

APPLICATION OF SOUTHWESTERN § BEFORE THE TEXAS
ELECTRIC POWER COMPANY FOR § COMMISSION ON
RENEWAL AND MAJOR AMENDMENT § ENVIRONMENTAL QUALITY
OF TPDES PERMIT NO. WQ0002496000 §

**SIERRA CLUB AND PUBLIC CITIZEN’S EXCEPTIONS TO THE ADMINISTRATIVE
LAW JUDGE’S PROPOSAL FOR DECISION**

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

The Sierra Club and Public Citizen (collectively “Protestants”) hereby file these exceptions to the Administrative Law Judge’s Proposal for Decision (“PFD”) and corresponding proposed order issued August 21, 2012. The ALJ’s recommendation that the Texas Commission on Environmental Quality (TCEQ) deny the contested case hearing request made by the Sierra Club and Public Citizen, on grounds that neither organization is an affected person entitled to party status, is legally and factually flawed and should not be accepted. The Administrative Law Judge misapplied the burden of proof in his determination and discounted critical evidence of the likelihood of an impact on Protestants’ members.

**I. OVERVIEW OF THE CHALLENGED WASTEWATER DISCHARGE PERMIT
AND SIERRA CLUB AND PUBLIC CITIZEN’S REQUEST FOR A CONTESTED
CASE HEARING**

The Henry W. Pirkey Power Plant is a 720 MW coal-burning power plant located near Hallsville, Texas in Harrison County operated by the Southwest Electric Power Company (“SWEPCO”). SWEPCO is seeking a major amendment to the Texas Pollutant Discharge Elimination System (“TPDES”) Permit for the Pirkey Plant (TPDES Permit No.

WQ0002496000). The proposed amended permit will authorize the discharge, through numerous outfalls, of stormwater runoff from landfills containing coal combustion waste, stormwater runoff from its lignite storage pile, metal cleaning wastes, and once-through cooling water, in addition to miscellaneous wastewaters generated in the process of burning coal, scrubbing the flue gases, and otherwise cleaning and maintaining the plant. This wastewater is discharged to two different waterbodies: either an unnamed tributary of Hatley Creek, which is a small intermittent stream on the western side of the plant, or Brandy Branch Reservoir, which is a popular fishing lake that empties into Brandy Branch Creek. Both Hatley Creek and Brandy Branch Creek ultimately join the Sabine River a few miles south of the plant.

Mr. Richard LeTourneau and Mr. Clint Rosborough are two long-time residents of Harrison County who are affected by the discharges from the Pirkey plant. Mr. LeTourneau regularly kayaks and fishes on the section of the Sabine River where it meets Hatley Creek and Brandy Branch Creek, and eats nearly all of the fish that he catches.¹ He typically visits this section of the river between eight and twelve times a year, and stays for at least eight hours each visit and sometimes for up to three days.² He has also paddled on and caught fish in Hatley Creek, going as far as a half mile upstream.³ For over thirty years he has leased a piece of riverfront property further down the Sabine River where he kayaks, canoes, boat, fishes, hunts and camps. He spends many weeks a year at this long-standing lease and uses water from a well on the property that is very close to the river.⁴

Mr. Rosborough owns property very near Hatley Creek and along the Sabine River, which floods regularly when Hatley Creek overflows its banks.⁵ He lives on a second piece of property further to the west, where he has three groundwater wells that he uses for his own

¹ Transcript from May 22, 2012 SOAH Hearing, at 21:8-10; 24:13-17.

² Tr. 24:6-24. He last visited this area of the Sabine River approximately two months ago and intends to return. Tr. 43:19-24. He often visits the river following rainstorms because the fishing is better during those times. Tr. 25:11-23.

³ Tr. 25:15-20; 43:12-17.

⁴ Tr. 26:6-11, 31:3-10.

⁵ Mr. Rosborough has an established campground on the Hatley Creek property that he plans to continue using. Tr. 100:14-18. He occasionally hunts on this property, mostly large game such as white tail deer and feral hogs, which he believes drink water from Hatley Creek and the Sabine River. Tr. 58:3-13 (noting that he keeps the game he hunts for consumption). He has a boat ramp on the Sabine River, and has plans to continue boating in the future, including the section east of the confluence with Hatley Creek. Tr. 100:16-01:24.

domestic and livestock purposes, to irrigate forage hay and a garden, to water his cattle, and to provide water to a rental property that he owns.⁶ Mr. Rosborough has fished for bass in Brandy Branch Reservoir as part of a local fishing club and plans to do so again in the very near future.⁷ Both men are concerned about pollution from the Pirkey plant and how it might affect their health and property interests, and both are members of the Sierra Club and Public Citizen.

On November 4, 2011, Sierra Club and Public Citizen filed a joint request for a contested case hearing concerning SWEPCO's application for renewal and major amendment of its TPDES permit for the Pirkey plant. On March 7, 2012, the TCEQ referred the hearing requests to the State Office of Administrative Hearings "for a determination on whether the requesters are affected persons pursuant to applicable laws." TCEQ Interim Order at 1 (Mar. 13, 2012). The Commission also determined that a number of issues on which Sierra Club and Public Citizen sought a hearing had been raised during the comment period, involved disputed issues of fact, and were relevant and material to the Commission's decision on the permit application. *Id.* at 1-2.

The issues found to be in dispute were: (1) whether the draft permit contains adequate protections for the attainable and designated uses of the receiving waters, and whether it ensures adequate protection of surface water quality; (2) whether the draft permit contains adequate effluent limits and monitoring requirements to ensure the protection of aquatic life in the receiving waters; (3) whether the permit contains adequate effluent limits to control barium and selenium; (4) whether the cooling water intake structure(s) complies with all applicable legal requirements to minimize environmental impacts; (5) whether the Executive Director complied with all applicable Commission rules in performing the anti-degradation review for the permit; (6) whether the draft permit contains adequate protections for groundwater in the area of the plant; and (7) whether or not the pump station at Lake O' the Pines is a cooling water intake structure subject to the Clean Water Act Section 316(b).

⁶ Tr. 69:3-70:17.

⁷ Tr. 71:16-25. He most recently fished in Brandy Branch Reservoir less than two years ago—in August or September of 2010, Tr. 85, and plans to do so on a regular basis in the future. Tr. 99:23-100:18.

In short, the merits of the contested case hearing referred, had it been held, would have been whether the permit complied with legal requirements in the Texas Water Code and the Clean Water Act, which are intended to protect aquatic life in the receiving streams like Hatley Creek, Brandy Branch Reservoir, and the Sabine River, and the health and well-being of individuals who are exposed to those receiving streams and their aquatic life, like Mr. LeTourneau and Mr. Rosborough.

II. PROCEEDINGS AT THE STATE OFFICE OF ADMINISTRATIVE HEARINGS AND THE ALJ'S DECISION

On May 22, 2012, the Honorable Richard R. Wilfong held an evidentiary hearing, which included several hours of testimony by Protestants. Following the hearing, the Applicant, the Executive Director, the Office of Public Interest Counsel, and Protestants, filed opening and reply briefs. In the Proposal for Decision issued August 21, 2012, the ALJ concluded that Sierra Club and Public Citizen had “failed to prove that at least one of their members is an affected person entitled to party status.” PFD at 1. As noted above, Sierra Club and Public Citizen have in common two members who are affected by the discharges from the Pirkey Power Plant—Mr. Richard LeTourneau and Mr. Clint Rosborough.⁸

The ALJ's conclusion that neither Mr. LeTourneau nor Mr. Rosborough is an affected person is based on two legal errors. First, the ALJ applied the wrong burden of proof to the affected person question. Because the question of whether these two individuals are affected persons within the meaning of Texas Water Code §5.115(a) overlaps with the merits of the requested hearing, the ALJ should have applied the standard for consideration of a plea to the jurisdiction, as set out in *Texas Dep't of Parks & Wildlife v. Maria Miranda & Ray Miranda*, 133 S.W.3d 217 (Tex. 2004). Instead, the ALJ applied a preponderance of the evidence standard—essentially requiring Protestants to prove their case on the merits just to get a hearing.

⁸ The ALJ did not address whether Sierra Club and Public Citizen otherwise satisfied the requirements for associational standing, which are set out in 30 Tex. Admin. Code §55.205(a). This permit's compliance with the Texas Water Code is germane to the organizational purposes of the Sierra Club and Public Citizen, which include protection of the state's water resources and promoting clean and sustainable energy. Moreover, the participation of the individual members discussed herein would not be required in a contested case hearing, since only prospective relief is sought. *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 448 (Tex. 1993).

Second, the ALJ failed to recognize the recreational interests of Mr. LeTourneau and Mr. Rosborough as justiciable under Water Code § 5.115(a). In doing so, the ALJ misinterpreted the recent court of appeals case, *Save Our Springs Alliance, Inc. v. City of Dripping Springs*, 304 S.W.3d 871 (Tex. App. – Austin 2010, *pet. denied*), which clearly states 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.

The Sierra Club and Public Citizen urge the Commission to carefully consider the significance of the many recent decisions from the Austin Court of Appeals which instruct that the Commission may not require hearing requestors to prove that they will be harmed by a wastewater discharge permit simply to obtain a hearing on the merits of that permit. Likewise, the Commission should clarify the sufficiency of recreational and environmental interests as the basis for affected person status under the TPDES program.

III. ARGUMENT

A. The ALJ Applied the Wrong Burden of Proof

The PFD states that Protestants must show by a preponderance of the evidence that their members will be affected, citing 30 Tex. Admin. Code §80.17(a).⁹ PFD at 4. Section 80.17(a) states the general rule in a contested case hearing that the burden of proof is on the moving party by a preponderance of the evidence. However, this rule does not apply here. The evaluation of whether a requester is an “affected person” is a determination for which the Texas Legislature and the Commission have developed separate criteria. *See* Tex. Water Code §5.115(a); 30 Tex. Admin. Code §55.203. Texas courts have developed a distinct body of law interpreting these

⁹ The ALJ also cites to the hearing transcript at page 18, where Protestants agreed that they had the “burden of proof” on the question of whether they were affected persons. As a preliminary matter, a party cannot alter the standard of proof in a proceeding by conceding that a different one applies, since the standard of proof is a matter of law, not fact. However, knowing that one party has the burden of proof does not determine the applicable *standard* of proof. As Hearing Requestors fully explained in their two post-hearing legal briefs to the ALJ, their burden was to show a dispute of fact as to the impact of the permitted activity on their members and their members’ use of the receiving waters.

two provisions, and specifically addressing the appropriate standard to apply in determining whether an entity is an “affected person.” See *City of Waco v. Texas Comm’n on Env’tl. 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).¹⁰

In *Waco*, the Austin Court of Appeals held that the standard applied to the consideration of a plea to the jurisdiction in Texas courts is also the standard applicable to the Commission’s consideration of a hearing request. *Waco*, 346 S.W.3d at 824 (adopting standard in *Miranda*, 133 S.W.3d 217). *Miranda*, in turn, had simply adopted the standard applicable to the consideration of a motion for summary judgment in Texas courts, and held that 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.” *Miranda*, 133 S.W.3d at 227-28. “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.” *Id.* at 227.

Under this standard, the following principles must be applied to the Commission’s consideration of a hearing requester’s “affected person” status:

1. The party opposing a requester’s standing has the burden of showing that there is no genuine issue of material fact related to whether a requester is an affected person.

¹⁰ There are two types of fact involved in the affected person determination. In *Bland Independent School District v. Blue*, 34 S.W.3d 547, 554-55 (Tex. 2000), the Texas Supreme Court distinguished between facts that are primarily jurisdictional, and facts that overlap with the substance of the would-be plaintiff’s claims. Some facts here are primarily jurisdictional—such as whether Mr. LeTourneau and Mr. Rosborough are members of Sierra Club and Public Citizen, and whether they use the receiving water bodies and have property and/or economic interests relating to those water bodies. The evidence at the hearing established these facts by the preponderance of the evidence. Other facts relevant to the affected person determination, including the potential impact on Mr. Rosborough and Mr. LeTourneau, implicate the merits of Protestants’ challenge, and are therefore *not* primarily jurisdictional. Their proof at this stage is governed by the framework set out in *Waco*, 346 S.W.3d 781; *Heat Energy Advanced Technology*, 962 S.W.2d at 295; and *United Copper Indus., Inc. v. Grissom*, 17 S.W.3d 797, 803 (Tex. App.–Austin 2000)—not by 30 Tex. Admin. Code § 80.17(a).

2. Evidence favorable to the hearing requester will be taken as true.
3. Every reasonable inference must be indulged in favor of the hearing requester and any doubts resolved in its favor.

The same principles apply to the ALJ's determination of affected person status after an evidentiary hearing. Although the *Waco* court framed the applicable legal standard in the context of a hearing request before the Commission, the underlying principle that a person need not prove the merits of their case in order to demonstrate a potential impact is not new for either the hearing request or in the SOAH context.¹¹

The Austin Court of Appeals has already addressed the standard for consideration of the question of affected person status after a SOAH hearing in *Heat Energy Advanced Technology, Inc. et al., v. West Dallas Coalition for Environmental Justice*, 962 S.W.2d 288 (Tex. App. – Austin 1998). *HEAT* involved a request by an environmental justice coalition for a contested case hearing on the operating permit for a hazardous waste facility. The Commission referred the case to SOAH for a determination on whether the coalition was an affected person. *Id.* at 289. After that hearing, the ALJ held that the coalition had standing, but the Commission substituted its own findings of fact and conclusions of law, and concluded that the coalition was not an affected person.

The Court of Appeals noted that one of the coalition's members had alleged that he could smell odors emanating from the facility, that the odors were stronger in the afternoon, and that the odors affected his breathing. *Id.* at 295. The court held that these allegations, combined with acknowledgments by the facility that it did emit offensive odors, showed that the "facility had the potential to emit odors." *Id.* The court therefore held that the evidence did not support the Commission's determination of the affected person issue, noting that "the Commission's findings suggest that the Coalition would have had to prove the merits of its case against HEAT just to have standing to prove them again in a hearing on the merits," and that the standard for

¹¹ A recent judicial appeal in Travis County also supports the application of the *Waco* standard to an evidentiary hearing on the question of affected person status. See Cause No. D-1-GN-09-000894, *Sierra Club v. Tex. Commission on Environmental Quality and Waste Control Specialists, LLC*, attached as Exhibit A. In that order, the judge concluded that "where disputed facts are relevant to both a hearing requestor's standing and the merits of a permit application, it is the requestor's right to have disputed facts material to the merits of claims and defense determined at a contested case hearing." *Id.*

participating in judicial or administrative proceedings “does not require parties to show they will ultimately prevail in their lawsuits; it requires them to show only that they will potentially suffer harm or have a ‘justiciable interest’ related to the proceedings.” *Id.* (emphasis added).

The *HEAT* court’s determination that that a person seeking a hearing must show only “that they will potentially suffer harm” does not square with the preponderance of the evidence standard applied by the ALJ in this case. It makes no sense to ask whether someone has proven that it is more likely than not that they may potentially suffer harm; instead the decision maker should ask whether there is any evidence that some harm may occur. Likewise, that decision maker must also bear in mind that the impacts need not be significant to render the individual an affected person. *See Waco*, 346 S.W.3d at 822 (noting that this inquiry “is controlled by *HEAT* and *United Copper*, in which we held that it is the existence of *some* impact from a permitted activity, and not necessarily the *extent or amount* of impact, that is relevant to standing”) (emphasis added).

Thus, a person seeking party status need not prove by a preponderance of the evidence that their interests will certainly be harmed. For example, at this stage Protestants need not prove that water quality standards would be violated by the authorized discharges, because that is an issue to be established on the merits. Here, the burden is on the Applicant, SWEPCO, to establish the absence of any factual dispute regarding an impact on Protestants’ interests.

B. Application of the Correct Standard of Proof Would Have Led to a Finding that Sierra Club and Public Citizen Are Affected Persons

The ALJ’s application of the incorrect standard of proof was prejudicial in this matter because it led the ALJ to weigh the evidence about the existence of an impact on Mr. Rosborough and Mr. LeTourneau, rather than determining whether there were disputes of fact about the existence of such an impact. The evidence showed a dispute of fact on several key issues.

For example, there was a dispute as to whether Mr. Rosborough’s 170 acres in the floodplain of Hatley Creek could be affected by contaminated discharge from the Pirkey plant into Hatley Creek. Hatley Creek overflows its banks on average twice a year, inundating approximately 95% of Mr. Rosborough’s property, and leaving water in several marshes and sloughs on the

property.¹² One SWEPCO witness, Mr. Lane Roberts, confirmed that Mr. Rosborough's property could regularly be inundated by Hatley Creek during heavy rainfall events,¹³ and that it was possible for Hatley Creek to flood, but for the Sabine River **not** to flood at the same time,¹⁴ meaning that the waters and sediments carried over Mr. Rosborough's property would be entirely those directly impacted by the Pirkey plant's effluent discharge.

The ALJ disregarded this evidence showing the potential impact of Pirkey's discharges to Hatley Creek on Mr. Rosborough's property. In the section of the PFD that discusses the flooding-related impacts on Mr. Rosborough's property, PFD at 24-25, the ALJ refers only to testimony offered by SWEPCO's witnesses that the floodwaters and sediments deposited on Mr. Rosborough's property could be from either the Sabine River or Hatley Creek, so it would be impossible to identify the source of the floodwaters. The ALJ briefly acknowledges the possibility that, at times, only Hatley Creek could flood, consistent with Mr. Roberts's testimony, but states that even in this "worst case scenario," the concentrations of pollutants that would reach Mr. Rosborough's property would be undetectable. This conclusion ignores the evidence in the record that the concentration of contaminants in the water column is not the only factor relevant to potential harm to Mr. Rosborough's interests.

SWEPCO's own expert, Dr. Lial Tischler, stated that suspended solids in the discharge would be carried by Hatley Creek and distributed over Mr. Rosborough's property as the floodwaters spread out and slow down enough that the suspended solids could settle out.¹⁵ Dr. Tischler also stated that selenium and heavy metals in Pirkey's discharge could become attached to these solids carried by the floodwater, and that hot spots could form where contaminated solids discharged from the facility settle out.¹⁶

¹² Tr. 56:6-23; *see also* Tr. 99:12-22 (Mr. Rosborough's testimony that when Hatley Creek is at flood stage, he can see water from the creek crossing through his property).

¹³ Tr. 232:1-13. He testified that Hatley Creek's peak flow in a ten-year storm event would be 4,870 cubic feet, and that such a flow would come out of the banks of Hatley Creek. Tr. 222:18-24:7.

¹⁴ Tr. 238:6-39:11.

¹⁵ Tr. 330:3-20. Mr. Rosborough likewise testified that he has observed sediments left on his property after floodwaters recede. Tr. 57:11-13.

¹⁶ Tr. 329:8-24; 331:23-25.

With respect to the risk of such hot spots, the ALJ noted that Mr. Rosborough had never tested the soil on his property for contaminants. PFD at 25. But Mr. Rosborough need not prove harm to his property by the discharges from the Pirkey plant—to the level that might entitle him to a remedy in a civil trespass action—in order to have standing for a contested case hearing on a wastewater discharge permit. *See Heat Energy*, 962 S.W.2d at 295 (standard to participate in administrative proceeding “requires [requesters] to show only that they will *potentially* suffer harm”); *United Copper Indus.*, 17 S.W.3d at 803. Furthermore, the question is not whether Mr. Rosborough has been impacted by past discharges, but, instead, whether he would be potentially impacted by operation of the facility as fully authorized in the future. Clearly, the ALJ’s application of a preponderance of the evidence standard was determinative here. Had the ALJ simply asked whether there was a dispute of fact as to impacts on Mr. Rosborough’s property from discharges to Hatley Creek, the answer would have been yes.¹⁷

The ALJ also failed to recognize the existence of a factual dispute regarding whether selenium could pose a risk to aquatic life and users downstream. The ALJ determined that there could be no impact on recreational users downstream because there would be extensive dilution of any discharges. This conclusion ignores evidence that certain of the contaminants discharged from Pirkey are bioaccumulative, particularly selenium, and therefore can have effects in an ecosystem over time even when their concentration in the water column is low.¹⁸ As SWEPCO’s witness Dr. Tischler acknowledged, the selenium that is discharged from Outfalls 004 and 006 can be taken up into aquatic life and passed up the food chain to other organisms that eat the fish.¹⁹ Dr. Tischler noted that one of the concerns with selenium bioaccumulation is the effect on birds that eat the selenium-containing fish, and could not establish that there would be no risk to humans who eat the same fish.²⁰ Indeed, no fish tissue data is available for Hatley Creek to establish that selenium has not bioaccumulated in the aquatic life in that small stream.²¹

¹⁷ The Commission must also bear in mind that the impacts need not be significant to render Mr. Rosborough an affected person. *See Waco*, 346 S.W.3d at 822 (noting that this inquiry “is controlled by *HEAT* and *United Copper*, in which we held that it is the existence of *some* impact from a permitted activity, and not necessarily the *extent or amount* of impact, that is relevant to standing”) (emphasis added).

¹⁸ Tr. 325:3-9.

¹⁹ Tr. 328:4-8.

²⁰ Tr. 328:2-23.

²¹ Tr. 325:10-17.

SWEPCO also acknowledged that selenium could bioaccumulate in the area of the Sabine River where Mr. LeTourneau fishes.²² Despite this record showing a dispute about whether bioaccumulation could pose some risk to either of these individuals' recreational interests, the ALJ concluded that dilution would eliminate all potential harm to those interests.

In sum, the ALJ incorrectly applied a preponderance of the evidence standard to the affected person determination, even though the question of whether Mr. LeTourneau and Mr. Rosborough are affected persons turns on facts that also underlie the merits of the issues referred to SOAH. In such circumstances, the Austin Court of Appeals has made clear that hearing requestors need not prove their affectedness by a preponderance of the evidence, but only show that there is a dispute of fact as to whether they could be affected in some way by the discharges authorized by the permit. Had the *Waco/Miranda* standard been correctly applied here, the ALJ would have concluded that Mr. LeTourneau's and Mr. Rosborough's justiciable interests were affected by the permitted discharges and therefore that the Sierra Club and Public Citizen are entitled to a hearing on the merits of the proposed amended permit.

C. The ALJ's Analysis of Recreational Standing Was Flawed

1. Recreational Interests Are Sufficient to Create Standing in Proceedings to Enforce Statutes Protecting Environmental and Recreational Interests

Mr. LeTourneau and Mr. Rosborough have clear recreational interests in Hatley Creek, the Sabine River, and Brandy Branch Reservoir, waters that will receive discharges from the Pirkey plant under the proposed amended permit. Such recreational interests are legally protectable and justiciable, particularly where the TCEQ's authority to issue the permit is granted by statutes that are intended to protect environmental and recreational interests. Indeed, Judge Rhonda Hurley of the Travis County District Court recently reversed TCEQ's denial of affected person status to an organization that sought to contest the TPDES permit issued to the City of Castroville, where the basis for the organization's standing was the recreational interest of one of its members in the

²² Tr. 326:12-27.

Medina River. *See* Exhibit B, Final Judgment, *Texas Rivers Protection Ass’n v. TCEQ*, Cause No. D-1-GN-09-001517 (Mar. 9, 2011).²³

The Austin Court of Appeals recently discussed the sufficiency of environmental and recreational interests in *Save Our Springs Alliance, Inc. v. City of Dripping Springs*, 304 S.W.3d 871 (Tex. App. – Austin 2010, *pet. denied*). That opinion recognized that statutes protecting “environmental, scientific, or recreational interests” could be enforced by persons alleging injury to those interests. *Id.* at 880-82. For example, it noted that standing had been found in cases brought under the Clean Water Act and the National Environmental Policy Act based solely on recreational interests. However, the court distinguished those types of cases from the one brought by the SOS Alliance, which relied on the state Uniform Declaratory Judgment Act for its cause of action, and alleged violations of substantive laws that did not relate to environmental protections. *Id.* at 882. SOS Alliance’s reliance on the environmental interests of its members who did not own affected property was therefore held to be insufficient because SOS Alliance had “alleged neither an environmental interest provided for or protected by statute.” *Id.*

The ALJ here dismissed the relevance of the *Save Our Springs* opinion to a TCEQ permitting case, reasoning that that opinion had recognized recreational and environmental standing only for Clean Water Act citizen enforcement actions brought under that statute’s express cause of action. PFD at 20. But in fact, the Court of Appeals in *Save Our Springs* specifically stated that environmental or recreational interests could give rise to standing under statutes where a specific cause of action was absent, so long as the statute generally protected environmental or recreational interests:

The few federal cases cited by SOS Alliance not involving the CWA—which has a citizen-enforcement provision—also involved environmental-protection statutes. In *Cantrell v. City of Long Beach*, 241 F.3d 674 (9th Cir. 2001), for example, the federal law sought to be enforced—the National Environmental Policy Act—included a federal policy to “preserve important historic, cultural, and natural aspects of our national heritage.” 241 F.3d at 679 (quoting 42 U.S.C. §4331(b)(4))

²³ Although Judge Hurley’s Final Judgment does not state the basis for her reversal of TCEQ, the briefs submitted to the district court in that matter concern the sufficiency of recreational interests to support standing in such a challenge, whether a recreational interest can be distinct from that of the general public, and whether the terms of EPA’s delegation of Clean Water Act permitting authority to Texas requires TCEQ to recognize recreational interests in TPDES permitting cases. *See* Exhibit C (Texas Rivers Protection Association reply brief).

(2003)). Thus, the Ninth Circuit concluded that the plaintiffs sufficiently alleged an injury in fact for constitutional standing purposes in that they “observed and enjoyed” endangered birds that could be evicted by the defendants' actions. *Id.* at 679–82. In short, each of the federal cases cited by SOS Alliance that found the existence of standing where the alleged harm was to environmental, scientific, or recreational interests involved a federal statute protecting those same interests.

Save Our Springs, 304 S.W.3d at 881.

Thus, *Save Our Springs* recognizes 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, specifically the federal Clean Water Act and the Texas Water Code. *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*[.]”)(emphasis added); *id.* §5.012 (giving TCEQ “primary responsibility for implementing the constitution and laws of this state relating to the conservation of natural resources and the protection of the environment.”). In fact, the water quality standards that determine the effluent limits in the draft permit require the protection of existing uses, 30 Tex. Admin. Code §307.5(b)(1), including “primary contact recreation.” TCEQ has defined this legally protected use to include “swimming, water skiing, diving, tubing, surfing, and the following whitewater activities: kayaking, canoeing, and rafting.” *Id.* §307.3(a)(47). Primary Contact recreation is further presumed to occur in perennial freshwater streams and intermittent freshwater streams. *Id.* §307.4(j)(2)(A).²⁴

Recreational, aesthetic, and environmental harms therefore constitute “particularized, legally protected interests” within this statutory and regulatory context. *SOS Alliance*, 304 S.W.3d at 882. Protestants have alleged harm to legally protected recreational and environmental interests in this permit challenge, and this is a sufficient basis for them to be deemed affected persons under §5.115(a).

²⁴ TCEQ’s water quality standards have been amended since the initial submission of SWEPCO’s application. The changes are not relevant for the purpose of the issues addressed in this brief. Protestant’s reference to the current version of the water quality standards for the purpose of evaluating the issues addressed in this brief does not constitute a position that the newly adopted standards, rather than the prior standards, apply to this application.

2. *Protestants' Recreational Interests Are Distinct From Those of the General Public*

The ALJ further concluded that neither Mr. LeTourneau nor Mr. Rosborough could have a personal justiciable interest based on their recreational use of the waterbodies receiving discharge from the Pirkey plant because their recreational interests are indistinguishable from those of the general public. PFD at 17. It is true that other members of the local community have the opportunity to recreate on these creeks and rivers, and that some do. But this is not the appropriate analysis. The question is whether Mr. Rosborough and Mr. LeTourneau have sufficiently concrete interests in the matter at hand to ensure that the court is not taking jurisdiction over a theoretical dispute. *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”). The Section 5.115(a) requirement that a person’s interest be distinct from that of the general public can therefore be satisfied by showing that an individual regularly exercises a right held by the general public, such that the public right is not hypothetical or abstract as to them, but rather concrete.

Property ownership is not necessary to distinguish such recreational interests from those of the general public. TCEQ administers the TPDES program under delegated authority from the U.S. EPA and has committed to implementing the permitting program consistent with that federal statute. See U.S. EPA, *State Program Requirements; Approval of Application to Administer the National Pollutant Discharge Elimination System (NPDES) Program; Texas*, 63 Fed. Reg. 51,164 (Sept. 24, 1998). Implementing a permitting program that is consistent with the federal statute includes providing opportunities for public participation and judicial review that are equivalent to those available under federal law.²⁵ EPA requires states that assume permitting authority to allow for judicial review “sufficient to provide for, encourage, and assist public

²⁵ Federal law is clear “that environmental plaintiffs adequately allege injury in fact when they aver 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.” *Friends of the Earth, Inc., et al. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 182-183 (2000) (citing testimony of members whose aesthetic and recreational enjoyment of a river were impaired by concerns of pollution and diminished property value). Texas courts regularly “look to the similar federal standing requirements for guidance.” *Brown v. Todd*, 53 S.W.3d 297, 305 (Tex. 2001).

participation in the permitting process,” and specifically prohibit requirements that a person show injury to a pecuniary interest or property interest in order to have standing. 40 C.F.R. §123.30. If property ownership is not a necessary condition of standing to challenge a TPDES permit in Texas courts, then it cannot be required to participate in the administrative contested case hearing process. *See Bosque River Coalition v. Texas Comm’n on Env’tl. Quality*, 347 S.W.3d 366, 375 (Tex. App. – Austin 2011, *pet. filed*) (“the same basic principles governing whether a party has standing to challenge governmental action in court also govern whether a party is an ‘affected person’ entitled to a contested-case hearing”).

The PFD reveals that the ALJ believed he was prevented by the rules of this Commission from concluding that the recreational interests asserted by Mr. Letourneau and Mr. Rosborough could be distinct from those of the general public for purposes of § 5.115(a). PFD at 21. The Sierra Club and Public Citizen urge 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 on a TPDES permit, in light of recent Texas court decisions and the commitment that Texas has made to the U.S. EPA to implement a permitting program with equivalent opportunities for public participation.

3. The Allegations and Record In This Case Are Sufficient to Establish Harm to Protestants Recreational and Environmental Interests

Despite expressing reservations about whether recreational interests are recognized under Texas law as a sufficient basis for standing, the ALJ goes on to conclude that the facts in this case are not “sufficiently particularized and concrete [with respect to Mr. LeTourneau and Mr. Rosborough] to sustain a finding of affectedness based solely on recreational interests.” PFD at 19. Once again, the ALJ imposes a standard of proof on Protestants that is inconsistent with *Waco* and *HEAT*, by requiring Protestants to prove harm by a preponderance of the evidence.

As an initial matter, Protestants note that it is the allegation of injury that must be “concrete” and “particularized,” not the proof of that harm. *See Brown v. Todd*, 53 S.W.3d 297, 305 (Tex. 2001).²⁶ Certainly, Mr. LeTourneau and Mr. Rosborough have testified to their concrete

²⁶ Indeed, proof of harm to the would-be plaintiff is foreign to the concept of standing. *See Hunt v. Bass*, 664 S.W.2d 323, 324 (Tex. 1984) (“question of standing is distinct from the question of

interests in recreation on Hatley Creek, the Sabine River, and Brandy Branch Reservoir. *See supra* pages 2-3.²⁷ The sufficiency of their allegations is apparent by reference to *Sierra Club v. Morton*, 405 U.S. 741 (1972). The ALJ finds it “noteworthy” that Sierra Club was denied standing in *Morton*. PFD at 20-21. However, the reasoning of the U.S. Supreme Court, stated in the excerpt provided in the PFD, readily shows why the allegations of Mr. LeTourneau and Mr. Rosborough are adequate. The Sierra Club lacked standing in *Morton* because it “failed to allege that it or its members would be affected in of their activities . . . by the Disney development. Nowhere in the pleadings or affidavits did the Club state that its members use Mineral King for any purpose.” 405 U.S. at 735. Here, two members of the Sierra Club and Public Citizen have alleged that they use the receiving waters, in contrast to *Morton*, where there was no allegation that the members would use the wilderness area to be developed. Furthermore, those members have alleged that they would be affected in their use of those natural resources.²⁸

However, instead of asking whether there were concrete allegations of cognizable harm, the ALJ requires that Protestants submit concrete evidence of that harm—which would require Protestants essentially to prove an element of their case in order to obtain a hearing on the merits of the permit. This is illogical, and incorrect under *Waco*, which requires that only a dispute of fact be shown at this stage, and *HEAT*, which held that the hearing requestor only needed to show “that they will potentially suffer harm” as a result of the activity authorized by the permit in question.

proof and once the plaintiffs *alleged* an interest peculiar to themselves and distinguishable from the public generally, they were entitled to a factual hearing”) (emphasis added).

²⁷ The fact that Mr. Rosborough does not plan to eat the bass that he catches does not somehow eliminate any legitimate interest that he has in the health and abundance of the bass fishery in Brandy Branch Reservoir, as suggested on page 15 of the PFD.

²⁸ Mr. LeTourneau limits his swimming activity and fish consumption based on what he has learned through reading various papers and hearing discussions from different groups with which he is involved, Tr. 27:14-23, 29:1-20, particularly the Northeast Texas Regional Water Planning Group, which he served on from 1998 to 2010. Tr. 20:16-23. He has also seen fish advisories in the area of the Sabine River around Hatley Creek, including one for selenium several years ago. Tr. 34:16-35:5. One of the factors that TCEQ is to consider in making an affected person determination is the likely impact of the regulated activity on use of the impacted natural resource by the person. 30 Tex. Admin. Code §55.203(c)(5). The PFD does not discuss or acknowledge that the discharges authorized by the proposed amended permit will continue to affect Mr. LeTourneau’s use of the Sabine River.

The risk of harm alleged by Protestants is not speculative. The ALJ's conclusion that there would be no risk of harm to Mr. LeTourneau and Mr. Rosborough's recreational interests is enumerated into five basic points, PFD at 16-17, each of which is undermined by application of the improper standard of proof, as well as other legal and factual errors.

First, that the areas where Mr. Rosborough and Mr. LeTourneau recreate are far downstream. This conclusion overlooks the fact that Mr. Rosborough recreates in Brandy Branch Reservoir, which is a small reservoir that directly receives hundreds of millions of gallons of discharge from the Pirkey plant daily. Moreover, the distance downstream does not, by itself, negate the impact on individuals using that water body. *See Waco*, 346 S.W.3d at 826. According to SWEPCO's own witness, Dr. Tischler, dissolved selenium contained in the discharge could be carried all the way down Hatley Creek and into the Sabine River where Mr. LeTourneau recreates.²⁹ Indeed, Dr. Tischler testified that the selenium in the water column would be carried all the way to Toledo Bend Reservoir, far beyond the section of the Sabine River where Mr. LeTourneau has his camp.³⁰ As the Austin Court of Appeals held in *Texas Natural Resource Conservation Commission v. Grissom*, the demonstrated potential for a contaminants from a facility to reach the hearing requester in any concentration is adequate to justify a finding that a person is affected; a determination of whether that contaminant will be present in a dangerous concentration is properly an issue for the hearing on the merits.³¹

Second, that there would be extensive dilution of any discharges authorized by the proposed amended permit. As discussed above, this conclusion ignores evidence that certain of the contaminants discharged from Pirkey are bioaccumulative and therefore can affect an ecosystem over time even if their concentration in the water column is low. Moreover, because Mr. LeTourneau is especially likely to kayak and fish on the affected section of the Sabine River and Hatley Creek immediately following a rainstorm,³² which is also the time when discharge from Pirkey's impoundments is most likely,³³ there is an increased likelihood that he will be exposed

²⁹ Tr. 322:16-323:9.

³⁰ Tr. 322:21-23:2.

³¹ *Grissom*, 17 S.W.3d 797, 803 (Tex. App. – Austin, 2000, pet. dism'd).

³² Tr. 25:11-23.

³³ *See* SWEPCO Response, *supra* note 3, at 9-10 (stating that Pirkey discharges enter the Sabine River “only during or immediately after significant storm events”).

to pollutants in the water column and contaminated sediments stirred up by fast-moving flood waters.

Third, that the effluent limits in the proposed amended permit are designed to protect aquatic life, recreation, and human health, under the worst-case conditions. As an initial matter, this conclusion is irrelevant to the question at hand. Whether a discharge will cause a violation water quality standards intended to prevent the *impairment* of a use such as recreation is a wholly separate question from whether those uses will merely be *impacted*. Furthermore, while it may be true that the law requires permits to contain effluent limits that protect these values, whether the numeric effluent limits and other conditions in the permit are in fact adequate to protect water quality cannot be assumed for the purposes of the affected person determination, because that is an issue to be resolved in a contested case hearing. *See* TCEQ Interim Order ¶3(b)(i)-(iii), (v).

In *Waco*, 346 S.W.3d at 824, the Austin Court of Appeals incorporated into the affected person determination standard the rules applicable on motions for summary judgment, which require that evidence favorable to the hearing requester be taken as true, and that every reasonable inference must be indulged in favor of the hearing requester and any doubts resolved in the requester's favor. For this reason, at the evidentiary hearing, the parties were not permitted to offer evidence on the merits of the proposed amended permit, meaning that evidence calling into the question the bases on which TCEQ had set the effluent limits was not permitted.³⁴ The propriety of the effluent limits in the permit therefore cannot be assumed as the basis for concluding that Protestants have no basis for concern with regard to the authorized discharges.

Moreover, the ALJ's conclusion that the effluent limits are calculated to protect these values ignores that the permit exempts certain discharges from these effluent limits altogether. For example, the permit authorizes unlimited discharge of selenium, a bioaccumulative pollutant with known harmful effects on wildlife, into Brandy Branch Reservoir, from Outfall 003 during 10-year, 24-hour storm events.³⁵ That fact alone shows a likely impact on those who fish in Brandy Branch Reservoir, such as Clint Rosborough.

³⁴ Tr. 18:7-12.

³⁵ Tr. 342:11-17, 350:3-25.

Fourth, that the proposed amended permit does not change any of the effluent limits in the existing permit. While true, this statement is misleading because SWEPCO seeks a major amendment to its permit, including permission to intermittently redirect water from the plant's Ash Pond into the Landfill Pond and therefore to a different outfall, permission to reduce the two-foot freeboard requirement for ponds that provides a critical margin of safety during storm events,³⁶ and reductions in monitoring requirements at three outfalls.³⁷ Each of these changes to the permit has the potential to increase the impact of the Pirkey plant's discharges on the aquatic environment, recreational users of the streams, and property owners. Moreover, any changes between the existing permit and the proposed amended permit are not the focus of the affected person question. As the Austin Court of Appeals made clear in *Waco*: "That the current legal requirements incorporated into the new permit are 'more protective' than in years past is, standing alone, irrelevant." *Waco*, 346 S.W.3d at 822. *Id.* 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 involved in a particular permit application.

Fifth, the water quality standards are being attained in the receiving streams. Similar to the third finding listed above, this finding is answering the wrong question, since the existence of an *impact*, which is the question at this stage, is wholly separate from the existence of an *impairment* of a use. Moreover, the record does not conclusively establish that Pirkey's future discharges, as authorized by the proposed amended permit, could not impair water quality or result in degradation. Although the record contains historical water quality data for the area, there is no information about when these samples were taken from the affected water bodies—specifically, whether these data are based on samples taken following the allegedly "infrequent" discharges from Pirkey.³⁸ Because the Draft Permit authorizes intermittent discharges from a number of outfalls, and because Pirkey allegedly discharges wastewater only intermittently,³⁹ the

³⁶ SWEPCO's own witness acknowledges that the proposed amended permit will be less stringent in one important respect—the reduced freeboard requirement will increase the chance that the facility will have to discharge water from the Landfill Pond during a storm event in order to prevent overflow. Tr. 335:5-336:2.

³⁷ Exhibit ED-E, Fact Sheet at 6-7.

³⁸ Tr. 320:17-321:5.

³⁹ PFD at 15; *see also* Tr. 254:6-13, Tr. 284:12-18, 309:10-13. *See also* ED Exhibit E, Executive Director's Response to Public Comments at 10-11 ("Wastewaters from the Landfill Pond are anticipated to be discharged only intermittently, during large storm events.").

timing of sampling events upon which the state water quality data are based is especially important. If these samples were taken when there had not been a recent discharge, there would be no accurate record of the water quality impacts of those discharges. Additionally, past sampling would only be relevant if it indicated the quality of the receiving water under conditions when the facility was discharging as fully authorized under the terms of the permit. SWEPCO has adamantly taken the position such a scenario has never occurred in the past. Thus, the record does not establish that the state water quality standards are being met at all times when the facility is discharging as fully authorized by the permit.⁴⁰

In addition, whether water quality standards based on designated attainable uses are being met does not address whether the anti-degradation provisions of the Texas Water Quality Standards are being satisfied. Absent a showing of necessity, TCEQ's anti-degradation policy prohibits any degradation of fishable/swimmable waters.⁴¹ Thus, a disputed issue of fact related to the water quality impacts of the proposed amended permit goes to the merits of the application even if the disputed impacts would not rise to the level of violating the designated use criteria. The degradation of water quality relative to the quality of these receiving waters before the Pirkey plant began operating is an impact pertinent to the affected person determination; yet the ALJ does not find that no degradation is occurring, even though that degradation would represent an impact on the recreational interests of Mr. Rosborough and Mr. LeTourneau.

In conclusion, the ALJ's analysis of the potential impacts on Mr. LeTourneau's and Mr. Rosborough's recreational interests is incomplete and based on an incorrect standard of proof. When the proper standard is applied, and the entire record considered fairly, it is clear that Mr. LeTourneau and Mr. Rosborough, and therefore the Sierra Club and Public Citizen, are affected persons.

⁴⁰ Tr. 321:11-25.

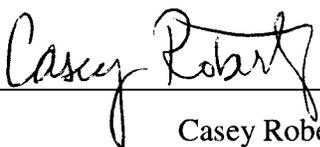
⁴¹ 30 Tex. Admin. Code §307.5(b)(2); *see also* Tex. Water Code §26.003. The baseline for the degradation analysis is the "highest water quality sustained since November 28, 1975," 30 Tex. Admin. Code §307.5(c)(2)(B), which in this case means the quality of Brandy Branch Reservoir, Hatley Creek, and the Sabine River before Pirkey began discharging any wastewater. Tr. at 246:23-25 (Mr. Mills's testimony that the wastewater discharge permit for the plant has been in effect since 1984).

IV. CONCLUSION

For the reasons provided above, Sierra Club and Public Citizen respectfully request that the Commissioners do not accept the Proposed Order and Proposal for Decision submitted by the ALJ. Sierra Club and Public Citizen request that the Commission instead determine that Sierra Club and Public Citizen are affected persons, and refer the case back to the ALJ for a contested case hearing, following a preliminary hearing for the purpose of accepting any further applications for party status, and in order to establish a procedural schedule for a hearing on the merits with regard to SWEPCO's application to renew and amend TPDES Permit No. WQ0002496000.

Dated: September 10, 2012

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, David Abell, certify that on September 10, 2012, that the Sierra Club and Public Citizen's Exceptions to the Administrative Law Judge's Proposal For Decision, was filed electronically with the TCEQ's Office of the Chief Clerk and a complete copy was forwarded to all persons listed on the attached mailing list via U.S. Mail.



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NO. 2011-2199-IWD; PERMIT NO. WQ0002496000

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Exhibit A



261ST DISTRICT COURT

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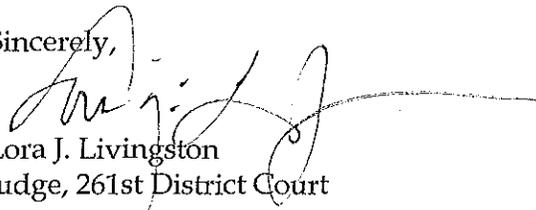
Terry L. Scarborough
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Re: Cause No. D-1-GN-09-000894, *Sierra Club v. Texas Commission on Environmental Quality and Waste Control Specialists, LLC*, in the 201st Judicial District Court of Travis County, Texas

Dear Counsel:

I have received and considered the correspondence from counsel regarding the Order in the above-referenced case, including the request to limit the contested case hearing to the determination of affected person status only. However, the court instructed in *City of Waco v. Tex. Comm'n on Envtl. Quality*, 346 S.W.3d 781, 819 (Tex. App. – Austin 2011, pet filed), that where disputed facts are relevant to both a hearing requestor's standing and the merits of a permit application, it is the requestor's right to have disputed facts material to the merits of claims and defenses determined at a contested case hearing. Accordingly, I have prepared the enclosed Order remanding the case to the TCEQ.

Sincerely,


Lora J. Livingston
Judge, 261st District Court

cc: Ms. Amalia Rodriguez-Mendoza, Travis County District Clerk

CAUSE NO. D-1-GN-09-000894 (Consolidated)

SIERRA CLUB

v.

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY AND
WASTE CONTROL SPECIALISTS, LLC

§
§
§
§
§
§

IN THE DISTRICT COURT OF

TRAVIS COUNTY, TEXAS

98th JUDICIAL DISTRICT

ORDER

On May 8, 2012, the Court conducted a hearing on the merits in this case. Plaintiff Sierra Club, Defendant Texas Commission on Environmental Quality (TCEQ), and Intervenor Waste Control Specialists, LLC (WCS) appeared through their respective counsel.

After considering the pleadings, briefs, evidence and oral arguments of counsel, the Court hereby finds that the TCEQ erred in denying Sierra Club's Hearing Request regarding WCS's Application for RAW License No. R04100. Accordingly, the Court finds that this matter should be remanded to TCEQ to allow Sierra Club to participate in a contested case hearing.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Final Order issued by the TCEQ on January 20, 2009, is REVERSED and REMANDED to the TCEQ.

IT IS FURTHER ORDERED that costs are to be borne by the party that incurred the cost.

All other relief not expressly granted is DENIED.

This judgment resolves all claims of all parties and is intended to be final and appealable.

SIGNED on May 14, 2012.


LORA J. LIVINGSTON
JUDGE PRESIDING

Exhibit B

CAUSE NO. D-1-GN-09-001517

TEXAS RIVERS PROTECTION ASSOCIATION, HARVEY LEE KUNZE, Plaintiffs,

v.

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, Defendant

§
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§
§

IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS, 201st JUDICIAL DISTRICT

Filed in The District Court of Travis County, Texas

MAR 09 2011 BP

At: Amalia Rodriguez-Mendoza, Clerk

FINAL JUDGMENT

On June 4, 2010, the above-captioned case, an administrative appeal, came for hearing on the merits. Plaintiffs, Texas Rivers Protection Association (“TRPA”) and Harvey Lee Kunze, and Defendant, Texas Commission on Environmental Quality (“TCEQ”), appeared by and through their respective counsel.

The Court hereby ORDERS the following: (1) Plaintiffs’ request in their Petition for judicial review that this Court reverse the TCEQ’s order concluding that TRPA and Harvey Lee Kunze lacked standing as affected persons is GRANTED; (2) Plaintiffs’ request in their Petition for judicial review that this Court reverse the TCEQ’s order granting the City of Castroville a major amendment to Permit No. WQ0010952001, authorizing a discharge of a maximum of 900,000 gallons per day or treated wastewater effluent, is GRANTED.

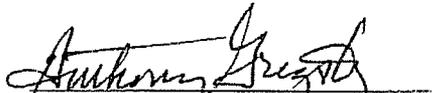
The TCEQ’s order issued March 3, 2009, is hereby REVERSED and this case is REMANDED to the Commission with instructions to proceed to a contested case hearing on the merits of the permit-amendment application before the State Office of Administrative Hearings.

All requested relief not expressly granted is DENIED. This judgment is intended to resolve all the claims of all the parties and to be final and appealable.

SIGNED this 9 day of March, 2011.


JUDGE RHONDA HURLEY
98TH DISTRICT COURT

APPROVED AS TO FORM ONLY:


Anthony Grigsby
Assistant Attorney General
Envtl. Prot. & Admin. Law Div.
Representing the TCEQ


Bill Bunch
SOS Alliance, Inc.
Representing the TRPA and Mr. Kunze

Exhibit C

CAUSE NO. D1-GN-09-001517

| | | |
|--------------------------------|---|-------------------------------------|
| TEXAS RIVERS PROTECTION | § | |
| ASSOCIATION, HARVEY LEE KUNZE, | § | |
| Plaintiffs, | § | IN THE DISTRICT COURT |
| | § | |
| v. | § | OF TRAVIS COUNTY, TEXAS, |
| | § | |
| TEXAS COMMISSION ON | § | 201 st JUDICIAL DISTRICT |
| ENVIRONMENTAL QUALITY, | § | |
| Defendant | § | |
| | § | |

**REPLY BRIEF OF PLAINTIFFS TEXAS RIVERS PROTECTION
ASSOCIATION AND HARVEY LEE KUNZE**

TO THE HONORABLE DISTRICT JUDGE RHONDA HURLEY:

Plaintiffs Texas Rivers Protection Association (“TRPA”) and Harvey Lee Kunze now file this reply to the response brief of Defendant Texas Commission on Environmental Quality (“TCEQ”). In this administrative appeal, Plaintiffs challenge a TCEQ order denying TRPA and Mr. Kunze standing to contest a major amendment to the City of Castroville’s wastewater permit, and respectfully reply to TCEQ’s arguments as follows.

I. TCEQ Confuses the Standing Inquiry with the Merits of the Case

The TCEQ’s position on standing implicitly and explicitly goes against two crystal clear principles of standing law expressed by the Texas Supreme Court. The first is that “*the question of standing is distinct from the question of proof* and once the plaintiffs alleged an interest peculiar to themselves and distinguishable from the public generally, they were entitled to a factual hearing.” *Hunt v. Bass*, 664 S.W.2d 323, 324 (Tex.1984) (emphasis added). The second point is that “[s]tanding focuses on the

question of *who* may bring an action” *Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d 849, 851 (Tex. 2000) (emphasis added).

In this case, a hearing on the merits would determine whether the proposed wastewater discharge will harm the health of downstream owners, swimmers, fish, wildlife, or the public—and whether the permit application should be denied or further conditioned to protect these interests. Standing, on the other hand, deals primarily with whether Mr. Kunze (and by extension TRPA) is the proper person to bring the contested case, not whether he can ultimately prevail on the claims asserted.

At the standing stage, it is only “potential harm” that must be shown, not actual harm. *Texas Rivers Protection Assoc. v. Texas Natural Resource Conservation Comm’n*, 910 S.W.2d 147, 152 (Tex. App.—Austin 1995) [hereinafter “TRPA”]. The regulation itself talks about “likely impacts.” 30 TAC §55.203(c). Contrary to TCEQ’s position, Plaintiffs were not required to have Mr. Kunze testify as to facts such as “the likely concentration of the pollutant at his wife’s property” caused by the proposed wastewater discharge. TCEQ Response Brief at 9. While proper in a hearing on the merits (where it would most likely be offered through expert testimony), proof of such facts does not belong in the threshold inquiry of standing. “In fact, it is not proper for the court to consider the likelihood of success on the merits in determining the plaintiff’s standing to proceed.” *Hill v. City of Houston, Texas*, 764 F.2d 1156, 1159-60 (5th Cir. 1987).

The ALJ, the Commissioners, and the attorney for the TCEQ Executive Director all recognized that if Mr. Kunze owned land at roughly one mile downstream from the wastewater discharge point, that there would be, *ipso facto*, a reasonable risk of harm to that riparian property that he would be entitled to “affected person” status. The ALJ even

stated that other TRPA members, some of whom own property much farther downstream than the Kunzes, would qualify as “affected persons.” *See Tr.* at 13, Appx. Tab 4, Plaintiffs’ initial brief. Having large amounts of sewage dumped into a small stream that was previously sewage-free a short distance upstream of your family’s property will, as a matter of common sense, interfere with and cause concern about your use and enjoyment of that property for swimming and fishing in the stream, and for drinking and home use of water from a shallow well adjacent to the stream. Mr. Kunze’s testimony and other evidence establish these points sufficiently and without contradicting evidence.

The standing inquiry must focus only on who should be able to bring a contested case, and not on whether claims on the merits are likely to be successful. In this case, Mr. Kunze is the quintessential individual entitled to standing. The United States Supreme Court has repeatedly “held that environmental plaintiffs adequately allege injury in fact when they aver 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.” *Friends of the Earth, Inc., et al. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 182-183 (2000) (citing testimony of members whose aesthetic and recreational enjoyment of a river were impaired by concerns of pollution and diminished property value).

Mr. Kunze’s testimony (discussed on pgs. 5-6 of Plaintiff’s initial brief) more than adequately established standing by alleging multiple concerns about negative impacts to water quality from the proposed wastewater discharge and multiple interests that were sufficiently distinguishable from the general public. To require Plaintiffs to marshal proof of facts such as the likely concentration of pollutants near the Kunze property would be to impose “unreasonable obstacles” for obtaining a contested case.

See Texas Ass'n of Bus. v. Texas Air Control Bd., 852 S.W.2d 440, 447 (Tex. 1993) (stating that the first prong of the associational standing test—whether members have standing to sue in their own behalf—is not meant to “impose unreasonable obstacles to associational representation”).

II. The Texas Supreme Court Has Long Recognized Recreational Interests Are Sufficient to Establish Standing

Recreational interests, even without an associated property right, are adequate to demonstrate a “justiciable interest.” The Texas Courts have long held and repeatedly affirmed that for standing purposes “the harm may be economic, recreational, or environmental.”¹ The federal courts have repeatedly treated a recreational interest alone as sufficient to demonstrate standing.² The federal courts have never required that some other interest accompany a recreational interest for it to be considered a valid basis for standing, and the TCEQ has never been upheld in taking such a position when judicially challenged on the issue.

As noted by the Office of Public Interest Counsel at the Commission’s meeting, the case at hand is simply a repeat of the matter involving the application of Eastman Chemical Company for an industrial waste discharge permit. *See Tr.* at 12, Appx. Tab 4, Plaintiffs’ initial brief. In that case, the TNRCC attempted to deny standing to an

¹ *See, e.g.: TRPA; Dennis Nausler and Nausler Investments, L.L.C. v. Coors Brewing Co. and Golden Distributing Enterprises, L.P.*, 170 S.W.3d 242, 248 (Tex. App. – Dallas 2005 no writ); *Cornyn v. Fifty-Two Members of the Schoppa Family*, 70 S.W.3d 895, 900 (Tex. App. – Amarillo 2001 no writ); *City of Bells v. Greater Texoma Utility Authority*, 790 S.W.2d 6, 11 (Tex. App. – Dallas 1990, writ denied); *Billy B. v. Board of Trustees of the Galveston Wharves, et al.*, 717 S.W.2d 156 (Tex. App. – Houston [1st] 1986 no writ); *Super Wash, Inc. v. City of White Settlement*, 131 S.W.3d 249, 255 (Tex. App. – Fort Worth 2004 pet. granted); *Polaris Industries, Inc. et al. v. Larry McDonald*, 119 S.W.3d 331 (Tex. App. – Tyler 2003 no writ); *Assoc. Gen. Contractors, Inc. v. City of Corpus Christi*, 694 S.W.2d 581, 581-82 (Tex. App.-Corpus Christi 1985, no writ).

² *See, e.g.: Lujan v. National Wildlife Federation*, 497 U.S. 871 (U.S. 1990); *Laidlaw*, 582 U.S. 167, 180 (U.S. 2000); *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546, 556 (5th Cir. 1996) (standing demonstrated by members who used Galveston Bay for various recreational activities, including swimming, canoeing, and bird watching.)

individual whose recreational interest was fishing on the Sabine River downstream of the proposed discharge. The TCEQ was overturned on appeal in *Keith Weaver v. Texas Natural Resource Conservation Commission*, Cause No. 98-04623 (201st Dist. Ct., 1999).

The TCEQ wrongly states on pg. 9 of its brief that “[t]he Texas Supreme Court adopted the holding that (at least for judicial standing) a recreational interest is insufficient to distinguish a person’s alleged special injury from the general public’s interest,” citing the appellate cases of *San Antonio Conservation Society v. City of San Antonio*, 250 S.W.2d 259 (Tex. Civ. App. Austin 1952, writ ref’d), *Save Our Springs Alliance, Inc. v. City of Dripping Springs*, No. 03-04-00683-CV, 2010 WL 521027, at *6 (Tex.App.-Austin 2010, no pet. h.). This statement rather misleadingly suggests that a recreational interest can never establish standing, when what the courts found in those cases was that the recreational interest at issue was not sufficiently distinguishable from the public so as to establish standing. *See e.g. Save Our Springs Alliance, Inc.*, 2010 WL 521027, at *6 (“there is nothing to distinguish the environmental, scientific, or recreational concerns of SOS Alliance's members from the same concerns experienced by the public in general”).

Given the “concrete and particularized” nature of injury to Mr. Kunze’s recreational interests (more than adequately proven up at the preliminary hearing), it is nothing more than a straw man argument to claim that conferring standing on Plaintiffs in this case would amount to a “free pass” for any member of public to participate in any contested case. It is illogical, indefensible, and inequitable to hold that Mr. Kunze, who swims and fishes a short distance downstream from a very large sewage plant, does not have standing to contest a proposed discharge from that sewage plant. Others who have

the right to enjoy the Medina River may not avail themselves of that right—but those are not the facts here. While the Plaintiffs have shown other independent bases for standing (e.g. Mr. Kunze’s authority to act for his wife in regards to the riverfront property), it is especially important to groups like TRPA that Mr. Kunze be afforded the right to defend his own recreational interests by being able to pursue a contested case on the basis of injury in fact to such interests.

III. The 1995 and 1999 Amendments to Tex. Water Code § 5.115(a) Did Not Narrow the Range of “Affected Persons”

Contrary to TCEQ’s assertions, the 1995 and 1999 amendments to Tex. Water Code § 5.115(a) did not “narrow the range of persons who could qualify for contested case hearings.” What the amendments did with respect to § 5.115 were: (1) in 1995’s S.B. 1546, codify existing principles of standing and require TCEQ’s predecessor agency TNRCC to adopt rules specifying factors to consider in determining “affected person” status; and (2) in 1999’s H.B. 801, actually expanded the right to a contested case hearing by deleting a provision that allowed TNRCC to deny hearings at its discretion if the Commission found a request was “not reasonable” or “not supported by competent evidence.” In this case, the TCEQ seeks to reintroduce these deleted phrases in order to erect its own view of what evidence is “competent” or “reasonable.” The plain language of these bills (included in Appx. E to TCEQ’s response brief) does not support TCEQ’s forced reading.

The actual legislative history of Water Code § 5.115(a) reveals that the legislature intended the term “affected person” to be interpreted with the broader scope advocated by Plaintiffs. The primary author of 1995’s S.B. 1546 was State Senator Teel Bivins. When discussing the Conference Committee Report for the Bill on the Senate floor, Senator

Bivins noted that the bill was intended to create a statutory basis for TNRCC to adopt rules regarding affected parties. He stressed, however, that the statute was intended to reflect the TNRCC's current practice and existing case law on the issue. See Attachment A to this reply brief, Floor Debate of Senate Bill 1546, May 9, 1995. TNRCC's practice at the time of this bill's passage was to foster the broad participation of the public in contested case hearings. See e.g. *Fort Bend County v. Texas Parks & Wildlife Comm'n*, 818 S.W.2d 898, 899 (Tex. App.—Austin 1991, no writ) (“the right to participate in agency proceedings is liberally construed in order to allow the agency the benefit of diverse viewpoints”).

On pgs. 13-14 of its response brief, TCEQ cites to *Rawls v. TCEQ* to support its argument that “while the legislature narrowed participation in TCEQ contested cases, it expanded the public-comment procedure to require the Agency to consider and respond to differing viewpoints.” There is no such relationship between the contested case provisions and the public comment provisions. In fact, one of the main points of *Rawls v. TCEQ* was that “the two are separate, distinct processes which serve different purposes.” 2007 WL 1849096 at *2. It may be that the public comment provisions are more widely applicable than the test for standing set forth in the contested case provisions, but there is no indication that the former provisions were meant to compensate for the asserted narrowing in the latter. Again, this is a forced reading by TCEQ that does not represent any legislative intent. If anything, the addition of the public comment provisions in 1999 simply expanded public participation in matters before the TCEQ while not changing standing for contested cases in any way. Certainly, none of the amendments to § 5.115

(or any other parts of the Water Code) resulted in an abrogation of Plaintiffs' cited case law.

IV. Plaintiffs Properly Rely on Federal Case Law and Other Federal Authority

TCEQ argues on pg. 15 of its response brief that "TCEQ administers state laws, not federal rules and cases" and that the term "delegation" is a misnomer in describing the TCEQ's administration of wastewater permits under the federal Clean Water Act. TCEQ appears to take the view that when the EPA administrator suspended the federal permitting program, this act suspended the application of federal law altogether.

From the Plaintiffs' view, there is no way to think of TCEQ's administration of wastewater permits as anything but a "delegation" of federal authority and this fact is borne out repeatedly in the record. For example, pg. 34 of the Memorandum of Agreement between TCEQ and EPA³ states:

The TNRCC has been authorized by EPA to administer a partial NPDES program and retain lead responsibility for the Clean Water Act (CWA) in the State with respect to sources, activities and facilities with TNRCC's jurisdiction. EPA has continuing responsibility for oversight of the TPDES program in Texas in order to assure adherence to federal statutory and regulatory requirements implementing the CWA and to maintain national consistency.

Texas standing law cannot be more restrictive than federal law without jeopardizing what is clearly a delegation of authority to administer federal environmental programs in the State of Texas. Delegation requires assurance that Texas standing law is not more restrictive than federal law. In addition to the federal regulation (40 C.F.R. § 123.30) discussed in Plaintiff's initial brief on pg. 16, this is supported by the Texas Attorney General's Statement of Legal Authority for the Texas National Pollution Discharge

³ Available at: <http://www.tceq.state.tx.us/assets/public/permitting/waterquality/attachments/general/c1.pdf>

Elimination System Program (Dec. 24, 1997).⁴ The Statement of Legal Authority notes on pg. 27 that “Texas employs the same standard for associational standing as used by the federal courts,” and that the Texas and federal standard for individual standing are “very similar.” If Texas courts were to significantly deviate from federal standing law in a manner that made it more difficult for plaintiffs to obtain standing, it could call into question a fundamental premise upon which federal programs have been delegated to the State of Texas. *See Commonwealth of Virginia v. EPA*, 80 F.3d 869, 879 (4th Cir. 1996) (upholding EPA's refusal to delegate Clean Air Act permitting to Virginia because “Virginia courts have denied standing to plaintiffs who would have met Article III's standing requirements”).

Texas courts have for quite some time drawn on, incorporated, and followed principles of federal standing. This development has become a point of law itself, with the Texas Supreme Court recognizing that “[W]e may look to the similar federal standing requirements for guidance.” *Brown v. Todd*, 53 S.W.3d 297, 305 (Tex. 2001). The case law, the terminology, and the principles of standing are all consistent. Looking to federal standing case law and regulations here, where TCEQ is administering the federal Clean Water Act's Pollutant Discharge Elimination System permitting, is particularly appropriate.

V. While Plaintiffs Were Not Required to Demonstrate a Property Interest under Applicable Law or the TCEQ's Charging Order, Mr. Kunze in Fact Testified as to a Remainder Interest in His Wife's Property In Addition to Testifying that He Had the Authority to Act on her Behalf

Mr. Kunze testified on cross-examination that a living trust, of which he is the recipient, ties him to his wife's property. Tr. at 17, Appx. Tab 2, Plaintiff's initial brief.

⁴ Available at: <http://www.tceq.state.tx.us/assets/public/permitting/waterquality/attachments/municipal/ag-sig~1.pdf>

While such a remainder interest is not the same as if the property were community property, in which case there would be no doubt that Mr. Kunze owned the property, it does provide an “ownership interest” and “legal interest” in the real property at issue, contrary to TCEQ’s assertion that Mr. Kunze did not demonstrate any such interest. *See* TCEQ response brief at 8. Even though property ownership is not required for demonstrating standing, if it was, Plaintiffs would submit that Mr. Kunze’s remainder interest is sufficient for standing purposes.

The technical rules that TCEQ seeks to impose on Plaintiffs to demonstrate Mr. Kunze’s authority to act for his wife (*see* TCEQ response brief at 15-18) are, like many of TCEQ’s arguments, overly burdensome requirements when viewed in the proper context of a standing inquiry. *See* TCEQ response brief at 15-18. Mr. Kunze testified under oath that he was the caretaker of his wife’s property and was specifically authorized to act for her in seeking a contested case hearing on Castroville’s proposed wastewater discharge to protect the Kunze family’s interests in having clean water for recreational and drinking water purposes at Mrs. Kunze’s property. Mrs. Kunze sat in the hearing room during this testimony. *See* discussion in Plaintiffs’ initial brief at 17-18.

Finally, the charging order from TCEQ did not require that Plaintiffs demonstrate standing exclusively through demonstration of property ownership by Mr. Kunze or through in other specific set of facts: it only asked the Administrative Law Judge to determine if Mr. Kunze met the “affected person” test. *See id.* at 11-12. Under the law and evidence, Mr. Kunze clearly met the test. TCEQ’s opposite conclusion is not supported by substantial evidence, is arbitrary and capricious, and is contrary to the law.

VI. Conclusion

Plaintiffs respectfully pray that the TCEQ's order be reversed, that Castroville's permit amendment be declared void, and that this matter be remanded to the agency for a contested case on the merits of Castroville's wastewater discharge permit application.

Dated: April 23, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served on the persons listed below, on April 23, 2010:

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