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January 30, 2012

Ms. Bridget Bohac
Office of the Chief Clerk, MC-105
Texas Commission on Environmental Quality
12100 Park 35 Circle, Building F
Austin, TX 78753

via electronic submission

Attn: Agenda Docket Clerk

Re: Application of White Stallion Energy Center, L.L.C.
SOAH DOCKET NO. 582-09-3008
TCEQ DOCKET NO. 2009-0283-AIR

Dear Ms. Bohac:

Enclosed please find Sierra Club's Response to Parties' Briefs Concerning Procedures for Addressing New Evidence on Remand. If you have any questions concerning this filing, please do not hesitate to contact me at the number above.

Sincerely,

Gabriel Clark-Leach

Enclosure

cc: Service List (via electronic mail and U.S. mail)

SOAH DOCKET NO. 582-09-3008
TCEQ DOCKET NO. 2009-0283-AIR

APPLICATION OF WHITE STALLION § BEFORE THE TEXAS COMMISSION
ENERGY CENTER, L.L.C. §
FOR STATE AIR QUALITY PERMIT § ON
NOS. 86088; HAP28, PAL26, §
AND PSD-TX-1160 § ENVIRONMENTAL QUALITY
HEARINGS §

**SIERRA CLUB'S RESPONSE TO PARTIES' BRIEFS CONCERNING PROCEDURES
FOR ADDRESSING NEW EVIDENCE ON REMAND**

TO THE HONORABLE COMMISSIONERS AND GENERAL COUNSEL TROBMAN:

COMES NOW Sierra Club and files this Response to Parties' briefs concerning procedures for addressing new evidence on remand, and would respectfully show the following:

I. Introduction and Summary

The District Court has ordered that proceedings before the State Office of Administrative Hearings ("SOAH") and the Texas Commission on Environmental Quality ("TCEQ" or "Commission") regarding White Stallion's air permit application be re-opened so that new evidence concerning White Stallion's October 25, 2010 site plan ("new site plan") and its impacts on White Stallion's air permit application may be taken and considered by the Commission.¹ The Court's remand was *proper*, because, consistent with Tex. Gov't Code § 2001.175(c), new evidence within the scope of the Remand Order is material to the question of whether White Stallion's permit should be issued, and parties did not have an opportunity to present and develop such evidence during the initial hearing before SOAH.² The remand in this case was *necessary* to provide the public with a meaningful opportunity to participate in the permitting process as the Clean Air Act requires.³

¹ Remand Order at 2.

² *Id.* at 1; Tex. Gov't Code § 2001.175(c).

³ Remand Order at 1; 42 U.S.C. § 7470(5).

Sierra Club urges the Commission to either (1) require White Stallion to re-file its application as Tex. Health & Safety Code § 382.0291(d) provides or (2) nullify its previous decision to issue White Stallion's air permit, so that the matter may be sent back to SOAH for a full and fair hearing on issues within the scope of the Remand Order.⁴

II. Argument

White Stallion and the Executive Director have made several strange claims and recommendations regarding the remand proceedings, which the Commission should reject. For example, White Stallion suggests that it would be proper for the Commission to pass judgment on the significance of new evidence without allowing parties any discovery or any opportunity to develop evidence through direct testimony and cross-examination during a contested case hearing before SOAH.⁵ Likewise, the Executive Director bluntly contends that the Commission may consider new evidence "entirely by written submission" and that EDF bears the burden of proof on issues open on remand.⁶ Parties are entitled to a contested case hearing to develop new evidence on remand just as they were entitled to hearing to develop evidence during the initial proceedings.⁷ Thus, the Commission should reject these claims and recommendations, because they are without merit, contrary to the clear language of the Remand Order, and contrary to applicable rules and statutes. Specifically, the Commission may not disregard its own rules regarding the rights of parties in air permit cases where, as here, the applicant has requested a direct referral to SOAH for a contested case hearing.⁸ The rules and statutes that applied to the

⁴ Sierra Club Brief at 2-3.

⁵ See, e.g., White Stallion Brief at 2 (laying out proposed procedure for remand proceedings consistent with the Commission's power to do anything necessary and convenient and to hold hearings)

⁶ Executive Director's Brief at 3, n12. Presumably, the Executive Director means all Protestants and not simply EDF.

⁷ *City of Waco v. Texas Com'n on Environmental Quality*, 346 W.W.3d 781, 818 (Tex.App.—Austin 2011) ("[S]ubstantial evidence review on an agency record is simply 'not possible' absent the opportunity to develop that record through a contested-case or adjudicative hearing.")

⁸ See, e.g., 30 Tex. Admin. Code §§ 55.210, 80.4, 80.115, 80.151.

Commission's initial proceedings on White Stallion's air permit application continue to apply on remand.

A. Special Procedures Recommended by White Stallion and the Executive Director Fail to Give Full Effect to the Remand Order

White Stallion and the Executive Director's procedural proposals fail to comply with both the letter and the spirit of the Remand Order. The Remand Order clearly indicates that further process is necessary to ensure meaningful public participation in this case.⁹ To this end, the Court "re-opened" proceedings on White Stallion's application.¹⁰ To ensure that all material evidence concerning White Stallion's application is given sufficient weight, the Commission is clearly obligated to give serious consideration to new evidence offered by all parties.¹¹ Thus, contrary to White Stallion's brief, the Remand Order does not leave

the Commission in position to either (1) further explain for the benefit of the reviewing court how, under the applicable law, site plans in other regulatory proceedings are irrelevant to a decision on the Air Permit application as filed by the applicant, or (2) instead now choose to reopen its permit decisions based on ongoing evolution in project design.¹²

The Remand Order was necessary to provide parties with an opportunity to present new material evidence.¹³ It was not intended to simply provide White Stallion and the Executive Director an opportunity to develop the same arguments they presented in their briefs opposing EDF's motion for remand before the District Court (and the Court of Appeals and the Supreme

⁹ Remand Order at 1.

¹⁰ *Id.* at 2.

¹¹ *Id.* ("[T]his appeal shall be abated pending the taking of such evidence and pending TCEQ's decision whether to change its findings and decision by reason of the additional evidence as provided under Tex. Gov't Code § 2001.175(c).").

¹² White Stallion Brief at 5.

¹³ Remand Order at 1 ("The Court is satisfied that the additional evidence is material and there are good reasons why it was not presented in the proceeding before the State Office of Administrative Hearings. . . and the TCEQ. . . and that unless the Court grants this motion, the public will not be afforded meaningful participation in the permit application review process.").

Court on mandamus appeal), which were rejected by the Court.¹⁴ The Remand Order expressly directs the Commission to take new evidence on White Stallion's new site plan and its impact on White Stallion's air permit application.¹⁵ The Remand Order also directs the Commission to decide whether its previous findings and decision regarding White Stallion's application should be modified in light of the new evidence.¹⁶ Thus, the Remand Order forecloses the first option proposed by White Stallion.¹⁷

Though White Stallion and the Executive Director clearly believe that new evidence within the scope of the Remand Order is irrelevant, they may not simply presume that the Court has erred in finding that new evidence is material.¹⁸ Accordingly, if the Commission is to comply with the Remand Order, it has no choice but to reopen its permitting decision in this case in light of new evidence as directed by the Court.

¹⁴ *Id.*

¹⁵ Remand Order at 2.

¹⁶ *Id.*

¹⁷ White Stallion argues that the Tex. Gov't Code § 2001.175(c) is "a procedural tool by which a reviewing court may provide the agency the *opportunity* but not the obligation to reconsider its decision in light of new, previously unavailable evidence that might change that decision while judicial review remains pending." White Stallion Brief at 3. White Stallion does not attempt to explain why the Court may not require the Commission to reconsider its previous decision in light of new material evidence. Even if we accept White Stallion's claim as true, the Commission clearly *should* reconsider its previous decision in light of new evidence offered on remand. Failure to consider relevant evidence properly introduced into the record would be arbitrary and capricious and invite reversal or another remand on appeal.

¹⁸ Moreover, neither the Executive Director nor White Stallion have cited any rule or statute indicating that "it is irrelevant to the validity of the air permit authorization whether the applicant submits conflicting information in other media applications." Executive Director Brief at 5; *see also* White Stallion Brief at 5-6. On the other hand, Tex. Health & Safety Code § 382.0518(b) directs the Commission to make its decision on an air permit application based on "information available to the Commission," and says nothing indicating that consideration should be limited to permit application representations. Certainly "available information" must include information beyond representations made by an applicant in a permit application. For example, the Commission may not, as a matter of policy, disregard relevant and reliable evidence offered on the record by a protestant simply because it conflicts with representations made in an application. *See also* Tex. Health & Safety Code §§ 382.0515(2) and (3) ("A person applying for a permit shall submit to the commission: . . . (2) copies of all plans and specifications necessary to determine if the facility or source will comply with applicable federal and state air control statutes, rules, and regulations and the intent of this chapter; and (3) any other information the commission considers necessary.")

B. White Stallion's Application Must Be Referred Back to SOAH

On February 27, 2009, White Stallion requested that its application be directly referred to SOAH for a contested case hearing.¹⁹ In cases where an applicant requests a direct referral, the Commission's rules require that "the chief clerk shall refer the application directly to SOAH for a hearing on whether the application complies with all applicable statutory and regulatory requirements."²⁰ Accordingly, White Stallion's application was referred to SOAH for a hearing. After a hearing was conducted and in light of evidence admitted during that hearing and the administrative law judges' evaluation of that evidence, the Commission issued its October 19, 2010 order granting White Stallion's permit application. Judge Livingston ordered the Commission to "re-open" proceedings on White Stallion's application so that new material evidence may be taken and considered. To comply with the Remand Order, the Commission should invoke its "re-opening" rule, which provides that "[t]he Commission. . . may order the judge to reopen the record for further proceedings on specific issues in dispute."²¹ While the Executive Director and White Stallion have pointed out that the Commission has the authority and the discretion to conduct its own evidentiary hearings in some cases, the Commission does not have such discretion in permitting cases, such as this, where a direct referral has been requested by the applicant.²² To give effect to the Remand Order, the Commission must follow its own rules, re-open the record, and refer the matter back to SOAH for further proceedings on issues related to White Stallion's new site plan.²³

¹⁹ 2 A.R. Item 19 (Letter RE: Requesting direct referral to SOAH; from Eric Groten, Attorney for Applicant).

²⁰ 30 Tex. Admin. Code § 55.210(b).

²¹ 30 Tex. Admin. Code § 80.265.

²² 30 Tex. Admin. Code § 55.210(b); *See also*, 30 Tex. Admin. Code § 80.265, which indicates that re-opened proceedings are to be referred back to a judge.

²³ 30 Tex. Admin. Code §§ 55.210(b); 80.265; 80.272(d)(2).

C. White Stallion Bears the Burden of Proof on Issues Open on Remand

The Remand Order states that additional evidence concerning White Stallion's site plan is "material." Evidence is "material" only if it could affect the agency's decision.²⁴ Thus, in this case, new evidence concerning White Stallion's October 25, 2010 site plan is material only because it could affect the agency's decision to issue White Stallion air permit. The Commission may only authorize air permits like White Stallion's if the applicant demonstrates that its application meets all the relevant requirements of state and federal statutes and rules.²⁵ In a contested case hearing on an application for an air authorization, the applicant is the moving party and must prove by a preponderance of the evidence that it has made all required demonstrations.²⁶

The ultimate question that the Commission must answer in light of new evidence offered on remand is the same question it was required to answer in the original proceedings: does White Stallion's application meet all relevant requirements of state and federal statutes and rules? The applicant bears the burden of proof on all issues related to this question. Accordingly, it would be improper to, as the Executive Director suggests, shift the burden of proof on any issue open on remand away from the applicant.

D. Rights of Parties on Remand

The Commission's contested case hearing rules provide that

A party has the right to conduct discovery, present a direct case, cross-examine witnesses, make oral and written arguments, obtain copies of all pleadings, motions, replies, and other filed documents, receive copies of all notices issued by the commission concerning the proceeding to which the person is a party, and, as directed by the judge, otherwise fully participate as a party in the proceeding.²⁷

²⁴ *Smith Motor Sales, Inc. v. Texas Motor Vehicle Com'n*, 809 S.W.2d 268, 270 (Tex.App.—Austin 1991).

²⁵ 30 Tex. Admin. Code § 55.210, 80.17(a), 116.111(a).

²⁶ Executive Director Brief at 3 (citing 30 Tex. Admin. Code § 80.17(a)).

²⁷ 30 Tex. Admin. Code § 80.115(a).

Thus, even if White Stallion and the Executive Director decline to supplement their direct cases on remand, Sierra Club (and other parties) must have an opportunity to make a direct case based on new evidence, cross-examine witnesses, make oral and written arguments, and conduct discovery concerning issues open on remand. Moreover, as EDF argued in its Motion for Remand, parties must also have the right to cross-examine agency and applicant witnesses concerning their prior testimony in light of White Stallion's new site plan. Failure to allow such cross-examination would improperly limit parties' right to offer and develop evidence on the impacts of the new site plan under applicable law as contemplated by the Remand Order.²⁸

The Commission rule regarding discovery in contested case hearings provides that discovery in contested case hearings should generally be conducted according to the Texas Rules of Civil Procedure.²⁹ The Texas Rules of Civil Procedure provide that

a party may obtain discovery regarding any matter that is not privileged and is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party.³⁰

Thus, parties must have an opportunity to conduct discovery concerning White Stallion's new site plan and its impacts on White Stallion's air permit application under applicable laws.

III. Conclusion

Sierra Club respectfully requests that the Commission require White Stallion resubmit its air permit application consistent with § 382.0291(d). In the alternative, Sierra Club requests that the Commission nullify its October 19, 2010 order granting White Stallion's application, and

²⁸ Remand Order at 2 ("It is ordered that. . .this matter be remanded for the taking of additional evidence on the October 25, 2010 site plan. . .and its impacts on WSEC's TCEQ air permit application under applicable law." (emphasis added)).

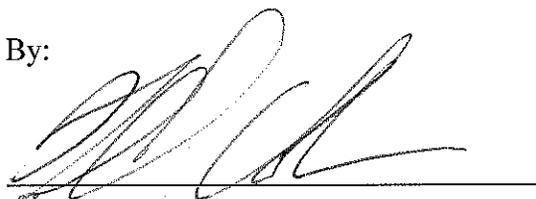
²⁹ 30 Tex. Admin. Code § 80.151. While this rule does include the caveat "unless commission rules provide or the judge orders otherwise," neither the Executive Director nor White Stallion has pointed to any Commission rule indicating that the Texas Rules of Civil Procedure should not be followed in this case.

³⁰ Tex. R. Civ. P., Rule 192.3(a).

remand the matter to the State Office of Administrative Hearings for a contested case hearing on issues within the scope of the Remand Order.

Respectfully Submitted,
ENVIRONMENTAL INTEGRITY PROJECT

By:

A handwritten signature in black ink, appearing to read 'G. Clark-Leach', is written over a solid horizontal line.

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CERTIFICATE OF SERVICE

This is to certify that on this the 30th day of January, 2012, the foregoing document has been served by hand-delivery, email, facsimile or U.S. Mail to the addressees listed below:

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