

Jon Niermann, *Chairman*
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Erin E. Chancellor, *Interim Executive Director*



Garrett T. Arthur, *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

February 13, 2023

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

RE: **Entergy Texas, Inc. (Applicant)**
TCEQ Docket No. 2023-0164-AIR

Dear Ms. Gharis:

Enclosed for filing is the Office of Public Interest Counsel's Response to Requests for Hearing in the above-entitled matter.

Sincerely,

A handwritten signature in cursive script that reads "Jennifer Jamison".

Jennifer Jamison, Attorney
Assistant Public Interest Counsel

cc: Mailing List

TCEQ DOCKET NO. 2023-0164-AIR

**APPLICATION BY
ENERGY TEXAS, INC.
FOR TCEQ AIR QUALITY
PERMIT NUMBERS
166032, GHGPSDTX210,
AND PSDTX1598**

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**BEFORE THE
TEXAS COMMISSION ON
ENVIRONMENTAL
QUALITY**

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE
TO REQUESTS FOR HEARING**

TO THE HONORABLE MEMBERS OF THE TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY:

The Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (TCEQ or the Commission) files this Response to Requests for Hearing in the above-referenced matter and respectfully submits the following.

I. INTRODUCTION

A. Summary of Position

Before the Commission is an application by Entergy Texas, Inc. (Applicant) for a New Source Review Authorization under Texas Clean Air Act (TCAA) § 382.0518. If issued, this permit would authorize the construction of a new facility that may emit air contaminants. The Commission received timely comments, requests for a public meeting, and hearing requests via form letter from 471 members and supporters of Sierra Club, Environmental Integrity Project, Environment Texas, Air Alliance Houston, Clean Energy Fund of Texas, Inc., Port Arthur Community Action Network, and Texas Campaign for the Environment (collectively, the "Conservation Organizations"). For the reasons stated herein, OPIC respectfully recommends the Commission deny all pending hearing requests.

B. Background of Facility

Entergy Texas, Inc. applied to the TCEQ for a New Source Review Authorization for initial issuance of Air Quality Permit Numbers 166032, GHGPSDTX210, and PSDTX1598. If issued, this permit would authorize the Applicant to construct the Orange County Advanced Power Station. The plant would be located at 1000 Power House Road in Orange County. Contaminants authorized under this permit include carbon monoxide (CO), organic compounds, particulate matter including particulate matter with diameters of 10 microns or less and 2.5 microns or less (PM10 and PM2.5, respectively), sulfuric acid mist, greenhouse gases (GHGs), nitrogen oxides (NOX), hazardous air pollutants (HAPs), sulfur dioxide (SO2), aqueous ammonia (NH3), and hydrogen (H).

The permit application was received on July 29, 2021 and declared administratively complete on August 4, 2021. The Notice of Receipt and Intent to Obtain an Air Quality Permit (NORI) was published in English on August 14, 2021 in the *Orange Leader*, and in Spanish on August 15, 2021 in *El Perico*. The Notice of Application and Preliminary Decision for an Air Quality Permit (NAPD) was published on June 29, 2022, in English in the *Orange Leader* and in Spanish on June 29, 2022, in *El Perico*. A public meeting was held on August 1, 2022 at Lamar State College. The public comment period ended on August 1, 2022, and the Executive Director's (ED) Response to Comments (RTC) was mailed on December 6, 2022. The deadline to request a contested case hearing was January 5, 2023.

II. APPLICABLE LAW

This Application was filed after September 1, 2015 and is therefore subject to the procedural rules adopted pursuant to Senate Bill 709. Tex. S.B. 709, 84th Leg., R.S. (2015). Under

30 TAC § 55.201(c), a hearing request by an affected person must be in writing, must be timely filed, may not be based on an issue raised solely in a public comment which has been withdrawn, and, for applications filed on or after September 1, 2015, must be based only on the affected person's timely comments.

Section 55.201(d) states that a hearing request must substantially comply with the following:

- (1) give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request;
- (2) identify the requestor's personal justiciable interest affected by the application, including a brief, but specific, written statement explaining in plain language the requestor's location and distance relative to the proposed facility or activity that is the subject of the application and how and why the requestor believes he or she will be adversely affected by the proposed facility or activity in a manner not common to members of the general public;
- (3) request a contested case hearing;
- (4) list all relevant and material disputed issues of fact that were raised by the requestor during the public comment period and that are the basis of the hearing request. To facilitate the Commission's determination of the number and scope of issues to be referred to hearing, the requestor should, to the extent possible, specify any of the ED's responses to the requestor's comments that the requestor disputes, the factual basis of the dispute, and list any disputed issues of law; and
- (5) provide any other information specified in the public notice of application.

Under 30 TAC § 55.203(a), an "affected person" is one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. An interest common to members of the general public does not qualify as a personal justiciable interest. Relevant factors to be considered in determining whether a person is affected include:

- (1) whether the interest claimed is one protected by the law under which the application will be considered;
- (2) distance restrictions or other limitations imposed by law on the affected interest;

- (3) whether a reasonable relationship exists between the interest claimed and the activity regulated;
- (4) likely impact of the regulated activity on the health and safety of the person, and on the use of property of the person;
- (5) likely impact of the regulated activity on use of the impacted natural resource by the person;
- (6) for a hearing request on an application filed on or after September 1, 2015, whether the requestor timely submitted comments on the application that were not withdrawn; and
- (7) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

30 TAC § 55.203(c).

Under § 55.203(d), to determine whether a person is an affected person for the purpose of granting a hearing request for an application filed on or after September 1, 2015, the Commission may also consider the following:

- (1) the merits of the underlying application and supporting documentation in the administrative record, including whether the application meets the requirements for permit issuance;
- (2) the analysis and opinions of the executive director; and
- (3) any other expert reports, affidavits, opinions, or data submitted by the executive director, the applicant, or hearing requestor.

Under 30 TAC § 55.211(c)(2)(A)(ii), for an application filed on or after September 1, 2015, the Commission shall grant a hearing request made by an affected person if the request raises disputed issues of fact that were raised by the affected person during the comment period, that were not withdrawn by filing a withdrawal letter with the Chief Clerk prior to the filing of the ED's RTC, and that are relevant and material to the Commission's decision on the application.

Under § 55.211(c)(2)(B)–(D), the hearing request, to be granted, must also be timely filed with the Chief Clerk, pursuant to a right to hearing authorized by law, and comply with the requirements of § 55.201.

III. DISCUSSION

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Individuals listed on Conservation Organizations letters

The Commission received timely comments, requests for a public meeting, and hearing requests via a form letter from 471 members and supporters of Conservation Organizations, as previously listed.¹ The map prepared by the ED lists only one requestor, Ellen Buchanan, whose request is also included as one of the Conservation Organization form letters. Ms. Buchanan's address is mapped as 35.04 miles from the proposed facility, and her request does not offer any particularized concern outside of the comments included on the Conservation Organization form letter. Accordingly, OPIC cannot find that Ellen Buchanan is an affected person for the same reasons OPIC recommends denial of all Conservation Organization letter requestors as described below.

While it seems likely that the intended purpose of the form letter was to comment and request a public meeting, certain language contained in the letter could be interpreted as a request for a contested case hearing. Specifically, the letter states, "TCEQ should immediately make the application available to the public and hold a public *hearing* so that the agency and public can make a transparent and informed decision about approving this major source of pollution." (emphasis added). Thus, OPIC is analyzing the Conservation Organization form letters as requests for a contested case hearing pursuant to 30 TAC § 55.201(d) and 30 TAC § 55.203(a).

A valid hearing request must substantially comply with the factors set forth in 30 TAC § 55.201(d). As such, a requestor must list a name and address, a description of their personal,

¹ The text preceding the Conservation Organizations' letter specifically states, "The following 465 members and supporters of the Conservation Organizations respectfully request a public meeting so that interested members of the public and our members and supporters can better understand the Application and any proposed permit. See 30 T.A.C. § 55.154(c)(1) and (3)."

justiciable interests affected by the application, and a brief written statement explaining in plain language the requestor's location and distance relative to the proposed facility. While some of the Conservation Organization letter requests list names or partial addresses, none of the requests substantially comply with the requirements established by 30 TAC § 55.201(d). Specifically, the letters fail to list a full address of any requestor, and instead include only a name, city, and zip code for each requestor. Further, the requests do not indicate an approximate location relative to the proposed facility consistent with 30 TAC § 55.201(d), and many contain general concerns rather than a particularized statement indicating how the requestor will be impacted by the proposed facility. In addition, under 30 TAC § 55.203(a), an “affected person” is one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. An affected person must articulate a personal interest in the application that is not common to members of the general public. While the Conservation Organizations letters articulate concerns that are within the jurisdiction of the TCEQ, they do not state concerns that are specific to any one person or organization. As such, OPIC cannot find that any of the requestors have satisfied the requirements of 30 TAC § 55.203(a).

IV. CONCLUSION

Having found that none of the members and supporters of the Conservation Organizations qualify as affected persons in this matter, OPIC respectfully recommends the Commission deny all requests for a contested case hearing.

Respectfully submitted,

Garrett T. Arthur
Public Interest Counsel

By:  _____

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CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2023 the original of the Office of Public Interest Counsel's Response to Hearing Requests was filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail, electronic mail, or by deposit in the U.S. Mail.



Jennifer Jamison

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See attached list.

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