Bryan W. Shaw, Ph.D., *Chairman*
Carlos Rubinstein, *Commissioner*
Toby Baker, *Commissioner*
Zak Covar, *Executive Director*

# TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

September 20, 2012

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

Re: **Southwestern Electric Power Company**
**TCEQ DOCKET NO. 2011-2199-IWD**
**SOAH DOCKET NO. 582-12-5301**

Dear Ms. Bohac

Enclosed for filing is the Executive Director's Reply to Sierra Club and Public Citizens' Exceptions to the Proposal for Decision in the above-entitled matter.

Sincerely,

For
D. A. Chris Ekoh, Senior Attorney
Environmental Law Division
State Bar No. 06507015

cc: Mailing List

Enclosure

**SOAH DOCKET NO. 582-12-5301**
**TCEQ DOCKET NO. 2011-2199-IWD**

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| **APPLICATION OF SOUTHWESTERN ELECTRIC POWER COMPANY FOR RENEWAL AND MAJOR AMENDMENT OF TPDES PERMIT NO. WQ0002496000** | §<br>§<br>§<br>§<br>§<br>§<br>§ | **BEFORE THE STATE OFFICE**<br><br>**OF**<br><br>**ADMINISTRATIVE HEARINGS** |

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# EXECUTIVE DIRECTOR'S REPLY TO SIERRA CLUB AND PUBLIC CITIZEN'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S PROPOSAL FOR DECISION

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**TO THE HONORABLE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:**

Comes Now, the Executive Director of the Texas Commission on Environmental Quality (Commission) and files this, his REPLY to Sierra Club and Public Citizen's (Requestors) exceptions to the Administrative Law Judge's (ALJ) Proposal for Decision (PFD) regarding whether Requestors are affected persons under applicable law on the application for a major amendment with renewal filed by the Southwestern Electric Power Company (SWEPCO).

## Introduction and Summary of Executive Director's Position

In their Exceptions to the Administrative Law Judge's Proposal For Decision, the Requestors relied heavily on the reasoning of *Texas Dep't of Parks & Wildlife v. Miranda,*[1] and *City of Waco v. Tex. Comm'n on Envtl. Quality*[2]. As a preliminary matter, these two cases are not directly controlling here because the procedural stance and commission decision addressed in *City of Waco* is substantially different from the instant case. In *City of Waco,* the commission denied the hearing requests without referring the cases to the State Office of Administrative Hearings (SOAH) for a contested case hearing to make a determination whether the requestors are affected persons. In this case, the commission referred the case to SOAH and the case is before SOAH, and after receiving and considering the evidence, SOAH made a determination that the Requestors are not affected persons under Texas law. The plea to the jurisdiction and summary judgment standards discussed in the *City of Waco* and *Miranda* are therefore inapplicable here as the Requestors have been afforded an opportunity to present evidence on affectedness before a finder of fact (the Honorable Judge Wilfong).

Second, in their exceptions, the Requestors conflate the burden of proof, which requires parties to prove a disputed assertion, sometimes called the burden of production, with the burden of proof, which denotes the evidentiary standard a party's evidence is held

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[1] *Texas Dep't of Parks & Wildlife v. Miranda,* 133 S.W.3d 217, 227–28 (Tex.2004).
[2] *City of Waco v. Tex. Comm'n on Envtl. Quality,* 346 S.W.3d 781, 824 (Tex.App. – Austin 2011, pet.denied)

to, sometimes called the burden of persuasion. As the burden of proof is on the moving party by a preponderance of the evidence,[3] both the burden of production and persuasion is borne by the hearing requester; the party seeking "party status" in a contested case hearing on a permit application.[4] As articulated by the court in *City of Waco*, to have standing in this case, the Requestors must 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).

*City of Waco v. Texas Comm'n on Envtl. Quality*, (emphasis added.)[5]

The Executive Director contends that Mr. LeTourneau and Mr. Rosborough have failed to identify their personal justiciable interest that would be adversely affected by the application in a manner not common to members of the general public.

The interests raised by Mr. LeTourneau and Mr. Rosborough relating to recreating in the Sabine River, Brandy Branch Reservoir, and Hatley and Brandy Branch Creek six to nine miles from the nearest outfall at the SWEPCO facility are interests shared in common with members of the general public.[6] Neither Mr. LeTourneau nor Mr. Rosborough has a greater or lesser privilege than any member of the general public to the Sabine River, Brandy Branch Reservoir, or Hatley and Brandy Branch Creek than any other member of the general public. They have not articulated how their recreational interests would be particularly harmed by SWEPCO's application, and further, they failed to demonstrate particularized harm to their recreational interest in a manner not common to the general public. The un-particularized recreational interests claimed by both Mr. LeTourneau and Mr. Rosborough are therefore interests not protected by the law under which this application is being considered.

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[3] *See* 30 TEX.ADMIN.CODE §80.17(a).
[4] *See* 30 TEX.ADMIN.CODE §80.109(a).
[5] 346 S.W.3d 781, 802 (Tex.App.--Austin 2011, no pet. h.)
[6] As a preliminary matter, it should be noted that the Hearing Requesters, in a moment of candor about the recreational interests claimed by their members in the Sabine River, Brandy Branch Reservoir, and Hatley and Brandy Branch Creek, state "it is true that other members of the local community have the opportunity to recreate on [the Sabine River, Brandy Branch Reservoir, and Hatley and Brandy Branch Creek], and that some do. *See* Sierra Club and Public Citizen's Exceptions to the Administrative Law Judge's Proposal for Decision at P.14, section 2, Line 4.

Mr. Rosborough's health, properties, and water wells are not likely to be affected by the application. The draft permit includes effluent limitations that are deemed protective of both surface and groundwater water quality and the environment. Mr. Rosborough's 169-acre tract is not adjacent to Hatley Creek and there are intervening properties between Mr. Rosborough's 169-acre tract and Hatley Creek. The only time waters from Hatley Creek get to Mr. Rosborough's property is when Hatley Creek floods during periods of excessive rainfall. But for flooding, waters from Hatley Creek, including discharges, if any, from the applicant's facility will not get to Mr. Rosborough's property. The issue of flooding contributing to an injury is the precise intervening cause that the court highlighted in *City of Waco* when it stated that: "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.*"[7] (Emphasis added). Flooding is an intervening cause that neither the commission nor the SWEPCO has control over. The Commission does not have jurisdiction to regulate flooding in the context of wastewater discharge permit. However, the applicant is required to comply with all the numeric and narrative effluent limitations and other conditions in the draft permit at all times, including during flood conditions.

## The ED's Discussion on the Requesters' exceptions to the PFD.

### 1. The ALJ was correct in concluding that Mr. LeTourneau's and Mr. Rosborough's recreational interests in the Sabine River, Brandy Branch Reservoir, and Hatley and Brandy Branch Creek are interests shared with members of the general public and not an interest of the type that confers standing under Texas law.

a. The Requestors claim that their members' frequency of use of a Texas river, creek, or a public park with a public boat ramp, entitles those members to recreational standing, finds no support in Texas law.

The applicable Texas case on this issue, *San Antonio Conservation Soc'y v. City of San Antonio*, held that for standing purposes, *it is the nature of the wrong, injury or damage which controls and not the extent.*[8] (Emphasis added). This statement of law directly contradicts the Requestors' contention that an individual's regular use of a right held by the general public is sufficient to satisfy the Texas Water Code's requirement that an affected person's claimed justiciable interest not be an interest common to members of the general public.[9]

*San Antonio Conservation Soc'y* is analogous to the present case. San Antonio Conservation Society, an organization which spent money to beautify the park central to the case, whose members included property owners, tax payers, qualified voters, and

[7] 346 S.W.3d 781, 802 (Tex.App.--Austin 2011, no pet. h.).
[8] *San Antonio Conservation Soc'y v. City of San Antonio*, 250 S.W.2d 259, 263 (Tex.Civ.App. Austin 1952, writ ref'd).
[9] TEX.WATER.CODE § 5.115(a).

residents and inhabitants of the City, sought to prevent the City of San Antonio, a governmental entity, from authorizing a particular action. In this case, the Requestors are seeking to prevent the TCEQ from granting SWEPCO's application for major amendment with renewal. In both cases, a "personal justiciable interest" was and is needed to have standing to intervene in the case.[10] In elaborating as to why the injury to appellants' rights of ingress and egress to their own properties was insufficient for standing purposes, the court stated:

> This condition is one which the public in general endures along with appellants. While persons who use these streets frequently would be more inconvenienced than those who seldom go that way, this is not the test. *It is the nature of the wrong, injury or damage which controls and not the extent.*[11] (Emphasis added).

This statement on injury becomes even more applicable when one considers the testimonies of Mr. LeTourneau and Mr. Rosborough during the evidentiary hearing. Mr. LeTourneau testified that nothing would stop any member of the public from [recreating] in Hatley Creek and the Sabine River.[12] He testified that he sees other members of the general public [recreating] in the Sabine River; and there is nothing preventing anybody else from enjoying the river and recreating in the river the same way he does.[13] He testified that anyone who accessed the Sabine River, fished and caught fish "could be" affected the same way he is affected.[14] Mr. LeTourneau testified that he "presumes" that the water quality from the Pirkey plant will affect him "the same way it would affect anybody else with regards to [recreation]."[15] As well, Mr. Rosborough testified much to the same. Mr. Rosborough testified that the water quality effect would be the same for anybody using [Brandy Branch] reservoir; he does not have the exclusive right to fish in the reservoir,[16] that any member of the public can recreate on Brandy Branch Reservoir;[17] and that there is no exclusive right for anyone to recreate on the Sabine River or in Brandy Branch Reservoir.[18] The same reasoning the court used in *San Antonio Conservation Soc'y* to articulate why the appellants had no personal justiciable interest is the same reasoning the Commission should adopt in

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[10] *South Tex. Water Auth. v. Lomas,* 223 S.W.3d 304, 307 (Tex.2007) (holding that for a party to have standing to challenge a governmental action, as a general rule, it must demonstrate a particularized interest in a conflict distinct from that sustained by the public at large.) *See Tri County Citizens Rights Org. v. Johnson,* 498 S.W.2d 227, 228–29 (Tex.Civ.App.-Austin 1973, writ ref'd n.r.e.) ("It is an established rule ... that '... sufficiency of a plaintiff's interest (to maintain a lawsuit) comes into question when he intervenes in public affairs. When the plaintiff, as a private citizen, asserts a public, as distinguished from a private, right, and his complaint fails to show that the matters in dispute affect him differently from other citizens, he does not establish a justiciable interest.' ") (quoting 1 Roy W. McDonald, Texas Civil Practice § 3.03, at 229 (rev.vol.1965)).
[11] *San Antonio Conservation Soc'y,* 250 S.W.2d at 263.
[12] SOAH Hr'g Tr. 32:18-22, May 22, 2012.
[13] SOAH Hr'g Tr. 33:8-16, May 22, 2012.
[14] SOAH Hr'g Tr. 34:6-9, May 22, 2012.
[15] SOAH Hr'g SOAH Hr'g Tr. 35:12-15, May 22, 2012.
[16] SOAH Hr'g Tr. 85:12-14, 18; 86:4-7, and 11-18, May 22, 2012.
[17] SOAH Hr'g Tr. 96:2-4, May 22, 2012.
[18] SOAH Hr'g Tr. 96:5-8, May 22, 2012.

finding that Mr. LeTourneau and Mr. Rosborough do not have personal justiciable interests in the instant case. The court in *San Antonio Conservation Soc'y* summarized the reason as follows:

> The reason that appellants have no justiciable interest in this controversy is that any right which they have to enjoy the charm and beauty of the San Antonio River and its banks within the City of San Antonio is a right shared in common with all the people of San Antonio and with the public in general and any impairment of this right is an injury or damage sustained by appellants in common with the general public. Only lawfully constituted guardians of the public interest may maintain actions for the redress of such character of injuries.[19] Proximity to the river and parks along its banks does not determine the character of appellants' interests as being justiciable or not. The interests which they seek to protect are the same whether they are used or enjoyed must or little or none. The only interests which appellants alleged in the river and parks is the right of enjoyment. This interest is common to all the people of San Antonio, those who avail themselves of the privilege as well as to those who do not or cannot.[20]

An injury to a recreational interest shared in common with the public is not enough to confer standing under Texas law no matter what the frequency of use is. "There is no Texas authority for the proposition that ... injury to ... 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."[21]

b. <u>The ALJ was correct in concluding Mr. LeTouneau's interest in a leased property 45 to 50 miles downstream from the confluence of Hatley Creek and the Sabine River will not be affected by the permitted activities at the SWEPCO facility.</u>

Mr. LeTourneau testified that he leases a property along the Sabine River approximately 45 to 50 miles downstream from the confluence of Brandy Branch Creek and the Sabine River.[22] Mr. LeTourneau testified that he is not concerned about his interest in this property and that his recreation on the Sabine River between Highway 149 and 43 is more important to him.[23] The Requestors' own expert hydrologist testified that groundwater in the area of the plant flows towards the south/southwest.[24] Mr. LeTourneau's property is located at least 45-50 miles south/southeast of the plant. With respect to any potential groundwater impacts from the ponds, Mr. Franklin Mills

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[19] *San Antonio Conservation Soc'y,* 250 S.W.2d 259 at 263.
[20] *Id.* at 264.
[21] *Save Our Springs Alliance, Inc. v. City of Dripping Springs,* 304 S.W. 3d 871, 882 (Tex.App.--Austin 2010, pet.denied).
[22] SOAH Hr'g Tr. 41:7-11, 42:16-25 May 22, 2012.
[23] SOAH Hr'g Tr. 43:1-6, May 22, 2012.
[24] SOAH Hr'g Tr. 116:10-24, May 22, 2012.

(an expert for SWEPCO) testified that he occasionally reviews the groundwater well evaluation data for the ponds and that the data "reflects that there are no impacts from any of the activities at the plant."[25] The water wells in Mr. LeTourneau's leased property will not be negatively impacted by the activities at the SWEPCO facility.

Finally, the SWEPCO permit has been in existence since 1984.[26] This permit action is for a major amendment and renewal without an increase in the permitted volume of treated wastewater. The numeric limitations in the permit will not change with this permitting action.[27] The draft permit proposes more stringent effluent limitations than those in the existing permit.[28]

c. The ALJ was correct in concluding that Mr. Rosborough's property which is approximately 4 miles from the nearest outfall at SWEPCO will not be affected by the permitted discharges at the facility.

Mr. Rosborough's primary concern regarding his property is that floodwaters from Hatley Creek causes sediments and pollutants such as selenium to be deposited on his property.[29] Mr. Rosborough claims he will be affected by this application because "he is concerned about pollutants like selenium that Pirkey discharges to Hatley Creek which are deposited on [his] land through flooding."[30]

Mr. Rosborough's testimony on the exact location of this property shifted considerably.[31] The undisputed fact in the record is that Mr. Rosborough's property is not adjacent to Hatley Creek.

Mr. Rosborough testified that Hatley Creek would flood if it rains heavily without any discharges from the SWEPCO facility;[32] he cannot distinguish the discharge from the applicant's property from the general rainwater when it floods;[33] and when his property

[25] SOAH Hr'g Tr. 274-75:21-25, 1-5, May 22, 2012.
[26] SOAH Hr'g Tr. 246:24-25, May 22, 2012.
[27] SOAH Hr'g Tr. 249:5-6, Exhibit APP-9.
[28] *See* Ex. ED-E, Draft Permit.
[29] *See* Ex. APP-2.
[30] *Id.*
[31] First it was adjacent to Hatley Creek and it was possible to access Hatley Creek without crossing someone else's property at the northern-most point of his 169-acre tract.( SOAH Hr'g Tr. 53:5-7, 75:8-12, May 22, 2012). Then it was that the northeast corner of his property did not touch Hatley Creek's bank but only the mitigation area of Hatley Creek.(SOAH Hr'g Tr. 80:2-3, May 22, 2012). Then it was again that Hatley Creek was directly adjacent to the northeast corner of his property but that his property does not actually touch the banks of Hatley Creek.(SOAH Hr'g Tr. 80:11-13, 93-94:9-25, 1-6, May 22, 2012). Then later, when an expert for SWEPCO was testifying, it was brought to light that property records show that Hatley Creek actually runs though someone else's property.( SOAH Hr'g Tr. 80:11-13, 93-94:9-25, 1-6, May 22, 2012).
[32] SOAH Hr'g Tr. 96:19-23, May 22, 2012.
[33] SOAH Hr'g Tr. 97:19-24, May 22, 2012.

floods, he cannot distinguish floodwater from the Sabine River from floodwater from Hatley Creek.[34]

The draft permit proposed by the commission in this case does not authorize the applicant to cause flooding or otherwise deposit sediments onto Mr. Rosborough's 169-acre tract.[35] The draft permit has effluent limitations and other permit conditions which the applicant must comply with in times of flooding. The effluent limitations for selenium and other pollutants in the draft permit are deemed protective of water quality and the designated uses of the Sabine River and Hatley Creek. Mr. Rosborough testified that under normal stream conditions, including the discharges from SWEPCO, the water from Hatley Creek or the Sabine River will not reach his property. The only way the water reaches his property is through flooding. His concern about flooding is beyond the scope and jurisdiction of what the commission regulates in the context of a wastewater discharge permit. Therefore, he cannot demonstrate affectedness under 30 TEX.ADMIN.CODE §55.203(c)(1). In accord is the *City of Waco* case where the court stated that: "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.*"[36] (Emphasis added).

### 1. The Requestors reliance on the principles articulated in City of Waco v. Tex. Comm'n on Envtl. Quality is in misplaced.

The reasoning and principles espoused in *Texas Dep't of Parks & Wildlife v. Miranda,*[37] and *City of Waco v. Tex. Comm'n on Envtl. Quality*[38] are not applicable to this case. The distinguishing factor in this case from *City of Waco,* is that the Commission's consideration of the City of Waco's hearing request was not considered a contested case hearing subject to the APA.[39] Where as in this case the Commission referred the Requestors hearing request to SOAH, instructing SOAH to prepare a recommendation on the sole question of whether the Requestor is an affected person, summary judgment principles should have no place. Summary judgment is a legal tool used to avoid sending a case to the trial of fact. In this case, the trial of fact (the ALJ) has received trial testimony, therefore summary judgment principles are inapplicable. Additionally, according to the TCEQ rules, when the commission refers a hearing request to SOAH it is processed as a contested case under the APA.[40] Therefore, the only facts of relevance that were in dispute at the contested case hearing, were those going to the issue of affectedness.[41]

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[34] SOAH Hr'g Tr. 104:7-11, May 22, 2012.
[35] *See* Ex. ED-E, Draft Permit and Fact Sheet.
[36] 346 S.W.3d 781, 802 (Tex.App.--Austin 2011, no pet. h.).
[37] *Texas Dep't of Parks & Wildlife v. Miranda,* 133 S.W.3d 217, 227–28 (Tex.2004).
[38] *City of Waco v. Tex. Comm'n on Envtl. Quality, 346 S.W.3d 781, 824 (Tex.App. – Austin 2011, pet.denied)*
[39] *Id. at 799. (stating* the Commission did not elaborate in its order on its specific grounds for denying the City's hearing request, nor did it enter findings of fact and conclusions of law...)
[40] *See* 30 TEX.ADMIN.CODE §55.211(b)(4).
[41] SOAH Hr'g Tr. 6:19-25, 8:19-21, 9:5-25, 10:1-3,13:11-14, 20-24, May 22, 2012.

The Requestors continually misapply the Texas Water Code, the TCEQ rules, the Commission's interim order issued March 13, 2012, and the holdings of *Miranda* and *City of Waco*, to claim that they are entitled to a contested case hearing on the merits of the permit simply because disputed jurisdictional facts overlap with substantive facts. That contention finds no support in either case, is inconsistent with the Texas Water Code and ignores the reality that the only facts that were in dispute at the May 22, 2012 contested case hearing were jurisdictional and related to affectedness.[42] "The commission may not grant a request for a contested case hearing unless the commission determines that the request was filed by an affected person as defined by [Texas Water Code] Section 5.115."[43] By referring the affectedness issue to SOAH for a contested case hearing, the commission instructed a finder of fact to resolve the disputed jurisdictional facts; thereby preserving the parties' right to present the merits of their case at trial in accordance with the *City of Waco* decision.[44]

The Requestors, unlike the City of Waco, were afforded a contested case hearing solely to present evidence as to their members' affectedness and simply failed to produce credible or relevant evidence to the finder of fact, the ALJ. Had the Requestors produced credible or relevant evidence at the contested case hearing convened solely for the purpose of determining affected person status, it would have been afforded two separate contested case hearings. However, the Requestors applied the wrong purpose or standard to its contested case hearing convened solely for the purpose of determining affected person status and assumed that all that was needed was a showing that disputed jurisdictional facts overlap with substantive facts, which is not the standard enunciated in *Miranda* or *City of Waco*. The actual language of the *Miranda* and *City of Waco* opinions is that "the [Texas] water code and Commission rules create an entitlement to a contested-case hearing that is analogous to a civil claimant's right to have disputed material fact issues determined at trial—an *affected person* is entitled to a contested-case hearing on disputed questions of fact ... that are relevant and material to the Commission's decision on a permit application."[45] (Emphasis added). Only affected persons are entitled to contested case hearings on the merits of the permit, not individuals who simply highlight that substantive facts overlap with jurisdictional facts that they themselves have called into dispute. A claimant's right to a determination of material, disputed facts at trial presumes, of course, that the claimant has properly invoked the trial court's subject-matter jurisdiction.[46] The correct principle to glean from the *City of Waco* is that "the Commission's procedural discretion in considering evidence relevant to hearing requests is as broad as that of trial courts deciding evidence-based jurisdictional challenges. However,... whatever discretion the Commission does possess would be limited, in a manner similar to trial courts, in instances where *it determines* disputed facts that are relevant to both a hearing requester's standing and the merits of a permit application.[47] (Emphasis added). In this

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[42] *Id.*
[43] TEX.WATER.CODE § 5.556(c).
[44] *City of Waco v. Tex. Comm'n on Envtl. Quality, 346 S.W.3d 781 at 824.*
[45] *Id.*
[46] *Id.*
[47] *Id.*

case, the Commission delegated its determination of disputed jurisdictional facts to SOAH for a recommendation on the sole question of whether the Requestor is an affected person, just as the Texas Rules of Civil Procedure allow a trial court to assist in the disposition of the case by directing the parties to appear before it for a pretrial conference to consider dilatory pleas, contested issues of fact, and simplification of the issues.[48]

The Requestors' contention that all that is needed to be an affected person is a showing that disputed jurisdictional facts overlap with substantive facts is semantics and misleading. The logical result of the Requestors' contention is a violation of both the Texas Water Code (TWC), and the TCEQ rules, both of which only allow for contested case hearings for affected persons. The ALJ was correct in finding that the Requestors lack associational standing to request a contested case hearing on the merits of the permit application and be granted party status because they both failed to prove that at least one of their members is an affected person entitled to party status in accordance with applicable law.

### 2. Sierra Club and Public Citizen's attempt to rely on the District Court's judgment in Texas Rivers Protection Ass'n v. TCEQ is also misplaced.

*Texas Rivers Protection Ass'n v. TCEQ*[49], similar to this case, involved a contested case hearing convened at SOAH to determine the affectedness of individuals who filed a hearing request who owned riparian property one mile downstream of the discharge point. After stating in his hearing request that he owned river front property, Mr. Harvey Lee Kunz testified that it is actually his wife who owns river front property adjacent to the Medina River approximately one mile downstream from the point of discharge from the city's wastewater treatment plant. The issue in the case was whether Mr. Kunze's wife, whose river front property was held as separate property, actually wanted to protest the permit and whether Mr. Kunze had been authorized to act in her behalf. The Requestors cite the case for the fictitious proposition that the recreational interests claimed by their members are legally protectable and justiciable where the TCEQ's authority to issue permits is granted by statutes that are intended to protect environmental and recreational interests. Not only does the proposition not find support in any case law or rules and regulations, the Requestors plainly admit in their Exceptions to the PFD at footnote 23, that they have no idea why the District Court judge reversed the TCEQ, only offering anecdotal evidence about why they assume she reversed the TCEQ.

### 3. Sierra Club and Public Citizen mischaracterize *Save Our Springs'* discussion of cases involving Federal Environmental-Protection Statutes.

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[48] Tex.R. Civ. P. 166(a),(e)
[49] Cause No. D-1-GN-09-001517 (March 9, 2011).

Initially it should be noted the Requestors, in more than one instance, are trying to have it both ways on this issue.[50]

Requestors give great weight to the discussion of the federal cases in *Save Our Springs Alliance, Inc. v. City of Dripping Springs*[51] that were cited by the plaintiffs for the proposition that environmental harm constitutes an injury in fact for purposes of standing. What the Requestors miss, is those cases involve the application of federal environmental-protection statutes that prohibited the types of conduct alleged by the plaintiffs to have occurred. Further, many of the cases in question involved the "Citizen Suit Provision" of the Clean Water Act.[52] None of these cases are applicable to the present case. The Citizen Suit Provision is a legislatively created- private right of action to sue to enforce an effluent standard or limitation under the Clean Water Act, that the defendant is not meeting.[53] The provision "confers standing to *enforce* the Clean Water Act to the full extent allowed by the Constitution."[54](Emphasis added). Unlike cases involving the Texas Water Code or the TCEQ rules found in Title 30 of the Texas Administrative Code, the cases brought under the Citizen suit Provision involved plaintiffs who possessed a legally protected interest for purposes of standing by virtue of a federal statute. The Requestors are inventing law when they attempt to analogize the legally protected interest in having a permittee comply with its permit, which claimants under the Citizen Suit Provision possess, with Texas statutes that protect human health and the environment. The Requestors mistakenly assume that because recreational interests can be sufficient to create standing in a suit to enforce an effluent standard or limitation under the Clean Water Act, that recreational interests are sufficient to create standing in any situation involving statutes that protect human health and the environment.

The Requestors repeatedly assert that their indentified members have legally protected recreational and environmental interests; however, these legally protected recreational and environmental interests are common to members of the general public, and if affected, do not constitute a particularized injury sufficient to establish standing in all cases arising under statutes that protect environmental, scientific, or recreational interests.

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[50] The Hearing Requesters claim in their Exceptions that the *Save Our Springs* case stands for the proposition, coincidentally without a cite to the opinion's page number where their contention is, that cases grounded in statutes protecting environmental and recreational interests are an exception to the general rule in Texas law that a recreational interest unconnected to a property interest does not provide standing. However, later when the Hearing Requesters attempt to argue that recreational interests are sufficient for standing purposes, they claim that property ownership is not necessary to distinguish recreational interests from those of the general public. Then, after making claims that are directly contradictory and in what seems is a bizarre request to be found in post-hearing pleadings, the Hearing Requesters ask the Commission to clarify the sufficiency of recreational interests and need for property rights to qualify as an affected person entitled to a contested case hearing.

[51] *Save Our Springs Alliance, Inc. v. City of Dripping Springs*, 304 S.W. 3d 871, 880 (Tex.App.--Austin 2010, pet.denied).

[52] 33 U.S.C. § 1365 (a).

[53] *Save Our Springs Alliance at 881.*

[54] *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 152 (4th Cir.2000).

The source of the Requestors' misapplication of the law can be readily traced to the selective reading of the *Save Our Springs* case. The Requestors quote the language of *Save Our Springs:*

> The few *federal* cases cited by SOS Alliance not involving the CWA—which has a citizen-enforcement provision—also involved environmental-protection statutes. (Emphasis added).[55]

The ED would show that the court in *Save Our Springs* at Footnote 6, that appears directly after the above statement about federal cases, is alluding to the distinction in between federal case law and Texas case law.[56] This allusion to the difference between federal and state case law is supported by the court's statement: [57]

> In sum, we do not find any Texas case in which an alleged injury to a plaintiff's environmental, scientific, or recreational interests conferred standing in the absence of allegations that the plaintiff has an interest in property affected by the defendants' actions.[58]

## Conclusion

For the reasons stated above, the ALJ was correct in concluding that the Requestors lacked associational standing to request a hearing and be granted party status because they both failed to prove that at least one of their members is an affected person entitled to party status in accordance with applicable law. The ALJ was correct in recommending that the Commission deny the hearing requests and return the matter to the TCEQ ED for administrative processing as an uncontested case. Further, the ALJ was correct in concluding that Mr. LeTouneau and Mr. Rosborough's recreational interests in the Sabine River, Brandy Branch Reservoir, and Hatley and Brandy Branch

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[55] *Save Our Springs Alliance at 881.*

[56] "We note that this Court's holding in *Texas Rivers* that harm for purposes of standing may be "economic, recreational, or environmental" appears to be connected to federal case law in which a federal statute protected such interests. The Texas case from which the "economic, recreational, or environmental" language originates is *Housing Authority of Harlingen v. State* in its general statement of the test for standing...As authority for the language, the court in *Housing Authority of Harlingen* cited several United States Supreme Court opinions, and appears to have taken its description of the scope of an injury in fact from *Association of Data Processing Service Organizations...* In that case, the Supreme Court observed that the legal interest required for purposes of standing "may reflect 'aesthetic, conservational, and recreational' as well as economic values," provided that "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."

[57] Also supporting this assertion is the statement earlier in the opinion by the court that "the federal cases cited by SOS Alliance, in which environmental harm is held to constitute an injury in fact for purposes of standing, involve the application of federal environmental-protection statutes that prohibited the types of conduct alleged by the plaintiffs in those cases to have occurred. The majority of the federal cases cited by SOS Alliance to demonstrate that an injury in fact for purposes of standing may be environmental involve claims under the federal Clean Water Act." *Id.*

[58] *Save Our Springs Alliance at 882.*

Creek are interests shared with members of the general public. That the interest claimed by Mr. LeTourneau in a leased property 45 to 50 miles downstream from the confluence of Hatley Creek and Sabine River will not be affected by the permitted activities at the SWEPCO facility. That the property owned by Mr. Rosborough which is approximately 4 miles from the nearest outfall at SWEPCO will not be affected by the permitted discharges at the facility. Finally, that the evidence and legal theories presented and advanced by the Requestors were not credible or relevant.

Respectfully submitted,

Texas Commission on Environmental Quality

Zak Covar,
Executive Director

Robert Martinez, Director
Environmental Law Division

for

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## CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2012 the Executive Director's Reply to Sierra Club and Public Citizen's Exceptions to the Administrative Law Judge's Proposal for Decision was filed with the Texas Commission on Environmental Quality's Office of the Chief Clerk and 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.

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**TCEQ Docket No. 2011-2199-IWD**

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