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September 20, 2012

Mr. Les Trobman, General Counsel
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

Re: SOAH Docket No. 582-12-5301; TCEQ Docket No. 2011-2199-IWD

**Application of Southwestern Electric Power Company, Renewal and Major
Amendment of TPDES Permit No. WQ0002496000**

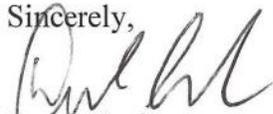
Applicant SWEPCO's Reply Brief to the Exceptions to the Proposal for Decision

Dear Mr. Trobman:

Please find attached Southwestern Electric Power Company's ("SWEPCO's") Reply Brief to the Exceptions to the Proposal for Decision in the above referenced matter. Pursuant to 30 Texas Administrative Code § 1.10(d), SWEPCO's Reply Brief is being filed via the Chief Clerk's designated electronic filing system, and 7 copies are being filed with the Chief Clerk.

Thank you for your consideration.

Sincerely,



Derek Seal

Enclosures: SWEPCO's Exceptions to the PFD
Service List
Certificate of Service

cc: Service List
TCEQ Chief Clerk via electronic filing

SOAH DOCKET No. 582-12-5301
TCEQ DOCKET No. 2011-2199-IWD

APPLICATION OF SOUTHWESTERN §
ELECTRIC POWER COMPANY FOR §
RENEWAL AND AMENDMENT OF §
TPDES PERMIT NO. WQ0002496000 §

BEFORE THE
STATE OFFICE OF
ADMINISTRATIVE HEARINGS

**APPLICANT SOUTHWESTERN ELECTRIC POWER COMPANY'S
REPLY BRIEF TO THE EXCEPTIONS TO THE PROPOSAL FOR DECISION**

TO THE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL
QUALITY:

COMES NOW, Southwestern Electric Power Company, (the "Applicant" or "SWEPCO") and files this reply brief in response to the Exceptions (the "Exceptions") to the Proposal for Decision (the "PFD")¹ that were filed by the Sierra Club and Public Citizen (the "Hearing Requesters").² SWEPCO agrees with the special exceptions filed by the Executive Director of the Texas Commission on Environmental Quality (the "TCEQ").³

The sole issue before the Administrative Law Judge (the "ALJ") was whether Mr. Richard LeTourneau or Mr. Clint Rosborough meet the "affected person" criteria for party designation in this case regarding SWEPCO's application to renew Texas Pollution Discharge Elimination System ("TPDES") Permit No. WQ0002496000 (the "Application") for the Henry W. Pirkey Power Plant ("Pirkey").⁴ If neither Mr. LeTourneau nor Mr. Rosborough are affected persons, then the Hearing Requesters are not affected persons. The

¹ See PFD (August 21, 2012).

² See Sierra Club and Public Citizen's Exceptions to the Administrative Law Judge's Proposal for Decision (filed September 10, 2012).

³ See Executive Director's Special Exception to Correct References in the Proposal for Decision and Order in This Case (filed September 10, 2012).

⁴ See Prehearing Conference Tr. at 13:20-24 (scope of the preliminary hearing)(Judge Wilfong).

ALJ clarified that the preliminary hearing held on May 22, 2012 was not a hearing on the merits of the Application.⁵

I. OVERVIEW

The Hearing Requesters raise three basic issues in their Exceptions: (i) whether the ALJ applied the correct burden of proof, (ii) whether the application of a different burden of proof would change the outcome of the PFD, and (ii) whether the recreational interests alleged in this case can support a legal right to a hearing on the merits.

First, regarding the burden of proof issue, the Commissioners gave the Hearing Requesters the relatively unusual opportunity to demonstrate at a preliminary evidentiary hearing whether their factual assertions are more than mere conjecture or speculation. The Hearing Requesters failed to do so. After failing to take advantage of the opportunity to make their own case, the Hearing Requesters now want the Commissioners to shift the burden to SWEPCO to demonstrate the absence of any factual dispute regarding the impacts that they allege.⁶ Contrary to the Hearing Requesters' position, their burden is not so low as to only require them to dream-up what they call a "fact" that SWEPCO would dispute in order to trigger a right for the Hearing Requesters to have a hearing on the merits.

The second issue raised in the Hearing Requesters' Exceptions is really an extension of the burden of proof issue. The Hearing Requesters point to two particular factual allegations that they have raised regarding the alleged impacts that the Application would have on Mr. LeTourneau and Mr. Rosborough, and suggest that they should be given a hearing on the merits simply because SWEPCO disagrees with their particular factual allegations. Despite the Hearing Requesters' arguments, simply pointing to a disputed fact

⁵ See Prehearing Conference Tr. at 17:4-18 (the preliminary hearing is not a hearing on the merits)(Judge Wilfong).

⁶ See Hearing Requesters' Exceptions, at 8.

does not allow the Hearing Requesters to ignore the evidentiary record and dodge their burden of proof.

Third, the Hearing Requesters would have the Commissioners grant them a hearing on the merits based solely on their alleged recreational interests. However, based on the evidentiary record, the ALJ rightfully states in the PFD that the evidentiary record does not show that the claimed recreational interests are more particularized than the exact same interests that are common to members of the general public.⁷ Thus, the Hearing Requesters cannot legally qualify as affected persons following the plain language of the Texas Water Code and TCEQ's rules.⁸

The ALJ gave the parties the opportunity to fully brief the legal and factual issues in this case.⁹ SWEPCO's reply brief is based largely on SWEPCO's briefs that have already been filed in the record at the State Office of Administrative Hearings ("SOAH"). SWEPCO's reply brief incorporates SWEPCO's briefs filed at SOAH to the extent that SWEPCO's briefs that have been filed address the issues raised in the Hearing Requesters' Exceptions.¹⁰

II. THE ALJ CORRECTLY APPLIED THE APPROPRIATE BURDEN OF PROOF

It is noteworthy that the Hearing Requesters volunteered during the evidentiary hearing that they bear the burden of proof so that they would have the ability to present rebuttal evidence.¹¹ After the evidentiary hearing, the Hearing Requesters seem to have changed their position and now seem to believe that in lieu of a burden of proof, they must

⁷ See PFD, at 18.

⁸ See *id.*; TEX. WATER CODE § 5.115(a); 30 TEX. ADMIN. CODE § 55.203(a).

⁹ See Order No. 2, Briefing Schedule, Page Limits, and Transcription Costs (May 29, 2012).

¹⁰ See Applicant SWEPCO's Brief Regarding Affected Person Criteria (June 12, 2012); Applicant SWEPCO's Reply Brief Regarding Affected Person Criteria (June 26, 2012).

¹¹ See Prehearing Conference Tr. at 18:5-9 (Counsel for Hearing Requesters regarding the burden of proof)(Allmon).

only offer a factual assertion that overlaps with the merits of the case.¹² The Hearing Requesters' raised the same argument (i.e., their only burden is to raise a factual allegation that overlaps with the merits) in their briefs filed with the Commissioners before the Commissioners referred their hearing request to SOAH for a preliminary hearing,¹³ and regurgitated the argument in their Exceptions.¹⁴ Had the Commissioners agreed with the Hearing Requesters' position, the Commissioners could have already granted a hearing on the merits.

Notwithstanding the unequivocal applicability of 30 Texas Administrative Code ("TAC") § 80.17(a) to this case, the Hearing Requesters argue that the burden of proof is somehow governed by a separate body of law.¹⁵

A. TCEQ RULES REQUIRE THE HEARING REQUESTERS TO MEET THE PREPONDERANCE OF THE EVIDENCE STANDARD

At the outset, none of the cases cited by the Hearing Requesters reference TCEQ's rules that govern the burden of proof in all TCEQ proceedings that are conducted at SOAH. TCEQ rules expressly contemplate evidentiary hearings solely on the affected party question, which is fitting for this case.¹⁶ There are no special burden of proof rules for evidentiary hearings such as the one in this case in which the only issue was whether the Hearing Requesters are affected parties. Thus, the ALJ correctly applied the only rule that could be applied in this case by applying 30 TAC § 80.17(a),¹⁷ which states that "[t]he burden of proof is on the moving party by a preponderance of the evidence"¹⁸ Although 30 TAC § 80.17

¹² See Hearing Requesters' Exceptions, at 6.

¹³ See Sierra Club and Public Citizen Reply In Support of Request for Contested Case Hearing, TCEQ Docket No. 2011-2199-IWD (February 27, 2012), at 11.

¹⁴ See Hearing Requesters' Exceptions, at 6-7.

¹⁵ See Hearing Requesters' Exceptions, at 5, citing TEX. WATER CODE § 5.115(a) and 30 TEX. ADMIN. CODE § 55.203(a).

¹⁶ See 30 TEX. ADMIN. CODE § 55.211(b)(4).

¹⁷ See PFD, at 4.

¹⁸ See 30 TEX. ADMIN. CODE § 80.17(a).

includes some specific exceptions regarding the burden of proof for water utility matters and enforcement matters that are not applicable to this case, there are no exceptions applicable to this case. Further, 30 TAC § 80.1 unambiguously states that “[e]xcept as provided in this chapter, this chapter applies to and provides procedures for *all contested case hearings and other hearings held by SOAH.*”¹⁹ (emphasis added). Thus, the preponderance of the evidence standard set forth in 30 TAC § 80.17(a) clearly applies to this case. If the TCEQ had intended for a different standard of proof to apply to evidentiary hearings held on the affected party issue such as in this case, the TCEQ could have prescribed an exception, but TCEQ did not do so.

In addition, hearing requesters have had the burden of proof by a preponderance of the evidence to demonstrate that they are affected persons in other TCEQ cases referred to SOAH on the sole issue of affected party status.²⁰ One example is a case touted in the Hearing Requesters’ Exceptions involving a preliminary hearing on the affected party issue for a water quality permit in which the hearing requesters say the alleged impact was “more than adequately proven up at the preliminary hearing.”²¹ Thus, it is not new for a hearing requester to be required to prove-up his or her case on whether the person is an affected party at a preliminary SOAH hearing via the preponderance of the evidence standard.

Based on a plain reading of TCEQ’s rules which require the Hearing Requesters to carry the burden of proof by a preponderance of the evidence, and based on past cases, the ALJ applied the correct burden of proof. By asking that a different standard apply in this

¹⁹ See 30 TEX. ADMIN. CODE § 80.1.

²⁰ See *Proposal for Decision, Application by East Texas Precast Co., Ltd., for Registration and Approval to Use the Air Quality Standard Permit for Concrete Batch Plants*, Registration No. 86593, SOAH Docket No. 582-10-2070, TCEQ Docket No. 2009-1691-AIR, p. 6 (April 8, 2010) (The ALJ concluded that the protestants who moved for a hearing and admission as parties had the burden of proving that they were entitled to a hearing).

²¹ See *Texas Rivers Protection Ass’n’s Reply Brief, Texas Rivers Protection Ass’n v. Texas Comm’n on Env’tl. Quality*, Cause No. D-1-GN-09-001517 (201st Dist. Ct., 2011), at 5, attached to Hearing Requesters’ Exceptions, Exhibit C.

case, the Hearing Requesters are asking the Commissioners to pretend that the rules do not apply.

B. RECENT JUDICIAL DECISIONS DO NOT CHANGE THE HEARING REQUESTERS BURDEN OF PROOF

The Hearing Requesters incorrectly interpret a handful of state court decisions²² to support their contention that: (i) TCEQ rules do not apply to this case, and (ii) their burden is so low as to only require them to show that there are disputed facts related to the affected person determination that overlap with the merits of the Application.²³

In their Exceptions, the Hearing Requesters correctly reference the personal justiciable interest standard set forth in Texas Water Code § 5.115(a) and in TCEQ rules in 30 TAC § 55.203 that must be applied in determining whether the Hearing Requesters have established standing for a hearing on the merits.²⁴ Contrary to the Hearing Requesters' contentions, in implementing Texas Water Code § 5.115(a), the court in the *Bosque River Coalition* case that follows and cites to the *City of Waco* case explicitly states that the facts alleged by a hearing requester, or the "required "potential harm" from the permit's issuance must . . . be more than speculative . . . [t]here must be some allegation or evidence that would *tend to show* that the [requester's legally protected interests] will be affected by the action."²⁵ (emphasis added). Further, the court in the *Bosque River Coalition* case found that "unsupported factual conclusions cannot support a reasonable inference that those facts

²² See *City of Waco v. Tex. Comm'n on Env'tl. Quality*, 346 S.W.3d at 781 (Tex. App.-Austin 2011); *Heat Energy Advanced Tech., Inc. v. West Dallas Coal. for Env'tl. Justice*, 962 S.W.2d 288 (Tex. App.-Austin 1998, pet. denied); *Sierra Club v. Tex. Comm'n on Env'tl. Quality and Waste Control Specialists, LLC*, Cause No. D-1-GN-09-000894 (261st Dist. Ct., 2012).

²³ See Hearing Requesters' Exceptions, at 5-8.

²⁴ See Hearing Requesters' Exceptions, at 5.

²⁵ See *Bosque River Coalition*, 347 S.W.3d 366, at 375-376, citing *City of Waco*, 346 S.W.3d at 805-06, citing *Save Our Springs Alliance, Inc. v. City of Dripping Springs*, 304 S.W.3d 871, 883 (Tex.App.-Austin 2010, pet. denied); *United Copper v. Grissom*, 17 S.W.3d 797, 803-804 (Tex. App.-Austin 2000, pet. dismissed); *Heat Energy Advanced Tech., Inc. v. West Dallas Coal. for Env'tl. Justice*, 962 S.W.2d 288, 295 (Tex. App.-Austin 1998, pet. denied).

exist.”²⁶ Thus, when read in their entirety, the *City of Waco* case and the *Bosque River Coalition* case require that the Hearing Requesters must do something more than allege facts that overlap with the merits of the case in order to trigger a hearing on the merits. In applying the personal justiciable interest standard set forth in Texas Water Code § 5.115(a), the court in the *City of Waco* explicitly requires that in order to “possess standing,” a hearing requester must affirmatively establish:

- “(1) an “injury in fact” from the issuance of the permit as proposed--an invasion of a “legally protected interest” that is (a) “concrete and particularized” and (b) “*actual or imminent, not conjectural or hypothetical*”;
- (2) the injury must be “fairly traceable” to the issuance of the permit as proposed, as opposed to the independent actions of third parties or other alternative causes unrelated to the permit; and
- (3) it must be likely, and *not merely speculative*, that the injury will be redressed by a favorable decision on its complaints regarding the proposed permit (i.e., refusing to grant the permit or imposing additional conditions).”²⁷ (emphasis added)

Injuries couched in terms of potentialities or events that “may” happen are mere speculation and fall short of establishing a justiciable interest and standing.²⁸

The *Heat* case,²⁹ which is relied upon in the Hearing Requesters’ Exceptions, was referenced and considered in both the *City of Waco*³⁰ case and the *Bosque River Coalition* case.³¹ *Heat* and the cases upon which *Heat* is based impose an affirmative burden on a hearing requester to show a personal justiciable interest.³² Courts have further noted that in determining whether a person has a justiciable interest in an administrative matter “[t]he supreme court has declared that a party is “aggrieved” for purposes of the [Administrative

²⁶ See *Bosque River Coalition*, 347 S.W.3d at 381, citing *City of Waco*, 346 S.W.3d at 826, citing *Coastal Transp. Co., Inc. v. Crown Cent. Petroleum Corp.*, 136 S.W.3d 227, 233 (Tex. 2004).

²⁷ See *City of Waco*, 346 S.W.3d at 802.

²⁸ *Texas Disposal Systems Landfill, Inc. v. Texas Comm’n on Env’tl. Quality*, 259 S.W.3d 361, 264 (Tex.App.—Amarillo 2008, no pet.).

²⁹ See *Heat Energy Advanced Tech., Inc.*, 962 S.W.2d 288.

³⁰ See *City of Waco*, 346 S.W.3d, particularly at 803-807.

³¹ See *Bosque River Coalition*, 347 S.W.3d, at 376.

³² See *Heat Energy Advanced Tech., Inc.*, 962 S.W.2d at 295 (This standard requires parties to show that they will suffer harm or have a “justiciable interest” relating to the proceedings) citing TEX. WATER CODE § 5.115(a), and *Texas Rivers Protection Ass’n v. Texas Natural Resource Conservation Comm’n*, 910 S.W.2d 147, 151, 152 n. 2 (Tex. App.—Austin 1995, writ denied).

Procedures Act] if the party can show a justiciable interest in the contested matter.”³³ Here, the Hearing Requesters must carry their burden of proof and make a demonstration by a preponderance of the evidence regarding the affected person test.³⁴

Notably, one of the cases relied upon by the court in the *Bosque River Coalition* case and cited in the Hearing Requesters’ Exceptions is the *United Copper* case, in which the court concluded that denying a hearing requester’s request for a hearing on the merits “without first providing him an opportunity to *present evidence* in support of his request, as well as a chance to rebut the evidence produced by [the permit applicant] was unreasonable.”³⁵ (emphasis added) In this case, contrary to the *United Copper*, *Bosque River Coalition*, and *City of Waco* cases, the Hearing Requesters have been given the opportunity to present evidence, but instead are arguing that they have no such burden.

Finally, the Hearing Requesters say that the determination in *Heat* does not square with the preponderance of the evidence standard.³⁶ However, the court in the *City of Waco* case found that both *United Copper* and *Heat* are consistent with the requirement that a hearing requester must establish potential harm, and pointed to specific proof that established the potential harm in the record in both *United Copper* and in *Heat*.³⁷ In this case, unlike in the *Heat* and *United Copper* cases, after considering the evidence in the record and applying Texas Water Code § 5.115(a), the ALJ did not find that there was sufficient specific proof of potential harm. The ALJ in this case has concluded that: (i) the Hearing Requesters failed to demonstrate through concrete and particularized facts that the issuance of SWEPCO’s proposed amended permit would pose risk of harm to recreational interests that are *not conjecture or are not merely speculative*,³⁸ and (ii) factual allegations relating to claimed

³³ See *Texas Rivers Protection Ass’n*, 910 S.W.2d at 151, citing *Hooks v. Texas Dep’t of Water Resources*, 611 S.W.2d 417, 419 (Tex. 1981).

³⁴ See 30 TEX. ADMIN. CODE § 80.17(a) (burden of proof is on the moving party by a preponderance of the evidence).

³⁵ See *United Copper v. Grissom*, 17 S.W.3d at 806.

³⁶ See Hearing Requesters’ Exceptions, at 8.

³⁷ See *City of Waco*, 346 S.W.3d, 805-806.

³⁸ See PFD, at 16.

property interests are based on *groundless conjecture* lacking evidentiary support, or there is *no remote possibility* that harm would be caused to property.³⁹ (emphasis added)

Simply put, the Hearing Requesters have failed to prove by a preponderance of the evidence that SWEPCO's Application would cause potential harm to the claimed interests of Mr. LeTourneau or to Mr. Rosborough. As discussed in more detail below, based on the evidentiary record, the ALJ could not have reached any other conclusion.

III. CHANGING THE BURDEN OF PROOF WOULD LEAD TO ABSURD RESULTS

The Hearing Requesters suggest that if ALJ would have allowed them to meet their burden by simply raising a factual issue about the impacts on Mr. LeTourneau or Mr. Rosborough that SWEPCO disputes, then the Hearing Requesters would have been entitled to a hearing on the merits.⁴⁰ Based on the Hearing Requesters' logic, all they would need to do to trigger a hearing on the merits is to trump-up some factual issue with which SWEPCO disagrees. Put another way, the practical effect of implementing the Hearing Requesters' position is that they would be entitled to a hearing on the merits unless SWEPCO agrees with them on every factual issue that they might raise, whether or not the factual assertion is pure conjecture or speculation. The Hearing Requesters' position is completely contrary to Texas Water Code § 5.115(a) as interpreted in the *Bosque River Coalition* and *City of Waco* cases as previously discussed. In addition, the Hearing Requesters' position would lead to absurd results and place them in no-lose scenario whereby: (i) they get a hearing on the merits if SWEPCO disagrees with any factual assertion that they can concoct, or (ii) if SWEPCO agrees with a factual assertion, then SWEPCO would have to change the Application to the Hearing Requesters' satisfaction (i.e., agreeing with a factual assertion alleging a problem is tantamount to agreeing that Application should be changed).

³⁹ See PFD, at 22, 26.

⁴⁰ See Hearing Requesters' Exceptions, at 8.

Notwithstanding the Hearing Requesters' incorrect assertions that they need only conjure-up a fact issue to establish standing, SWEPCO will nevertheless address the two fact issues in dispute that are raised in the Hearing Requesters' Exceptions for purposes of setting the record straight.

A. THE EVIDENTIARY RECORD DOES NOT INDICATE THAT THERE ARE ANY NEGATIVE IMPACTS ON MR. ROSBOROUGH'S DOWNSTREAM PROPERTY

First, the Hearing Requesters say that there is a dispute with SWEPCO about whether Mr. Rosborough's property about four miles south of the nearest discharge from the Pirkey Plant⁴¹ is in the floodplain.⁴² The evidentiary record does not include a single indication that SWEPCO has a quibble about whether Mr. Rosborough's property is in the floodplain. The Hearing Requesters' seem to have confused a floodplain issue with a disagreement about whether Mr. Rosborough's property is near Hatley Creek and whether any discharge from Pirkey might affect his property during a flood. Mr. Rosborough's affidavit filed with the Commissioners and entered into evidence says that Mr. Rosborough's property is "along" Hatley Creek,⁴³ and the Hearing Requesters entered a map into evidence in which Mr. Rosborough indicated that his property touches Hatley Creek in the far, northeast corner.⁴⁴ The request of Mr. Rosborough made during the hearing by counsel for the Hearing Requesters was to "generally outline the property that *borders* Hatley Creek on this map."⁴⁵ (emphasis added) However, SWEPCO clearly demonstrated that the Hearing Requesters' evidence on whether Mr. Rosborough's property touches Hatley Creek is misleading at best. The property is only "along" Hatley Creek under a very loose interpretation of the term

⁴¹ See Ex. APP-6; Prehearing Conference Tr. at 219:18-22 (Mr. Rosborough's property is about four miles downstream from the nearest discharge point of the Pirkey Plant)(Roberts).

⁴² See Hearing Requesters' Exceptions, at 8-9.

⁴³ See Ex. APP-2.

⁴⁴ See Ex. P-2; Prehearing Conference Tr. at 53:24-54:9 (Mr. Rosborough drawing on Ex. P-2 the location of his property in relation to Hatley Creek).

⁴⁵ See Ex. APP-2; Prehearing Conference Tr. at 53:24-54:1 (Allmon).

“along,” and it certainly does not “border” Hatley Creek.⁴⁶ Mr. Rosborough even testified on cross-examination that his property does not touch Hatley Creek.⁴⁷

The Hearing Requesters’ Exceptions take isolated bits and pieces of testimony in the record from SWEPCO’s water quality expert, Dr. Lial Tischler, in an attempt to suggest that flooding on Mr. Rosborough’s property will have an impact on the property.⁴⁸ However, when put into proper context of his complete testimony, Dr. Tischler actually testified that: (i) any selenium (which the Hearing Requesters’ seem to be concerned about) in any discharge from the Pirkey plant during a flood would be *undetectable and indistinguishable from background*,⁴⁹ and (ii) although it is *possible* for floodwaters to carry selenium from Pirkey to Mr. Rosborough’s property, it is not *probable*, and “certainly . . . not to levels that would *potentially* endanger human health and the environment.”⁵⁰ (emphasis added) Thus, the Hearing Requesters’ assertions are based on conjecture and are nothing more than unproven hypothesis and cannot pass muster under the personal justiciable interest test outlined in Texas Water Code § 5.115(a) as interpreted by the courts, as discussed above.

The Hearing Requesters’ impliedly admit in their exceptions that they are required to demonstrate that Mr. Rosborough’s property could *potentially* be impacted by the discharges from Pirkey and cite the *Heat* case as authority.⁵¹ (emphasis added by Hearing Requesters).⁵² Based on the evidentiary record, the ALJ found that in this case that:

[T]he preponderance of the credible evidence shows that even assuming a worst case scenario . . . the discharge would be diluted by 200 to 1 and the concentrations of pollutants that would reach Mr. Rosborough’s property

⁴⁶ See Ex. APP-6, Ex. APP-10.

⁴⁷ See Prehearing Conference Tr. at 80:2-3 (Rosborough).

⁴⁸ See Hearing Requesters’ Exceptions, at 8-10.

⁴⁹ See Prehearing Conference Tr. at 315:5-10 (Dr. Tischler).

⁵⁰ See Prehearing Conference Tr. at 347:15-22 (Dr. Tischler).

⁵¹ See Hearing Requesters’ Exceptions, at 10.

⁵² See Hearing Requesters’ Exceptions, at 10.

would be undetectable and indistinguishable from background . . . there is no scientific basis to conclude that there is even a remote possibility that discharges from the Pirkey Power Plant . . . would cause any harm to Mr. Rosborough's property.⁵³

SWEPCO agrees with the ALJ. In this case, the Hearing Requesters failed to show that there is the *potential* for any harm to Mr. Rosborough's property. The evidentiary record shows that the so-called "fact" that Mr. Rosborough's property might be negatively affected by the discharge from Pirkey was conclusively disproved.

B. THE EVIDENTIARY RECORD DOES NOT INDICATE NEGATIVE IMPACTS BASED ON BIOACCUMULATION

Second, the Hearing Requesters state in their Exceptions that there is a factual dispute regarding whether selenium would have an impact based on bioaccumulation in aquatic life.⁵⁴ The Hearing Requesters attempt to imply that Dr. Tischler testified that bioaccumulation of selenium in fish tissue is a concern related to the discharge from Pirkey.⁵⁵ To the contrary, Dr. Tischler testified that the actual fish tissue data for the relevant part of the Sabine River and for Brandy Branch Reservoir indicate that there is no cause for concern about selenium.⁵⁶

Although there is no fish tissue data for Hatley Creek, when asked specifically whether the discharge from Pirkey might affect Mr. LeTourneau's use of Hatley Creek (who revealed for the first time at the preliminary hearing that he recreates in Hatley Creek),⁵⁷ Dr. Tischler testified that discharges from Pirkey would not affect Mr. LeTourneau's use of

⁵³ See PFD, at 25-26.

⁵⁴ See Hearing Requesters' Exceptions, at 10-11.

⁵⁵ See Hearing Requesters' Exceptions, at 10.

⁵⁶ See Prehearing Conference Tr. at 304:14 to 307:3, 326:16-22 (Dr. Tischler).

⁵⁷ See Prehearing Conference Tr. at 31:11 to 32:3 (LeTourneau).

Hatley Creek.⁵⁸ In fact, Mr. LeTourneau only kayaks or canoes up Hatley Creek about a half a mile.⁵⁹ Thus, Mr. LeTourneau's use of Hatley Creek is over 3 ½ miles from the nearest discharge from Pirkey.⁶⁰ Further, discharges from Pirkey that may eventually enter Hatley Creek only come from Outfalls 004, 005, and 006 and only occur when the ponds are full, which would only be when there is rain in the area⁶¹ and presumably higher than normal flows in Hatley Creek. Further, Pirkey's operating history demonstrates that many of the discharges from Pirkey have been infrequent; more particularly, there has not been a discharge at Outfall 006 (Secondary Ash Pond) into Hatley Creek since May of 2008.⁶² The infrequent discharges are due in large part to water conservation and recycling measures employed at Pirkey.⁶³ Therefore, based on the infrequent discharge from Pirkey that may eventually enter Hatley Creek and the diluted nature of the discharges, the evidentiary record indicates that water quality in Hatley Creek would not negatively affect the recreational use of Hatley Creek,⁶⁴ which includes any alleged bioaccumulative impacts.

The Hearing Requesters want to ignore the real-world fish tissue data that indicates that there is no cause for concern in the waterbodies that receive discharges from Pirkey. The Hearing Requesters also want to require somebody else to disprove their theory that selenium might bioaccumulate in fish tissue in Hatley Creek. The Hearing Requesters are grasping at straws.

IV. THE ALJ'S ANALYSIS AND CONCLUSION THAT THE CLAIMED RECREATIONAL INTERESTS ARE NOT SUFFICIENT TO ESTABLISH STANDING IS CORRECT

⁵⁸ See Prehearing Conference Tr. at 301:7-15; 309:3 to 310-17 (Dr. Tischler).

⁵⁹ See Prehearing Conference Tr. at 43:12-17 (LeTourneau).

⁶⁰ See Ex. APP-6; Prehearing Conference Tr. at 219:18-22 (Mr. Rosborough's property is about four miles downstream from the nearest discharge point of the Pirkey Plant, which is near the confluence of the Sabine River and Hatley Creek)(Roberts). If Mr. LeTourneau only paddles a half a mile up Hatley Creek, he never comes closer than 3 ½ miles from the nearest discharge point from Pirkey.

⁶¹ See Prehearing Conference Tr. at 309:10-17 (Dr. Tischler).

⁶² See Prehearing Conference Tr. at 253:13-21 (Mills).

⁶³ See Prehearing Conference Tr. at 253:2-9 (Mills).

⁶⁴ See Prehearing Conference Tr. at 310:7-9 (Dr. Tischler).

In the last section of the Hearing Requesters' Exceptions, they take a scattershot approach in attempting to make a case that they have demonstrated that Mr. LeTourneau or Mr. Rosborough have a recreational interests in Hatley Creek, the Sabine River, and Brandy Branch Reservoir.⁶⁵ Despite their approach, "[a]n interest common to members of the general public does not qualify as a personal justiciable interest"⁶⁶ that will trigger a right to a hearing on the merits. As explained below, since there is nothing in the evidentiary record to indicate that either Mr. LeTourneau or Mr. Rosborough have any interest that is not common to members of the public, they do not have a recreational interest for purposes of triggering a hearing on the merits in this matter. After describing Mr. LeTourneau's and Mr. Rosborough's recreational uses, SWEPCO's discussion below is an attempt to follow the somewhat confusing sequence of the issues as the issues have been raised in the Hearing Requesters Exceptions.

A. MR. LETOURNEAU'S CLAIMED RECREATIONAL INTEREST⁶⁷

Mr. LeTourneau claims that he kayaks, fishes, boats, swims, camps, and hunts in the Sabine River⁶⁸ and in Hatley Creek.⁶⁹ However, only about 15% of the part of the Sabine River in which Mr. LeTourneau says he uses is actually downstream from any of the waters that eventually receive any of the discharge from Pirkey.⁷⁰ Mr. LeTourneau testified that anyone from the public can access the river from many of the same locations from which he accesses the river, namely the public boat ramps at either State Highway 43 or State Highway

⁶⁵ See Hearing Requesters' Exceptions, at 11-20.

⁶⁶ See TEX. WATER CODE § 5.115(a); 30 TEX. ADMIN. CODE § 55.203(a).

⁶⁷ See Hearing Requesters' Exceptions, at 2 for a discussion of what is presumably the facts from the evidentiary record that the hearing Requesters can muster to describe why Mr. LeTourneau's recreational interests are different from any member of the public.

⁶⁸ See Ex. APP-1; Prehearing Conference Tr. at 21:9-10, 30:23 to 31:20 (describing Mr. LeTourneau's claimed recreational interests, some of which were offered for the first time at the preliminary hearing)(LeTourneau).

⁶⁹ See Prehearing Conference Tr. at 25:15-16, 31:21 to 32:3, 43:12-17 (Mr. LeTourneau raised his claimed recreational interest in Hatley Creek for the first time at the preliminary hearing)(LeTourneau).

⁷⁰ See Ex. APP-4; Prehearing Conference Tr. at 212:24 to 213:4 (Roberts).

149.⁷¹ He testified that he often sees others kayaking or canoeing or fishing in the same part of the river where he claims his interest.⁷² He testified that “I see a lot of our hunting club members on the river”⁷³ and that “probably a thousand people use the river in a year.”⁷⁴ He went so far as to admit that he is not affected differently than anybody else who kayaks or fishes in the same way that he does.⁷⁵ Mr. LeTourneau’s only interest other than a recreational interest that he claims between State Highway 43 and State Highway 149 is a lease 45-50 miles from the confluence of Hatley Creek and the Sabine River, but no evidence was offered regarding whether Mr. LeTourneau’s lease could possibly make him an affected person.⁷⁶ In summary, because Mr. LeTourneau’s claimed recreational interest is *common to the members of the general public*, he cannot be an affected party based on the plain face of the Texas Water Code and TCEQ’s rules.

B. MR. ROSBOROUGH’S CLAIMED RECREATIONAL INTEREST⁷⁷

Mr. Rosborough claims to have fished, snorkeled, and dove in Brandy Branch Reservoir in the past, and although he no longer plans to snorkel or dive and he has not fished there since August or September 2010, he may decide to fish there in the future.⁷⁸ Based solely on Mr. Rosborough’s own testimony that he does not recreate in Brandy Branch Reservoir, he cannot have an interest in Brandy Branch Reservoir that would make him an affected person. Even if Mr. Rosborough used Brandy Branch Reservoir, he testified that Brandy Branch Reservoir is open to the public, that there is at least one public boat ramp, and that the water quality in Brandy Branch Reservoir would affect anyone who was there in the

⁷¹ See Prehearing Conference Tr. at 32:18 to 34:15 (Mr. LeTourneau describing the public’s access to the same stretch of river where Mr. LeTourneau recreates)(LeTourneau).

⁷² See Prehearing Conference Tr. at 33:8-11 (LeTourneau).

⁷³ See Prehearing Conference Tr. at 45:20-21 (LeTourneau).

⁷⁴ See Prehearing Conference Tr. at 49:6-7 (LeTourneau).

⁷⁵ See Prehearing Conference Tr. at 33:17- 34:15 (LeTourneau).

⁷⁶ See Prehearing Conference Tr. at 41:3-6, 42:3-25 (LeTourneau).

⁷⁷ See Hearing Requesters’ Exceptions, at 2-3 for a discussion of what is presumably the facts from the evidentiary record that the hearing Requesters can muster to describe why Mr. Rosborough’s recreational interests are different from any member of the public.

⁷⁸ See Ex. APP-2; Prehearing Conference Tr. at 71:1-25, 85:6-11 (describing Mr. Rosborough’s claimed recreational interests, some of which were offered for the first time at the preliminary hearing)(Rosborough).

same way that it would affect him if he were there.⁷⁹ In fact, SWEPCO owns Brandy Branch Reservoir, allows public access to the reservoir, and pays the costs to allow public access.⁸⁰ Thus, even assuming arguendo that Mr. Rosborough had a recreational interest in Brandy Branch Reservoir, his interest would be completely *common to the members of the general public*. Mr. Rosborough's claimed recreational interest in Brandy Branch Reservoir fails to make him an affected party based on the plain face of the Texas Water Code and TCEQ's rules.

In addition to a claimed recreational interest in Brandy Branch Reservoir, Mr. Rosborough claims that property he owns "along" Hatley Creek is property that he uses for recreation, specifically for hunting (on rare occasions), camping, and to launch a boat to fish upriver on the Sabine River.⁸¹ He testified that he used to fish in the inlet where Hatley Creek meets the Sabine but that he no longer does so because he has other interests, but that he has in the past boated up Hatley Creek.⁸² Mr. Rosborough's property is located in the same area of the Sabine River and Hatley Creek where Mr. LeTourneau claims to kayak, fish, boat, swim, camp, and hunt (*i.e.*, near the confluence of Hatley Creek and the Sabine River),⁸³ and their recreational activities are the same. As explained in more detail above, Mr. LeTourneau's testimony is that his recreational interests in this shared part of the Sabine River and Hatley Creek that is open to the public is shared with many other members of the public. Thus, both Mr. LeTourneau's and Mr. Rosborough's claimed recreational interests in the Sabine River and Hatley Creek are *common to the members of the general public*. Their claimed recreational interests, again, fail to make either of them an affected person based on the plain face of the Texas Water Code and TCEQ's rules.

⁷⁹ See Prehearing Conference Tr. at 85:12-18, 96:2-8 (Rosborough).

⁸⁰ See Prehearing Conference Tr. at 255:5 to 256:18 (explanation of SWEPCO's ownership and management of Brandy Branch Reservoir)(Mills).

⁸¹ See Ex. APP-2; Prehearing Conference Tr. at 57:16-18, 58:8-10, 59:2-3 (Rosborough).

⁸² See Prehearing Conference Tr. at , 59:4-8, 82:15-20 (Rosborough).

⁸³ See Ex. P-1; Prehearing Conference Tr. at 23:6-10, 25:15-17, (Mr. LeTourneau's marking on a map the area between State Highway 43 and State Highway 149 depicting where he purports to recreate, which includes the confluence of the Sabine River and Hatley Creek, and his testimony that he has paddled up Hatley Creek from the Sabine River)(LeTourneau).

C. RECREATIONAL INTERESTS HAVE NEVER BEEN FOUND BY A TEXAS COURT TO BE SUFFICIENT BY THEMSELVES TO ESTABLISH STANDING

The Hearing Requesters offer the *Texas Rivers Protection Association* case in which a Travis County District Court reversed TCEQ's denial of a TPDES permit issued to the City of Castroville⁸⁴ as support for the proposition that courts have established that recreational interests alone can support a hearing request.⁸⁵ Unfortunately for the Hearing Requesters, they have over-played their hand because the *Texas Rivers Protection Association* case includes a multitude of factors upon which the judge could have based her ruling that are totally unrelated to the recreational interest issue. Exhibit B to the Hearing Requesters' Exceptions is the judge's order in the *Texas Rivers Protection Association* case, and Exhibit C is an unsigned brief purportedly filed by the hearing requesters in that case. However, there is nothing to link the judge's order and the unsigned brief together, as the Hearing Requesters readily admit.⁸⁶ Thus, the Hearing Requesters' Exhibit C cannot be seriously relied upon as any legal authority espoused by a court, and should not be given any weight other than as a statement of the Hearing Requesters' position.

Interestingly, the brief in the *Texas Rivers Protection Association* case in the Hearing Requesters' Exhibit C asserts that standing is appropriate in that case because the hearing request in that case is based at least in part on "an "ownership interest" and "legal interests" in the real property at issue."⁸⁷ It turns out that by the hearing requesters own admission in the *Texas Rivers Protection Association* case, the person upon whom standing was based had a property interest that the hearing requesters claim was within one mile

⁸⁴ See *Texas Rivers Protection Ass'n*. (201st Dist. Ct., 2011).

⁸⁵ See Hearing Requesters' Exceptions, at 11-12.

⁸⁶ See Hearing Requesters' Exceptions, footnote 23.

⁸⁷ See *Texas Rivers Protection Association Reply Brief*, at 10, attached to Hearing Requesters' Exceptions, Exhibit C.

radius of, and downstream of the point of discharge.⁸⁸ The reason that the Hearing Requesters offered the case seems to be to show a case in which recreational interests alone were found to be sufficient to establish standing for a hearing. However, there is no support in the case for this attempted point. Thus, the *Texas Rivers Protection Association* case offered by the Hearing Requesters does not provide any reason why the ALJ's following statement in the PFD is incorrect: "The ALJ is not aware of any decision by a Texas court holding that a claimed recreational interest by itself is sufficient to establish that someone is an affected person entitled to a contested case hearing."⁸⁹

The Hearing Requesters' Exceptions also suggest that the *Save Our Springs Alliance* case stands for the proposition that a claimed recreational interest alone is sufficient to trigger their right to a contested case hearing.⁹⁰ The Hearing Requesters seem to rely on the *Save Our Springs Alliance* case to make the point that federal Clean Water Act cases do not require alleged injuries to be distinct from interests of the general public to gain standing, and then go on to suggest that Texas law should be the same.⁹¹ One key finding in the *Save Our Springs Alliance* case that the Hearing Requesters did not include in their exceptions is the court's finding that:

There is no Texas authority for the proposition that the type of injury alleged by SOS Alliance in this case – injury to its members' environmental, scientific, and recreational interests generally and without any interest in or connection to the real property involved – is the type of interference with a legally protected interest or injury that confers standing as a matter of state law.⁹²

⁸⁸ See *Protestant's Exceptions to the ALJ's Proposal for Decision, City of Castroville Application to Amend TLAP Permit No. WQ0010952001*, SOAH Docket No. 582-08-4359, TCEQ Docket No. 2008-0559-MWD, p. 1 (filed December 22, 2008).

⁸⁹ See PFD, at 19.

⁹⁰ See Hearing Requesters' Exceptions, at 12-13; *Save Our Springs Alliance, Inc. v. City of Dripping Springs*, 304 S.W.3d 871.

⁹¹ See Hearing Requesters' Exceptions, at 12-13.

⁹² See *Save Our Springs Alliance, Inc. v. City of Dripping Springs*, 304 S.W.3d at 882.

In short, there is no link between the underlying cause of action in the *Save Our Springs Alliance* case and provisions of state law and TCEQ rule that govern the Commissioners' determination regarding whether the Hearing Requesters are affected parties in this case.

D. NEITHER MR. LETOURNEAU'S NOR MR. ROSBOROUGH'S RECREATIONAL INTERESTS ARE DISTINCT FROM THOSE OF THE GENERAL PUBLIC

The Hearing Requesters next argue that Mr. LeTourneau and Mr. Rosborough can acquire a recreational interest by showing that they regularly exercise a right held by the general public,⁹³ but they provide no support for their position. The Hearing Requesters admit that "other members of the community have the opportunity to recreate on these creeks and rivers, and that some do."⁹⁴ However, the Hearing Requesters' suggestion that Mr. LeTourneau or Mr. Rosborough have a recreational interest different than a member of the general public falls flat because they have presented no facts or specific examples of how Mr. LeTourneau or Mr. Rosborough expect to be impacted any differently than other members of the public who have recreation interests in Sabine River, Hatley Creek, or Brandy Branch Reservoir. The only evidence is Mr. LeTourneau's testimony that he recreates in the Sabine River about eight to twelve times a year near Interstate 20 and State Highways 43 and 149.⁹⁵ However, Mr. LeTourneau also testified that "It's probably a thousand people use the river in a year."⁹⁶ Mr. Rosborough testified that he recreates in the Sabine River upstream of the Pirkey discharge, and that he does not recreate in Brandy Branch Reservoir or in Hatley Creek.⁹⁷ Thus, there is nothing in the record which has been offered by the Hearing

⁹³ See Hearing Requesters' Exceptions, at 14.

⁹⁴ See Hearing Requesters' Exceptions, at 14.

⁹⁵ See Prehearing Conference Tr. at 23:17-18, 24:6 (LeTourneau). Mr. LeTourneau also testified that he recreates along the Sabine River approximately 45-50 miles away from Pirkey about 45 to 50 times a year, although practically no evidence was offered regarding how the Application may affect the Sabine River at this distance. See Prehearing Conference Tr. at See 26:10-14.

⁹⁶ See Prehearing Conference Tr. at 49:6-7 (LeTourneau).

⁹⁷ See Prehearing Conference Tr. at 59:4-8, 71:1-25 (Rosborough).

Requesters that indicates that either Mr. LeTourneau or Mr. Rosborough is affected any differently than any other member of the public. The potential harm urged by the Hearing Requesters does not rise to the level of a personal stake in the controversy.

The Hearing Requesters go on to say that: (i) property interest is not required to distinguish a recreational interest from members of the general public, and (ii) federal delegation of the TPDES permitting program precludes TCEQ from denying a hearing request unless a hearing requester has a property interest.⁹⁸ As an aside and as previously discussed, the only property interests raised in the Hearing Requesters' Exceptions are Mr. Rosborough's property approximately 4 miles south of the nearest Pirkey discharge point, and Mr. LeTourneau's lease that is 45-50 miles downstream. As previously discussed, the banks of Hatley Creek do not touch Mr. Rosborough's property. With regard Mr. LeTourneau's lease some 45-50 miles away from Pirkey,⁹⁹ the Hearing Requesters offered no evidence to back-up their strained attempt to establish a connection between the discharge from Pirkey and Mr. LeTourneau's lease. At the end of the day, notwithstanding whether Mr. LeTourneau or Mr. Rosborough have a property interest, they simply have not demonstrated that they are affected differently than the general public and do not pass the affected person test.

In short, as previously discussed, nothing in the record reflects that Mr. LeTourneau or Mr. Rosborough use Hatley Creek, the Sabine River, or Brandy Branch Reservoir any differently than any other person.

E. THE EVIDENTIARY RECORD ONLY SUPPORTS A CONCLUSION THAT NEITHER MR. LETOURNEAU NOR MR. ROSBOROUGH ARE AN AFFECTED PERSON

⁹⁸ See Hearing Requesters' Exceptions, at 14.

Lastly, the Hearing Requesters revisit the burden of proof issue, and seem to complain that the ALJ imposed a harsh burden of proof on them by not allowing them to get by with simply *alleging* “concrete” and “particularized” injury or harm.¹⁰⁰ They go on to cite to cases that have nothing to do with the personal justiciable interest standard set forth in Texas Water Code § 5.115(a).¹⁰¹ In the interest of brevity, SWEPCO does not restate the previous discussion and analysis regarding the appropriate burden of proof. SWEPCO briefly responds below to the the Hearing Requesters’ complaints about the five evidentiary points relied upon by the ALJ to find that the Hearing Requesters “failed to demonstrate through the presentation of concrete and particularized facts that issuance of the proposed amended permit will pose risk” to Mr. LeTourneau’s or Mr. Rosborough’s recreational uses.¹⁰²

1. Mr. LeTourneau and Mr. Rosborough Recreate Far Downstream

The Hearing Requesters’ suggestion that the potential for contaminants in any concentration is sufficient to trigger a contested case hearing¹⁰³ leads to more absurd results. As a practical matter, according to their position every discharge from any facility would be sufficient to trigger a contested case hearing far downstream since every discharge necessarily contains some contaminants that *could* wash far downstream. Here, the Hearing Requesters think that Mr. LeTourneau’s camp 45-50 miles downstream is not too far, but offer nothing more than conjecture or speculation to support their position. In this case, the ALJ found that the evidentiary record when taken as a whole clearly shows that any risk of negative impacts downstream is only conjectural or speculative. (To set the record straight, Mr. Rosborough testified that he has not fished in Brandy Branch Reservoir since August or September of 2010¹⁰⁴ and he no longer snorkels there because of his age, although he may

¹⁰⁰ See Hearing Requesters’ Exceptions, at 15-16.
¹⁰¹ See Hearing Requesters’ Exceptions, at 15.
¹⁰² See PFD, at 16-17.
¹⁰³ See Hearing Requesters’ Exceptions, at 17.
¹⁰⁴ See Prehearing Conference Tr. at 85:8-11 (Rosborough).

fish there in the future.¹⁰⁵ Thus, he only has a speculative recreational interest in Brandy Branch Reservoir.)

2. Dilution of the Discharge

The Hearing Requesters' complaint about the ALJ's finding that the discharge is far too diluted to pose a risk of harm¹⁰⁶ repeats the Hearing Requesters' bioaccumulation argument which has already been discussed above. SWEPCO will not repeat the bioaccumulation discussion, but responds to the Hearing Requesters' assertions that Mr. LeTourneau is somehow affected more when he paddles up Hatley Creek after a storm event by pointing to Dr. Tishler's testimony:

I heard Mr. LeTourneau's testimony . . . based on reviewing the actual water quality data collected by the state over the last 10 years and documented in their 2010 integrated water quality report, plus understanding the way the Texas water quality standards work when they are used to develop permit limitations, I believe the Mr. LeTourneau's uses of the stream will be protected, both Hatley Creek and the Sabine River.¹⁰⁷

3. Effluent Limits are Protective Under Worst-Case Conditions

The Hearing Requesters say that whether the effluent limits in the Application are designed to be protective is not relevant to the affected party determination.¹⁰⁸ To set the record straight, there was no evidence admitted into the record regarding how TCEQ set the particular effluent limits in SWEPCO's existing permit, or in the Application. As is discussed in the fourth point below, evidence was admitted into the evidentiary record

¹⁰⁵ See Prehearing Conference Tr. at 71:8-25 (Rosborough).

¹⁰⁶ See Hearing Requesters' Exceptions, at 17-18.

¹⁰⁷ See Prehearing Conference Tr. at 301:7-15 (Dr. Tischler).

¹⁰⁸ See Hearing Requesters' Exceptions, at 18.

regarding the effect of the effluent limits that is totally independent of SWEPCO's existing permit and totally independent of the Application. The evidence in the record shows that the effluent limits that have been set in SWEPCO's existing permit are not resulting in a violation of water quality standards,¹⁰⁹ and neither will the same limits that are set by the Application.¹¹⁰ Thus, based on evidence that is not related to the merits of the Application, the evidentiary record shows that neither Mr. LeTourneau's nor Mr. Rosborough's recreational uses will be impacted by the Application. There was no evidence identified in the Hearing Requesters' Exceptions relating to a negative impact of the effluent limits in the Application that should be taken as true or resolved in their favor.

4. The Proposed Permit Does Not Change Effluent Limits

The Hearing Requesters argue that the ALJ and the Commissioners should not consider that SWEPCO's Application does not change any of the effluent limits in SWEPCO's existing permit, although the Hearing Requesters agree that the effluent limits are not changed by the Application.¹¹¹ SWEPCO agrees with the Hearing Requesters that it is the overall impact of a regulated activity that must be considered in determining whether a person is affected, not just the impact of the change.¹¹² SWEPCO refers the Commissioners to the TCEQ's 2010 Water Quality Inventory for the Sabine River and for Brandy Branch Reservoir, that indicates that all water quality standards and all designated uses for those waterbodies are either fully supported or of no concern.¹¹³ The testimony from Dr. Tischler conclusively establishes that the designated uses and water quality standards for the receiving water for the relevant segment of the Sabine River and for Brandy Branch Reservoir are being met and that Hatley Creek is protected.¹¹⁴ Further, Dr. Tischler testified that since the

¹⁰⁹ See Prehearing Conference Tr. at 301:19 to 306:12 (Dr. Tischler).

¹¹⁰ See Prehearing Conference Tr. at 307:15 to 308:13 (Dr. Tischler).

¹¹¹ See Hearing Requesters' Exceptions, at 19.

¹¹² See Hearing Requesters' Exceptions, at 19.

¹¹³ See Ex. APP-15; Prehearing Conference Tr. at 304:14-23 (Dr. Tischler).

¹¹⁴ See Prehearing Conference Tr. at 304:14 to 306:12, 309:3-17 (Dr. Tischler).

discharge from Pirkey has been unchanged for a number of years and the new permit based on the Application would be the same as the current permit (except for being slightly more stringent), there would be no change in water quality based on the Application.¹¹⁵ Thus, the actual, real-world water quality data that is totally independent of the Application shows that neither Mr. LeTourneau nor Mr. Rosborough are negatively impacted under either SWEPCO's existing permit, or under the changes that would be made to the existing permit by the Application.

5. Water Quality Standards are Being Attained

Lastly, the Hearing Requesters say that a finding that water quality standards are being attained in the receiving streams is different from whether a use is being impaired and is not an appropriate issue for the ALJ or the Commissioners to consider.¹¹⁶ The Hearing Requesters say that "the record does not *conclusively establish* that Pirkey's future discharges, as authorized by the proposed permit, could not impair water quality or result in degradation."¹¹⁷ (emphasis added) As previously discussed above, the burden of proof is on the Hearing Requesters in this case. Rather than offering a shred of their own evidence to make their case, the Hearing Requesters fault SWEPCO for not offering more evidence than SWEPCO offered. In any event, SWEPCO agrees with the ALJ's finding that based on the evidence that is actually in the evidentiary record that water quality standards are being attained, and that this evidence is relevant to whether Mr. LeTourneau or Mr. Rosborough are affected parties. As previously discussed, this evidence in the record is totally independent of the merits of the Application.

V. CONCLUSION AND PRAYER

¹¹⁵ See Prehearing Conference Tr. at 308:5-13 (Dr. Tischler).

¹¹⁶ See Hearing Requesters' Exceptions, at 19-20.

¹¹⁷ See Hearing Requesters' Exceptions, at 19.

Despite being given every opportunity to do so, the Hearing Requesters have not met their legal burden to demonstrate that either Mr. LeTourneau or Mr. Rosborough is an affected person. It is especially notable that the Hearing Requesters' Exceptions do not include any mention of any of their own expert evidence. Rather, the Hearing Requesters' Exceptions only reference bits and pieces of their cross-examination of SWEPCO's expert witnesses, but without considering the testimony in context.

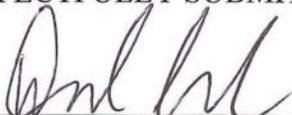
The Hearing Requesters have raised multiple issues, but all are based on conjecture, unfounded hypothesis, or on speculation. Further, the evidentiary record clearly shows that for reasons completely separate from the merits of the Application, neither Mr. Rosborough nor Mr. LeTourneau is an affected person. When read as a whole, and for the reasons discussed above, evidentiary record conclusively demonstrates that the fact issues alleging that the Application would impact Mr. LeTourneau's or Mr. Rosborough's use of the Sabine River, Hatley Creek, or Brandy Branch Reservoir are nothing more than speculation and conjecture.

For the aforementioned reasons, SWEPCO requests that the Commissioners adopt the PFD and proposed order, and issue the permit.

Dated: September 20, 2012

RESPECTFULLY SUBMITTED,

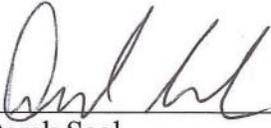
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Certificate of Service

I hereby certify that on this 20th day of September, 2012, a true and correct copy of the foregoing document was provided to the persons on the attached Service List in the manner indicated on the Service List, and is being mailed to the same via regular mail.



Derek Seal

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SOAH Docket No. 582-12-5301
TCEQ Docket No. 2011-2199-IWD

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