

McELROY, SULLIVAN & MILLER, L.L.P.
Attorneys at Law

MAILING ADDRESS
P.O. BOX 12127
AUSTIN, TX 78711

1201 SPYGLASS DRIVE
SUITE 200
AUSTIN, TX 78746

TELEPHONE
(512) 327-8111

FAX
(512) 327-6566

January 30, 2012

Via Electronic Filing
and Hand Delivery

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

Attn: Agenda Docket Clerk

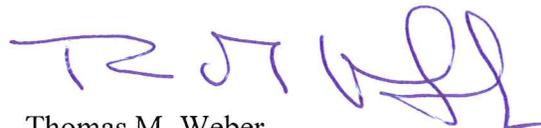
Re: Application of White Stallion Energy Center, LLC
SOAH DOCKET NO. 582-09-3008
TCEQ DOCKET NO. 2009-0283-AIR

Dear Ms. Bohac:

Enclosed please find an original and seven copies of Environmental Defense Fund, Inc.'s Reply to the Briefs on Remand of White Stallion Energy Center, LLC and the Executive Director.

If you have any questions concerning this filing, please do not hesitate to contact me at the number above.

Sincerely,



Thomas M. Weber

TMW/jam
5043-11
Enclosure

cc: Mr. Les Trobman, TCEQ General Counsel (via hand delivery)
Service List (via hand delivery and e-mail)

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

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

ENVIRONMENTAL DEFENSE FUND’S REPLY TO THE BRIEFS ON REMAND OF WHITE STALLION ENERGY CENTER, LLC AND THE EXECUTIVE DIRECTOR

TO THE HONORABLE COMMISSIONERS AND GENERAL COUNSEL TROBMAN:

COMES NOW Environmental Defense Fund, Inc. (“EDF”) and files this Reply to the Briefs on Remand of White Stallion Energy Center, LLC (“White Stallion”) and the Executive Director (“Executive Director”), and would respectfully show the following:

I. Summary.

The District Court’s Remand Order requires that additional evidence be taken on: (1) the October 25th Site Plan submitted by White Stallion to the U.S. Army Corps of Engineers (“the Corps”); and (2) on that site plan’s “impacts on WSEC’s TCEQ air permit application under applicable law.”¹ The TCEQ’s Office of General Counsel has requested that the parties brief “the procedural aspects and the scope of the remand.”

White Stallion has played a shell game with its ever-changing site plans and made a mockery of TCEQ’s air permitting process. TCEQ issued White Stallion an air permit based on a specific site plan that White Stallion’s CEO testified was the site plan White Stallion “fully and completely” intended to build (“the Air Permit Site Plan”). But within days of the Final Order, White Stallion represented to the U.S. Army Corps of Engineers (“the Corps”), subject to criminal penalty, that it intended to build the plant based on an entirely different site plan—one

¹ See EDF’s Brief on Remand, Attachment II, Remand Order (emphasis added).

that moved 73 out of the 84 emissions points shown on the Air Permit Site Plan.² The October 25th Site Plan submitted to the Corps is dated a mere six days after TCEQ issued its Final Order in the air permitting case. The Corps has now issued White Stallion a wetlands permit based on this new site plan. Therefore, White Stallion must now demonstrate that its current site plan—the October 25th Site Plan—complies with applicable air quality laws.

In their respective briefs, White Stallion and the Executive Director propose procedures on remand that invite reversible error. Both White Stallion and the Executive Director ask TCEQ to shift the burden of proof to EDF. This is an air permitting case. As the applicant, White Stallion has the burden of proof because it is the party charged under federal and state law with demonstrating compliance with applicable air quality standards. At this point, White Stallion has never demonstrated that the October 25th Site Plan complies with applicable air quality standards.

While the Executive Director apparently recognizes EDF's right to a hearing and discovery on remand,³ White Stallion proposes a procedure on remand that allows no opportunity for an evidentiary hearing, no cross examination and no discovery. Due process requires that parties be afforded a full and fair hearing on disputed fact issues. *Geeslin v. State Farm Lloyds*, 255 S.W.3d 786, 802-804 (Tex.App. – Austin 2008). A full and fair hearing necessarily includes the right to conduct discovery and cross-examination. *Id.* The Commission should reject White Stallion's attempt to deny EDF discovery and a full and fair hearing.

² White Stallion incorrectly states that only material handling operations were moved. The October 25th Site Plan reflects the movement of 73 emissions points, which includes the movement of a diesel-fired fire water pump and dozens of cooling tower emissions points. See Attachment A, Exhibit D-3 to EDF's Motion for Remand, which lists each emissions point that moved and highlights those not associated with material handling operations.

³ See Executive Director's Brief on Remand, pp. 2-4 (stating "Chapter 80 of TCEQ rules apply to such a proceeding" and "it would also appear permissible for the Commission to provide for a limited discovery opportunity, in order to put the evidence for which this matter was remanded into a meaningful context").

Both White Stallion and the Executive Director also invite error by suggesting that TCEQ limit the scope of remand to the taking of additional evidence on only the October 25th Site Plan. This would violate the express language of the District Court’s Remand Order. The Court specifically ordered the taking of additional evidence not only on the October 25th Site Plan but also on the “impacts” associated with the October 25th Site Plan. An “impacts” analysis necessarily requires new air dispersion modeling, discovery, and a full hearing. Without new modeling, the Applicant cannot demonstrate that the October 25th Site Plan complies with “applicable law” including 40 CFR § 52.21(k) (entitled “Source ***Impact*** Analysis”)—the EPA rule which lies at the very heart of air quality regulation and which is incorporated in TCEQ’s own rules.⁴ As it stands now, the only evidence presented by either party demonstrates that White Stallion has not made the required demonstration for the plant it now plans to build. *See* Attachment B, Supplemental Affidavit of Roberto Gasparini, Ph.D from EDF’s Reply in Support of APA Motion to Remand.

The Commission should ignore White Stallion’s and the Executive Director’s invitations to commit error. The public (including EDF) is entitled to notice and an opportunity for a full evidentiary hearing on the plant White Stallion ***actually intends to build***. Given the extent of

⁴ EPA’s rules at 40 CFR § 52.21(k) provide as follows:

- (k) Source impact analysis. The owner or operator of [a proposed new major source of air pollutants] *shall demonstrate that allowable emission increases from the proposed source or modification, in conjunction with all other applicable emissions increases or reductions (including secondary emissions), would not cause or contribute to air pollution in violation of:*
 - (1) Any national ambient air quality standard in any air quality control region; or
 - (2) Any applicable maximum increase over the baseline concentration in any area.

40 CFR § 52.21(k) (emphasis added). See also Clean Air Act §165(a)(3) (42 USC § 7475 (a)(3)) (providing that an operator of a new major source of air pollutants must “demonstrate” the facility will not “cause or contribute” to air pollution in violation of national ambient air quality standards or maximum allowable increases in air pollution). 40 CFR § 52.21(k) is arguably **the** single most important standard with which air quality permit applicants must comply and is the foundation of air quality regulation in the United States.

the changes made to the Air Permit Site Plan, the Commission should require White Stallion to resubmit its application and issue new notice to the public pursuant to the plain language of Texas Health & Safety Code § 382.0291(d). At the very least, the Commission should remand this matter to the State Office of Administrative Hearings (“SOAH”) for a full evidentiary hearing, including discovery, and for the taking of additional evidence on the issues identified by the District Court in the Remand Order.

II. The Changes to the Site Plan Constitute an Amendment Under § 382.0291(d).

Texas Health & Safety Code § 382.0291(d) provides that an applicant “may not amend the application after the 31st day before the date on which a public hearing on the application is scheduled to begin.” If an amendment “would be necessary,” the applicant must “resubmit the application” to TCEQ and publish new notice. White Stallion’s newly minted wetlands Corps permit, issued subsequent to its air permit, is based on sworn representations to the federal government that it plans to build the plant according to the October 25th Site Plan—a site plan that moves 73 out of 84 emissions points. Thus, White Stallion’s own sworn representations to the Corps and the Corps’ subsequent issuance of a wetlands permit based on those representations establish that an amendment is “necessary.”

Furthermore, EDF’s expert dispersion modeler, Dr. Roberto Gasparini, Ph.D., testified by Supplemental Affidavit submitted to the District Court that new modeling is required in order to determine whether emissions from White Stallion’s October 25th Site Plan comply with federal and state air quality standards:

5. One of the 73 emission sources that moved is the Railcar Unloading Building (EPN DCRAILUL or Entry Number 20 on Exhibit D-3 to my prior affidavit). This emission source represents the third largest emitter of particulate matter at the proposed White Stallion power plant (the main stacks represent the first and second largest emitters) and it was moved approximately 788 meters from the middle of the property to a location very close to the property

line. Since emission impacts are determined at off-property locations, **the movement of an emission source closer to a property line will likely increase its off-property emission impacts.** Another of the 73 emission sources that moved is Conveyor 3 (EPN CONV3 or Entry Number 38 on Exhibit D-3 to my prior affidavit). This emission source is a conveyor used for transporting materials. By moving the Railcar Unloading Building farther from the material storage piles, the length of this conveyor must be increased. Emission rates from conveyors are based in part on conveyor length and the equations used to calculate emission rates for conveyors are found in TCEQ guidance. See Attachment 1. For every additional 300 feet of conveyor length (approximately 91 meters), the emission rate is increased. The emission rate from this conveyor will increase. **An increase in emission rate will affect the emission impact caused by this source.**

6. In my opinion, the movement of emission sources closer to the property line and the lengthening of the conveyors are material changes and warrant re-modeling the potential emissions impacts associated with the proposed plant. **Without modeling the emissions from the sources as they would be located on White Stallion's new site plan, it is not possible to determine whether the net effect would be a violation of one or more of the federal or state clean air standards.**

See Attachment B, Supplemental Affidavit of Roberto Gasparini, Ph.D. (emphasis added). Dr. Gasparini's sworn testimony questioning White Stallion's ability to qualify for an air permit based on its October 25th Site Plan went completely unchallenged by either White Stallion or the Executive Director. This unchallenged testimony highlights why White Stallion must amend its application and submit new modeling analyzing the off-property impacts associated with its 73 moved emissions points.

Further, the changed site plan, dated six days after TCEQ signed the Final Order and which must have taken weeks if not months of engineering time to prepare, raises substantial questions about whether White Stallion intentionally sought to circumvent § 382.0291(d). White Stallion may have deliberately waited until after the close of the record at TCEQ, after the SOAH ALJs' Proposal for Decision, or after the TCEQ's Final Order, to finalize "the switch." We simply do not know. If TCEQ does not require White Stallion to resubmit its application

under § 382.0291(d), then (as discussed below) it should remand to SOAH in part to allow discovery to determine whether resubmission of the application “would be necessary.” With discovery, the parties can investigate and determine precisely when White Stallion knew that it planned to change its site plan.

White Stallion continues to pretend that its permit is valid even though it is based on an outdated site plan. But the Air Permit Site Plan is either outdated or White Stallion lied to the Corps in order to obtain its wetlands permit. White Stallion cannot have it both ways. Note that, in its brief, White Stallion never says that it still intends to build the Air Permit Site Plan. Instead, White Stallion tries to draw the Commission into White Stallion’s site-plan charade stating that the “Commission fully understood that the site plan would likely change.” White Stallion also suggests that EDF’s concern that the Commission has been “misled” is based solely on CEO Rotondi’s sworn testimony that White Stallion “fully and completely” intended to construct the Air Permit Site Plan “in every respect.” This is laughable. The evidence that White Stallion likely misled the Commission is extensive, going far beyond Mr. Rotondi’s sworn testimony (which we now know is, at the very least, inaccurate). This evidence includes:

- E-mails dated January 2009 among White Stallion’s consultants and management discussing further revisions to the site plan to minimize impacts to wetlands. *See* EDF’s Brief on Remand, Attachment I, Exhibit A, Tab 4. These e-mails, exchanged more than a year before the contested case held on the air permit application, acknowledged that these changes “may affect the wastewater permit and the air dispersion modeling.”⁵

⁵ The following persons were included in this email chain: White Stallion CEO Frank Rotondi who testified at the air permit hearing in support of the application; Larry Shell, Vice President & Sr. Project Manager for Stanley Consultants, Inc. (the firm that designed and engineered the proposed plant) who testified as an expert in support of the Application; Joe Kupper, air dispersion modeler with the RPS Group who testified as an expert at the hearing in support of the Application; Shanon DiSorbo, consultant with RPS Group who testified as an expert at hearing in support of the Application; and Scott Jecker, wetlands consultant who prepared White Stallion’s wetlands application filed with the Corps. *See* EDF’s Brief on Remand, Attachment I, Exhibit A, Tab 4.

- Two other contradicting site plans, one filed under sworn certification with the TCEQ's Water Quality Division in February 2009, a second (earlier) site plan filed with the Corps in September 2009, both of which are different than White Stallion's September 2008 Air Permit Site Plan and White Stallion's October 25th Site Plan. *See* EDF's Brief on Remand, Attachment I, Exhibit B, pp. 11-12.
- Additional testimony by CEO Rotondi that the only site plan that had been approved by White Stallion's so-called "development committee" was the Air Permit Site Plan⁶ and that White Stallion was "fully willing to comply in every respect with construction of this project according to the [Air Permit] site plan." *See* EDF's Brief on Remand, Attachment I, Exhibit C, pp.78, 88-90.
- The ALJ's reliance on CEO Rotondi's testimony in deciding not to recommend denial on the multiple site-plan issue (but rather, recommending denial on other grounds). As the ALJ's state in their PFD:

Mr. Rotondi testified that WSEC intended to build the facility as stated in this [the air] application. Although we were concerned about WSEC's actions in filing other site plans, we concluded that those actions did not change the facts that led the Commission to refer this case to SOAH. **If WSEC intended to build the proposed facility as shown in the site plan in this application, then Protestants' concerns did not rise to the level of a legal basis for continuing the hearing.**

See EDF's Brief on Remand, Attachment I, Exhibit B, p. 13-14 (emphasis added).

- The October 25th Site Plan itself and the fact that it was changed *a mere six days after TCEQ issued its Final Order* –a site plan upon which the Corps relied in issuing White Stallion a wetlands permit.

Given all this evidence, it is quite possible that CEO Rotondi misled the Commission. Further investigation is warranted. Changes to detailed engineering plans for multi-billion dollar power plants do not happen overnight; rather, it takes weeks if not many months to do so. In all the proceedings involving remand, White Stallion has never once denied that it knew it planned to change its plans at the time the Final Order was issued. Not once. At the very least, before the Commission issued its Final Order, White Stallion should have informed the Commission that it

⁶ Both Mr. Rotondi and Mr. Bird (who signed both of the sworn and certified applications filed with TCEQ's Water Quality and Air Permit Divisions respectively) are on White Stallion's so-called "development committee." *See* EDF's Brief on Remand, Attachment I, Exhibit B, p. 12.

was in the process of changing its site plan and that CEO Rotondi's testimony was no longer accurate—especially given the concerns expressed by the ALJs in their PFD.

The Commission should reject White Stallion's assertion that the Commission "fully understood" that the site plan would change to the extent it did. How could the Commission fully understand the impacts associated with moving 73 out of 84 emissions points absent new modeling, full discovery or cross-examination? If the Commission had "fully understood" that White Stallion planned to change its plans before the Final Order was issued, then the Commission would be in the position of blatantly violating § 382.0291(d). EDF rejects that proposition and so should the Commission.

White Stallion tries to avoid complying with § 382.0291(d) by hiding behind the so-called "permit alteration" process set out in 30 TAC § 116.116 which White Stallion asserts does not require notice and hearing. But a TCEQ rule cannot trump a statute.⁷ Further, even assuming 30 TAC § 116.116 has any relevance under these circumstances (which it does not), the language of the rule itself requires amendment, not alteration. Under § 116.116(b) (entitled "Permit Amendment"), amendment is required if there is "an increase in the emission rate of any air contaminant." Dr. Gasparini's unchallenged, unrefuted testimony excerpted above points out that the October 25th Site Plan increases the length of the conveyor system, which requires the addition of a new emission point or points, and which in turn increases the emissions rate of an air contaminant (i.e. particulate matter). Further, subsection (b)(2) of the rule provides that applications to amend "must be submitted with a completed Form PI-1 and are subject to the requirements of § 116.111 (relating to General Applications)" which requires new notice

⁷ TCEQ rules also preclude an applicant from circumventing the Texas Clean Air Act TCEQ's rules. 30 TAC § 101.3

(discussed in more detail below). So even under White Stallion’s legally incorrect analysis, there is no doubt that amendment is required.

Under White Stallion’s approach, applicants would be free to obtain pre-construction air permits for major sources of air pollution by proffering “dummy” site plans—plans designed to demonstrate compliance with applicable air quality standards but which the applicant has no intention of actually building. The EPA warned TCEQ of this possibility. By letter dated May 13, 2011 from Jeff Robinson (Chief of EPA’s Air Permits Section) to Steve Hagle (Director of TCEQ’s Air Permits Division), EPA raised concerns about White Stallion’s multiple site plans stating that under a permit alteration approach “we’re left with a ‘bait-and-switch’ scenario where a source can propose one site plan during the original permit application process, navigate through Texas’ public participation process for permits, obtain a permit, and then immediately change the site plan with no EPA and public review in order to obtain other permits that may be necessary for construction of the facility. This raises significant issues about meaningful public participation in the permit decision-making process.” *See* Attachment C, EPA’s May 13, 2011 Letter. In its Remand Order, the District Court likewise recognizes the need for “meaningful public participation” in the permitting process. *See* EDF’s Brief on Remand, Attachment II, Remand Order.

Section 382.0291(d) is designed to prevent the very type of bait-and-switch that White Stallion is attempting to foist on TCEQ and the public. TCEQ must reject White Stallion’s attempt to circumvent both the letter and spirit of § 382.0291(d) and the public’s right to “meaningful participation in the decision-making process” and instead require that White Stallion resubmit its application.

III. Absent Compliance with § 382.0291(d), TCEQ Should Remand to SOAH with Full Discovery.

If TCEQ fails to require White Stallion to resubmit its Application under § 382.0291(d), then TCEQ must, at the very least, remand to SOAH with instructions to hold a hearing on the two issues identified by the Court: (1) the October 25th site plan submitted by White Stallion to the U.S. Army Corps of Engineers (“the Corps”); and (2) on that site plan’s “impacts on WSEC’s TCEQ air permit application under applicable law.” Such a proceeding would necessarily require new modeling by the applicant to determine the “impacts” associated with the October 25th Site Plan, discovery by the parties, live cross-examination and an opportunity for EDF and the other protesting parties to present their own modeling.

There is recent TCEQ precedent for remanding this matter to SOAH. In the Las Brisas coal plant case, it was determined at hearing through cross-examination of the applicant’s air dispersion modeler that Las Brisas had accidentally mislocated three (3) emissions points thus rendering the applicant’s air dispersion modeling inaccurate.⁸ With the support of the Executive Director, this very Commission remanded the case back to SOAH for a new hearing, which included the opportunity to conduct discovery and cross-examination. *See* Attachment D, Las Brisas Interim Order (stating “**This matter is hereby remanded to SOAH . . . solely for the purpose of reopening the record to take additional evidence from the parties, including cross examination and rebuttal testimony**”). *Id.* In the case at bar, White Stallion purposefully moved 73 out 84 emissions points. Following its own rationale in the Las Brisas case, the Commission should remand to SOAH for the taking of additional evidence, including discovery and cross-examination.

⁸ Las Brisas’ air dispersion modeling was defective for numerous other reasons as detailed in EDF’s pleadings in the Las Brisas case.

A. A Full and Fair Hearing Requires Discovery.

The October 25th Site Plan and the new modeling required to analyze the impacts associated with the new plan requires full discovery and cross-examination just as in the Las Brisas case. The Third Court of Appeals has held that, absent the opportunity to develop a full record through the contested case process, meaningful appellate review is not possible. *See City of Waco v. Texas Commission on Environmental Quality*, 346 S.W.3d 781, 818 (Tex.App. – Austin 2011, pet pending), quoting *Texas Department of Ins. v. State Farm Lloyds*, 260 S.W.3d 233, 245 (Tex.App. – Austin 2008, no pet.)(stating that “substantial evidence review on an agency record is simply ‘not possible’ absent the opportunity to develop that record through a contested-case or adjudicative hearing”); see also *Geeslin v. State Farm Lloyds*, 255 S.W.3d 786, 802-804 (Tex.App. – Austin 2008)(A party is “denied a full and fair hearing” if the agency “denie[s] the discovery it requested.”). This case law is consistent TCEQ rules that include the right to conduct discovery among the rights afforded parties in contested case hearings. 30 TAC § 80.115(a).

B. White Stallion Has the Burden of Proof on Remand.

Regardless of whether TCEQ requires White Stallion to resubmit its application or remands this matter to SOAH, TCEQ’s rules establish that White Stallion is “the applicant” and that the applicant has the burden of proof. TCEQ’s rules require all air permit applicants to demonstrate compliance with the federal Clean Air Act.

§116.111 General Application

(a) In order to be granted a permit, amendment or special permit amendment, the application must include . . .

(2) information which demonstrates that emissions from the facility, including any associated dockside vessel emissions, meet all of the following...

(I). Prevention of Significant Deterioration (PSD) review. If the proposed facility is located in an attainment area, it shall comply with all applicable requirements in this chapter concerning PSD review.⁹

30 TAC § 116.111 (emphasis added). Thus, in its application, an applicant must show (among other things) that its proposed source will comply with the demonstrations required under 40 CFR § 52.21(k) (entitled “Source Impact Analysis” and incorporated in TCEQ’s PSD regulations at 30 TAC § 116.160(c)(2)(A)).¹⁰ If an applicant fails to make these required demonstrations, then its application is deficient on its face and a permit cannot be issued. Here, White Stallion has never made the required demonstrations for the October 25th Site Plan—the plant it actually intends to build. The Commission should reject White Stallion’s and the Executive Director’s attempts to shift the burden of proof because doing so would be in direct violation of its own rules and EDF’s due process rights.

C. TCEQ Should Reject White Stallion’s Attempt to Limit the Scope of Remand.

White Stallion suggests that TCEQ need only consider the October 25th Site Plan and not the impacts associated with that site plan as ordered by the District Court. *See* White Stallion Brief, pp. 3-4 (stating “Nor is the Commission compelled to consider any ‘evidence’ other than the ‘evidence’ that EDF presented to the District Court as the basis for its remand”). White Stallion cites to several cases in its brief that it argues stand for the proposition that the District Court is without power to impose conditions on the taking of additional evidence on remand. *See* White Stallion Brief, p.4 (stating: “courts cannot dictate how the agency must correct its error”). All the cases cited by White Stallion are cases interpreting APA § 2001.174 and discuss

⁹ Likewise, if the proposed facility is in a nonattainment area, it shall comply with all applicable requirements in this chapter concerning nonattainment review. 30 TAC 116.111(a)(2)(H) (emphasis added)

¹⁰ *See also* 30 TAC § 80.117(b): “The applicant shall present evidence to meet its burden of proof on the application, followed by the protesting parties...”

remand in the context of an administrative appeal. The remand here was ordered under APA § 2001.175(c), not § 2001.174. By its own terms, APA § 2001.175(c) allows the Court to require the agency to take the additional evidence “on conditions determined by the court.” Here the Court’s Remand Order requires (or imposes conditions on) TCEQ to take evidence not just on the October 25th Site Plan but also on the “impacts” associated with the October 25th Site Plan. Analyzing the impacts associated with emissions from a particular site plan requires that the applicant perform new modeling to determine whether it can comply with 40 CFR § 52.21(k) (which, again, is entitled “Source ***Impact*** Analysis”)(emphasis added). New modeling by the applicant, in turn, requires that the protesting parties be allowed to conduct discovery on that new modeling, that the applicant’s witness sponsoring that new modeling be subject to cross examination, and that the protesting parties be allowed to offer their own modeling into evidence.¹¹

In a case actually discussing remand to an agency under § 2001.175(c),¹² the agency conducted another hearing, admitted an additional party, and added 492 pages of transcript and 25 new exhibits to the record. *Independence Sav. & Loan Ass’n v. Gonzales County Sav. & Loan*, 568 S.W.2d 463, 464-466 (Tex.App. – Austin 1978, writ ref’d n.r.e.). On appeal of the district court’s order, the appellate court stated that they were “fully in accord with the court’s remand of the case to the Commissioner.” *Id.* at 466. Unlike the cases cited by White Stallion, the *Independence* case offers real insight on the scope of remand and the right to fully develop a record.

¹¹ The Executive Director suggests that the additional evidence can be considered based on written submission. See Executive Director’s Brief on Remand, p. 3. A full and fair hearing requires not just the opportunity to present evidence but also the opportunity for cross-examination. Limiting EDF’s participation to what amounts to just written submission violates EDF’s due process rights and denies EDF meaningful participation in the permit application review process.

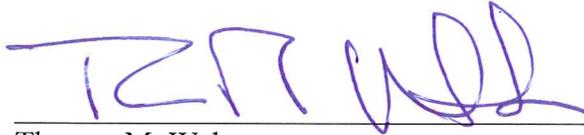
¹² This case discusses the predecessor of APA § 2001.175(c), section 19(d)(2) of the Administrative Procedure and Texas Register Act.

The Commission should reject White Stallion's suggestion that the Commission ignore the District Court's Order requiring the taking of additional evidence on the impacts associated with the October 25th Site Plan.

IV. Conclusion.

White Stallion's ever-changing site plans deserve scrutiny. If White Stallion is entitled to a new permit, they must prove it. EDF respectfully requests that TCEQ require the Applicant to comply with § 382.0291(d) and resubmit its application and issue new notice. Absent that, EDF requests that TCEQ remand to SOAH for discovery and a full and fair hearing on the issues raised in the Remand Order.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'T.M. Weber', is written over a horizontal line.

Thomas M. Weber
State Bar No. 00794828
Paul R. Tough
State Bar No. 24051440
McElroy, Sullivan & Miller, L.L.P.
P.O. Box 12127
Austin, Texas 78711
Tel. (512) 327-8111; Fax (512) 327-6566

Attorneys for Environmental Defense Fund, Inc.

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 and/or certified mail return receipt requested to the addressees listed below:

Nancy Olinger, Assistant Attorney General
Cynthia Woelk, Assistant Attorney General
Office of the Attorney General
Environmental Protection Section
P.O. Box 12548, Capitol Station (MC-018)
Austin, Texas 78711-2548
Phone: 512/463-2012
Fax: 512/320-0052

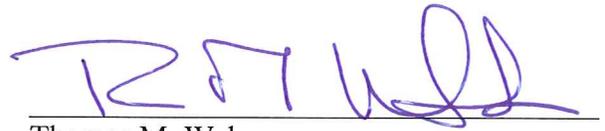
Ilan Levin
Gabriel Scott Leach
Environmental Integrity Project
1303 San Antonio St., Suite 200
Austin, Texas 78701
Phone: 512/637-9477
Fax: 512/584-8019

Eric Groten
Vinson & Elkins
2801 Via Fortuna, Suite 100
Austin, Texas 78746-7568
Phone: 512/542-8400
Fax: 512/542-8612

Stephanie Bergeron Perdue
TCEQ Legal Division (MC-218)
P.O. Box 13087
Austin, Texas 78711-3087
Phone: 512/239-0600
Fax: 512/239-0606

Blas Coy
Scott Humphrey
TCEQ Office of Public Interest Counsel (MC-103)
MC 103
P.O. Box 13087
Austin, Texas 78711-3087
Phone: 512/239-6363
Fax: 512/239-6377

Docket Clerk
TCEQ Office of the Chief Clerk (MC-105)
P.O. Box 13087
Austin, Texas 78711-3087
Phone: 512/239-3300
Fax: 512/239-3311



Thomas M. Weber

Entry Number	EPN Name (AERMOD Source ID)	EPN Name (Modeling Report Table 5-1)	UTM mE - AERMOD Input	UTM mN - AERMOD Input	UTM mE - Using 404 Plot Plan	UTM mN - Using 404 Plot Plan	Distance Moved (meters)	Direction Moved (degrees*)	EPNs Moved (running total)
1	1A1B	Units 1 and 2 CFB Boiler	206,868.0	3,194,028.0	206,868.0	3,194,028.0	0		0
2	2A2B	Units 3 and 4 CFB Boiler	206,996.0	3,194,028.0	206,996.0	3,194,028.0	0		
3	DCFUEL1	Unit 1 Fuel/Limestone Dust Collector	206,837.0	3,193,884.0	206,837.0	3,193,884.0	0		
4	DCFUEL2	Unit 2 Fuel/Limestone Dust Collector	206,899.0	3,193,884.0	206,899.0	3,193,884.0	0		
5	DCFUEL3	Unit 3 Fuel/Limestone Dust Collector	206,965.0	3,193,884.0	206,965.0	3,193,884.0	0		
6	DCFUEL4	Unit 4 Fuel/Limestone Dust Collector	207,027.0	3,193,884.0	207,027.0	3,193,884.0	0		
7	FLYASH1	Unit 1 Fly Ash Dust Collector	206,734.0	3,193,942.0	206,930.0	3,194,210.0	332	54	1
8	FLYASH2	Unit 2 Fly Ash Dust Collector	206,724.0	3,193,925.0	206,930.0	3,194,190.0	336	52	2
9	FLYASH3	Unit 3 Fly Ash Dust Collector	207,130.0	3,193,942.0	206,930.0	3,194,138.0	280	136	3
10	FLYASH4	Unit 4 Fly Ash Dust Collector	207,140.0	3,193,925.0	206,930.0	3,194,118.0	285	137	4
11	BEDASH12	Unit 1 & 2 Bed Ash Dust Collector	206,714.0	3,193,907.0	206,930.0	3,194,170.0	340	51	5
12	BEDASH34	Unit 3 & 4 Bed Ash Dust Collector	207,150.0	3,193,907.0	206,930.0	3,194,098.0	291	139	6
13	LIME12	Unit 1 & 2 Lime Silo Dust Collector	206,776.0	3,193,944.0	206,795.0	3,193,952.0	21	23	7
14	LIME34	Unit 3 & 4 Lime Silo Dust Collector	207,088.0	3,193,944.0	207,090.0	3,193,950.0	6	72	8
15	CARBON12	Unit 1 & 2 Carbon Silo Dust Collector	206,776.0	3,193,937.0	206,795.0	3,193,944.0	20	20	9
16	CARBON34	Unit 3 & 4 Carbon Silo Dust Collector	207,088.0	3,193,937.0	207,090.0	3,193,943.0	6	72	10
17	EMGEN1	Diesel-Fired Emergency Generator 1	206,892.0	3,193,808.0	?	?			
18	EMGEN2	Diesel-Fired Emergency Generator 2	206,892.0	3,193,808.0	?	?			
19	FWPMP	Main Diesel-Fired Fire Water Pump	206,746.0	3,194,087.0	206,672.0	3,194,130.0	86	150	11
20	DCRAILUL	Railcar Unloading Building	205,719.0	3,193,884.0	206,080.0	3,194,585.0	788	63	12
21	DC CRUSH	Crusher Building	206,580.0	3,193,884.0	206,613.0	3,193,892.0	34	14	13
22	FA1LOAD	Fly Ash #1 Truck Loading Fugitives	206,734.0	3,193,942.0	206,930.0	3,194,210.0	332	54	14
23	FA2LOAD	Fly Ash #2 Truck Loading Fugitives	206,724.0	3,193,925.0	206,930.0	3,194,190.0	336	52	15
24	FA3LOAD	Fly Ash #3 Truck Loading Fugitives	207,130.0	3,193,942.0	206,930.0	3,194,138.0	280	136	16
25	FA4LOAD	Fly Ash #4 Truck Loading Fugitives	207,140.0	3,193,925.0	206,930.0	3,194,118.0	285	137	17
26	BA12LOAD	Bed Ash #1 Truck Loading Fugitives	206,714.0	3,193,907.0	206,930.0	3,194,170.0	340	51	18
27	BA34LOAD	Bed Ash #2 Truck Loading Fugitives	207,150.0	3,193,907.0	206,930.0	3,194,098.0	291	139	19
28	BARGE1a	Barge Unloading to Hopper	205,610.0	3,193,591.0	205,540.0	3,193,663.0	100	134	20
29	BARGE1b	Barge Unloading to Hopper	205,610.0	3,193,591.0	205,540.0	3,193,663.0	100	134	21
30	BARGE2a	Barge Hopper to CO-1	205,629.0	3,193,542.0	205,540.0	3,193,663.0	150	126	22
31	BARGE2b	Barge Hopper to CO-1	205,629.0	3,193,542.0	205,540.0	3,193,663.0	150	126	23
32	CONV1	Conveyor #1	205,621.0	3,193,565.0	205,540.0	3,193,663.0	127	130	24
33	TRSF1	CO-1 to CO-2	205,638.0	3,193,520.0	205,540.0	3,193,663.0	173	124	25
34	CONV2	Conveyor #2	205,729.0	3,193,699.0	205,877.0	3,193,913.0	260	55	26
35	RAILFUG	Rail Unloading Fugitives	205,719.0	3,193,884.0	206,080.0	3,194,585.0	788	63	27
36	TRUCK1	Truck Unloading to Hopper	205,788.0	3,193,890.0	?	?			
37	TRUCK2	Truck Hopper to CO-3	205,788.0	3,193,890.0	?	?			
38	CONV3	Conveyor #3	205,773.0	3,193,884.0	206,082.0	3,194,342.0	552	56	28
39	TRSF2	CO-3 to CO-4 or CO-5	205,821.0	3,193,884.0	206,216.0	3,194,147.0	475	34	29
40	TRSF3	CO-2 to CO-4 or CO-5	205,821.0	3,193,884.0	206,216.0	3,194,147.0	475	34	30
41	CONV4	Conveyor #4	205,926.0	3,193,884.0	206,285.0	3,194,055.0	398	25	31
42	CONV5	Conveyor #5	205,926.0	3,193,884.0	206,285.0	3,194,055.0	398	25	32
43	TRSF4	CO-4 to Mobile Stacker	206,200.0	3,193,884.0	206,335.0	3,193,988.0	170	38	33
44	TRSF5	CO-5 to Mobile Stacker	206,200.0	3,193,884.0	206,335.0	3,193,988.0	170	38	34
45	TRSF6	Mobile Reclaim to CO-6 or CO-7	206,200.0	3,193,884.0	206,335.0	3,193,988.0	170	38	35
46	CONV6	Conveyors #6 and #7	206,344.0	3,193,884.0	206,365.0	3,193,946.0	65	71	36
47	TRSF7	CO-6 or CO-7 to CO-8 or CO-9	206,428.0	3,193,884.0	206,401.0	3,193,892.0	28	163	37
48	CONV7	Conveyors #8 and #9	206,690.0	3,193,884.0	206,509.0	3,193,894.0	181	177	38
49	CONV8	Conveyors #10 and #11	206,690.0	3,193,884.0	206,715.0	3,193,891.0	26	16	39
50	CT1A	Cooling Tower #1	206,529.9	3,194,395.8	206,708.0	3,193,842.0	582	288	40
51	CT1B	Cooling Tower #1	206,536.6	3,194,379.8	206,715.0	3,193,826.0	582	288	41
52	CT1C	Cooling Tower #1	206,543.1	3,194,364.0	206,722.0	3,193,810.0	582	288	42
53	CT1D	Cooling Tower #1	206,549.7	3,194,348.2	206,729.0	3,193,794.0	582	288	43
54	CT1E	Cooling Tower #1	206,556.2	3,194,332.4	206,736.0	3,193,778.0	583	288	44
55	CT1F	Cooling Tower #1	206,562.8	3,194,316.6	206,743.0	3,193,762.0	583	288	45
56	CT1G	Cooling Tower #1	206,569.3	3,194,300.7	206,750.0	3,193,746.0	583	288	46
57	CT1H	Cooling Tower #1	206,575.9	3,194,284.9	206,757.0	3,193,730.0	584	288	47
58	CT2A	Cooling Tower #2	206,589.9	3,194,251.2	206,776.0	3,193,676.0	605	288	48
59	CT2B	Cooling Tower #2	206,596.5	3,194,235.2	206,783.0	3,193,660.0	605	288	49
60	CT2C	Cooling Tower #2	206,603.0	3,194,219.3	206,790.0	3,193,644.0	605	288	50
61	CT2D	Cooling Tower #2	206,609.6	3,194,203.5	206,797.0	3,193,628.0	605	288	51
62	CT2E	Cooling Tower #2	206,616.2	3,194,187.7	206,804.0	3,193,612.0	606	288	52
63	CT2F	Cooling Tower #2	206,622.7	3,194,171.9	206,811.0	3,193,596.0	606	288	53
64	CT2G	Cooling Tower #2	206,629.3	3,194,156.1	206,818.0	3,193,580.0	606	288	54
65	CT2H	Cooling Tower #2	206,635.8	3,194,140.3	206,825.0	3,193,564.0	607	288	55

Entry Number	EPN Name (AERMOD Source ID)	EPN Name (Modeling Report Table 5-1)	UTM mE - AERMOD Input	UTM mN - AERMOD Input	UTM mE - Using 404 Plot Plan	UTM mN - Using 404 Plot Plan	Distance Moved (meters)	Direction Moved (degrees*)	EPNs Moved (running total)
66	CT3A	Cooling Tower #3	207,111.5	3,194,395.8	207,215.0	3,193,940.0	467	283	56
67	CT3B	Cooling Tower #3	207,118.2	3,194,379.8	207,222.0	3,193,924.0	467	283	57
68	CT3C	Cooling Tower #3	207,124.7	3,194,364.0	207,229.0	3,193,908.0	468	283	58
69	CT3D	Cooling Tower #3	207,131.3	3,194,348.2	207,236.0	3,193,892.0	468	283	59
70	CT3E	Cooling Tower #3	207,137.8	3,194,332.4	207,243.0	3,193,876.0	468	283	60
71	CT3F	Cooling Tower #3	207,144.4	3,194,316.6	207,250.0	3,193,860.0	469	283	61
72	CT3G	Cooling Tower #3	207,150.9	3,194,300.7	207,257.0	3,193,844.0	469	283	62
73	CT3H	Cooling Tower #3	207,157.5	3,194,284.9	207,264.0	3,193,828.0	469	283	63
74	CT4A	Cooling Tower #4	207,171.5	3,194,251.2	207,284.0	3,193,774.0	490	283	64
75	CT4B	Cooling Tower #4	207,178.1	3,194,235.2	207,291.0	3,193,758.0	490	283	65
76	CT4C	Cooling Tower #4	207,184.7	3,194,219.3	207,298.0	3,193,742.0	491	283	66
77	CT4D	Cooling Tower #4	207,191.2	3,194,203.5	207,305.0	3,193,726.0	491	283	67
78	CT4E	Cooling Tower #4	207,197.8	3,194,187.7	207,312.0	3,193,710.0	491	283	68
79	CT4F	Cooling Tower #4	207,204.3	3,194,171.9	207,319.0	3,193,694.0	491	283	69
80	CT4G	Cooling Tower #4	207,210.9	3,194,156.1	207,326.0	3,193,678.0	492	284	70
81	CT4H	Cooling Tower #4	207,217.4	3,194,140.3	207,333.0	3,193,662.0	492	284	71
82	SP1	Petcoke/Coal Storage Pile	205,838.7	3,193,661.5	206,273.0	3,193,843.0	471	23	72
83	SP2	Limestone Storage Pile	206,224.1	3,193,756.5	206,413.0	3,193,959.0	277	47	73
84	LF1	Ash Disposal Landfill	207,862.0	3,193,559.0	?	?			

SUPPLEMENTAL AFFIDAVIT OF ROBERTO GASPARINI, Ph.D.

STATE OF TEXAS §

COUNTY OF TRAVIS §

Before me, the undersigned notary public, upon this day personally appeared Roberto Gasparini, Ph.D., a person whose identity has been verified by me, who, upon the administration of an oath, stated and deposed as follows:

1. "My name is Dr. Roberto Gasparini. I am over the age of 21, of a sound mind, and competent in all respects to make this affidavit. I have personal knowledge of all of the facts stated herein, and all of such facts are true and correct. This affidavit supplements my prior affidavits dated March 3, 2011 and May 2, 2011. I have reviewed the responses filed by White Stallion Energy Center, L.L.C. ("White Stallion") and the Texas Commission on Environmental Quality ("TCEQ") to Environmental Defense Fund, Inc.'s ("EDF") Motion for Remand.

2. Each of the emissions sources identified in White Stallion's air permit application is important for air dispersion modeling purposes. This is because the emission sources and their locations are inputs to the air dispersion model. The moving of emissions sources changes the input data used in the air dispersion model. The air dispersion model uses the emission source locations, among other inputs, to predict off-property emission impacts resulting from operation of the proposed power plant. The predicted off-property emission impacts are then compared against the applicable state and federal standards to determine compliance with Clean Air Act requirements and implementing regulations. When changes occur to the input data (i.e. moving emission sources) then the output data (i.e. the predicted off-property emission impacts) are also likely to change. Based on my comparison of the October 2010 site plan and the Air Permit Site Plan, 73 out of a total of 84 emission points used in the air dispersion model for the air permit application were moved. In my opinion, without modeling the emissions from the sources as they would be located on White Stallion's new site plan, it is not possible to determine whether the net effect would be a violation of one or more of the federal or state clean air act standards.

3. White Stallion's response emphasizes the importance of the location of the main stacks (which are similar to very tall chimneys) and ignores the other numerous material handling emission sources at the site, such as conveyors, fuel/ash piles, and material unloading facilities. White Stallion's air quality permit authorizes the receipt, storage, and handling of very large quantities of materials at the proposed power plant, including 5,000,000 tons per year ("tpy") of coal, 5,000,000 tpy of petroleum coke, and 2,000,000 tpy of limestone. The air quality permit also authorizes the handling of 1,500,000 tpy of fly ash and 800,000 tpy of bed ash, which are waste products resulting from the combustion of coal and petroleum coke. These materials when received and handled at the proposed power plant will result in particulate matter emissions, including emissions of coal dust and petroleum coke dust. Therefore, the locations of the emission points associated with the handling of this material are very relevant. Most of the emission sources that have moved are associated with the receipt and handling of these large quantities of materials. Only air dispersion modeling can determine the net effect of moving 73

emission points on off-property impacts in this case.

4. The off-property impacts resulting from the emission of pollutants from the material handling facilities will be different from the impacts resulting from the emission of pollutants from the main stacks. The off-property impacts from all emission sources are affected by the release height of the emissions, among other factors, such as exit velocity and temperature. For example, the main stacks are 487 feet tall. The maximum emission impacts from the main stacks (taller sources) typically occur farther from the source whereas the maximum emission impacts from a source with a shorter release height typically occurs closer to the source. This is because emissions from the main stacks are influenced by a higher exit velocity, temperature, and height. Material handling facilities are typically associated with shorter release heights. In this context, though, "shorter release height" does not necessarily mean less emissions or that these sources are less important for modeling purposes or regulatory compliance. By moving the shorter release height sources closer to a property line it is likely that the emission impacts in the nearby off-property area will increase.

5. One of the 73 emission sources that moved is the Railcar Unloading Building (EPN DCRAILUL or Entry Number 20 on Exhibit D-3 to my prior affidavit). This emission source represents the third largest emitter of particulate matter at the proposed White Stallion power plant (the main stacks represent the first and second largest emitters) and it was moved approximately 788 meters from the middle of the property to a location very close to the property line. Since emission impacts are determined at off-property locations, the movement of an emission source closer to a property line will likely increase its off-property emission impacts. Another of the 73 emission sources that moved is Conveyor 3 (EPN CONV3 or Entry Number 38 on Exhibit D-3 to my prior affidavit). This emission source is a conveyor used for transporting materials. By moving the Railcar Unloading Building farther from the material storage piles, the length of this conveyor must be increased. Emission rates from conveyors are based in part on conveyor length and the equations used to calculate emission rates for conveyors are found in TCEQ guidance. See Attachment 1. For every additional 300 feet of conveyor length (approximately 91 meters), the emission rate is increased. The emission rate from this conveyor will increase. An increase in emission rate will affect the emission impact caused by this source.

6. In my opinion, the movement of emission sources closer to the property line and the lengthening of the conveyors are material changes and warrant re-modeling the potential emissions impacts associated with the proposed plant. Without modeling the emissions from the sources as they would be located on White Stallion's new site plan, it is not possible to determine whether the net effect would be a violation of one or more of the federal or state clean air standards.

Further affiant sayeth not."



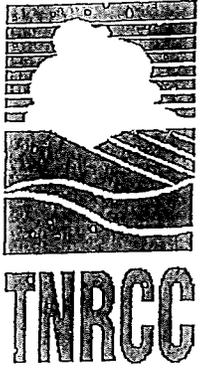
Roberto Gasparini, Ph. D.

SUBSCRIBED AND SWORN to before me, the undersigned notary, on this the 23rd day of May, 2011, to which witness my hand and official seal.



Jeana Matetzschk

Notary Public, State of Texas



May 1996

CHEER Workshop

May 16, 1996

printed on
recycled paper

New Source Review Division

TEXAS NATURAL RESOURCE CONSERVATION COMMISSION

Attachment 1



1.5 lb / ton

PEDCo

uncontrolled factor for phosphate rock transfer and loading (apply control efficiencies of 90-95%)

neg-0.2 lb/ton

PEDCo "Evaluation of Fugitive Dust from Mining" PEDCo Environmental, Cincinnati, Ohio, (prepared for EPA) April, 1976.

phosphate rock

0.04 -0.96 lb PM/ ton

"Reasonably Available Control Measures for Fugitive Dust Sources" Ohio EPA, Office of Air Pollution Control, Columbus, Ohio, Sept 1980. Reference: "Technical Guidance for Control of Industrial Process Fugitive Particulate Emissions", PEDCo, for EPA, EPA-450/3-77-010, March 1977

Conveying and transfer of coal.

0.02 lb PM/ ton

"Reasonably Available Control Measures for Fugitive Dust Sources" Ohio EPA, Office of Air Pollution Control, Columbus, Ohio, Sept 1980. Reference: "Fugitive Emissions from integrated Iron and Steel Plants". Bohn, Cuscino & Cowher, Midwest Research Institute, Kansas City, MO for EPA, EPA 600/2-78-050. March 1978

Conveying and transfer of coal.

0.02 lb PM/ ton

"Reasonably Available Control Measures for Fugitive Dust Sources" Ohio EPA, Office of Air Pollution Control, Columbus, Ohio, Sept 1980. Reference: "Evaluation of Fugitive Dust Emissions from Mining", PEDCo for EPA, Cincinnati, OH

Conveying and transfer of coal.

0.8 lb PM/ ton

"Reasonably Available Control Measures for Fugitive Dust Sources" Ohio EPA, Office of Air Pollution Control, Columbus, Ohio, Sept 1980.

Transfer (spillage) of coal

$$EF = \frac{(0.0018) \left(\frac{S}{5}\right) \left(\frac{W}{5}\right) \left(\frac{H}{10}\right)}{\left(\frac{M}{2}\right)^2} \text{ lbTSP/ton}$$

"Technical Guidance Document for Estimating Fugitive Dust Impacts from Coal Handling Operations - Volume 2" Howroyd (Dames & Moore) for US Dept of Energy Office of Scientific and Technical Information, DOE/RG/10312-1 , Sept 1984. Reference: Bohn of MRI, 1978.

Conveyor transfer (enclosed); Transfer station enclosures are projected to have an effective control of 90%. For an open conveyor transfer, increase emissions by a factor of 10. S = silt content (%); w = wind speed (mph) H = drop height (ft); M = moisture content (%)

$$E = k(0.0032) \frac{(U/5)^{1.3}}{(M/2)^{1.4}} \text{ (lb/ton)}$$

AP-42, Ch 13, 13.2.4-3

For batch or continuous drop points; k=particle size multiplier; U=wind speed in mph; M=moisture content (%); Equation degrades if silt and moisture content of coal is outside the parameters that were used to derive the equation.

$$E = k(0.0032) \frac{(U/5)^{1.3}}{(M/2)^{1.4}} \text{ (lb/ton)}$$

for BEST ESTIMATE of Transfer Operations.

$$E = k(0.0032) \frac{(U/5)^{1.3}}{(M/2)^{1.4}} \text{ (lb/ton)}$$

for BEST ESTIMATE of Conveying Operations
(Use this equation for each 100 yards of conveyor length.)



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6
1445 ROSS AVENUE, SUITE 1200
DALLAS TX 75202-2733

MAY 13 2011

Mr. Steve Hagle, Director
Air Permits Division (MC 163)
Office of Permitting, Remediation, and Registration
Texas Commission on
Environmental Quality
P.O. Box 13087
Austin, TX 78711-3087

RE: White Stallion Energy Center, Air Permit Nos. PSDTX1160, PAL26, and HAP28,
Matagorda County, Texas

Dear Mr. Hagle:

We are in receipt of four (initial and amended) permit applications submitted by White Stallion Energy Center (WSEC) to various state and federal agencies, in support of permitting activities for WSEC's proposed power plant facility in Matagorda County, Texas. The permit applications include the 1) air quality permit application initially submitted on September 5, 2008, (with subsequent amendments) to the Texas Commission on Environmental Quality (TCEQ); 2) Texas Pollutant Discharge Elimination System permit application initially submitted on February 20, 2009, to the TCEQ; 3) dredge and fill permit application initially submitted in September 2009, to the Department of the Army, Galveston District Corps of Engineers (Corps); and 4) revised dredge and fill permit application dated October 25, 2010, and submitted to the Corps in November 2010. A copy of each site plan is enclosed. In each permit application, the site plans appear to have changed. What site plan does TCEQ recognize as the applicable site plan for this facility?

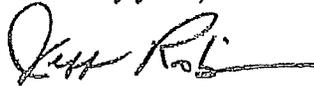
WSEC obtained an air quality permit from TCEQ on December 16, 2011. Prior to permit issuance, WSEC's permit application, the site plan, and the associated air modeling were subject to public review and comment. If WSEC elects to change the site plan from the site plan represented by WSEC in the air quality permit, EPA expects that this substantive change would also be subject to public review and comment. A change to the site plan could have an impact on the air modeling, and ultimately an impact on human health and the environment. Or, the change in the site plan may have no impact at all. That answer has not been determined yet. But EPA and the public should be able to review and comment on this issue.

To that end, EPA hopes that such a change to the site plan would be done through a permit amendment (offering public review and comment) and not a permit alteration (which does not afford EPA and public review and comment). Otherwise, we're left with a "bait-and switch"

scenario where a source can propose one site plan during the original permit application process, navigate through Texas' public participation process for permits, obtain a permit, and then immediately change the site plan with no EPA and public review in order to obtain other permits that may be necessary for construction of the facility. This raises significant issues about meaningful public participation in the permit decision-making process.

Please contact me at (214) 665-7250 or Stephanie Kordzi, of my staff, at (214) 665-7520, if you have questions, or would like to discuss this further. We look forward to working with you on this matter.

Sincerely yours,



Jeff Robinson
Chief
Air Permits Section

Enclosures

cc: Mr. Randy Hamilton (MC-163)
Texas Commission on Environmental Quality

Mr. Randy Bird
Chief Operating Officer
White Stallion Energy Center LLC
1302 Waugh Drive, Suite 896
Houston, TX 77019-3908

Mr. John Blevins
Director
Compliance Assurance and
Enforcement Division

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



AN INTERIM ORDER concerning the Administrative Law Judges' Proposal for Decision Regarding the Application of Las Brisas Energy Center, LLC for State Air Quality Permit No. 85013, HAP 48, PAL 41, and PSD-TX-1138; TCEQ Docket No. 2009-0033-AIR; SOAH Docket No. 582-09-2005.

On June 30, 2010, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the application (Application) of Las Brisas Energy Center, LLC (Las Brisas or Applicant) for State Air Quality Permit No. 85013, Hazardous Air Pollutant Permit No. HAP-48, Plantwide Applicability Limit Permit No. PAL-41, and Prevention of Significant Deterioration Permit No. PSD-TX-1138. A Proposal for Decision (PFD) was presented by Craig R. Bennett and Tommy L. Broyles, Administrative Law Judges (ALJs) with the State Office of Administrative Hearings (SOAH), who conducted a hearing in this case from November 2 through November 12, 2009.

After considering the ALJs' Proposal for Decision, oral argument of the parties, and the filings in this matter, the Commission found that the primary boilers for the proposed project are not subject to case-by-case MACT preconstruction permitting requirements. In addition, the Commission determined to remand the matter to SOAH solely for the purpose of reopening the record, pursuant to 30 Texas Administrative Code § 80.265 and Texas Government Code § 2003.047(m), to take additional evidence on: 1) whether there will be any increase in particulate matter (PM) from off-site material handling sources above what was modeled, or if the ultimate conclusions from the impacts analysis would be unchanged by secondary sources; 2) review of additional modeling performed by Applicant in support of the Application; 3) the ability of Applicant to design and install a conveyor system that will not be a source of emissions; 4) the ability of Applicant to design and install a system for ash loading into trucks that will not be a

Attachment D

source of emissions; 5) whether the modeling inputs, with respect to moisture content, for the Port of Corpus Christi Authority facilities are proper; 6) what are the proper BACT emission limits for total particulate matter (PM/PM₁₀) and mercury; and 7) the proper revisions to Special Condition 44 to address any changes in BACT limits. Finally, the Commission directed that a Revised PFD and Proposed Order shall be developed that incorporates the additional evidence, as appropriate, as well as other findings made by the Commissioners at its June 30, 2010 meeting. The Commission directed that the Revised PFD and Proposed Order shall be submitted to the Commission and mailed to the parties by not later than four months from the date of its June 30, 2010 meeting.

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY that:

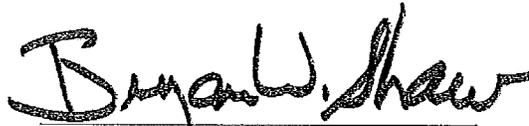
- (1) The Commission finds that the primary boilers for the proposed project are not subject to case-by-case MACT preconstruction permitting requirements.
- (2) This matter is hereby remanded to SOAH, pursuant to 30 Texas Administrative Code § 80.265 and Texas Government Code § 2003.047(m), solely for the purpose of reopening the record to take additional evidence from the parties, including cross examination and rebuttal testimony, on the following issues:
 - a) Whether there will be any increase in particulate matter (PM) from off-site material handling sources above what was modeled, or if the ultimate conclusions from the impacts analysis would be unchanged by secondary sources;
 - b) Review of additional modeling performed by Applicant in support of the Application;
 - c) The ability of Applicant to design and install a conveyor system that will not be a source of emissions;
 - d) The ability of Applicant to design and install a system for ash loading into trucks that will not be a source of emissions;
 - e) Whether the modeling inputs, with respect to moisture content, for the Port of Corpus Christi Authority facilities are proper;
 - f) What are the proper BACT emission limits for total particulate matter (PM/PM₁₀) and mercury; and

g) The proper revisions to Special Condition 44 to address any changes in BACT limits.

(3) The ALJs shall issue a Revised PFD and Proposed Order that incorporates the additional evidence, as appropriate, as well as the other findings made by the Commissioners at the June 30, 2010 Agenda meeting. The Revised PFD and Proposed Order shall be submitted to the Commission and mailed to the parties by not later than 4 months from the Commissioners' June 30, 2010 Agenda. The parties shall have an opportunity to file exceptions and replies to the portions of Revised PFD that have been modified since the Commission's June 30, 2010 Agenda and to the Proposed Order.

Issue Date: JUL 01 2010

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY


Bryan W. Shaw, Ph.D., Chairman