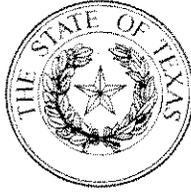


State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

August 21, 2012

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

Re: SOAH Docket No. 582-12-5301; TCEQ Docket No. 2011-2199-IWD; In Re: Application of Southwestern Electric Power Company for Renewal and Major Amendment of TPDES Permit No. WQ0002496000

Dear Mr. Trobman:

The above-referenced matter will be considered by the Texas Commission on Environmental Quality on a date and time to be determined by the Chief Clerk's Office in Room 201S of Building E, 12118 N. Interstate 35, Austin, Texas.

Enclosed are copies of the Proposal for Decision and Order that have been recommended to the Commission for approval. Any party may file exceptions or briefs by filing the documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than **September 10, 2012**. Any replies to exceptions or briefs must be filed in the same manner no later than **September 20, 2012**.

This matter has been designated **TCEQ Docket No. 2011-2199-IWD; SOAH Docket No. 582-12-5301**. All documents to be filed must clearly reference these assigned docket numbers. All exceptions, briefs and replies along with certification of service to the above parties shall be filed with the Chief Clerk of the TCEQ electronically at <http://www10.tceq.state.tx.us/epic/efilings/> or by filing an original and seven copies with the Chief Clerk of the TCEQ. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,

A handwritten signature in black ink, appearing to read "Richard R. Wilfong".
Richard R. Wilfong
Administrative Law Judge

RRW/lis
Enclosures
cc: Mailing List

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STYLE/CASE: SOUTHWESTERN ELECTRIC POWER COMPANY

SOAH DOCKET NUMBER: 582-12-5301

REFERRING AGENCY CASE: 2011-2199-IWD

**STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

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

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

TABLE OF CONTENTS

I. Introduction..... 1

II. Procedural History..... 2

III. Applicable Law..... 3

IV. Discussion..... 5

 A. Summary of the Hearing Requestors' Evidence 5

 1. Testimony of Richard LeTourneau..... 5

 2. Testimony of Thomas Clinton Rosborough..... 7

 3. Additional Testimony 9

 B. Summary of SWEPCO's Evidence..... 10

 1. Testimony of Lane David Roberts..... 10

 2. Testimony of Franklin Lester Mills..... 11

 3. Testimony of Lial Frederick Tischler, Ph.D..... 12

 C. ALJ's Analysis..... 15

 1. The preponderance of the evidence shows that Mr. LeTourneau's and Mr. Rosborough's recreational interests would not be adversely affected by issuance of the proposed amended permit..... 15

- 2. Mr. LeTourneau’s and Mr. Rosborough’s recreational interests are indistinguishable from those common to the general public and fail to demonstrate a personal justiciable interest as required to establish affected person status. 17
- 3. The Hearing Requestors failed to show that granting the Application would adversely affect any property interests based on evidence that is not speculative, conjectural, or hypothetical. 21
 - a. Mr. LeTourneau’s leased property 21
 - b. Mr. Rosborough’s properties..... 22
- V. Conclusion and Recommendation..... 26

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

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

PROPOSAL FOR DECISION

I. INTRODUCTION

Southwestern Electric Power Company (SWEPCO or Applicant) operates the Henry W. Pirkey Power Plant (Pirkey Power Plant), a lignite-fueled electric generating station located near the City of Hallsville in Harrison County, Texas, pursuant to Texas Pollution Discharge Elimination System (TPDES) Permit No. WQ0002496000. On August 31, 2010, SWEPCO filed an application to renew and amend the TPDES permit (the Application) with the Texas Commission on Environmental Quality (TCEQ or Commission). Sierra Club and Public Citizen filed requests for a contested hearing.¹ Each claimed that at least one of its members was an affected person entitled to party status. The Commission referred the hearing requests to the State Office of Administrative Hearings (SOAH) for a determination whether Sierra Club and Public Citizen have associational standing to request a hearing and participate as parties.

The Administrative Law Judge (ALJ) finds that Sierra Club and Public Citizen lack associational standing to request a hearing and be granted party status because they both failed to prove that at least one of their members is an affected person entitled to party status in accordance with applicable law. Accordingly, the ALJ recommends that the Commission deny the hearing requests and return this matter to the TCEQ Executive Director (ED) for administrative processing as an uncontested case.

¹ At times the ALJ refers to Sierra Club and Public Citizen collectively as "Hearing Requestors."

II. PROCEDURAL HISTORY

SWEPCO filed its Application on August 31, 2010. The ED declared the Application administratively complete on October 25, 2010, and technically complete on May 11, 2011. Required notices were published, as described in the findings of fact and conclusions of law in the attached proposed order. The public comment period ended on August 12, 2011. The ED's Response to Public Comment was filed on October 5, 2011, and the Final Decision Letter was mailed on October 7, 2011. The deadline to file a request for a contested case hearing was November 7, 2011.

At its March 7, 2012 open meeting, the TCEQ Commissioners considered the requests for a contested case hearing filed by Sierra Club and Public Citizen, and referred the hearing requests to SOAH to determine whether the hearing requestors have associational standing for party status in accordance with applicable laws. The Commission directed that the ALJ not consider any additional members of Sierra Club or Public Citizen other than Richard LeTourneau and Thomas Clinton Rosborough for purposes of making the initial determination of affectedness required for associational standing. The ALJ was further instructed that only in the event it was determined that either of the above-named persons was an affected person, thus giving Sierra Club, Public Citizen, or both associational standing for party status, should the seven referred environmental impact issues be considered.

Thus, the threshold issue to be decided is whether Mr. LeTourneau or Mr. Rosborough meets the definition of an affected person as set forth in the Texas Water Code and TCEQ rules. That would, in turn, give the Hearing Requestors associational standing and a right to an evidentiary hearing on the Application.

A preliminary hearing was conducted on May 22, 2012, at the SOAH hearing facility in Austin, Texas, by ALJ Richard R. Wilfong. The Applicant was represented by Derek Seal, attorney. Sierra Club and Public Citizen were represented by Eric Allmon, attorney. Sierra Club was also represented by Casey Roberts, attorney. The Office of Public Interest Counsel was represented by Eli Martinez, attorney. The ED was represented by Chris Ekoh and Michael Parr,

attorneys. Jurisdiction was established and evidence was received concerning whether Mr. LeTourneau or Mr. Rosborough are affected persons entitled to party status. The record closed upon receipt of the parties' reply briefs on June 26, 2012.

As discussed below, the evidence shows that neither Mr. LeTourneau nor Mr. Rosborough has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest more directly affected by the Application than members of the general public. Consequently, they do not qualify as affected persons for party status under the requirements of Texas Water Code (Code) § 5.115(a) and 30 Texas Administrative Code (TAC) § 55.203(a).

III. APPLICABLE LAW

The rule at 30 TAC § 55.201 implements Code § 5.115(a). It provides that an affected person may request a contested case hearing. To qualify as an affected person, a person must have "a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. *An interest common to members of the general public does not qualify as a personal justiciable interest*" 30 TAC § 55.203(a) (emphasis added). Subsection (c) of that rule provides the following:

In determining whether a person is an affected person, all factors shall be considered, including, but not limited to, the following:

- (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; and

- (5) likely impact of the regulated activity on use of the impacted natural resource by the person.

Additionally, Texas courts have held that the test establishing whether someone is an affected person requires that each of three factors must be met:

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

The rule at 30 TAC § 55.205 provides that a group or association may request a contested case hearing only if: (1) one or more members of the group or association would otherwise have standing to request a hearing; (2) the interests the group or association seeks to protect are germane to the purposes of the group or association; and (3) neither the claim asserted nor the relief requested requires the participation of the individual members in the case.

The parties agree that the Hearing Requestors have the burden to prove by a preponderance of the evidence that either Mr. LeTourneau or Mr. Rosborough meets TCEQ’s threshold test as an affected person in order to confer associational standing on at least one of the Hearing Requestors.³

² *City of Waco v Tex. Comm’n on Env’tl. Quality*, 346 S.W.3d 781, 794 (Tex. App. – Austin 2011, pet. denied); *Bosque River Coalition v Tex. Comm’n on Env’tl. Quality*, 347 S.W.3d 366 (Tex. App. – Austin 2011, pet. filed).

³ Tr. at 18; 30 TAC § 80.17(a).

IV. DISCUSSION

Based on TCEQ's rules, the Hearing Requestors lack associational standing and are not entitled to a hearing unless at least one of their members, Mr. LeTourneau or Mr. Rosborough, satisfies the legal criteria to be an affected person as set forth above. Accordingly, the following discussion will focus on the facts concerning the interests asserted by these gentlemen and the sufficiency of the facts to demonstrate that they are affected persons in accordance with applicable law.

A. Summary of the Hearing Requestors' Evidence

1. Testimony of Richard LeTourneau

Mr. LeTourneau testified that he has lived in Hallsville, Texas for over 30 years.⁴ He indicated in his affidavit that his residence is located eight miles north of Hallsville and 12-15 miles north of the Pirkey Power Plant.⁵ He testified that he is a member of both Sierra Club and Public Citizen,⁶ and that he was recruited by Sierra Club to be a party in this case.⁷ He also testified that he leases property for recreational use along the Sabine River approximately 45 to 50 miles downstream from the confluence of the Sabine River and Hatley Creek. He said that he did not mention this leased property in his affidavit that was filed with the Commission because his recreational activities in the area of the Sabine River between Highways 149 and 43 are more important to him.⁸ Mr. LeTourneau testified that the Pirkey Power Plant discharges from detention or holding ponds into Brandy Branch and Hatley Creek which flow into the Sabine River. He claimed that he kayaks, canoes, boats, fishes, hunts, camps and swims in the Sabine River between Highway 149 and Highway 43.⁹ He testified that he also uses the Sabine

⁴ Tr. at 19.

⁵ Ex. APP-1.

⁶ Tr. at 20.

⁷ Tr. at 38.

⁸ Tr. at 43.

⁹ Tr. at 21; SC/PC Ex. P-1.

River in the area between FM 2517 and Highway 84 for the same types of recreational activities.¹⁰ He claimed that he recreates in these areas of the river 45-50 times a year. He said that when he fishes in the Sabine River he catches mainly catfish and drum and he eats the fish that he catches. He claimed that he also paddles up Hatley Creek as far as half a mile and fishes when “the water is up” following a rain storm¹¹ Mr. LeTourneau stated that he has concerns about pollutants added to the water in the areas of the Sabine River where he recreates and fishes.¹² He stated that he has decided not to eat fish that he caught in the river because of the condition he sees in the fish or if he does not like the smell of the fish.¹³ He further testified that he now only submerges his body in the water up to his neck instead of swimming in the river because he does not want the water to enter his mouth, nose or ears.¹⁴

On cross-examination by SWEPCO and the ED, Mr. LeTourneau testified that nothing would stop any member of the public from kayaking, canoeing, fishing and swimming in the Sabine River or Hatley Creek in the same way that he does.¹⁵ He also acknowledged that he sees other members of the general public using the river on an average day, including members of his hunting club. He estimated that about one percent of the population of Longview/Marshall uses the river, and that he sees a thousand people or more use the Sabine River annually.¹⁶ He also acknowledged that anyone who accessed the Sabine River, fished and caught fish could be affected in the same way he is affected.¹⁷ He similarly testified that he presumes that the water quality from the Pirkey Power Plant will affect him “the same way it would affect anybody else with regards to kayaking, swimming, [and] fishing.”¹⁸ Mr. LeTourneau claimed he has seen

¹⁰ Tr. at 26.

¹¹ Tr. at 25.

¹² Tr. at 27.

¹³ Tr. at 29.

¹⁴ Tr. at 29.

¹⁵ Tr. at 32.

¹⁶ Tr. at 45-46, 48.

¹⁷ Tr. at 34.

¹⁸ Tr. at 35.

unhealthy fish in the Sabine River, but he could not tell if the fish were unhealthy because of the discharge from the Pirkey Power Plant.¹⁹

2. Testimony of Thomas Clinton Rosborough

Mr. Rosborough testified that he is a member of the Sierra Club and Public Citizen. He stated that he has resided in the general vicinity of the Pirkey Power Plant for 30 years and lives on land his family has owned for over 100 years.²⁰ He referred to the property where he lives as the “ranch property.”²¹ He testified that he has three water wells on the ranch property: two deep wells, completed at 350 feet and 360 feet respectively, that he plans to use for irrigation, and one shallow well, completed at 28 feet, that he uses for drinking water.²² He stated that he owns two houses on the ranch property, one is his homestead and the other is a rental property.²³ He raises beef cattle and grows forage to feed the cattle on the ranch property.²⁴ Mr. Rosborough mentioned no concerns regarding any actual or potential adverse affects to his ranch property associated with the permit amendments proposed in the Application.

Mr. Rosborough also testified that he owns another tract of land consisting of approximately 169 acres along Hatley Creek that he referred to as the “river property.”²⁵ He stated that he has two groundwater wells on this tract.²⁶ He claimed that Hatley Creek overflows its banks during normal rainfall years and floods about 95 percent of his 169-acre tract twice a year on average. However, he said that Hatley Creek has not overflowed its banks and flooded his river property in the past two years.²⁷ He indicated concern regarding pollutants such as

¹⁹ Tr. at 37.

²⁰ Tr. at 52; SC/PC Ex. P-5.

²¹ SC/PC Ex. P-5.

²² Tr. at 66-67; SC/PC Ex. P-5.

²³ Tr. at 69.

²⁴ Tr. at 69-70.

²⁵ Tr. at 53-55; SC/PC Ex. P-2.

²⁶ Tr. at 54.

²⁷ Tr. at 56.

selenium that are discharged from the Pirkey Power Plant and are deposited on his land through flooding.

Mr. Rosborough testified that he uses the river property for recreation. He has a private boat ramp on the property that he uses once or twice a year. He also has a travel trailer and camp area on the property.²⁸ He said that he rarely hunts on the property and no longer fishes on Hatley Creek because he has other interests.²⁹ He testified that he and his wife used to dive and snorkel in Brandy Branch Reservoir, but they have not done that for several years because they are getting a little older. Regarding fishing, he stated that he is a member of the Sportsman Bass Club and that he fishes for bass competitively. However, he said that he and his wife rarely eat bass, so the bass they catch are released back into the water.³⁰

On cross-examination by SWEPCO and the ED, Mr. Rosborough testified that the northeast corner of his river property is close to, but does not actually touch the bank of Hatley Creek. Rather, he said that it touches what he described as the “mitigation area,” which he explained was “the area that drains back into the creek.”³¹ He testified that flood water carries sediment onto his 169-acre tract, and the sediment comes from numerous places, including both Hatley Creek and the Sabine River. When his property floods, he cannot distinguish whether the floodwater is from the Sabine River or from Hatley Creek, nor can he distinguish any discharge from the Applicant’s property from the general rainwater when it floods.³² He also confirmed that the only time water from Hatley Creek reaches his property is when it floods, which normally occurs twice a year.³³ He testified that he has never tested his river property to see if it has any contaminants that are above background levels.³⁴ He also said that he has never tested

²⁸ Tr. at 57-58.

²⁹ Tr. at 58-59.

³⁰ Tr. at 71-72.

³¹ Tr. at 80, 94.

³² Tr. at 82, 95, 97, and 104.

³³ Tr. at 99, 102.

³⁴ Tr. at 81.

the quality of the water produced from the groundwater wells on either of his properties.³⁵ He also confirmed that none of the tributaries, creeks, rivers, or reservoirs that receive discharges from the Pirkey Power Plant run through or are contiguous to the ranch property where he lives.³⁶

With respect to his recreational use of Brandy Branch Reservoir, Mr. Rosborough testified that there is a public boat ramp at the reservoir that any member of the public is free to use, and he has seen other people use the reservoir for recreation. He acknowledged that nobody has an exclusive right to recreate on the reservoir or the Sabine River, and the water quality effect would be the same for everyone using the reservoir or the river.³⁷

3. Additional Testimony

The Hearing Requestors also presented the testimony of expert witnesses George Rice, a groundwater hydrologist, and Sasha Earl, a civil engineer and water resources specialist.³⁸ Mr. Rice opined that the direction of the groundwater flow in the vicinity of the Pirkey Power Plant is generally in the direction of Mr. Rosborough's ranch property. Mr. Earl opined that pollutants discharged from the Pirkey Power Plant will potentially reach Mr. Rosborough's river property. Their opinions are further discussed in the ALJ's analysis below. Public Citizen additionally presented very brief testimony of Kiaba White concerning the purpose of Public Citizen, which is uncontested.

³⁵ Tr. at 83.

³⁶ Tr. at 98.

³⁷ Tr. at 85, 95-96

³⁸ Tr. at 105-135 and 138-192; SC/PC Exs. P-6 and P-10.

B. Summary of SWEPCO's Evidence

1. Testimony of Lane David Roberts

Mr. Roberts is a civil engineer and a hydrologist employed by Akron Consulting in Longview, Texas.³⁹ Mr. Roberts presented three maps that were admitted and depict the location of the Pirkey Power Plant, the outfalls covered by the TPDES permit, the Sabine River, Hatley Creek, Brandy Branch Reservoir, area highways, Mr. Rosborough's property, and the distances between these locations.⁴⁰ Mr. Roberts testified that Mr. Rosborough's 169-acre river property is located four miles downstream from the nearest outfall from the Pirkey Power Plant. He also testified that the banks of Hatley Creek do not touch his property. Mr. Roberts also performed a hydrologic model of Hatley Creek at the confluence with the Sabine River using regression equation methodology.⁴¹ The study area encompassed a 35.6 square mile watershed. He testified that based on the hydrologic model, during a ten-year storm event Hatley Creek would be flooding out of its bed and banks and its flow would be 4,870 cubic feet per second. He also confirmed that Mr. Rosborough's property would likely be flooded two times during an average year, but indicated it would be difficult to discern whether the flood water on Mr. Rosborough's property was from Hatley Creek or the Sabine River since the property is located so close to the confluence of the two water channels.⁴² He also compared the watershed of two water channels noting that the watershed of the Sabine River is 100 times greater than the watershed of Hatley Creek.⁴³ Thus the flood water on Mr. Rosborough's 169-acre tract would be vastly greater from the Sabine River than from Hatley Creek.

³⁹ Tr. at 205-241; Applicant Ex. 3.

⁴⁰ Applicant Exs. 4, 5, and 6.

⁴¹ Tr. at 221; Applicant Ex. 7.

⁴² Tr. at 231, 237-238.

⁴³ Tr. at 238.

2. Testimony of Franklin Lester Mills

Mr. Mills testified that he is employed by SWEPCO's parent company, American Electric Power, as a Water Quality Specialist. He stated he is responsible for all aspects of wastewater permitting and permit compliance for six plants, including the Pirkey Power Plant.⁴⁴ He testified as an expert witness concerning water quality and wastewater permitting. Mr. Mills testified that the amended TPDES permit sought by the Application does not change any of the numeric discharge limitations in the existing permit.⁴⁵ He further testified that the proposed amended permit is actually slightly more stringent than the existing permit.⁴⁶ He confirmed that the draft permit is more stringent in that it: (1) requires monitoring of dissolved oxygen at Outfall 002; (2) lowers the limit for total suspended solids at Outfall 202; (3) lowers the limit for total suspended solids at Outfall 004; (4) imposes a liner requirement; (5) reduces the mixing zone at Outfall 002 from a 200-foot radius to a 100-foot radius; (6) adds a reopener clause to the permit; and (7) restricts the allowable days of discharge from Outfalls 003 and 004.

Mr. Mills testified that only two ponds, the landfill pond and the ash pond, receive coal combustion waste and all the water in those is recycled and consumed in the wet FGD system.⁴⁷ He said that in essence, the Pirkey Power Plant does not discharge any coal combustion waste. As a matter of normal operating procedure, all that water is recycled. He stated that the only exception would be that occasionally during periods of excessive rainfall the ponds capture precipitation and may discharge some of it if the volume is greater than needed for normal plant operation.⁴⁸ He also testified that none of the outfalls discharge continuously, except for Outfall No. 002 that discharges once-through cooling water. He said that some of the outfalls

⁴⁴ Tr. 242-293; Applicant Ex. 8.

⁴⁵ Tr. at 249.

⁴⁶ Tr. at 289.

⁴⁷ FGD is a commonly used acronym referring to Flue Gas Desulfurization technology used to reduce air emissions of SO₂.

⁴⁸ Tr. at 251-252.

have not discharged for many years.⁴⁹ For example, Outfall 003 has not discharged more than three times in 14 years.⁵⁰

Mr. Mills testified that Brandy Branch Reservoir is owned by SWEPCO, but it is open to the public for recreational use. SWEPCO maintains a public boat ramp and no permission is required for any member of the public to use the reservoir for boating, fishing, and other recreational uses.⁵¹

3. Testimony of Lial Frederick Tischler, Ph.D.

Dr. Tischler holds a B.S. in Civil Engineering from Texas Western College, an M.S. in Environmental Health Engineering, and a Ph.D. in Civil Engineering (environmental), both from the University of Texas at Austin. He is licensed as a professional engineer in Texas and practices as a consulting environmental engineer as a partner in the Tischler/Kocurek consulting firm.⁵² In preparation for his expert testimony in this hearing, Mr. Tischler focused on the receiving water quality and the proposed amended permit in comparison to the existing permit. He testified that the discharges from the Pirkey Power Permit as would be authorized by the draft permit would have no adverse effects that may endanger aquatic life or human health in the area where Mr. Rosborough's property is located. He explained that effluent limits are based on water quality standards designed to protect designated uses, including aquatic life, recreation, and human health due to ingestion of treated drinking water, fish or shellfish from the receiving water, as mandated under the Clean Water Act.⁵³ Dr. Tischler also testified that discharges from the Pirkey Power Plant would not adversely affect water quality in the areas where Mr. LeTourneau kayaks, canoes, fishes, and recreates in the Sabine River and Hatley Creek.

⁴⁹ Tr. at 253.

⁵⁰ Tr. at 284.

⁵¹ Tr. at 255-256.

⁵² Applicant Ex. 14.

⁵³ Tr. at 300.

Specifically, he opined that Mr. LeTourneau's and Mr. Rosborough's recreational uses of the streams will be protected from any adverse affect.⁵⁴

With reference to the 2010 Texas Water Quality Inventory,⁵⁵ Dr. Tischler testified that for the rolling ten-year period covered by the report, the segment of the Sabine River downstream of Hatley Creek is shown to be either "fully supporting" or "no concern" regarding the attainment of the water quality standards. For Brandy Branch Reservoir the reported assessment is based on fish tissue samples that are analyzed in comparison with a threshold level. For the whole list of things measured, including selenium, all of them are listed as "no concern."

With respect to the recreational uses of Hatley Creek, as testified to by Mr. LeTourneau, Dr. Tischler explained that the permit limits are set considering the highest recorded discharge flow for each outfall and the lowest flow in the receiving water, meaning that the permit is designed to meet water quality standards with the lowest potential amount of dilution of the effluent. In other words, he stated that the permit is designed to be protective of all uses of the receiving stream all the time. Thus, he concluded that neither Mr. LeTourneau nor Mr. Rosborough would have any reason for concern with respect to using Hatley Creek even if there were a discharge from the Pirkey Power Plant. He concluded that the changes proposed in the amended permit would have no adverse effect on Mr. LeTourneau or Mr. Rosborough.⁵⁶

With respect to the flooding issues raised by Mr. Rosborough, Dr. Tischler explained that the flows from the three outfalls that discharge indirectly into Hatley Creek range from zero to 5 million gallons per day. Assuming the worst scenario possible, he calculated that the maximum discharge of 5 million gallons per day converts to approximately 7.5 cubic feet per second. So, if all the outfalls discharge together at the maximum flow rate, the combined flow would be 22.5 cubic feet per second. Using Mr. Robert's number that the flood water flow in Hatley Creek during a ten-year storm event would be 4,870 cubic feet per second, and dividing

⁵⁴ Tr. at 301.

⁵⁵ Applicant Ex. 15.

⁵⁶ Tr. at 309-310.

that by 22.5 comes out roughly to a 200 to 1 dilution. Dr. Tischler opined that if some of this water flooded across Mr. Rosborough's river property the concentrations for any of the pollutants would be indistinguishable from background. He further testified that with respect to selenium, for example, the amount that would be discharged at those flow rates would be undetectable and indistinguishable from background.⁵⁷

With respect to the opinion of Mr. Rice concerning the flow of groundwater from the vicinity of the Pirkey Power Plant in the direction of Mr. Rosborough's property, Dr. Tischler testified that Mr. Rice's first exhibit showing groundwater flow,⁵⁸ when examined closely, shows that water is flowing not only southwest, but also southeast which he said, simply points out that surface features like the Sabine River, the Brandy Branch Reservoir, and Hatley Creek, as well as subsurface features, can significantly affect groundwater flow. Consequently, he testified that "in the absence of monitoring wells located over the entire area, you simply can't say what direction the groundwater flow is going in a regional way."⁵⁹

Dr. Tischler opined:

[T]here simply is not enough groundwater monitoring well data to predict regional patterns nor to be able to make any kind of statement with respect to whether the groundwater flow is from under the ponds onto downstream property or whether it goes in an entirely different direction into the lake or simply doesn't go anywhere at all and just is essentially very low velocity and moves so slowly that there's virtually no movement in the groundwater. You really can't say without a lot more monitoring well data.⁶⁰

⁵⁷ Tr. at 315.

⁵⁸ SC/PC Ex. P-9.

⁵⁹ Tr. at 316.

⁶⁰ Tr. at 316-317.

C. ALJ's Analysis

- 1. The preponderance of the evidence shows that Mr. LeTourneau's and Mr. Rosborough's recreational interests would not be adversely affected by issuance of the proposed amended permit.**

The preponderance of the evidence shows that:

- The area of the Sabine River where Mr. LeTourneau primarily recreates is approximately 10 miles from the Pirkey Power Plant's nearest outfall.⁶¹
- Mr. LeTourneau paddles up Hatley Creek and fishes only when the water is up following a rain storm.⁶²
- Mr. Rosborough used to fish in the Sabine River, but no longer does so because of other interests.⁶³
- Mr. Rosborough used to swim and dive in Brandy Branch Reservoir, but no longer does so because he is growing older.⁶⁴
- Mr. Rosborough has joined the Sportsman Bass Club and plans to fish competitively for bass in Brandy Branch Reservoir. He plans to catch and release rather than eat the fish he catches.⁶⁵
- The proposed amended permit does not change any of the discharge limitations in the existing permit.⁶⁶
- Once-through cooling water is the only continuous discharge from the Pirkey Power Plant. Discharges from all other outfalls are infrequent.⁶⁷

⁶¹ ED Ex. ED-G.

⁶² Tr. at 25.

⁶³ Tr. at 58-59.

⁶⁴ Tr. at 71.

⁶⁵ Tr. at 72.

⁶⁶ Tr. at 249.

⁶⁷ Tr. at 253, 284.

- All water containing lignite combustion waste is recycled and consumed in the wet FGD system, except occasionally excessive rainfall captured by the ponds may be discharged if the volume is greater than needed for normal plant operation.⁶⁸
- The effluent limits are based on water quality standards designed to protect aquatic life, recreation, and human health.⁶⁹
- The proposed amended permit effluent limits are set considering the highest discharge flow for each outfall and the lowest flow in the receiving water, meaning that the permit is designed to meet water quality standards with the lowest amount of dilution of the effluent.⁷⁰
- According to the 2010 Texas Water Quality Inventory the segment of the Sabine River downstream of Hatley Creek is shown to be either “fully supporting” or “no concern” regarding the attainment of water quality standards.⁷¹
- The analysis of fish tissue from fish in Brandy Branch Reservoir show no concern for all of the things measured, including selenium.⁷²
- If issued, the proposed amended permit would have no adverse effect on Mr. LeTourneau’s or Mr. Rosborough’s recreational uses of the streams.⁷³

Based on this evidence the ALJ finds that Mr. LeTourneau and Mr. Rosborough have failed to demonstrate through the presentation of concrete and particularized facts that issuance of the proposed amended permit will pose risk of harm to their recreational uses that are not conjectural or merely speculative. Rather, the evidence shows the areas where they recreate are far downstream; (2) there would be extensive dilution of any discharges authorized by the proposed amended permit; (3) the effluent limits in the proposed amended permit are designed to protect aquatic life, recreation, and human health, under worst case conditions, i.e., maximum discharges and minimum dilution; (4) the proposed amended permit does not change any of the

⁶⁸ Tr. at 251-252.

⁶⁹ Tr. at 300.

⁷⁰ Tr. at 309-310.

⁷¹ Tr. at 304.

⁷² Tr. at 305.

⁷³ Tr. at 301, 309-310.

effluent limits in the existing permit; and (5) water quality standards are being attained in the receiving streams. Accordingly, the ALJ concludes that neither Mr. LeTourneau nor Mr. Rosborough have shown a particularized potential harm to their recreational uses sufficient to satisfy the legal criteria required for a finding that they are affected persons entitled to party status in this proceeding.

- 2. Mr. LeTourneau's and Mr. Rosborough's recreational interests are indistinguishable from those common to the general public and fail to demonstrate a personal justiciable interest as required to establish affected person status.**

The distances from the Pirkey Power Plant outfalls to the confluence with the Sabine River range from over six miles to over nine miles. Mr. LeTourneau primarily recreates in the area of the Sabine River that is four miles downstream from Brandy Branch Reservoir which is approximately 10 miles from SWEPCO's nearest outfall.⁷⁴ He does not have any greater privilege than any other member of the general public to swim, canoe, kayak, or fish in the areas of the Sabine River that he claims he primarily uses for recreation, or to Hatley Creek where he occasionally paddles and fishes "when the water is up." Mr. LeTourneau does not have a personal justiciable interest in the Sabine River, Hatley Creek, or the fish in either of them. His right to take and eat fish from the Sabine River and Hatley Creek is a right common to and shared by any members of the general public who want to avail themselves of the opportunity.

The same is the case with respect to Mr. Rosborough's recreational interests. He claimed that the river property he owns "along" Hatley Creek is property that he uses for recreation, including launching a boat to fish upstream on the Sabine River. Mr. Rosborough's river property is located in the same area near the confluence of the Sabine River and Hatley Creek where Mr. LeTourneau claims to kayak, boat, fish, and swim, and their recreational activities are substantially the same. This area is commonly used by many other members of the public, and the same is true for the Brandy Branch Reservoir.

⁷⁴ ED Ex. ED-G.

The preponderance of the evidence shows that both Mr. LeTourneau's and Mr. Rosborough's recreational interests in the Sabine River, Hatley Creek, and Brandy Branch Reservoir are not more particularized than those common to the members of the general public. Thus, their shared recreational interests fail to make either of them an affected person based on the plain language of the Texas Water Code and TCEQ's rules.

The ALJ's finding is supported by the decisions of several Texas courts that have considered whether recreational uses shared with other members of the general public can form the basis to establish that an individual has a personal justiciable interest:

In *Save Our Springs Alliance, Inc. v. City of Dripping Springs*⁷⁵ the court concluded that:

There is no Texas authority for the proposition that the type of injury alleged by SOS Alliance in this case—injury to its members' environmental, scientific, and recreational interests generally and without any interest in or connection to the real property involved—is the type of interference with a legally protected interest or injury that confers standing as a matter of state law. SOS Alliance must show a particularized, legally protected interest that is actually or imminently affected by the alleged harm.⁷⁶

In *Stop the Ordinances Please v. City of New Braunfels*,⁷⁷ the court concluded that:

For a party to have standing to challenge a governmental action, as a general rule, it must demonstrate a particularized interest in a conflict distinct from that sustained by the public at large. . . It is an established rule . . . that . . . sufficiency of a plaintiff's interest (to maintain a lawsuit) comes into question when he intervenes in public affairs. *When the plaintiff, as a private citizen, asserts a public, as distinguished from a private, right, and his complaint fails to show that the matters in dispute affect him differently from other citizens, he does not establish a justiciable interest.*⁷⁸

⁷⁵ 304 S.W.3d 871 (Tex. App.—Austin 2009, pet. Denied).

⁷⁶ *Id.* at 882.

⁷⁷ 306 S.W.3d 919 (Tex. App.—Austin 2010, no pet.)

⁷⁸ *Id.* at 926. (internal citations and quotation marks omitted, emphasis added).

In *San Antonio Conservation Soc. v. City of San Antonio*,⁷⁹ the court concluded that:

The reason that appellants have no justiciable interest in this controversy is that any right which they have to enjoy the charm and beauty of the San Antonio River and its banks within the City of San Antonio is a right shared in common with all the people of San Antonio and with the public in general, and any impairment of this right is an injury or damage sustained by appellants in common with the general public. Only lawfully constituted guardians of the public interest may maintain actions for the redress of such character of injuries.⁸⁰

The ALJ is not aware of any decision by a Texas court holding that a claimed recreational interest by itself is sufficient to establish that someone is an affected person entitled to a contested case hearing.⁸¹ However, notwithstanding the absence of such authority the ALJ does not doubt that there may be situations where the facts are sufficiently particularized and concrete to sustain a finding of affectedness based solely on recreational interests. But, with respect to Mr. LeTourneau and Mr. Rosborough the ALJ finds the facts insufficient to support such a conclusion.

The Hearing Requestors and OPIC additionally assert that because TCEQ administers the TPDES program under delegated authority from the U.S. Environmental Protection Agency (EPA), it is obligated to comply with the EPA requirement to allow for judicial review “sufficient to provide for, encourage, and assist public participation in the permitting process” without requiring a person to show injury to a pecuniary interest or property interest in order to have standing.⁸² The Hearing Requestors and OPIC then cite to federal Clean Water Act cases for the proposition that there is no requirement that the alleged recreational interest or environmental interest be held exclusively by the person seeking a hearing. Rather, they claim all that must be shown to provide standing in federal court is to show that the alleged injury to a recreational, environmental, or aesthetic interest is concrete and

⁷⁹ 250 S.W.2d 259 (Tex. Civ. App.—Fort Worth 1990, no writ).

⁸⁰ *Id.* at 263.

⁸¹ ED Ex. ED-E at 14-18.

⁸² 40 C.F.R. § 123.30.

particularized, and not merely a generalized public grievance. The Hearing Requestors and OPIC conclude that it is the actual, frequent, and recurring recreational use that distinguishes the harm Mr. LeTourneau and Mr. Rosborough experience from that of the general public and makes them affected persons entitled to a contested hearing. SWEPCO and the ED disagree. For the reasons discussed above the ALJ also disagrees.

Moreover, the federal Clean Water Act enforcement cases cited by the Hearing Requestors do not stand for the proposition that recreational interests can suffice to establish a personal justiciable interest as the Hearing Requestors assert. They are the same cases reviewed and distinguished in *Save our Springs Alliance*, where the court stated:

The federal cases cited by SOS Alliance, in which environmental harm is held to constitute an injury in fact for purposes of standing, involve the application of federal environmental-protection statutes that prohibited the types of conduct alleged by the plaintiffs in those cases to have occurred. The majority of the federal cases cited by SOS Alliance to demonstrate that an injury in fact for purposes of standing may be environmental involve claims under the federal Clean Water Act (CWA) The CWA itself provides for a private right of action. A suit to enforce an effluent standard or limitation under the CWA may be brought by any “citizen,” which is defined as “a person or persons having an interest which is or may be adversely affected.” . . . This provision “confers standing to enforce the Clean Water Act to the full extent allowed by the Constitution.” . . . In these cases, then, the plaintiffs possessed a legally protected interest for purposes of standing by virtue of a federal statute.⁸³

These federal cases do not support a justiciable interest based on recreational interests in this TCEQ permitting case.

The ALJ finds it noteworthy that the Hearing Requestors cite *Sierra Club v. Morton*,⁸⁴ for the 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

⁸³ 304 S.W.3d 871, 880-881.

⁸⁴ 405 U.S. 727, 741, 92 S.Ct 1361 (1972).

be lessened' by the challenged activity."⁸⁵ However, the court actually found that Sierra Club lacked standing to maintain the action, stating that:

The Sierra Club failed to allege that it or its members would be affected in any of their activities or pastimes by the Disney development. Nowhere in the pleadings or affidavits did the Club state that its members use Mineral King for any purpose, much less that they use it in any way that would be significantly affected by the proposed actions of the respondents.⁸⁶

Overall, the ALJ finds the federal law arguments of the Hearing Requestors and OPIC to lack important nuance. This case involves an amendment to a Texas TPDES permit governed by the Texas Water Code and TCEQ rules as construed and applied by Texas courts. Texas law requires the TCEQ—and every other Texas agency—to follow its own rules until they are changed. The ALJ must apply the rules of the state agency for which the ALJ is preparing a Proposal for Decision (PFD). Thus, the ALJ concludes, in accordance with the Texas Water Code § 5.115(a), 30 TAC § 55.203(a), and controlling decisions of the Texas courts, that the recreational interests asserted by Mr. LeTourneau and Mr. Rosborough are indistinguishable from the interests common to members of the general public and fail to qualify as personal justiciable interests sufficient to confer standing in this case.

3. The Hearing Requestors failed to show that granting the Application would adversely affect any property interests based on evidence that is not speculative, conjectural, or hypothetical.

a. Mr. LeTourneau's leased property

Although not mentioned in his affidavit,⁸⁷ Mr. LeTourneau mentioned during his testimony that for over 30 years he has leased property along the Sabine River 45-50 miles from the Pirkey Power Plant. He stated that there is a groundwater well on the property and he uses the property for camping and other recreational purposes. When asked why he did not mention

⁸⁵ Hearing Requestors' Initial Brief at 9.

⁸⁶ *Sierra Club v. Morton* at 735, 1366.

⁸⁷ Applicant Ex. 1.

this lease in his affidavit he said, “what I put in there is more important, that recreation in the area between 149 and 43.” No other evidence was presented establishing any connection between the leased property and any discharge from the Pirkey Power Plant. To the contrary, the Hearing Requestors’ own evidence presented through the expert testimony of Mr. Rice, if taken as true, indicates that groundwater flows in the south/southwest direction from the Pirkey Power Plant.⁸⁸ Whereas, Mr. LeTourneau’s leased property is located 45-50 miles southeast of the Pirkey Power Plant.

The ALJ finds no evidence in the record to support the Hearing Requestors’ assertion that Mr. LeTourneau might be affected if the groundwater well on the lease 45-50 miles from the Pirkey Power Plant might be impacted by the Application. Thus, the ALJ concludes that the Hearing Requestors’ assertion that Mr. LeTourneau might have a property interest adversely impacted by the Application is based on groundless conjecture lacking evidentiary support in the record.

b. Mr. Rosborough’s properties

The evidence shows that Mr. Rosborough owns two pieces of property in the vicinity of the Pirkey Power Plant: (1) the river property that he uses for recreation, located approximately four miles south of the Pirkey Power Plant “along” Hatley Creek near the confluence with the Sabine River, and (2) the ranch property where he resides and raises cattle, located a few miles west of the river property, and not contiguous to any waterway that could potentially receive discharges from the Pirkey Power Plant.

Groundwater

Although not mentioned in his affidavit, Mr. Rosborough testified that on his ranch property he has two deep groundwater wells that he plans to use to irrigate forage for his cattle, and one shallow groundwater well that he uses for drinking water. He also testified that he has

⁸⁸ Tr. at 116.

two groundwater wells on his river property. Although Mr. Rosborough did not mention any concern regarding groundwater quality, the Hearing Requestors presented the expert testimony of Mr. Rice that the groundwater flow in the general vicinity of the Pirkey Power Plant is to the south/southwest—the direction of Mr. Rosborough’s properties—endeavoring to show that Mr. Rosborough’s groundwater wells may potentially be affected by groundwater migration.⁸⁹ The implication, of course, is that if any of the lined containment ponds at the Pirkey Power Plant were to leak it would be possible for contaminated groundwater to affect Mr. Rosborough’s wells. However, Mr. Rice testified on cross-examination that the few groundwater wells that he used to form his opinion concerning the direction of groundwater flow, were located south of the lignite mine that supplies fuel for the Pirkey Power Plant, which is four to five miles away from the plant.⁹⁰ He further acknowledged that Hatley Creek is between Mr. Rosborough’s properties and the groundwater wells used to form his opinion, and it is possible that other intervening geologic features may also exist which could have a significant effect on the direction and rate of groundwater flow.⁹¹

SWEPCO’s hydrologist Dr. Tischler persuasively testified that, there is not enough groundwater monitoring well data to predict regional patterns or the direction of groundwater flow.⁹² In fact, Dr. Tischler pointed out that the exhibit relied upon by Mr. Rice actually indicates that groundwater is flowing not only to the southwest but also to the southeast (away from Mr. Rosborough’s properties),⁹³ and that surface features such as Hatley Creek and any subsurface features can significantly affect groundwater flow.⁹⁴ Dr. Tischler emphasized that “in the absence of monitoring wells located over the entire area, you simply can’t say what direction the groundwater flow is going in a regional way.”⁹⁵ Based on the limited data considered by Mr. Rice, and the considerable distance from the ponds at the Pirkey Power Plant to

⁸⁹ SC/PC Ex. P-9; Tr. at 127.

⁹⁰ SC/PC Ex. P-7; Tr. at 129.

⁹¹ SC/PC Ex. P-7; Tr. at 130-131.

⁹² Tr. at 316-318.

⁹³ Tr. at 315.

⁹⁴ Tr. at 316.

⁹⁵ *Id.*

Mr. Rosborough's property, Dr. Tischler testified that the likelihood of any pollutants showing up in the wells on Mr. Rosborough's property "would be very small" (which assumes that any of the ponds would be leaking).⁹⁶

The ALJ finds that Mr. Rice's opinion concerning the direction of groundwater flow lacks an adequate foundation of scientifically reliable data, which renders his opinion speculative, unreliable, and lacking credibility. Conversely, the ALJ finds the opinions of Dr. Tishler pointing out the flaws of Mr. Rice's analysis to be persuasive, well-reasoned, and properly focused on the considerations one would expect of professional hydrologists in forming opinions of this nature, which Mr. Rice failed to adequately consider. The Hearing Requestors have not provided any credible evidence demonstrating that groundwater flows from the Pitkey Power Plant towards Mr. Rosborough's groundwater wells. They certainly have not demonstrated that the groundwater wells on his properties are or would be at actual or imminent risk of harm. Thus, the ALJ concludes that Sierra Club and Public Citizen failed to meet their burden of proving that Mr. Rosborough is an affected person because of likely, as opposed to speculative, potential migration of contaminated groundwater affecting his water wells.

Flooding

Mr. Rosborough's only stated concern was that flooding from Hatley Creek deposits sediments on his river property that could potentially include pollutants like selenium from the Pirkey Power Plant discharges that would be authorized if the Application is approved. However, the facts contained in his testimony belie the existence of any grounds for concern that are more than conjecture and speculation. Mr. Rosborough testified that:

- His river property is approximately four miles from the nearest discharge point at the Pirkey Power Plant;⁹⁷

⁹⁶ Tr. at 348-349.

⁹⁷ SC/PC Ex. P-2; Tr. at 75.

- his river property is close to, but does not actually touch, the bank of Hatley Creek;
- he does not see water flowing across his property that comes from Hatley Creek unless the creek is at flood stage which typically happens twice a year;⁹⁸
- the floodwaters that he sees on his property come from both the Sabine River (which is upstream of Hatley Creek and would not have received any discharge from the Pirkey Power Plant) and from Hatley Creek;⁹⁹
- the origin of floodwaters on his property could not be discerned;¹⁰⁰
- there is no way to distinguish any discharge from the Pirkey Power Plant from the rainwater that is overflowing the banks of Hatley Creek;¹⁰¹
- the origin of any sediment that may be on his property could be from numerous places in addition to Hatley Creek;¹⁰² and
- his property has never been tested to see if it has any contaminants that are above background levels.¹⁰³

The ALJ finds it particularly significant that Mr. Rosborough's river property never has any contact with water flowing in Hatley Creek, except when it is flooding. On those occasions, the preponderance of the credible evidence shows that even assuming a worst case scenario—the maximum discharge from the Pirkey Power Plant and flow of floodwaters only from Hatley Creek and not the Sabine River—the discharge would be diluted by 200 to 1¹⁰⁴ and the concentrations of any pollutants from the Pirkey Power Plant that would reach Mr. Rosborough's property would be undetectable and indistinguishable from background. When further considering that Mr. Rosborough's property is flooded by both Hatley Creek and the Sabine

⁹⁸ Tr. at 99, 102.

⁹⁹ Tr. at 92, 95.

¹⁰⁰ Id.

¹⁰¹ Tr. at 97, 104.

¹⁰² Tr. at 82.

¹⁰³ Tr. at 81.

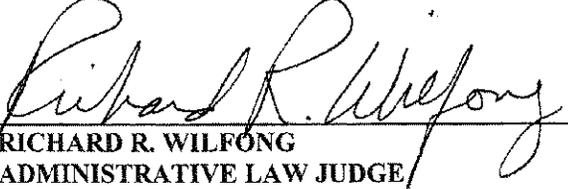
¹⁰⁴ Tr. at 314.

River, the floodwaters of the Sabine River receive no discharges from the Pirkey Power Plant, and the Sabine River watershed is 100 times greater than the watershed of Hatley Creek, there is no scientific basis to conclude there is even a remote possibility that discharges from the Pirkey Power Plant as authorized by the Application would cause any harm to Mr. Rosborough's property. Accordingly, the ALJ finds there is no evidence of potential harm to Mr. Rosborough's property due to the discharges under the proposed permit during times of flood that is not speculative, hypothetical, or conjectural.

V. CONCLUSION AND RECOMMENDATION

Sierra Club and Public Citizen failed to meet their burden to prove that either Mr. LeTourneau or Mr. Rosborough is an affected person in accordance with applicable law. Consequently, neither Sierra Club nor Public Citizen has associational standing to request a hearing. The ALJ recommends that the Commission deny their hearing request and remand the Application to the ED for administrative processing as an uncontested case.

SIGNED August 21, 2012.


RICHARD R. WILFONG
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**AN ORDER
CONCERNING THE APPLICATION BY
SOUTHWESTERN ELECTRIC POWER COMPANY
FOR RENEWAL AND AMENDMENT TO TPDES PERMIT NO. WQ0002496000
TCEQ DOCKET NO. 2011-2199-IWD
SOAH DOCKET NO. 582-12-5301**

On _____, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the requests for hearing by Sierra Club and Public Citizen who assert associational standing derived from the affectedness of their members, Richard LeTourneau and Thomas Clinton Rosborough, relating to the application of Southwestern Electric Power Company (SWEPCO) for renewal and major permit amendment to Texas Pollution Discharge Elimination System (TPDES) Permit No. WQ0002496000 for continued authorization of discharges associated with the Henry W. Pirkey Power Plant, a lignite-fueled electric generating station located in Harrison County, Texas. A Proposal for Decision (PFD) was presented by Administrative Law Judge (ALJ) Richard R. Wilfong with the State Office of Administrative Hearings (SOAH), who conducted an evidentiary hearing on this matter on May 22, 2012, in Austin, Texas. The record closed on June 26, 2012.

The following participated in the evidentiary hearing: SWEPCO; the Executive Director (ED); Sierra Club; Public Citizen; and the Office of Public Interest Counsel (OPIC).

After considering the Proposal for Decision, the Commission makes the following Findings of Fact and Conclusions of Law.

I. FINDINGS OF FACT

1. On August 31, 2010, SWEPCO applied to the TCEQ for renewal of and a major amendment to Permit No. WQ0002496000 (the Application) for its Henry W. Pirkey Power Plant to authorize: (a) an increase in the capacity of the existing Flue Gas Desulphurization (FGD) and Fly Ash Landfill Retention Pond; (b) the diversion of wastewater from the Ash Pond into the FGD and Fly Ash Landfill Retention Pond on an infrequent basis; (c) a reduction in the monitoring frequency for total suspended solids at Outfalls 004 and 005 from once per month to once per quarter; (d) a reduction in the monitoring frequency for oil and grease at Outfall 006 from once per month to once per quarter; (e) a reduction in the monitoring frequency for oil and grease at Outfall 102 from once per quarter to once per year; (f) a reduction in the monitoring frequency for biochemical oxygen demand (5-day) at Outfall 302 from once per two months to once per quarter; and (g) a temporary reduction in the two-foot freeboard requirement for ponds during storm events.
2. The proposed permit amendment would not change any of the numeric discharge limitations in the existing permit.
3. The proposed permit amendment would be more stringent than the existing permit in that it: (1) requires monitoring of dissolved oxygen at Outfall 002; (2) lowers the limit for total suspended solids at Outfall 202; (3) lowers the limit for total suspended solids at Outfall 004; (4) imposes a line requirement; (5) reduces the mixing zone at Outfall 002 from a 200-foot radius to a 100-foot radius; (6) adds a reopener clause to the permit; and (7) restricts the allowable days of discharge from Outfalls 003 and 004.
4. SWEPCO's Henry W. Pirkey Power Plant is located approximately six miles southeast of the City of Hallsville, Harrison County, Texas.
5. On or about October 25, 2010, the ED declared the Application administratively complete.
6. On or about May 11, 2011, the ED declared the Application technically complete.
7. Public comments and hearing requests were filed by interested persons concerning the Application and Draft Permit, which were considered by the Commission during its open meeting on March 7, 2012.
8. By Interim Order dated March 8, 2012, the TCEQ referred the matter to SOAH for a contested-case hearing as follows:

- a. To determine whether Sierra Club or Public Citizen are affected persons pursuant to applicable law;
 - b. No other members of Sierra Club and/or Public Citizen other than Richard LeTourneau and Thomas Clinton Rosborough shall be considered for purposes of associational standing in regard to the initial determination of affectedness;
 - c. Only in the event that it is determined that Sierra Club and/or Public Citizen have demonstrated affectedness then SOAH may consider requests for hearing submitted by other individuals or organizations and the following seven environmental impact issues be considered:
 - i. Whether the draft permit includes adequate protections for the attainment and designated uses of the receiving waters, and whether it ensures adequate protection of surface water quality;
 - ii. Whether the draft permit contains adequate effluent limits and monitoring requirements to ensure the protection of aquatic life in the receiving waters;
 - iii. Whether the draft permit contains adequate effluent limits to control barium and selenium;
 - iv. Whether the cooling water intake structure(s) complies with all applicable legal requirements to minimize environmental impacts, including harmful impacts on aquatic life;
 - v. Whether the ED complied with applicable Commission rules in performing the anti-degradation review for the permit;
 - vi. Whether the draft permit includes adequate protections for groundwater in the area of the plant and whether the Landfill Pond and other storage areas pose danger to groundwater; and
 - vii. Whether or not the pump station at Lake O' the Pines is a "cooling water intake structure."
9. On April 12, 2012, the Amended Notice of Hearing on the Application was published in the *Marshall News Messenger*, a newspaper published and generally circulated in Harrison County, Texas.

10. The evidentiary hearing concerning affectedness was conducted on May 22, 2012, at the SOAH hearing facility in Austin, Texas, by ALJ Richard R. Wilfong.
11. SWEPCO, Sierra Club, Public Citizen, the ED and OPIC participated in the evidentiary hearing.
12. The effluent from the Pirkey Power Plant is discharged via Outfalls 002 and 003 to Brandy Branch Reservoir; thence to Brandy Branch Creek; via Outfalls 004, 005, and 006 to unnamed tributaries of Hatley Creek; thence to Hatley Creek; thence all to Sabine River above Toledo Bend Reservoir in Segment No. 0505 of the Sabine River Basin.
13. Richard LeTourneau resides eight miles north of Hallsville, Texas, which is 12-15 miles north of the Pirkey Power Plant.
14. Mr. LeTourneau leases property for recreational use along the Sabine River approximately 45-50 miles downstream from the confluence of the Sabine River and Hatley Creek.
15. Any affect to Mr. LeTourneau's leased property as a result of discharges from the Pirkey Power Plant would be non-detectable.
16. Mr. LeTourneau kayaks, canoes, boats, hunts, camps and swims in the Sabine River between Highway 149 and Highway 43, and between FM 2517 and Highway 84, 45-50 times a year.
17. The area of the Sabine River where Mr. LeTourneau recreates closest to the Pirkey Power Plant is approximately 10 miles from the nearest outfall.
18. Mr. LeTourneau paddles up Hatley Creek as far as half a mile and fishes when the water is up following a rainstorm.
19. Mr. LeTourneau eats some of the fish that he catches.
20. Mr. LeTourneau is a member of both Sierra Club and Public Citizen.
21. Thomas Clinton Rosborough owns two pieces of property in the vicinity of the Pirkey Power Plant: (1) the river property consisting of approximately 169 acres that he uses for recreation, located approximately four miles south of the Pirkey Power Plant "along" Hatley Creek near the confluence with the Sabine River (river property), and (2) the ranch property where he resides and raises cattle, located a few miles west of the river property, and not contiguous to any waterway that could potentially receive discharges from the Pirkey Power Plant (ranch property).

22. There are three groundwater wells on Mr. Rosborough's ranch property: two deep wells, completed at 350 feet and 360 feet respectively, that he plans to use for irrigation, and one shallow well, completed at 28 feet, that he uses for drinking water.
23. There are two shallow groundwater wells on Mr. Rosborough's river property.
24. None of Mr. Rosborough's groundwater wells have ever been tested for pollutants.
25. The northeast corner of Mr. Rosborough's river property is close to, but does not actually touch the bank of Hatley Creek.
26. Hatley Creek overflows its banks during normal rainfall years and floods approximately 95 percent of the 169-acre river property twice a year on average.
27. Floodwater carries sediment onto Mr. Rosborough's river property that comes from several places, including both Hatley Creek and the Sabine River.
28. When Mr. Rosborough's river property floods it cannot be discerned whether the floodwater is from the Sabine River or Hatley Creek, nor can any discharge from the Pirkey Power Plant be distinguished from the stormwater.
29. Water from Hatley Creek touches Mr. Rosborough's river property only when it floods.
30. Mr. Rosborough's river property has never been tested to see if it has any contaminants that are above background levels.
31. Mr. Rosborough has a travel trailer and a camp area on his river property.
32. Mr. Rosborough rarely hunts on his river property.
33. None of the tributaries, creeks, rivers, or reservoirs that receive discharges from the Pirkey Power Plant run through or are contiguous to Mr. Rosborough's ranch property.
34. Mr. Rosborough no longer fishes on Hatley Creek because he has other interests.
35. Mr. Rosborough and his wife no longer snorkel or dive in Brandy Branch Reservoir because they are getting older.
36. Mr. Rosborough has joined the Sportsman Bass Club and he plans to fish competitively for bass in Brandy Branch Reservoir.
37. Mr. Rosborough intends to catch and release, rather than eat, the bass he catches in Brandy Branch Reservoir.

38. Mr. Rosborough is a member of both Sierra Club and Public Citizen.
39. Brandy Branch Reservoir is owned by SWEPCO, but is open to the public for recreational use.
40. There is a public boat ramp on Brandy Branch Reservoir that any member of the public is free to use without seeking permission.
41. The Sabine River, Hatley Creek, and Brandy Branch Reservoir are used daily by the general public for the same recreational uses as those engaged in by Mr. LeTourneau and Mr. Rosborough.
42. Nobody has an exclusive right to recreate on the Sabine River, Hatley Creek, or Brandy Branch Reservoir.
43. Everyone who uses the Sabine River, Hatley Creek, or Brandy Branch Reservoir for recreation would be affected in the same way Mr. LeTourneau and Mr. Rosborough are affected.
44. A thousand or more people use the Sabine River for recreation annually.
45. Mr. LeTourneau's and Mr. Rosborough's recreational uses of the Sabine River, Hatley Creek, and Brandy branch Reservoir, are common to members of the general public.
46. During a ten-year storm event, Hatley Creek would be flooding out of its bed and banks and its flow would be 4,870 cubic feet per second.
47. Assuming simultaneous maximum discharge flows from all outfalls at the Pirkey Power Plant, during a ten-year storm event, the discharges from the plant would be diluted 200 to 1.
48. If floodwater from Hatley Creek caused by a ten-year storm event flooded across Mr. Rosborough's river property (assuming none of the floodwater is from the Sabine River), concentrations for any of the pollutants from the Pirkey Power Plant, including selenium (assuming simultaneous maximum flows from all outfalls), would be undetectable and indistinguishable from background.
49. The water shed of the Sabine River is 100 times greater than the watershed of Hatley Creek.
50. Floodwater on Mr. Rosborough's river property would be greater from the Sabine River than from Hatley Creek.
51. No discharges from the Pirkey Power Plant enter the Sabine River upstream of the confluence with Hatley Creek.

52. Once through cooling water is the only continuous discharge from the Pirkey Power Plant. Discharges from all other outfalls are infrequent.
53. All water containing lignite combustion waste is recycled and consumed in the wet Flue Gas Desulfurization (FGD) system, except occasionally excessive rainfall captured in the ponds may be discharged if the volume is greater than needed for normal plant operation.
54. Discharges from the Pirkey Power Plant as would be authorized by the proposed amended permit would have no affect on the property interests of Mr. LeTourneau or Mr. Rosborough.
55. The segment of the Sabine River downstream of Hatley Creek is either “fully supporting” or “no concern” regarding attainment of water quality standards.
56. Tissue samples of fish from Brandy Branch Reservoir indicate “no concern” for the whole list of things measured, including selenium.
57. The effluent limits in the proposed amended permit are designed to protect aquatic life, recreation, and human health, assuming maximum discharges are occurring when there would be minimum dilution in the receiving stream.
58. The proposed amended permit would, if issued, not affect Mr. LeTourneau’s or Mr. Rosborough’s recreational uses of the streams.
59. There is insufficient groundwater monitoring data to determine the direction of groundwater flow in the vicinity of the Pirkey Power Plant, or whether there is any groundwater movement at all.

II. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over TPDES permits pursuant to Tex. Water Code (Code) § 5.013 and 30 Tex. Admin. Code (TAC) ch. 308.
2. SOAH has the authority to conduct evidentiary hearings and prepare proposals for decision on contested matters referred by the Commission pursuant to Tex. Gov’t Code § 2003.047.
3. Based on the above Findings of Fact neither Mr. LeTourneau nor Mr. Rosborough is an affected person within the meaning of 30 TAC § 55.203.
4. Based on the above Findings of Fact and Conclusions of Law, neither Mr. LeTourneau nor Mr. Rosborough qualify for party status in this proceeding.

5. Based on the above Findings of Fact and Conclusions of Law, Sierra Club and Public Citizen do not have associational standing in this proceeding pursuant to 30 TAC § 55.205, and their requests for a hearing should be denied.

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:

1. The Sierra Club and Public Citizen requests for hearing are denied.
2. In accordance with Tex. Water Code § 5.122 and 30 TAC § 55.203, this matter is uncontested by a person with an affected interest and is remanded to the ED for administrative processing as an uncontested permit application.
3. All other motions, requests for entry of specific Findings of Fact or Conclusions of Law, and any other requests for general or specific relief, if not expressly granted herein, are hereby denied.
4. The effective date of this Order is the date the Order is final, as provided by Tex. Gov't Code § 2001.144 and 30 TAC § 80.273.
5. The Commission's Chief Clerk shall forward a copy of this Order to all parties.
6. If any provision, sentence, clause, or phase of this Order is for any reason held to be invalid, the invalidity of any provision shall not affect the validity of the remaining portions of this Order.

ISSUED:

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

Bryan W. Shaw, Ph.D., Chairman
For the Commission