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Toby Baker, *Commissioner*
Zak Covar, *Commissioner*
Richard A. Hyde, P.E., *Executive Director*



Vic McWherter, Public Interest Counsel

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

December 29, 2014

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

RE: INDECK WHARTON, LLC
TCEQ DOCKET NO. 2014-0847-AIR

Dear Ms. Bohac:

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

Sincerely,

A handwritten signature in cursive script that reads "Eli Martinez".

Eli Martinez, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2014-0847-AIR

**IN THE MATTER OF
THE APPLICATION OF
INDECK WHARTON,
LLC FOR AIR PERMIT
NOS. 111724, PSD-TX-
1374**

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**BEFORE THE TEXAS
COMMISSION ON
ENVIRONMENTAL
QUALITY**

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

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

COMES NOW, the Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (the Commission or TCEQ) with a Response to Hearing Requests in the above-referenced matter.

I. INTRODUCTION

Indeck Wharton, LLC has applied to the TCEQ for a New Source Review Authorization under Texas Clean Air Act (TCAA), §382.0518. This will authorize the construction of a new facility that may emit air contaminants. This permit will authorize the applicant to construct three new natural gas fired combustion turbine generators (CTGs). The CTGs will either be the General Electric 7FA (~214 MW each) or the Siemens SGT6-5000F (~227 MW each), operating as peaking units in simple cycle mode. The facility is located on west side of State Route 71, 3350 feet south of the intersection of Route 71 and County Road 424 in Danevang, about 0.50 mile south of the center of Danevang, in Wharton County, Texas. Contaminants authorized under this permit include nitrogen oxides (NO_x), carbon monoxide (CO), sulfur dioxide (SO₂),

particulate matter (PM) including particulate matter with diameters of 10 microns or less (PM₁₀) and 2.5 microns or less (PM_{2.5}), volatile organic compounds (VOC), and hazardous air pollutants.

Before work is begun on the construction of a new facility that may emit air contaminants, the person planning the construction must obtain a permit from the TCEQ. This permit application is for an initial issuance of Air Quality Permit Numbers 111724 and PSDTX1374.

The permit application was received on June 18, 2013, and declared administratively complete on July 11, 2013. The Notice of Receipt and Intent to Obtain an Air Quality Permit (public notice) for this permit application was published in English on August 7, 2013, in the *El Campo Leader-News*. The Notice of Application and Preliminary Decision for an Air Quality Permit was published on May 17, 2014, in English in the *El Campo Leader-News*. A public meeting was held on September 30, 2014, in El Campo. The notice of public meeting was mailed to interested parties on September 9, 2014. The notice of public meeting was published in English on September 10, 2014, in the *El Campo Leader-News*. Although the public notices were also required to be published in a Spanish language newspaper of general circulation, this requirement was waived pursuant to 30 TAC § 39.405(h)(8) because the applicant certified that no Spanish language newspaper of general circulation exists in the municipality or county where the proposed facility is located. The public comment period ended at the conclusion of the public meeting on September 30, 2014. The ED prepared a response to comments, which was mailed on November 6, 2014. The period to request a contested case hearing ended on December 8, 2014.

TCEQ received a request for a contested case hearing on behalf of Danevang Lutheran Church, and a second request on behalf of Farryl Holub, Martha Ann Madsen

Holub, Jillian Nicole Holub, Jessica Ann Holub Rumbaugh, and LISTEN!—an Alliance to Protect the People and Property of Wharton County (LISTEN!). OPIC recommends denying the request of Danevang Lutheran Church, and granting the hearing request of LISTEN!, Farryl Holub, Martha Ann Madsen Holub, Jillian Nicole Holub, and Jessica Ann Holub Rumbaugh, and referring the matter to the State Office of Administrative Hearings (SOAH) on the issues outlined below.

II. APPLICABLE LAW

This application was declared administratively complete after September 1, 1999, and is subject to the requirements of Texas Water Code (TWC) § 5.556 added by Acts 1999, 76th Leg., Ch. 1350 (commonly known as “House Bill 801”). Under the applicable statutory and regulatory requirements, a hearing request must substantially comply with the following: give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request; identify the requestor’s personal justiciable interest affected by the application showing why the requestor is an “affected person” who may be adversely affected by the proposed facility or activity in a manner not common to members of the general public; request a contested case hearing; list all relevant and material disputed issues of fact that were raised during the comment period that are the basis of the hearing request; and provide any other information specified in the public notice of application. 30 TAC § 55.201(d). 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.” This justiciable interest does not include an interest common to the general public. 30 TAC § 55.203(c)

also provides relevant factors that will be considered in determining whether a person is affected. These factors 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, safety, and use of property of the person;
- (5) likely impact of the regulated activity on use of the impacted natural resource by the person; and
- (6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

The Commission shall grant an affected person's timely filed hearing request if:

(1) the request is made pursuant to a right to hearing authorized by law; and (2) the request raises disputed issues of fact that were raised during the comment period and that are relevant and material to the commission's decision on the application. 30 TAC § 55.211(c).

Accordingly, pursuant to 30 TAC § 55.209(e), responses to hearing requests must specifically address:

- (1) whether the requestor is an affected person;
- (2) which issues raised in the hearing request are disputed;

- (3) whether the dispute involves questions of fact or law;
- (4) whether the issues were raised during the public comment period;
- (5) whether the hearing request is based on issues raised solely in a public comment withdrawn by the commenter in writing by filing a withdrawal letter with the chief clerk prior to the filing of the Executive Director's response to Comment;
- (6) whether the issues are relevant and material to the decision on the application; and
- (7) a maximum expected duration for the contested case hearing.

A group or association may request a contested case hearing only if the group or association meets all of the following requirements:

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

The executive director, the public interest counsel, or the applicant may request that a group or association provide an explanation of how the group or association meets the requirements of 30 TAC § 55.205(a).

III. DISCUSSION

A. Determination of Affected Person Status

¹ 30 TAC § 55.205(a)

i. Danevang Lutheran Church (Danevang)

On June 11, 2014, the TCEQ received a letter requesting a contested case hearing on this matter from Danevang Lutheran Church. Danevang is a historic church located across from the proposed site on State Route 71. The Danevang property includes a museum, church, hall, and cemetery—all of which could be negatively impacted by the presence of a large, commercial power plant in close proximity as proposed in the Indeck permit application. The church raises concerns related to potential curtailment of visitors and donations that help maintain the property, as well as negative impacts to the overall beauty and serenity of the property. While OPIC empathizes with the desire to protect and preserve historical sites, concerns relating to the siting of modern, industrial and commercial facilities near historical grounds is not protected by the law under which the application will be considered and falls outside of the TCEQ's jurisdiction to regulate. Therefore, OPIC recommends denying the request of Danevang Church for a hearing request.

ii. Farryl Holub, Martha Ann Madsen Holub, Jillian Nicole Holub, Jessica Ann Holub Rumbaugh, and LISTEN!

On June 13, 2014 and June 16, 2014, the TCEQ received hearing requests on behalf of Farryl Holub, Martha Ann Madsen Holub, Jillian Nicole Holub, Jessica Ann Holub Rumbaugh, and LISTEN!

- a. Farryl Holub, Martha Ann Madsen Holub, Jillian Nicole Holub, and Jessica Ann Holub Rumbaugh

Farryl Holub submitted a timely-filed hearing request on behalf of himself, spouse Martha Ann Madsen Holub, and daughters Jillian Nicole Holub and Jessica Ann Holub Rumbaugh. The request raises concerns that contaminants emitted by the proposed plant may negatively impact air quality, the health and safety of the requestors and fellow residents, the health and safety of plant and animal life in the vicinity, and ground or surface water. Furthermore, Mr. Holub indicates that the applicant did not properly comply with notice requirements related to posting signs at the location of the proposed site. With the exception of the concern related to potential contamination of ground and surface water, OPIC finds that these interests are disputed, material and relevant issues of fact protected by the law under which the application will be considered.²

The hearing request indicates that Mr. Holub and his wife reside on 240 acres immediately south and southwest of the tract upon which Indeck is proposing to build its facility. The request also indicates that Mr. Holub's tract and Indeck's tract physically touch. Additionally, Mr. Holub, his wife, and their children—Jillian Nicole Holub and Jessica Ann Holub Rumbaugh—own another tract of land approximately 150 acres in size located one mile north of the proposed facility. At the time of this response, a map was not available from the executive director's office and OPIC therefore accepts these distance approximations as accurate. Due to the proximity of the property owned by the requestors, OPIC finds that a reasonable relationship exists between the interest claimed and the activity regulated,³ and therefore recommends that Mr. Holub, Martha Ann Madsen Holub, Jillian Nicole Holub, and Jessica Ann Holub Rumbaugh be determined affected persons in this matter.

² 30 TAC §55.209(e)

³ 30 TAC §55.203(c)(3)

b. LISTEN!

Mr. Holub's correspondence also requests a hearing on behalf of the organization LISTEN!—an Alliance to Protect the People and Property of Wharton County. While details regarding the purpose of the group are sparse, the name of the group indicates a general desire to maintain the well-being of people and property in the county where the proposed facility will be located. OPIC therefore finds that the interests the group or association seeks to protect in its hearing request are germane to the organization's purpose.⁴ Because OPIC has already recommended that Mr. Holub—member and president of LISTEN!—is an affected person, one or more members of the group or association otherwise have standing to request a hearing in their own right.⁵ Therefore, OPIC recommends that LISTEN! be determined an affected person and that their hearing request be granted.

B. Issues Raised in the Hearing Request

The following issues have been raised in the hearing request:

1. Potential negative impacts on air quality.
2. Potential negative impacts on human health.
3. Potential negative impacts on plant and animal life.
4. Compliance with the notice requirements of 30 TAC §39.604 relating to signage at the proposed facility.

⁴ 30 TAC § 55.205(a)(2)

⁵ 30 TAC § 55.205(a)(1)

D. Issues Raised in the Comment Period

All of the issues raised in the hearing request were raised in the comment period and have not been withdrawn. 30 TAC §§ 55.201(c) and (d)(4), 55.211(c)(2)(A).

E. Disputed Issues

There is no agreement between the hearing requesters and the ED on the issues raised in the hearing requests.

F. Issues of Fact

If the Commission considers an issue to be one of fact, rather than one of law or policy, it is appropriate for referral to hearing if it meets all other applicable requirements. 30 TAC § 55.211(c)(2)(A).

All of the issues raised in Mr. Holub's hearing request are issues of fact.

G. Relevant and Material Issues

The hearing requests raise issues relevant and material to the Commission's decision under the requirements of 30 TAC §§ 55.201(d)(4) and 55.211(c)(2)(A). In order to refer an issue to SOAH, the Commission must find that the issue is relevant and material to the Commission's decision to issue or deny this permit. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–251 (1986) (in discussing the standards applicable to reviewing motions for summary judgment the Court stated “[a]s to materiality, the substantive law will identify which facts are material . . . it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs”). Relevant and material issues are those governed by the substantive law under which this permit is to be issued. *Id.* Therefore, the concerns related to potential negative impacts

on air quality, human health, and plant and animal life are material and relevant to the Commission's decision on this application. Furthermore, 30 TAC §39.604 requires that a sign or signs must be placed at the site of the existing or proposed facility declaring the filing of an application for a permit and stating the manner in which the commission may be contacted for further information. Therefore, the concerns relating to posting of signage at the proposed site is also a material and relevant issue properly referred to SOAH for a contested case hearing.

In contrast, the requestors' concerns related to surface and groundwater contamination fall outside the Commission's jurisdiction under the TCAA to safeguard the state's air resources from pollution, and is not properly referred to a contested case hearing.

H. Issues Recommended for Referral

OPIC therefore recommends that the following disputed issues of fact be referred to SOAH for a contested case hearing:

1. Whether the proposed plant will negatively impact air quality.
2. Whether the proposed plant will negatively impact human health.
3. Whether the proposed plant will negatively impact plant and animal life.
4. Whether the proposed plant will negatively impact surface and ground water.
5. Whether the applicant properly complied with the notice requirements of 30 TAC §39.604 relating to signage at the proposed facility.

I. Maximum Expected Duration of Hearing

Commission Rule 30 TEX. ADMIN. CODE § 55.115(d) requires that any Commission order referring a case to SOAH specify the maximum expected duration of the hearing by stating a date by which the judge is expected to issue a proposal for decision. The rule further provides that no hearing shall be longer than one year from the first day of the preliminary hearing to the date the proposal for decision is issued. To assist the Commission in stating a date by which the judge is expected to issue a proposal for decision, and as required by 30 TEX. ADMIN. CODE §55.209(d)(7), OPIC estimates that the maximum expected duration of a hearing on this would be nine months from the first date of the preliminary hearing until the proposal for decision is issued.

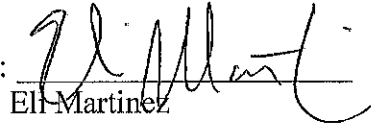
III. CONCLUSION

For the reasons discussed above, OPIC recommends that the Commission grant the hearing request of Farryl Holub, Martha Ann Madsen Holub, Jillian Nicole Holub, Jessica Ann Holub Rumbaugh, and LISTEN! and refer the matter to SOAH for a contested case hearing on the issues identified above for a maximum duration of nine months. OPIC recommends that the Commission deny the request of Danevang Lutheran Church.

Respectfully submitted,

Vic McWherter
Public Interest Counsel

By:



Eli Martinez

Assistant Public Interest Counsel

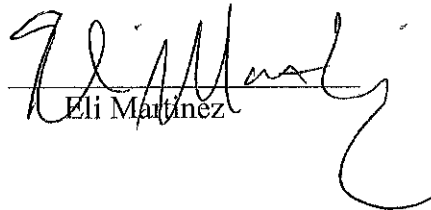
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CERTIFICATE OF SERVICE

I hereby certify that on December 29, 2014 the original and seven true and correct copies of the Office of the Public Interest Counsel's Response to Hearing Requests were 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 or by deposit in the U.S. Mail.



Eli Martinez

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