Brazos River (Segment 1242) and that existing uses will be maintained and protected";[13] and

(3) Ms. Hamilton's experience.[14]

The first two pieces of evidence cited above consist of nothing more than mere conclusions for which the expert could not provide details. Further, even if an expert has impressive credentials, a "naked and unsupported opinion or conclusion of a witness does not constitute evidence of probative force and will not support a jury finding even when admitted without objection."[15] Ms. Hamilton could not offer anything more than broad conclusions as stated in her interoffice memorandum and deposition testimony with regard to her Tier 2 antidegradation review for temperature due to either forgetfulness or lack of preparation. Furthermore, "it is the basis of the witness's opinion, and not the witness's qualifications or his bare opinions alone, that can settle an issue as a matter of law; a claim will not stand or fall on the mere *ipse dixit* of a credentialed witness."[16] Therefore, Ms. Hamilton's broad conclusory statements that no significant deterioration of water quality is expected in Segment 1242 of the Brazos fail to overcome her inability to answer detailed questions on how the temperature aspect

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[12] Sandy Creek Ex. 21.

[13] Sandy Creek Ex. 46, page 5.

[14] Sandy Creek Ex. 46, page 2.

[15] *Dallas Ry. & Terminal Co. v. Gossett*, 294 S.W.2d 377, 380 (Tex. 1956).

[16] *Burrow v. Arce*, 997 S.W.2d 229, 235 (Tex. 1999).

of her Tier 2 antidegradation review ensures that Texas' high-quality waters are not allowed to deteriorate to the level of water quality standards.

III. CONCLUSION

The Applicant failed to present evidence to meet the elements of a Tier 2 antidegradation showing with regard to any pollutant, including heat, except bacteria. In addition, the ED's water quality reviewer could not testify as to the details of her review of the Applicant's proposed thermal discharge. Dr. Wilson's erroneous conclusion that Tier 2 reviews apply exclusively to 303(d) listings leaves the Applicant with no evidence that would allow them to meet their burden of proof on the elements of a Tier 2 antidegradation showing. Therefore, the Commission should deny Sandy Creek's application for a TPDES permit.

Respectfully submitted,

Blas J. Coy, Jr.
Public Interest Counsel

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CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2006, the original of the Office of the Public Interest Counsel's Exceptions 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.

Emily A. Collins

Emily A. Collins

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SOAH Docket No. 582-06-2038
TCEQ Docket No. 2006-0402-IWD

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OPIC's Attachment A

Kathleen Hartnett White, *Chairman*
R. B. "Ralph" Marquez, *Commissioner*
Larry R. Soward, *Commissioner*
Glenn Shankle, *Executive Director*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
CHIEF CLERKS OFFICE

August 23, 2006

The Honorable Kerry D. Sullivan
Administrative Law Judge
State Office of Administrative Hearings
P. O. Box 13025
Austin, Texas 78711-3025

RE: Sandy Creek Energy Associates, L.P.
SOAH Docket No. 582-06-2038; TCEQ Docket No. 2006-0402-IWD

Dear Judge Sullivan:

Enclosed for filing is the Public Interest Counsel's Closing Argument in the above-entitled matter.

Sincerely,

Emily A. Collins

Emily A. Collins, Attorney
Public Interest Counsel

cc: Mailing List

Enclosure

SOAH DOCKET NO. 582-06-2038
TCEQ DOCKET NO. 2006-0402-IWD

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
CHIEF CLERKS OFFICE

APPLICATION OF SANDY CREEK ENERGY ASSOCIATES, L.L.P FOR TPDES PERMIT NO. WQ0004755000	§ § § §	BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS

THE OFFICE OF PUBLIC INTEREST COUNSEL'S CLOSING ARGUMENT

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

COMES NOW, the Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (TCEQ or Commission), and submits the following Closing Argument in the above-captioned matter and would respectfully show the following:

I. INTRODUCTION AND BACKGROUND

Sandy Creek Energy Associates, L.P. has proposed to operate a Powder River Basin coal-fired electric power generating facility using reclaimed water from the Waco Metropolitan Area Regional Sewerage System Treatment Facility (WMARSS). The proposed facility, located near the City of Riesel at the intersection of Rattlesnake Road and FM 1860 in McLennan County,[1] will use WMARSS water for its cooling towers, the flue gas desulfurization system, the bottom ash/submerged chain conveyor system, the steam cycle, chemical metal cleaning, and miscellaneous activities such as floor and equipment cleaning and quenching of hot process

[1] Statement of Basis/Technical Summary and Executive Director's Preliminary Decision, Sandy Creek Ex. 25, page 14 of 63.

streams.[2] The Applicant's discharge will contain water used in each of the processes listed above as well as switchyard stormwater runoff and coal pile stormwater runoff.[3] The Applicant proposes to discharge its effluent via a pipeline to the Brazos River Above Navasota River in Segment No. 1242 of the Brazos River Basin.[4] Segment No. 1242 has designated uses of high aquatic life use, contact recreation, and public water supply.[5]

The Executive Director (ED) received Sandy Creek's TPDES permit application on October 22, 2004, and declared the application administratively complete on December 29, 2004.[6] Sandy Creek published a Notice of Receipt of Application and Intent to Obtain a Water Quality Permit on January 7, 2005, in the *Riesel Rustler* and the *Waco Tribune-Herald*.[7] The Applicant published a Notice of Application and Preliminary Decision on September 2, 2005, in the *Riesel Rustler* and the *Waco Tribune-Herald*.[8] The Applicant published notice of a Public Meeting on the proposed TPDES permit on December 23, 2005, in the *Riesel Rustler* and the *Waco Tribune-Herald*,[9] and a public meeting was held on January 12, 2006. The ED mailed his

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[2] Direct Pre-filed Testimony of Kathy French for Sandy Creek Energy Associates, L.P., Sandy Creek Ex. 1, page 41 of 67, lines 13-18.

[3] *Id.* at page 46 of 67, lines 12-32 (coal pile runoff will be directed to a stormwater runoff pond prior to treatment and discharge).

[4] Statement of Basis/Technical Summary and Executive Director's Preliminary Decision, Sandy Creek Ex. 25, page 14 of 63.

[5] *Id.*

[6] Sandy Creek Ex. 18.

[7] Sandy Creek Ex. 19.

[8] Sandy Creek Ex. 26.

[9] Sandy Creek Ex. 29.

Response to Public Comment on March 30, 2006.[10] The Applicant requested a direct referral[11] to the State Office of Administrative Hearings pursuant to 30 TAC section 55.210(a) for a hearing on "whether the application complies with all applicable statutory and regulatory requirements.[12]

OPIC has organized its closing argument in accordance with the ALJ's request for the parties to have a uniform structure to their arguments. Therefore, the headings preceded by a roman numeral indicate the agreed-upon headings for purposes of organization. OPIC has retained each of the headings regardless of whether OPIC has outstanding issues under those headings.

II. COMPLETENESS OF THE APPLICATION

The Applicant appears to have met their burden of proof on the laws and rules regarding completeness of their application.

III. CHARACTERISTICS OF THE DISCHARGE

A. Temperature

Dr. Lee Wilson, Ph.D., for the Applicant, stated in his pre-filed testimony that "if thermal loading is properly accounted for, water quality at a new power plant would not be a major concern...."[13] Neither the Applicant nor the Executive Director (ED) properly accounted for

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[10] Sandy Creek Ex. 31.

[11] Ex. J-A.

[12] 30 TAC § 55.210(b) (2006).

[13] Direct Pre-filed Testimony of Lee Wilson, Ph.D. for Sandy Creek Energy Associates, L.P., Sandy Creek Ex. 39, page 53 of 62, lines 25-26.

thermal loading with respect to the Commission's antidegradation policy. While the Applicant's water quality expert testified to the water quality criteria for temperature in relation to the proposed discharge, the Applicant failed to submit any evidence to meet the elements of a Tier 2 antidegradation showing with regard to any pollutant, including heat, except bacteria. In addition, none of the ED staff reviewed or analyzed the Applicant's thermal loading under the Commission's water quality criteria or the antidegradation policy.[14]

1. *Water Quality Criteria and Antidegradation Are Distinct Legal Requirements*

Water quality standards include "designated uses," defined as "those uses specified in water quality standards for each water body or segments whether or not they are being attained,"[15] "criteria," defined as "elements of State water quality standards, expressed as constituent concentrations, levels, or narrative statements, representing a quality of water that supports a particular use,"[16] and an antidegradation policy.[17] Criteria alone may not be sufficient to protect a designated use,[18] and EPA recognizes that "[w]hen criteria are met, water quality will *generally* protect the designated use."[19] Accordingly, the United States Supreme Court has

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[14] OPIC notes that Kelly Holligan testified for the ED that "[t]he daily average temperature limit in the draft permit was established to be equivalent to the instream water quality criterion," but does not testify as to the 5 degree Farenheit differential in the general criterion, and specifically states that the antidegradation review was conducted by the Water Quality Standards Team and the Water Quality Assessment Team. Applicant Sandy Creek Energy Associates, L.P.'s Deposition on Written Questions of Kelly Holligan, Sandy Creek Ex. 45, page 8, lines 12-16.

[15] 40 C.F.R. § 131.3(f) (2006); *see also* 30 TAC § 307.3(15) (2006).

[16] 40 C.F.R. § 131.3(b) (2006); *see also* 30 TAC § 307.3(13) (2006).

[17] 30 TAC § 307.5(b) (2006).

[18] *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700, 715 (1994).

[19] 40 C.F.R. § 131.3(b) (emphasis added).

recognized that States may complement water quality criteria with a requirement that "activities also comport with designated uses...to ensure that each activity – even if not foreseen by the criteria – will be consistent with the specific uses and attributes of a particular water body."[20] The Commission's antidegradation policy augments water quality criteria and designated uses by ensuring that Texas' high-quality waters will not deteriorate to the level of water quality standards.[21]

TCEQ's water quality regulations contemplate criteria evaluation and antidegradation review as distinct legal requirements. Texas has developed and adopted a statewide antidegradation policy that provides increasingly strict protection for state waters depending on the quality of the receiving water above and beyond specific water quality criteria and designated uses.[22] TCEQ implements its antidegradation policy to ensure that Texas' high-quality waters are not allowed to deteriorate to the level of water quality standards by affording those waters three "tiers" of protection.[23] Tier 1 reviews, applicable to all water bodies regardless of whether the receiving water exceeds water quality goals,[24] requires water quality that will maintain and

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[20] *PUD No. 1*, 511 U.S. 700, 717 (1994).

[21] *See* Michael C. Blumm & William Warnock, *Symposium: The Clean Water Act Turns 30: Celebrating Its Past, Predicting Its Future: Roads Not Taken: EPA vs. Clean Water*, 33 Envt'l Law 79, 104 (2003).

[22] Texas is required to develop and adopt such a policy, including implementation methods, pursuant to 40 C.F.R. section 131.12 (2006).

[23] 30 TAC § 307.5(b).

[24] 30 TAC § 307.5(a) (2006); TCEQ Implementation Procedures, ED Ex. 6, page 24 (stating that "TPDES permit amendments or new permits that allow increased pollution loading are subject to review under Tier 1 of the antidegradation policy and all pollution that could cause an impairment of existing uses is included in the evaluation."); Revisions to the National Pollutant Discharge Elimination System Program and Federal Antidegradation Policy in Support of Revisions to the Water Quality Planning and Management Regulation, 64 Fed. Reg. 46058, 46063 (proposed August 23, 1999).

protect *existing* uses.[25] The Tier 1 antidegradation policy "establishes the floor" of water quality[26] and protects the environment where the *existing use* of a water body happens to be better than the segment's designated use.[27] TCEQ's Tier 2 portion of its antidegradation policy, applicable to waters that *exceed* fishable/swimmable quality, requires maintenance and protection of waters that exceed levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water.[28] As opposed to the Tier 1 portion of the antidegradation policy that ensures water quality necessary to maintain existing uses, Tier 2 protects and maintains water quality levels above the Tier 1 floor. Therefore, the Commission's Tier 2 antidegradation policy requires protection of "high quality waters" so that the existing level of water quality is maintained absent economic or social development justifications.

Dr. Wilson, for the Applicant, makes the assertion that "Tier 2 applies where an exceedance of [water quality] standards already exists and prohibits a worsening of conditions absent economic or social justifications."[29] While, at first glance, Dr. Wilson appears to make this assertion in accordance with the actual law on the subject described above, he further explains his assumption in Tier 2 applicability by stating that "[t]he Tier 2 review is based on a biennial report that the State of Texas is required to make to EPA in accordance with §303 of the

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[25] 30 TAC § 307.3(22) (2006) (defining "existing use" as "[a] use which is currently being support by a specific water body or which was attained on or after November 28, 1975.").

[26] Water Quality Standards Regulation, 63 Fed. Reg. 36742, 36781 (proposed July 7, 1998).

[27] *Id.*; 30 TAC § 307.5(b)(1) (2006); 30 TAC § 307.3(15) (defining "designated use" as "[a] use which is assigned to specific water bodies in Appendix A or in Appendix D in §307.10 of this title.").

[28] 40 C.F.R. § 131.12(a)(2); 30 TAC § 307.5(b)(2).

[29] Direct Pre-filed Testimony of Lee Wilson, Ph.D., Sandy Creek Ex. 39, page 30 of 62, lines 30-35.

Clean Water Act."[30] In referring to the Commission's 303(d) list of impaired waters as the basis for TCEQ's Tier 2 antidegradation reviews, Dr. Wilson seems to believe that Tier 2 reviews only apply to water bodies that are not meeting water quality standards and are, thereby, impaired.[31] Quite the contrary, Tier 2 antidegradation reviews apply where a water body is exceeding (meaning "better than") water quality criteria.[32] Tier 2 reviews ensure that where water quality is *better than* the minimum level necessary to support fishable/swimmable water quality, the high water quality of such waters will be maintained and protected unless a lowering of water quality is necessary to allow the occurrence of important economic or social development.[33]

Yet another distinction between water quality criteria and antidegradation arises in the context of the ultimate outcome of each separate review. Water quality criterion provide standards which may be incorporated into a permit,[34] antidegradation implementation focuses on alternatives to the proposed discharge if the Commission anticipates any sort of degradation.[35] Furthermore, TCEQ's Implementation Procedures contain separate procedures for

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[30] *Id.* at page 31 of 62, lines 9-17.

[31] TCEQ does, indeed, have implementation procedures tailored to assess discharges to impaired water bodies, but TCEQ carries out such procedures in Tier 1. TCEQ Implementation Procedures, ED Ex. 6, page 27 (providing procedures for evaluating discharges to 303(d) listed water bodies). Dr. Wilson's confusion on the applicability of Tier 2 antidegradation reviews not only explains the Applicant's omission of evidence on the ability of their discharge to comply with TCEQ's Tier 2 antidegradation policy, but also illustrates the need to sustain objections, such as OPIC's, to the qualification of a water quality professional as an expert in "regulatory aspects of TPDES permitting."

[32] 30 TAC § 307.5(b)(2), (c)(2)(B); TCEQ Implementation Procedures, ED Ex. 6, page 30; Water Quality Standards Regulation, 63 Fed. Reg. 36742, 36782 (proposed July 7, 1998).

[33] *Id.*

[34] 30 TAC §§ 307.4, 307.10.

[35] TCEQ Implementation Procedures, ED Ex. 6, page 35.

antidegradation review,[36] and, accordingly, TCEQ may refer the sole question of antidegradation to SOAH.[37] The Commission's antidegradation review assures that uses will be protected beyond the Commission's water quality criteria,[38] and, therefore, the Applicant has the burden to prove that its application will meet the requirements of the Commission's water quality criteria, as well as its antidegradation policy.

2. *Although the Applicant Failed to Make a Prima Facie Showing on Temperature Regarding the Commission's Antidegradation Policy, the Applicant Has Met Its Burden of Proof Regarding Water Quality Criteria for Temperature.*

Water quality criteria include both a maximum temperature differential of 5 degrees Fahrenheit as well as a 95 degree Fahrenheit maximum temperature for Segment 1242 of the Brazos.[39] Mr. Wilson testified that "[t]hermal loading has been taken care of by setting a permit limit equal to the stream standard"[40] and, based on mass-balance mixing, the Applicant's discharge would lead to an increase over background temperature of the Brazos of about 0.5 degrees Fahrenheit.[41] Mr. Wilson also testified on cross-examination that, despite seasonal variations in the temperature of the Brazos River, the Applicant's discharge of 95 degrees

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[36] *Id.* at pages 23-35.

[37] *Id.* at page 35.

[38] Applicant Sandy Creek Energy Associates, L.P.'s Deposition on Written Questions of Lori Hamilton, Sandy Creek Ex. 46, page 3, lines 45, 46, page 4, lines 1, 2 (stating that the purpose of a Tier 2 antidegradation review is to ensure that "where water quality exceeds the normal range of fishable/swimmable criteria, the water quality will be maintained unless lowering it is necessary for important economic or social development.").

[39] 30 TAC § 307.4(f); 30 TAC § 307.10, Appendix A (2006).

[40] Wilson Pre-filed Testimony, Sandy Creek Ex. 39, page 55 of 62, lines 15, 16.

[41] *Id.* at page 44 of 62, lines 5-12.

Fahrenheit would always, when based on mass-balance mixing, lead to the same temperature differential.[42] Therefore, the Applicant has met its burden to show that it will meet, at least with the imposition of cooling technology such as heat exchangers,[43] the water quality *criteria* for temperature. Mr. Wilson did not, however, testify to the ability of the Applicant's thermal discharge to comply with the Commission's antidegradation policy.

3. *The Applicant Failed to Meet Its Burden of Proof on Antidegradation, and the ED Failed to Analyze the Applicant's Ability to Meet Antidegradation Requirements With Respect to Temperature.*

TCEQ's antidegradation policy applies to actions, including wastewater discharges, regulated under state and federal authority that would increase pollution of water in the state.[44] As stated previously, TCEQ implements its antidegradation policy for the purpose of ensuring that Texas' high-quality waters *are not allowed to deteriorate to the level of water quality standards* by affording those waters three "tiers" of protection.[45] The Commission conducts Tier 2 antidegradation reviews, in particular, to ensure that wastewater discharges to waters that exceed fishable/swimmable quality,[46] such as Segment 1242 of the Brazos, do not cause

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[42] Collins cross-examination of Dr. Wilson, July 27, 2006, Transcript page 233, lines 20-25, page 234, lines 3-20, 24-25, page 235, lines 1-10.

[43] Wilson Pre-filed Testimony, Sandy Creek Ex. 39, page 58 of 62, lines 25, 26; Henry cross-examination of Ms. French, July 27, 2006, Transcript page 79, lines 8-16.

[44] 30 TAC § 307.5(a); TCEQ Implementation Procedures, ED Ex. 6, page 23.

[45] 30 TAC § 307.5(b).

[46] 30 TAC § 307.5(b)(2) (defining "fishable/swimmable" as "waters which have quality sufficient to support propagation of indigenous fish, shellfish, and wildlife and recreation in and on the water."); Lori Hamilton, for the ED, testified that she conducts Tier 2 antidegradation reviews for "water bodies that have intermediate, high, or exceptional aquatic life uses and a contact recreation use." Prefiled Testimony of Lori Hamilton, Water Quality

degradation[47] of the existing level of water quality unless lowering water quality is necessary for important economic or social development.[48]

Tier 2 antidegradation implementation procedures specifically consider temperature as a pollutant of concern for individual water bodies.[49] Pursuant to TCEQ's regulations, the Applicant must show that its discharge, with respect to temperature and all other pollutants, will not cause "degradation of waters which exceed fishable/swimmable quality."[50] TCEQ defines "degradation" as "a lowering of water quality by more than a de minimus extent…." In accordance with the required *de minimus* showing, the Commission requires a comparison of the effect of the discharge to baseline water quality conditions.[51] These baseline water quality conditions provide the framework in which water quality experts may determine any anticipated degradation.

TCEQ requires initial screening of increases in loading to determine the potential for degradation.[52] Such screening focuses on the change in assimilative capacity of the receiving water considering the sensitivity of the area aquatic ecosystem to the pollutant of concern and the

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Division, TCEQ Office of Permitting, Remediation, and Registration, on Behalf of the Executive Director of the Texas Commission on Environmental Quality, ED Ex. 5, p. 9, lines 20-21.

[47] 30 TAC § 307.5(b)(2) (defining "degradation" as "a lowering of water quality by more than a *de minimis* extent, but not to the extent that an existing use is impaired.").

[48] 30 TAC § 307.5(c)(2)(B); TCEQ Implementation Procedures, ED Ex. 6, page 30.

[49] TCEQ Implementation Procedures, ED Ex. 6, page 30. While TCEQ's implementation procedures provide specific "conditions" that are "usually not subject to an antidegradation review under Tier 2," none of those conditions were met here. *Id.* In addition, the federal mandate requiring states to adopt an antidegradation policy expressly directs states to consider thermal loading in accordance with section 316 of the Federal Clean Water Act. 40 C.F.R. § 131.12(a)(4) (2006).

[50] 30 TAC § 307.5(b)(2) (2006).

[51] *Id.* at page 31.

[52] *Id.* at 31. The initial screening procedure applies to all pollutants except dissolved oxygen or pH. *Id.* at 32.

characteristics of the water body.[53] While TCEQ's implementation guidance also states that "examples do not define degradation, nor do they address all pollutants and situations that can cause degradation,"[54] TCEQ provides the following example of where degradation is not likely in the context of thermal loading: "if 'end-of-pipe' temperatures are not expected to be significantly higher than applicable instream temperature criteria."[55] TCEQ describes final degradation determinations as "case-specific" and dependent upon the "characteristics of the water body and local aquatic communities."[56] If the initial screening indicates degradation, then the Commission evaluates the importance of the proposed project on area economic and social development.[57] The Commission also considers alternatives to the proposed discharge to reduce or eliminate the anticipated degradation.[58] The Applicant failed to provide evidence on any of the elements of an antidegradation showing as described above, and the Executive Director staff person charged with the responsibility to carry out an antidegradation review on the Sandy Creek application stated that she did not evaluate temperature in her review.

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[53] *Id.*

[54] *Id.* at 34.

[55] *Id.* at 33. OPIC notes that, in its reference to instream temperature criteria, this example ignores the requirement to compare the effect of the discharge on baseline water quality conditions as found any time between November 28, 1975, and the present time.

[56] *Id.*

[57] *Id.* at 34, 35.

[58] *Id.* at 35.

The ED must conduct a separate antidegradation review to augment its water quality review where a permitting action would "increase pollution of the water in the state."[59] Mr. Holligan, for the ED, testified that the antidegradation review of the Sandy Creek application was performed by the Water Quality Standards Team and the Water Quality Assessment Team,[60] but the ED witnesses offered to support that antidegradation review either testified that temperature was not taken into account in the water quality review[61] or testified that the review was limited to Dissolved Oxygen criterion.[62] Ms. Lori Hamilton, for the ED's Water Quality Standards Team, initially testified that she performed an antidegradation review for the Sandy Creek application that included a Tier 2 review that "preliminarily determined" that no significant degradation of water quality is expected in Segment 1242.[63] On cross-examination, however, Ms. Hamilton testified that she did not consider the heat portion of the Applicant's discharge at all in her water quality review.[64] Ms. Hamilton failed to perform an antidegradation

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[59] 30 TAC § 307.5(a). The definition of "pollution" includes heat. TEX. WATER CODE § 26.001(13) (2006); Applicant Sandy Creek Energy Associates, L.P.'s Deposition on Written Questions of Lori Hamilton, Sandy Creek Ex. 46, page 3, lines 38-39.

[60] Applicant Sandy Creek Energy Associates, L.P.'s Deposition on Written Question of Kelly Holligan, Sandy Creek Ex. 45, page 8, lines 14-16.

[61] Collins cross-examination of Ms. Hamilton, Transcript page 83, lines 8-23; *see also* Applicant Sandy Creek Energy Associates, L.P.'s Deposition on Written Questions of Lori Hamilton, Sandy Creek Ex. 46, page 2, lines 36-46 (describing her role in the permitting process, including an antidegradation review). Ms. Hamilton is a member of the Water Quality Standards Team. *Id.* at page 2, line 1.

[62] Applicant Sandy Creek Energy Associations, L.P.'s Deposition on Written Questions of Karen Holligan, Sandy Creek Ex. 49, page 2, lines 44-46. Ms. Holligan appears to be a member of the Water Quality Assessment Team based upon her professional title as an "Engineering Specialist/Modeling and Assessment Specialist." *Id.* at page 1, lines 38, 39.

[63] Applicant Sandy Creek Energy Associates, L.P.'s Deposition on Written Questions of Lori Hamilton, Sandy Creek Ex. 46, page 5, lines 3-5; *see also* TCEQ Interoffice Memorandum to Industrial Permits Team from Lori McElroy, Water Quality Standards Team, dated December 30, 2004, Sandy Creek Ex. 21.

[64] Collins cross-examination of Ms. Hamilton, July 28, 2006, Transcript page 83, lines 8-23 (stating that she could not recall looking at the proposed temperature discharge in her water quality review, and any temperature limits would be set by the permit writer).

review with respect to thermal loading despite the Commission's rule applying Tier 2 antidegradation reviews to "all pollution which could cause degradation of water quality...".[65] Therefore, the Applicant did not prove that its application meets the requirements of the Commission's Tier 2 antidegradation policy through the deposition testimony of TCEQ's Water Quality Standards Team member or the Commission's Water Quality Assessment Team member.

The Applicant, of course, has the burden to prove that its "application complies with all applicable statutory and regulatory requirements,"[66] including the requirement that the activities authorized by a TPDES permit shall not cause "degradation of waters which exceed fishable/swimmable quality."[67] Dr. Wilson, for the Applicant, testified that TCEQ staff performed a Tier 1[68] and Tier 2 antidegradation review and documented their findings in the "Permit Basis Document (page 2)" and in a December 31, 2004, memorandum from TCEQ's Water Quality Standards Team to the Industrial Permits Team that is included in evidence as Sandy Creek Exhibit 21.[69] Dr. Wilson then states that he agrees with the outcome of staff's Tier 2 antidegradation review because, upon considering that Segment 1242 of the Brazos is only impaired for bacteria and "domestic wastewater is not part of the discharge, the appropriate

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[65] 30 TAC § 307.5(c)(2)(B).

[66] 30 TAC § 55.210(b) (2006).

[67] 30 TAC § 307.5(b)(2).

[68] Although TCEQ staff later testified at the hearing that temperature was not considered in their antidegradation review, Dr. Wilson testified in his pre-filed direct testimony that he agrees with staff's Tier 1 determination because "there was not one instance where the evaluation indicated that the effluent would contain any pollutant that would cause an instream standard to be exceeded, or that would be of concern for any other reason (e.g. possible inconsistency with a narrative standard)." Wilson Pre-filed Testimony, Sandy Creek Ex. 39, page 39 of 62, lines 3-8.

[69] Wilson Pre-filed Testimony, Sandy Creek Ex. 39, page 38 of 62, lines 32-34, page 39 of 62, lines 1-14.

conclusion was reached that the SCES discharge would not contribute to further impairment."[70] Dr. Wilson's testimony on the Applicant's contribution to bacteria loading is the only evidence offered in support of the Applicant's burden to meet the elements of a Tier 2 antidegradation review.

As explained above, Tier 2 antidegradation reviews are not limited to *pollutants* for which an impairment exists in the receiving stream. According to TCEQ's antidegradation rules, "Tier 2 reviews apply to all pollution which could cause degradation of water quality...".[71] Similarly, Tier 2 antidegradation reviews are not limited to impaired receiving waters. TCEQ's regulations specifically provide that Tier 2 reviews apply to water bodies exceeding the level of water quality "necessary to support propagation of fish, shellfish, wildlife, and recreation in and on the water (fishable/swimmable quality)."[72] The Applicant has failed to present evidence to show that their discharge will lower water quality by only a *de minimus* extent.[73] In fact, the Applicant did not even bother to elicit testimony as to the particulars of a *de minimus* standard for specific pollutants, including temperature, in the context of antidegradation from their own water quality expert or from the ED staff[74] who reviewed their application. In addition, the

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[70] *Id.* at page 39 of 62, lines 9-14.

[71] 30 TAC § 307.5(c)(2)(B).

[72] *Id.*

[73] 30 TAC section 307.5(b)(2) requires the Applicant to show that its TPDES discharge will not cause "degradation of waters which exceed 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." The same subsection defines "degradation" as "a lowering of water quality by more than a de minimus extent, but not to the extent that an existing use is impaired."

[74] ED staff testified that a quantitative opinion about what is considered "significant degradation" versus *de minimus* was never formed in this case. Henry cross-examination of Ms. Hamilton, July 28, 2006 Transcript page 79, lines 9-15.

Applicant failed to establish any specifically relevant characteristics of the Brazos and the sensitivity of the local aquatic community.[75] Dr. Wilson's erroneous apparent assumption that Tier 2 reviews apply exclusively to 303(d) listings leaves the Applicant with no evidence that would allow them to meet their burden of proof on the elements of a Tier 2 antidegradation showing. Therefore, the Commission should deny Sandy Creek's application for a TPDES permit.

B. Air Deposition of Mercury

Ms. French, for the Applicant, stated that while a minor opportunity exists for the Sandy Creek facility's air emissions to have an impact on water quality, Sandy Creek did not assess that impact in applying for their wastewater discharge permit.[76] Kelly Holligan, for the ED, testified that the ED does not consider air emissions in its wastewater discharge permit application reviews.[77] OPIC agrees that, except in the instance of the implementation of a TMDL for mercury, there is no legal requirement that the ED take mercury emissions into account in its wastewater discharge application reviews.

TCEQ recognizes atmospheric deposition of mercury as a pollutant contributing to degradation of state water quality,[78] but Texas' framework for controlling such water pollution is

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[75] TCEQ's Procedures to Implement the Texas Surface Water Quality Standards specifically require Tier 2 antidegradation initial screening to consider the sensitivity of the aquatic ecosystem in the area and the characteristics of the water body. TCEQ Implementation Procedures, ED Ex. 6, page 33, 34.

[76] Henry Cross-examination of Ms. French, July 27, 2006, Transcript, page 36, lines 7-25, page 37, lines 1-6.

[77] Applicant Sandy Creek Energy Associates, L.P.'s Deposition on Written Questions of Kelly Holligan, Sandy Creek Ex. 45, page 5, lines 41, 42.

[78] 2005 Texas Nonpoint Source Management Program Report, SFR-068/04, submitted to U.S. Environmental Protection Agency, Region 6, from Rick Perry, Governor, on December 15, 2006, page 1, *available at* http://www.tceq.state.tx.us/assets/public/comm_exec/pubs/sfr/068_04.pdf (last checked August 21, 2006).

not found in the Texas Pollution Discharge Elimination System permitting program.[79] Instead, Texas considers atmospheric deposition of mercury as a nonpoint source subject to the TCEQ Nonpoint Source Management Program's Best Management Practices (BMPs).[80] While Sandy Creek's mercury emissions may indeed cause water quality standards exceedances and may cause degradation of water quality, the Commission must consider Sandy Creek's mercury deposition impact on water quality through the State's water quality standards, including antidegradation, and section 319 responsibilities.[81] TCEQ may approve Sandy Creek's TPDES application for its point source discharge, but must also assess the Applicant's potential to cause or contribute to degradation or impairment of state waters[82] prior to allowing the Sandy Creek facility to operate.

The Legislature provided authority to the Commission to issue permits for the "discharge of waste or pollutants into or adjacent to water in the state."[83] The Commission may deny a discharge permit "when the commission finds that issuance of the permit would violate the provisions of any state or federal law or rule or regulation promulgated thereunder, or when the commission finds that issuance of the permit would interfere with the purpose of this chapter."[84]

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[79] The exception to the exclusivity of point source and nonpoint source programs is the TMDL program, which integrates management of both categories of sources to bring water bodies back into compliance with water quality standards by establishing the amount of pollution that can be added to a water body.

[80] 2005 Texas Nonpoint Source Management Program Report, *available at* http://www.tceq.state.tx.us/assets/public/comm_exec/pubs/sfr/068_04.pdf (last checked August 21, 2006).

[81] *See* 33 U.S.C. § 1329 (2006).

[82] TEX. WATER CODE (TWC) § 26.121(c), (e) (2006).

[83] TWC § 26.027(a) (2006).

[84] *Id.*

Where "point sources"[85] discharge to water of the state,[86] the Applicant's stack presumably emits pollutants to the air that are deposited onto and into the soil of various watersheds and then transported to waterbodies via stormwater. TCEQ has defined nonpoint sources of pollution to include "atmospheric deposition" of mercury.[87] Therefore, any air deposition of mercury that occurs due to Sandy Creek's air emissions is more properly termed "nonpoint source pollution" rather than part of the Applicant's point source discharge. TCEQ's nonpoint source pollution management program, rather than the TPDES proceeding presently before the ALJ, provides the appropriate framework in which to assess and control an individual source's contributions to water quality degradation via air deposition of mercury.

Despite any Commission authorization to emit mercury to the air, the Commission eventually must also consider water quality impacts of the Applicant's emissions of mercury.[88] Accordingly, the Water Code prohibits the "performance of any activity other than a discharge" in violation of Chapter 26 of the Water Code or of "any rule, regulation, permit, or other order of the commission."[89] The Commission's water quality standards and Nonpoint Source

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[85] "Point source" is defined as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants or wastes are or may be discharged into or adjacent to any water in the state." TWC § 26.001(21) (2006); 30 TAC § 307.3(40) (2006). TCEQ may not allow a person to discharge any pollutant from any point source into any water in the state. TWC § 26.121(d) (2006).

[86] *See Chemical Weapons Working Group, Inc. v. U.S. Dep't of the Army*, 111 F.3d 1485 (10th Cir. 1997) (holding that smokestacks are not point sources when they emit particles that eventually fall into navigable waters); *but see No Spray Coalition, Inc. v. City of New York*, 351 F.3d 602 (2nd Cir. 2003).

[87] 2005 Texas Nonpoint Source Management Program Report, pages 1, 176, *available at* http://www.tceq.state.tx.us/assets/public/comm_exec/pubs/sfr/068_04.pdf (last checked August 21, 2006).

[88] The Clean Air Mercury Rule (CAMR), recently adopted by the Commission, provides a cap-and-trade system for mercury, but the rules do not incorporate water quality standards or TMDLs.

[89] TWC § 26.121(c), (e).

Management Program provide the State's primary means of confronting impacts from activities other than a discharge, such as nonpoint source contributions.

The purpose of Texas' water quality standards is to preserve water uses such as swimming and fishing and the protection and propagation of fish and wildlife.[90] The Commission's antidegradation policy specifically states that "[a]s necessary, cost-effective and reasonable best management practices shall be achieved for nonpoint sources of pollution."[91] Mercury contamination fish consumption advisories provide a simple demonstration of exceedances of water quality standards because either a designated (water quality criteria) or existing use (Tier 1 antidegradation) is not being met. Texas' antidegradation policy, in particular, is applicable to all state regulatory actions, including those related to nonpoint sources of pollution,[92] and the antidegradation policy, as described above, applies to different categories of state water depending on the quality of the receiving water. Tier 2 of the Commission's policy applies to waters that are performing above water quality standards.[93]

Texas' Nonpoint Source Management Program further refines the Commission's existing framework for controlling air deposition of mercury for state waters.[94] The State must submit, pursuant to the Federal Clean Water Act (FCWA) section 319, a report to EPA that does the following: (1) identifies state waters that cannot reasonably be expected to attain or maintain

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[90] TWC §§ 26.003, 26.011, 26.0135, 26.0136, 26.023 (2006); 30 TAC §§ 307.1, 307.4, 307.6, 307.7 (2006).

[91] 30 TAC § 307.5(b)(5) (2006).

[92] 30 TAC § 307.5(a).

[93] 30 TAC § 307.5(b)(2).

[94] 2005 Texas Nonpoint Source Management Program Report, page 1, *available at* http://www.tceq.state.tx.us/assets/public/comm_exec/pubs/sfr/068_04.pdf (last checked August 21, 2006) (stating that Texas' strategy is to protect and restore water impacted by nonpoint sources of pollution).

water quality standards without nonpoint source controls; (2) identifies categories and subcategories of nonpoint sources which add significant pollution to each portion of state waters; and (3) describe the process for identifying BMPs and measures to control each category and subcategory of nonpoint sources.[95] Texas' 2005 submission to EPA specifically states that atmospheric deposition is a nonpoint source pollutant,[96] and lists atmospheric deposition as a category of nonpoint sources.[97] In the 2005 section 319 report, TCEQ has also provided BMP examples for atmospheric deposition of mercury as "pollution prevention and emissions control measures to reduce the exposure and release of pollutants to the air" as well as "erosion and sediment control BMPs [to] reduce the entry of soil-bound pollutants, including those from atmospheric deposition, into storm water."[98]

TCEQ must analyze individual sources of air deposition of mercury, such as coal-fired power plants, according to the Agency's antidegradation policy, and, as needed, must require individual facilities to employ best management practices to reduce risks of mercury degradation and impairment of state waters. The Commission's Nonpoint Source Management Plan already provides the framework necessary to promulgate workable best management practices for air deposition of mercury. With the Sandy Creek facility and the numerous other coal-fired power plants that are seeking Commission authorization to operate, OPIC urges the Commission to

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[95] 33 U.S.C. § 1329(a).

[96] 2005 Texas Nonpoint Source Management Program Report, page 1, *available at* http://www.tceq.state.tx.us/assets/public/comm_exec/pubs/sfr/068_04.pdf (last checked August 21, 2006).

[97] 2005 Texas Nonpoint Source Management Program Report, page 172, *available at* http://www.tceq.state.tx.us/assets/public/comm_exec/pubs/sfr/068_04.pdf (last checked August 21, 2006) (listing atmospheric deposition as a "special source" along with mining and petroleum production, industrial sites, and roads).

[98] 2005 Texas Nonpoint Source Management Program Report, page 176, *available at* http://www.tceq.state.tx.us/assets/public/comm_exec/pubs/sfr/068_04.pdf (last checked August 21, 2006).

utilize its powers through existing statutory provisions and rules to ensure protection of Texas' aquatic and human health.

IV. TERMS AND CONDITIONS OF THE PERMIT

A. Aluminum

OPIC agrees with Dr. Wilson that the Sandy Creek permit should contain a monitoring requirement for total aluminum and dissolved aluminum, and a permit limit for total and dissolved aluminum, to ensure that any aluminum in the Applicant's discharge is below the water quality criteria for aluminum.[99]

V. CONCLUSION

The Applicant failed to present evidence to meet the elements of a Tier 2 antidegradation showing with regard to any pollutant, including heat, except bacteria. In addition, none of the ED staff reviewed or analyzed the Applicant's thermal loading under the Commission's water quality criteria or the antidegradation policy. Dr. Wilson's erroneous assumption that Tier 2 reviews apply exclusively to 303(d) listings leaves the Applicant with no evidence that would allow them to meet their burden of proof on the elements of a Tier 2 antidegradation showing. Therefore, the Commission should deny Sandy Creek's application for a TPDES permit. In addition, if TCEQ approves Sandy Creek's TPDES application for its point source discharge, the Commission must also assess the Applicant's potential to cause or contribute to degradation or impairment of state waters prior to allowing the Sandy Creek facility to operate.

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[99] Cagle Direct Examination of Dr. Wilson, July 28, 2006, Transcript, page 10, lines 12-15.

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CERTIFICATE OF SERVICE

I hereby certify that on August 23, 2006, the original of the Office of the Public Interest Counsel's Closing Argument 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 or by deposit in the U.S. Mail.

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