

Bryan W. Shaw, Ph.D., *Chairman*
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Blas J. Coy, Jr., *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

September 20, 2012

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

Dear Ms. Bohac:

Enclosed for filing is the Office of Public Interest Counsel's Reply to Exceptions to the Proposal for Decision in the above-entitled matter.

Sincerely,


Eli Martinez, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

SOAH DOCKET NO. 582-12-5301

TCEQ DOCKET NO. 2011-2199-IWD

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

**BEFORE THE TEXAS
COMMISSION ON
ENVIRONMENTAL QUALITY**

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S REPLY TO EXCEPTIONS
TO THE PROPOSAL FOR DECISION**

TO THE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

The Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (Commission or TCEQ) files this Reply to Exceptions to the Proposal for Decision in the above-referenced matter. OPIC agrees with Sierra Club and Public Citizen that the Administrative Law Judge (ALJ) in this proceeding did not apply the correct burden of proof and did not give proper consideration to the recreational interests of Mr. Rosborough and Mr. LeTourneau.

I. Burden of Proof

OPIC supports the analysis set forth in the Exceptions to the Proposal for Decision by Sierra Club and Public Citizen relating to the proper burden of proof. Although the general rule for contested case hearings held before the State Office of Administrative Hearings (SOAH) is that the moving party prove their case by a preponderance of the evidence,¹ the proper standard for affected person analysis is distinct.

OPIC agrees that the Austin Court of Appeals has determined that the standard applied to the consideration of a plea to the jurisdiction in Texas courts is also the

¹ 30 TAC §80.17(a).

standard applicable to the Commission’s consideration of a hearing request—namely, the same standard applicable to the consideration of a motion for summary judgment in Texas courts.² Therefore, where “the evidence creates a fact question regarding the jurisdictional issue, then the trial court cannot grant the plea to the jurisdiction, and the fact issue will be resolved by the fact finder.”³ “In a case in which the jurisdictional challenge implicates the merits of the plaintiffs’ cause of action and the plea to the jurisdiction includes evidence, the trial court reviews the relevant evidence to determine if a fact issue exists.”⁴

OPIC finds that Mr. LeTourneau and Mr. Rosborough raised a question of fact as to whether they could potentially be affected by the over 600 million gallons per day of discharge from the Pirkey Plant—which will contain bioaccumulative pollutants such as Selenium and Barium—by virtue of their property interests and recreational uses of the Sabine River, Hatley Creek, Brandy Branch Creek and Brandy Branch Reservoir.⁵ A question of fact relating to potential impact is the solitary burden placed on protestants to confer standing in a contested case hearing. A member of the public need not prove their case on the merits to have their day in court investigating the protectiveness of a permit which may impact their health and property. It is only by application of the incorrect standard—that the protestants must prove their interests *would* be impacted by a preponderance of the evidence—that the honorable ALJ reached the conclusion

² See *City of Waco v. Texas Comm’n on Envtl. Quality*, 346 S.W.3d 781, 801-02 (Tex. App. – Austin 2011); *Heat Energy Advanced Technology, Inc. et al., v. West Dallas Coalition for Environmental Justice*, 962 S.W.2d 288 (Tex. App. – Austin 1998).

³ *Miranda*, 133 S.W.3d at 227-28.

⁴ *Id.* at 227.

⁵ See Attached Exhibit, “Office of Public Interest Counsel’s Initial Brief on Affectedness,” for further discussion on this point.

that Mr. LeTourneau and Mr. Rosborough do not meet the standard for affected persons entitled to a contested case hearing.

II. Recreational Interests

OPIC further excepts to the ALJ's conclusion regarding recreational interests as a basis to confer standing.⁶ OPIC agrees that the Court of Appeals decision in *Save Our Springs* stands for the proposition that harm to recreational interests is sufficient to establish standing in all cases arising under statutes that protect environmental, scientific, or recreational interests, not just in those cases where the statute has a specific cause of action. This case concerns a TPDES permit and therefore implicates environmental interests protected by statute. Recreational, aesthetic, and environmental harms constitute "particularized, legally protected interests" within the statutory and regulatory context of this permitting decision, and protestants have alleged harm to legally protected recreational and environmental interests sufficient to confer standing under TWC §5.115(a).⁷

Furthermore, the interests of Mr. LeTourneau and Mr. Rosborough, as members of the public who actively recreate on the creeks and rivers that will be receiving discharge from the Pirkey Plant, constitute sufficiently concrete and particularized interests that distinguish their interest from that of the general public. Although members of the public have *theoretical* access to the same places as Mr. LeTourneau and Mr. Rosborough, it is Mr. LeTourneau and Mr. Rosborough's *active* use and recreation of

⁶ Proposal for Decision, Page 19.

⁷ See Attached Exhibit, "Office of Public Interest Counsel's Initial Brief on Affectedness," for further discussion on this point.

these areas that makes their interest concrete and particularized rather than theoretical—ensuring that the case is the subject of an actual controversy.⁸

III. Conclusion

OPIC finds that the ALJ did not apply the correct burden of proof in this proceeding, and did not give proper consideration to the recreational interests of Mr. Rosborough and Mr. LeTourneau. OPIC therefore recommends that the Commission not adopt the PFD and that the case be remanded to SOAH for a contested case hearing.

Respectfully submitted,

Blas J. Coy, Jr.
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for By: *Eli Martinez*
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⁸ *Waco*, 346 S.W.3d at 801-02 (standing under Texas law is concerned with ensuring that “the particular plaintiff has a sufficient personal stake in the controversy to assure the presence of an actual controversy that the judicial declaration sought would resolve”).

CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2012 the Office of Public Interest Counsel's Reply to Exceptions to the PFD was filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail, electronic mail, or by deposit in the U.S. Mail.

jm *Via M&Wletter*
Eli Martinez

EXHIBIT

SOAH DOCKET NO. 582-12-5301

TCEQ DOCKET NO. 2011-2199-IWD

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

**BEFORE THE STATE OFFICE OF
ADMINISTRATIVE HEARINGS**

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S INITIAL BRIEF ON
AFFECTEDNESS**

To the Honorable Administrative Law Judge RICHARD R. WILFONG:

The Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (Commission or TCEQ) files this Initial Brief on Affectedness in the above-referenced matter and respectfully shows the following.

I. Procedural Background

On March 7, 2012, the Commission considered during its open meeting a request for hearing filed by Sierra Club and Public Citizen concerning the application by Southwestern Electric Power Company (SWEPCO) for renewal and major amendment to TPDES Permit No. WQ0002496000 for continued authorization of discharges associated with the Henry W. Pirkey Power Plant in Harrison County (the plant). After evaluation of all relevant filings, the Commission determined to refer to the State Office of Administrative Hearings (SOAH) the hearing requests of Sierra Club and Public Citizen (collectively, requestors) for a determination on whether the requestors are affected persons pursuant to applicable laws.

On May 22, 2012, a hearing was convened at SOAH in Austin, Texas. SWEPCO, Public Citizen, Sierra Club, the Executive Director of the Commission (ED), and OPIC

participated in the proceedings. After reviewing the evidence presented at hearing, OPIC offers the following analysis in support of the finding that both Public Citizen and Sierra Club are affected persons under 30 Tex. Admin. Code §55.203 and Water Code §5.115, and therefore entitled to party status.

II. Sierra Club and Public Citizen Are Affected Persons

A group or association is eligible to request a hearing on a permit only if (1) one or more members of the group or association would otherwise have standing to request a hearing in their own right; (2) the interests the group or association seek to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of the individual members in the case.¹

A. Richard LeTourneau and Clint Rosborough are Active Members of Sierra Club and Public Citizen

Richard LeTourneau and Clint Rosborough appeared and testified on behalf of Public Citizen and Sierra Club. Messrs. LeTourneau² and Rosborough³ stated under oath that they seek a contested case hearing and are current members of both organizations. Because Mr. LeTourneau and Mr. Rosborough are members of both organizations, either individual may serve as the basis for organizational standing of either group.

B. Both Richard LeTourneau and Clint Rosborough have Standing to Pursue a Hearing in their Own Right

i. Affected Persons Under the Texas Administrative Code

¹ 30 TAC §55.205

² Transcript, Page 20, Lines 5-9.

³ Transcript, Page 51, Line 25 to Page 52, Lines 1-4.

An individual has standing to request a hearing if they are determined to be an affected person. An affected person is one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application.⁴

Factors considered in determining whether a person is an affected person under the Texas Administrative Code include, but are not limited to:

- (1) whether the interest claimed is one protected by the law under which the application will be considered;
- (2) distance restrictions or other limitations imposed by law on the affected interest;
- (3) whether a reasonable relationship exists between the interest claimed and the activity regulated;
- (4) likely impact of the regulated activity on the health and safety of the person, and on the use of property of the person;
- (5) likely impact of the regulated activity on use of the impacted natural resource by the person; and
- (6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.⁵

Because an interest common to members of the general public does not qualify as a personal justiciable interest,⁶ persons seeking a hearing must show that their interests are more likely to be adversely affected than those of the general public.⁷ However, a

⁴ 30 TAC §55.203(a)

⁵ 30 TAC §55.203(c)

⁶ *Id.*

⁷ *Id.* at 803.

requester does not need to show they will ultimately prevail on the merits; only that they will “potentially suffer harm or have a justiciable interest that will be affected.”⁸

ii. *Mr. LeTourneau and Mr. Rosborough have Recreational Interests in the Sabine that may be Affected by the Proposed Permit*

1. Mr. LeTourneau's Recreational Interests

Over the last 40 years,⁹ Mr. LeTourneau has used, and continues to use, an area of the Sabine River between Highway 149 and Highway 43¹⁰ to kayak, canoe, boat, fish, hunt, camp and swim.¹¹ Mr. LeTourneau testified that he consumes the fish that he catches during his fishing trips. Exhibit P-1 indicates that the identified area includes the confluence of the Sabine River with both Hatley Creek and Brandy Branch Creek—waterways which will receive discharge from the Pirkey Plant.¹²

Additionally, Mr. LeTourneau testified that on occasion during his canoeing and kayaking activities he travels approximately half mile up Hatley Creek in the direction of the Pirkey Power Plant outfalls.¹³ Mr. LeTourneau uses this segment of the River for these activities approximately 8-12 times per year.¹⁴

Mr. LeTourneau also uses a section of the Sabine River between Farm to Market 2517 and Highway 84¹⁵ approximately 45-50 times per year¹⁶ where he engages in fishing, kayaking, boating, swimming, and hunting.¹⁷

⁸ *United Copper Industries v. Grissom*, 17 S.W.3d 797, 803 (Tex.App.—Austin 2000, pet. dismissed), citing *Heat Energy Advanced Technology, Inc. v. West Dallas Coalition for Environmental Justice*, 962 S.W.2d 288 (Tex.App.—Austin 1998).

⁹ Transcript, Pg. 21, Line 13.

¹⁰ Transcript, Pg. 21, Lines 16-17.

¹¹ Transcript, Pg. 21, Lines 9-10.

¹² See Exhibit App-5, indicating that Hatley Creek will receive discharge from Outfalls 004, 005, & 006; Brandy Branch will receive discharge from Outfall 003. Both Hatley Creek and Brandy Branch flow into the Sabine River.

¹³ Transcript, Pg. 43, Lines 12-18.

¹⁴ Transcript, Pg. 24, Line 6.

¹⁵ Transcript, Pg. 26, Lines 10-11.

1. Mr. Rosborough's Recreational Interests

Mr. Rosborough uses the River Property, discussed further *infra*, to recreate on the Sabine River.¹⁸ In addition to sharing a southern border with the Sabine River, the River Property nearly adjoins Hatley Creek, which will receive discharge from Outfalls 004, 005, & 006.¹⁹ He maintains a boat ramp, camp site, and travel trailer on the property, from which he boats and hunts.²⁰ Mr. Rosborough consumes the game he hunts on this property.²¹

In addition, Mr. Rosborough is a member of Sportsman Bass Club, which holds yearly tournaments in Brandy Branch Reservoir.²² As indicated *supra*, Brandy Branch Reservoir will receive discharge from Outfall 003 in the form of storm water from the lignite runoff pond.²³ Mr. Rosborough testified that he intends to participate in these tournaments in the future.²⁴

iii. Recreational Interests are a Sufficient Basis to Confer Standing

The evidence presented at trial demonstrates that both Mr. LeTourneau and Mr. Rosborough have a legal justiciable interest in the recreational use of the Sabine River and a small segment of Hatley Creek by way of actual, recurring, and frequent recreation. The reach of the Sabine utilized by Mr. LeTourneau and Mr. Rosborough will receive discharge from the proposed permit. Degradation of the Sabine River from the permitted discharges may reduce the diversity and beauty of the areas Mr. LeTourneau and Mr. Rosborough frequent, thereby discouraging future recreation in

¹⁶ Transcript, Pg. 26, Line 14.

¹⁷ Transcript, Pg. 26, Line 17

¹⁸ Pg. 57, Lines 16-20.

¹⁹ See Exhibit App-5

²⁰ *Id.*

²¹ Pg. 57, Lines 11-13.

²² Pg. 71, Lines 18-25.

²³ See Executive Director's Response to Comments, Pg. 2.

²⁴ *Id.*

the area. These recreational, environmental, and aesthetic interests in the Sabine River are the kinds of interests recognized under both the Texas Water Code²⁵ and the Clean Water Act²⁶ implementing the Texas Pollution Discharge Elimination System ("TPDES") program.

It is important to note that, when considering a TPDES permit application, the TCEQ is exercising delegated authority to implement the federal Clean Water Act and has committed to implementing the permitting program consistent with that federal statute.²⁷ The Memorandum of Agreement between TCEQ and the U.S. EPA governing the delegation states:

The TNRCC shall operate the TPDES program in accordance with the Clean Water Act as amended, applicable federal regulations, applicable TNRCC legal authority, Title 30 Texas Administrative Code, and taking into consideration published EPA policy. The TNRCC has the primary responsibility to establish the TPDES program priorities, so long as they are consistent with Clean Water Act and NPDES goals and objectives.²⁸

The EPA's Clean Water Act regulations require states that assume permitting authority, as Texas has, to allow for judicial review "sufficient to provide for, encourage, and assist public participation in the permitting process." More specifically, those regulations provide:

²⁵ See, e.g., Tex. Water Code §26.003 ("It is the policy of this state and the purpose of this subchapter to maintain the quality of water in the state consistent with the public health and enjoyment."); Tex. Water Code §5.012 ("The commission is the agency of the state given primary responsibility for implementing the constitution and laws of this state relating to the conservation of natural resources and the protection of the environment.")

²⁶ Federal Clean Water Act, §101(a)(2).

²⁷ See 33 Tex. Reg. 1850 (Feb. 29, 2008) ("On September 14, 1998, TCEQ received delegation authority from the United States Environmental Protection Agency (EPA) to administer the National Pollutant Discharge Elimination System (NPDES) program under the TPDES program. As part of that delegation, TCEQ and EPA signed a Memorandum of Agreement (MOA) that authorizes the administration of the NPDES program by TCEQ as it applies to the State of Texas.")

²⁸ 2008 Memorandum of Agreement Between the Texas Natural Resources Conservation Commission and the U.S. Environmental Protection Agency, Region 6, Concerning the National Pollutant Discharge Elimination System, Exhibit D, at 2.

A State will meet this standard if State law allows an opportunity for judicial review that is the same as that available to obtain judicial review in federal court of a federally-issued NPDES permit (see § 509 of the Clean Water Act). A State will not meet this standard if it narrowly restricts the class of persons who may challenge the approval or denial of permits (for example, if only the permittee can obtain judicial review, if persons must demonstrate injury to a pecuniary interest in order to obtain judicial review, or if persons must have a property interest in close proximity to a discharge or surface waters in order to obtain judicial review.)²⁹

A recreational, environmental, or aesthetic interest can suffice to provide standing in federal court to enforce a water quality permit or challenge an agency decision under the Clean Water Act. For instance, in *Sierra Club, Lone Star Chapter v. Cedar Point Oil Company, Inc.*,³⁰ the court held that Sierra Club members who recreated in Galveston Bay and expressed concerns that wastewater discharge would impair the quality of the bay had sufficiently alleged "injury in fact" to support standing to enforce the permit limits. The Supreme Court held in *Friends of the Earth Inc. v. Laidlaw Envtl. Svcs. (TOC), Inc.*,³¹ that standing is established where plaintiffs are discouraged from recreating in a certain area due to reasonable concerns about pollution, or where their enjoyment of the resource is diminished by such concerns.³²

Furthermore, Travis County district courts have clearly articulated the proposition that the right to participate in administrative proceedings should be

²⁹ 40 C.F.R. § 123.30

³⁰ 73 F.3d 546, 556 (5th Cir. 1996)

³¹ 528 U.S. 167, 180-83 (2000)

³² See also *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 155 (4th Cir. 2000) (reasonable fear of health risks resulting from recreational use of water sufficient even without evidence of actual harm to the waterway); *Am. Bottom Conservancy v. U.S. Army Corps of Engineers*, 650 F.3d 652, 658 (7th Cir. 2011) (diminution of enjoyment of birdwatching activity is enough to confer standing to challenge Army Corps of Engineers' issuance of wetland fill permit, even if plaintiffs do not stop birdwatching on the site); *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972) (holding that environmental plaintiffs adequately allege injury in fact by stating that they use the affected area and are persons "for whom the aesthetic and recreational values of the area will be lessened" by the challenged activity).

construed liberally to encourage different points of view.³³ In past cases where an unduly narrow view of standing has been taken, the court has reversed on appeal.³⁴ A more liberal construction of standing in administrative proceedings is necessary because of the difference in purpose and in nature between administrative proceedings and judicial proceedings. While judicial proceedings are intended to resolve genuine controversies, administrative tribunals were created to uphold the public interest:

Since administrative proceedings are different from judicial proceedings in purpose, nature, procedural rules, evidence rules, relief available and the availability of review, it is understandable that one's right to appear in an agency proceeding should be liberally recognized. Moreover, administrative tribunals are created to ascertain and uphold the public interest through the exercise of their investigative, rulemaking and quasi-judicial powers. Any stricture upon standing in an administrative agency would thus be inconsistent with the proposition that the agency ought to entertain the advocacy of various interests and viewpoints in determining where the public interest lies and how it may be furthered. The doctrine of standing in the judicial branch serves, however, a different function: it avoids suits where there is no genuine controversy susceptible of judicial resolution and enforcement.³⁵

Although, as stated *supra*, an interest common to members of the general public does not qualify as a personal justiciable interest,³⁶ the actual, continued use of the Sabine River by Mr. LeTourneau and Mr. Rosborough is sufficient to establish a legally

³³ *Fort Bend County v. Texas Parks & Wildlife Comm'n*, 818 S.W.2d 898, 899 (Tex. App.—Austin 1991, no writ).

³⁴ See e.g. *West Dallas Coalition for Environmental Justice v. Texas Natural Resource Conservation Commission*, Cause No. 96-05388 (126th Dist. Ct., 1997); *Holton v. Texas Natural Resource Conservation Commission and City of Sherman*, Cause No. 97-06408 (261st Dist. Ct., 1998); *Citizens for Health Growth and Joe Grissom v. Texas Natural Resource Conservation Commission*, Cause No. 98-060646 (98th Dist. Ct., 1999); *Sierra Club, et al. v. Texas Natural Resource Conservation Commission*, Cause No. 97-07501 (201st Dist. Ct., 1999); *Keith Weaver v. Texas Natural Resource Conservation Commission*, Cause No. 98-04623 (201st Dist. Ct., 1999); and *Save Barton Creek Association v. Texas Natural Resource Conservation Commission*, Cause No. GN1000336 (345th Dist. Ct., 2001).

³⁵ *Texas Ind. Traffic League v. Railroad Comm'n*, 628 S.W.2d 187, 197 (Tex. App.—Austin), *rev'd on other grounds*, 633 S.W.2d 821 (Tex. 1982).

³⁶ *Id.*

protected interest that ensures a legitimate controversy and differentiates their concerns regarding impacts of the proposed permit on Sabine from that of the general public.³⁷

Therefore, because the Clean Water Act and Texas Water Code protect recreational, environmental, and aesthetic interests; because the TCEQ has the responsibility to encourage public participation in the permitting process; because standing in an administrative proceeding should not be construed in an unduly narrow manner; and because Mr. LeTourneau and Mr. Rosborough actually use a potentially affected reach of the Sabine River to recreate, OPIC finds that Mr. LeTourneau and Mr. Rosborough are affected persons.

iv. Mr. LeTourneau and Mr. Rosborough have Property Interests Whose Use May be Impacted by the Permitted Activities

1. Mr. LeTourneau's Property Interests

Mr. LeTourneau has maintained a property interest in the area of the proposed discharge for the past 30 years³⁸ in the form of a year-round lease of land that has "several miles of frontage on the (Sabine) river."³⁹ Mr. LeTourneau testified that he maintains the lease at least in part because he wants to recreate in and otherwise enjoy the waters of the Sabine.⁴⁰

Additionally, Mr. LeTourneau uses a water well on the property that is located approximately 30 feet from the River, and that is built to a depth of 30 feet.⁴¹

³⁷ *Id.* at 803.

³⁸ Pg. 41, Line 5

³⁹ Pg. 41, Lines 3-5

⁴⁰ Pg. 44, Lines 17-20

⁴¹ Pg. 42, Lines 13-15.

2. Mr. Rosborough's Property Interests

Mr. Rosborough owns two tracts of property in close proximity to Hatley Creek,⁴² These parcels were identified as the "river property"⁴³ and Mr. Rosborough's homestead⁴⁴ during the preliminary hearing.

The River Property borders Hatley Creek to the east and the Sabine River to the south.⁴⁵ Mr. Rosborough testified that his family has owned this property for over a hundred years,⁴⁶ and Exhibit P-4 depicts the parcel in an 1871 map of Harrison County,⁴⁷ The River Property is approximately 169 acres large⁴⁸ and experiences inundation from flood waters overflowing Hatley Creek approximately two times per year.⁴⁹ During these events, flood waters cover approximately 95% of the property⁵⁰ and leave sediment deposits after the water recedes.⁵¹ Marshes and sloughs across the property retain water year round from flooding events.⁵² There are two water wells located on the River Property. As discussed *supra*, this property is used for recreational purposes, where Mr. Rosborough maintains a boat ramp, camp site, and travel trailer.

Mr. Rosborough's homestead tract is located near Hatley Creek. This property contains two water wells. The shallow well is used to provide drinking water to Mr.

⁴² These parcels are identified in Exhibits P-2, P-4 & P-9.

⁴³ Pg. 56, Lines 1-5.

⁴⁴ Pg. 68, Lines 21-24.

⁴⁵ See Exhibits P-2, P-4 & P-9

⁴⁶ Pg. 52, Lines 16-19.

⁴⁷ Identified as the "P. Alston Tract"

⁴⁸ Pg. 56, Line 7.

⁴⁹ Pg. 56, Lines 13-15.

⁵⁰ Pg. 56, Lines 16-19.

⁵¹ Pg. 57, Lines 11-13.

⁵² Pg. 57, Lines 6-10.

Rosborough's home, a rental house present on the property, and the commercial beef cattle raised on the property.⁵³

Because these properties are used for recreation and habitation and contain water wells, their use could be altered if the draft permit is not sufficiently protective. These property interests are therefore independent and sufficient justiciable interests that satisfy the requirements of 30 TAC §55.203.

v. A Reasonable Relationship Exists Between the Interests Claimed and the Proposed Regulated Activity

Mr. LeTourneau and Mr. Rosborough are concerned that operation of the Pirkey Plant may contribute to pollution in the areas they frequent and result in negative personal health effects on themselves and the fish they catch and consume.⁵⁴ Mr. LeTourneau and Mr. Rosborough are also concerned that the authorized pollutants may negatively impact their property and the way they use it. The amount of discharge authorized by the draft permit is not insubstantial: releases will occur from at least three outfalls,⁵⁵ one of which will discharge in the amount of 600 million gallons per day.⁵⁶ The sheer enormity of such an operation raises the potential that the requestors will "potentially suffer harm or have a justiciable interest that will be affected."⁵⁷

⁵³ Pg. 69, Lines 6-10.

⁵⁴ Transcript, Pg. 27, Lines 5-10

⁵⁵ See Fact Sheet at 4.

⁵⁶ See Draft Permit at 2.

⁵⁷ *United Copper Industries v. Grissom*, 17 S.W.3d 797, 803 (Tex.App.—Austin 2000, pet. dism'd), citing *Heat Energy Advanced Technology, Inc. v. West Dallas Coalition for Environmental Justice*, 962 S.W.2d 288 (Tex.App.—Austin 1998).

C. The Requestors' Identified Interests are Germane to the Organizational Purpose of Public Citizen and Sierra Club

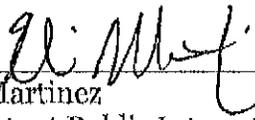
The organizational purpose of Public Citizen includes "the protection of its members from the environmental harms caused by coal-fired power plants, including impacts on water quantity and quality."⁵⁸ The organizational purpose of Sierra Club includes "the protection of water resources, including reductions in water pollution and for water conservation measures."⁵⁹ Mr. LeTourneau and Mr. Rosborough have identified interests in water quality and environmental degradation that are germane to the organizations' purpose, satisfying the requirements of 30 TAC §55.205(2).

III. Conclusion

After reviewing the evidence presented at trial, OPIC recommends that the Administrative Law Judge determine both Public Citizen and Sierra Club are affected persons under 30 Tex. Admin. Code §55.203 and Water Code §5.115 entitled to party status.

Respectfully submitted,

Blas J. Coy, Jr.
Public Interest Counsel

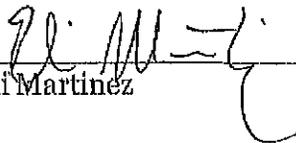
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⁵⁸ Sierra Club and Public Citizen Reply in Support of Contested Case Hearing, at 14.

⁵⁹ Exhibit P-11, Affidavit of Ken Kramer in Support of Sierra Club

CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2012 the Office of Public Interest Counsel's Initial Brief on Affectedness was filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail, electronic mail, or by deposit in the U.S. Mail.



Eli Martinez

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

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