

**IN THE MATTER OF WHITE  
STALLION ENERGY CENTER, LLC  
APPLICATION FOR AIR QUALITY  
PERMIT NOS. 86088, HAP28, PAL26  
AND PSD-TX-1160**

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**BEFORE THE  
TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY  
TCEQ DOCKET NO. 2009-0283-AIR;  
SOAH DOCKET NO. 582-09-3008**

**WHITE STALLION ENERGY CENTER, LLC'S RESPONSE TO "ENVIRONMENTAL  
DEFENSE FUND'S OBJECTIONS AND BRIEF WITH ACCOMPANYING REMAND  
EVIDENCE"**

To the Honorable Commissioners:

In its "Objections and Brief with Accompanying Remand Evidence," Environmental Defense Fund, Inc. ("EDF") (1) protests the procedures that the Commission has chosen to respond to the District Court Order dated June 20, 2011 in *Environmental Defense Fund, Inc. v. Texas Commission on Environmental Quality*, No. D-1-GN-11-000011 (201st Dist. Ct., Travis County) (the "Remand Order"); (2) proffers the "October 25, 2010 site plan" that was the subject of the Remand Order, as well as its views of the significance of that plan; and (3) proffers additional evidence having nothing to do with that site plan.

White Stallion Energy Center, LLC ("White Stallion") will not join EDF in repeating prior briefing on how the Commission should "take" EDF's "new evidence."

As for EDF's proffers of evidence concerning purported site plan changes, White Stallion objects to all of it as irrelevant. White Stallion requests that the Commission clarify for the court through letter or resolution that, having taken EDF's proffer of evidence, the Commission wishes to state explicitly what was implicit in its order issuing the White Stallion air permit: Evidence of site plans other than the one for which a permit is being issued are irrelevant to the decision to issue that permit.

And as for EDF's efforts to sneak into the record "evidence" on issues outside the scope of the Remand Order, White Stallion not only objects to it as irrelevant for consideration by the Commission, but asks that the Commission decline to consider the evidence as received into the administrative record. To the extent that the out-of-scope "evidence" otherwise would be considered received, White Stallion moves to strike it from the administrative record forwarded to the court on judicial review.

White Stallion finally requests that the Commission decline to make any changes to its existing, valid order, which directed the issuance of White Stallion's air permit.

## I. BACKGROUND

Air Permit No. 86088/HAP28/PAL26/PSD-TX-1160 (the "Air Permit") authorizes White Stallion to construct and operate the White Stallion Energy Center, a new 1,200 net megawatt electricity generating station, in Matagorda County, Texas.<sup>1</sup> White Stallion filed its application in September 2008.<sup>2</sup> On March 13, 2009, TCEQ's Executive Director found the application to be technically complete, issued the Draft Permit, and recommended that the application be approved.<sup>3</sup> The Commission then referred the matter to the State Office of Administrative Hearings ("SOAH") for a contested case hearing on whether the application complied with all applicable rules and regulations.<sup>4</sup> The contested case hearing began with a preliminary hearing on April 20, 2009; on February 18, 2010, the Administrative Law Judges closed the evidentiary record and adjourned the

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<sup>1</sup> TCEQ Final Order at Finding of Fact No. 1, *see* Air Permit ¶ 1

<sup>2</sup> TCEQ Final Order at Finding of Fact No. 1 & 14

<sup>3</sup> *Id.* at Finding of Fact No. 18

<sup>4</sup> *Id.* at Finding of Fact No. 17, 30 Tex. Admin. Code § 55.210(b)

live hearing.<sup>5</sup> Their proposal for decision issued on July 2, 2010.<sup>6</sup> The Commission ordered issuance of the Air Permit on September 29, 2010, and the Air Permit issued on December 16, 2010.<sup>7</sup>

White Stallion seeks to build a power plant fueled by coal and petroleum coke.<sup>8</sup> These fuels are received, stored, conveyed, and then burned in boilers, which generate the steam used to turn a turbine and make electricity. The combustion process, of course, is responsible for a vast majority of the power plant's emissions, which are vented through a stack after comprehensive treatment for pollution control.<sup>9</sup> A relatively small amount of "particulate matter" (dust) results from the receipt and handling of the fuels before their combustion in the boilers.<sup>10</sup> Ancillary equipment generates minor emissions.<sup>11</sup> White Stallion submitted its Air Permit application on the basis of a sensible layout for all of these operations. During the course of U.S. Army Corps of Engineers ("Corps") review of a later-filed application for a so-called § 404 wetlands permit, White Stallion realized it could mitigate wetlands impact by moving its material handling systems,<sup>12</sup> and so the site plan approved by the Corps places those material handling operations in locations that vary from those in

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<sup>5</sup> TCEQ Final Order at Finding of Fact No. 21, 24.

<sup>6</sup> PFD at p. 120.

<sup>7</sup> TCEQ Final Order, p. 1; Air Permit.

<sup>8</sup> Air Permit, Special Condition 7.

<sup>9</sup> See Air Permit, Maximum Allowable Emission Rate Table, p. 1-3 (EPN 1-A/B and EPN 2-A/B).

<sup>10</sup> See *id.*, p. 4-7.

<sup>11</sup> See *id.*, p. 3-9.

<sup>12</sup> Tr. p. 136-37 (Rotondi).

White Stallion's Air Permit application.<sup>13</sup> Although material handling systems include numerous small dust "emission points" (because each conveyor transfer and storage silo is treated as a separate point), the overwhelming majority of the layout from an air emissions standpoint is unaffected because the main stacks are in the same place in all plans.

Despite EDF's assumption that the site plan submitted on October 25, 2010, sets in stone what White Stallion "actually intends to build,"<sup>14</sup> of course further refinements or changes may prove advisable or necessary as this multi-year, multi-permit complex project moves forward. As made clear to the Commission,<sup>15</sup> White Stallion understands that it has an obligation ultimately to reconcile its various authorizations and discovered real-world conditions, pursuant to established TCEQ (or other agency) permit conditions and rules.<sup>16</sup> To require all permits to be identical from beginning to end of a multi-year process in which plans necessarily evolve to meet the potentially conflicting demands of various regulatory programs would be to make construction of all but the simplest industrial activities impossible, which may point to EDF's real objective in this proceeding.

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<sup>13</sup> EDF Motion to Reopen the Record, Extend the Time for Filing a Supplemental Motion for Rehearing and Extend the Time for Consideration of Motions for Rehearing, Attachment A-C.

<sup>14</sup> EDF's Objections and Brief with Accompanying Remand Evidence, p. 1 [hereinafter "EDF Remand Brief"].

<sup>15</sup> Tr. at pp. 144-145. Mr. Rotondi clearly testified that the site plan could change before final construction. See *e.g., id.*, p. 145 (Rotondi testifying, "The other [site plan] is part of a process to continue the permitting process of this project and may lead to potential petitions for alteration of this, but may – of the base design that we have provided here, and may not"), and *id.* at p. 79 (Rotondi testifying, "[W]e will continue to look at ways to improve this project, that I can tell you.").

<sup>16</sup> See *e.g.*, Tr. p. 132 (Rotondi) ("I do understand that at the end of the day that if there are differences, they have to be reconciled"); *id.* at pp. 18-19 & 38 (White Stallion counsel explaining "to the extent that there are variations, it is up to White Stallion to reconcile them" through appropriate agency processes); White Stallion Response to Exceptions, p. 6-7.

**II. UNDER APPLICABLE LAW, EDF'S PROFFERED EVIDENCE ON THE  
OCTOBER 25, 2010 SITE PLAN IS IRRELEVANT TO THE WHITE STALLION  
APPLICATION AND THE ISSUED AIR PERMIT.**

EDF proffers the October 25, 2010 site plan itself<sup>17</sup> and assorted affidavits<sup>18</sup> and testimony by Dr. Gasparini regarding his opinions about that particular site plan's air quality impacts, including unaudited dispersion modeling of emissions that he believes to be associated with that site plan.<sup>19</sup> White Stallion objects to that evidence as irrelevant, and respectfully submits that the Commission should decline to change anything about its December 2010 order in response to this "new evidence."

**A. TCEQ Evaluates And Grants Permits Based On, And Limited To, The  
Representations In Applications As Filed By Applicants.**

EDF appears to conceive of these proceedings as an opportunity to have a new contested case on a new application that no one has filed, and for the Commission to decide whether to issue a new permit to authorize a project for which no one has sought authorization. But all EDF can ask—and it never does—is that the Commission alter its findings and conclusions with respect to the application that White Stallion did file and the Air Permit that the Commission did issue.<sup>20</sup> That issued permit authorizes construction only on the site plan submitted with the application. White Stallion has not sought Commission authorization to build anything other than the project proposed in its Air Permit application. The very first paragraph on the face of White Stallion's permit provides as follows:

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<sup>17</sup> EDF Remand Brief, p. 7-10 and Attachment 3.

<sup>18</sup> *Id.* at p. 7-10, Attachment 3, Attachment 4, and Attachment 5

<sup>19</sup> *Id.* at p. 10-13 and Attachment 6.

<sup>20</sup> *See* Tex. Gov't Code § 2001.175(c); Remand Order ¶ 2 (appeal abated "pending TCEQ's decision whether to change its findings and decision by reason of the additional evidence").

Facilities covered by this permit shall be constructed and operated as specified in the application for the permit. All representations regarding construction plans and operation procedures contained in the permit application shall be conditions upon which the permit is issued.”<sup>21</sup>

EDF’s “Objections and Brief with Accompanying Remand Evidence” identifies no finding of fact or conclusion of law in the Commission Order granting the Air Permit that would be affected by past, present, or future adjustments to site plans presented in other permitting actions. There is none. As the SOAH ALJs pointed out in their Proposal for Decision, the hearing was convened to evaluate the air permit application direct-referred by the Commission to SOAH, not any other applications submitted for consideration by the Commission or other agencies under different regulatory programs.<sup>22</sup> The Commission ruled on that air permit application.<sup>23</sup> The existence of site plan variations (and the air quality consequences of any other site plan) could be relevant only to a decision that TCEQ did *not* make, namely to grant White Stallion a permit to build on a site plan other than the one included in its application.

“Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”<sup>24</sup> “Irrelevant ... evidence shall be excluded.”<sup>25</sup> No version of the

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<sup>21</sup> Air Permit ¶1; 30 Tex. Admin. Code § 116.116(a).

<sup>22</sup> PFD at p. 13.

<sup>23</sup> TCEQ Final Order at Finding of Fact No. 1, Conclusion of Law No. 7.

<sup>24</sup> Tex. R. Evid. 401.

<sup>25</sup> 30 Tex. Admin. Code § 80.127(a)(1); Tex. R. Evid. 402.

wetlands mitigation site plan, including the October 2010 revision, is even marginally relevant to the factual bases of the Commission's actions.<sup>26</sup>

**B. Only an Applicant Can Determine What To Propose For Authorization.**

TCEQ, as it must, evaluated the Air Permit application as submitted by the applicant against the standards of the Texas Clean Air Act.<sup>27</sup> The applicant's "proposed facility" is the basis of any air permit evaluation and the limit of the permit's authorization. TCEQ, much less EDF, has no authority to decide what should be proposed for authorization. The Commission's power is to describe "specific objections *to the submitted plans* of the proposed facility," if any.<sup>28</sup> The applicant bears the responsibility and the risk of determining what it requests to be authorized. EDF identified no statute or rule that takes away that discretion and responsibility.

Nowhere do the air permitting rules require "fully engineered plans" or "final plans" before an application can be made; nor do the rules reference plans that might be under consideration in other permitting actions.<sup>29</sup> As Administrative Law Judge Qualtrough explained during the hearing on the merits:

[T]his permit is going forward, and the applicant is making representations regarding these emissions. And, yeah, there's other federal permits that he's going to have to obtain; federal, state, whatever other authorizations they'll need. So something has got to go first, and, yeah, there may be changes to the layout.

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<sup>26</sup> TCEQ Final Order at Finding of Fact No. 1, Conclusion of Law No. 7; *see also* Tr. at 52:24-53:10 (White Stallion's objection on the record regarding relevance).

<sup>27</sup> *See, e.g.*, Tex. Health & Safety Code § 382.0518(b) (commission shall grant an air permit for a proposed facility if certain air quality findings are made).

<sup>28</sup> Tex. Health & Safety Code § 382.0518(d).

<sup>29</sup> *See, e.g.*, 30 Tex. Admin. Code § 116.111.

I mean, it's my understanding that what's proposed in the application is not the final engineered design of this facility. They don't know what to engineer to at this point in time. They don't have a permit here yet.<sup>30</sup>

Unable to identify any statute or rule that requires the air permit application to be final and immovable or identical with other requested authorizations, EDF tries to twist the certifications made in the application forms into a straightjacket that prevents the design from evolving at all.<sup>31</sup> But that is simply not a plain or even rational reading of the certifications. Rather, the certifications speak to the accuracy of facts included in the application with regard to the project for which that application is made, not the decision about what to apply for in the first instance.<sup>32</sup>

### **C. Applicants Bear the Responsibility to Determine If Changes To An Application Are Needed Before The Hearing.**

EDF argues that any difference in a project reflected in a filing in *another* permitting action *at any time* after the 31st day before the air permit public hearing begins requires the Commission (1) to stop the processing of the air permit, (2) to evaluate whether an amendment "would be necessary"

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<sup>30</sup> Tr. at p. 20 (Judge Qualtrough)

<sup>31</sup> EDF Remand Brief at p. 5

<sup>32</sup> The Air Permit, PI-1 certification provides

The signature below confirms that I have knowledge of the facts included in this application and that these facts are true and correct to the best of my knowledge and belief. I further state that to the best of my knowledge and belief, the project for which application is made will not in any way violate any provision of the Texas Water Code (TWC), Chapter 7, Texas Clean Air Act (TCAA), as amended, or any of the air quality rules and regulations of the Texas Commission on Environmental Quality or any local governmental ordinance or resolution enacted pursuant to the TCAA. I further state that I understand my signature indicates that this application meets all applicable nonattainment, prevention of significant deterioration, or major source of hazardous air pollutant permitting requirements. (emphasis added)

The Corps certification provides

Application is hereby made for a permit or permits to authorize the work described in this application. I certify that the information in this application is complete and accurate. (emphasis added)

under that other site plan; (3) to begin an entirely new, multi-year air permitting process (if that other site plan differs sufficiently as to constitute an amendment); (4) to stop and repeat, ad infinitum, if, for example, (a) the other permitting program requests changes to the site plan, (b) the developer itself identifies opportunities to improve its project, or (c) newly discovered site factors, like geology, suggest adjustments. In support of this Sisyphean permitting scheme, EDF offers one sentence from Texas Health & Safety Code § 382.0291(d). But § 382.0291(d) speaks only to what happens if *the applicant* decides it needs to make a change to the application during the specified period and that change triggers the standards for an amendment. Presented in its entirety (and not with EDF's quilt-work), the statute reads as follows:

(d) **An applicant** for a license, permit, registration, or similar form of permission required by law to be obtained from the commission 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 of an application would be necessary within that period, **the applicant** shall resubmit the application to the commission and must again comply with notice requirements and any other requirements of law or commission rule as though the application were originally submitted to the commission on that date. (emphasis added).

A statute should be interpreted according to its plain meaning.<sup>33</sup> Here the second sentence is clearly an explanation of the consequence for *the applicant's* prohibited action in the first sentence; TCEQ is not an active party under the language of this provision. That the applicant must actually propose a change to an application before the agency has any need to consider its implications is simply common sense.

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<sup>33</sup> *City of San Antonio v. City of Boerne*, 111 S.W. 3d 22, 29 (Tex. 2003); see also *City of Plano v. Pub. Util. Comm'n*, 953 S.W.2d 416, 421 (Tex. 1997) (court gives "serious consideration to an agency's construction of a statute that it is charged with enforcing, so long as the interpretation is reasonable and does not contradict the plain language of the statute.").

An applicant might determine that it needs to amend its application, for example, if it discovered a need to change the method of control of emissions—a change for which an amendment “would be necessary”—and it does not wish to wait and undergo later amendment proceedings to receive its authorization to do so.<sup>34</sup> It is the applicant who decides what permit it wants to receive. And so § 382.0291(d) is potentially invoked only when the applicant decides that it wants to receive a permit authorizing a facility different than the one for which it applied.

This plain reading of the statute hardly makes the provision meaningless; rather, it assures that the application that will be the subject of a hearing does not change (in any significant respect) during its course. The permit granted following the hearing is limited to the representations in the application, has been through a rigorous agency and public process, and constitutes a solid stake in the ground from which project developers can deviate in only limited respects without triggering an amendment.<sup>35</sup> This statutory provision does not *compel* amendments to an application; instead, it *prohibits* them during the course of a hearing in order to facilitate the public hearing process.

**D. TCEQ’s Permit Conditions and Validly Enacted Rules Provide the Mechanism for Addressing Site Plan Changes At The Appropriate Time and With the Appropriate Level of Process.**

Even if White Stallion settles on a site plan reflecting adjustments to the one contained in the Air Permit application in order to mitigate impacts on wetlands, there are processes in place for White Stallion to conform its as-built plant to the one for which a permit was issued. Just such adjustments are an expected part of the permitting process, as reflected, for example, in Special Condition No. 44 of the Air Permit:

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<sup>34</sup> See 30 Tex. Admin. Code § 116.116(b)(1)(A).

<sup>35</sup> See 30 Tex. Admin. Code § 116.116(b), (c), (d); *see also* Tex. Health & Safety Code § 382.0511(b), (d) (TCEQ authority to “amend, revise, or modify a permit” pursuant to implementing rules).

The holder of this permit shall submit ... change pages to the permit application reflective of the final plans and engineering specifications ... no later than 30 days before initial start-up of the CFB boilers. This information shall include ... Revised plot plans and equipment drawings as required to reflect the constructed facility.”

TCEQ rules establish a degree of process appropriate to the degree of change, distinguishing among amendments, alterations, permits-by-rule, etc.<sup>36</sup>

Locational adjustments do not necessarily require an amendment to an air permit. EDF asserts without basis that “[m]oving 73 out of 84 emissions points by itself clearly requires that White Stallion perform new modeling and resubmit its application.”<sup>37</sup> Changes to the location of facilities generally require permit alterations, not amendments, and may not even invoke the Commission’s permitting authority. Under a permit alteration, changes in representations in an application can be made provided they do not cause (i) a change in the method of control of emissions, (ii) a change in the character of emissions, or (iii) an increase in the emission rate of any air contaminant.<sup>38</sup> The relevant provisions of 30 Texas Administrative Code § 116.116 are approved in the State Implementation Plan and govern air permitting in Texas without exception.<sup>39</sup>

TCEQ’s rules are validly enacted and consistently applied. EDF’s complaint, ultimately, is with how TCEQ might implement its rules in the future, if and when White Stallion seeks to undertake conforming changes to the permit that TCEQ already *has* issued. If the engineered

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<sup>36</sup> See 30 Tex. Admin. Code § 116.116. Corps regulations also provide a range of process for changes. See 33 C.F.R. § 325.7. Notably, the October 25, 2010 site plan delineates where impacts to wetlands are authorized and where they are not, representing but one layout that will accomplish what is required by the Corps.

<sup>37</sup> EDF Remand Brief at p. 4.

<sup>38</sup> 30 Tex. Admin. Code § 116.116(c); Tex. Health & Safety Code §§ 382.0518(a) (requiring amendments only for “modifications” to facilities) & 382.003(9) (defining “modification” to include only changes “that increases the amount of any air contaminant emitted by the facility into the atmosphere or that results in the emission of any air contaminant not previously emitted that increase emissions”).

<sup>39</sup> 40 C.F.R. § 52.2270(c).

project ultimately requires a reconciliation between the Air Permit and other permitting actions, that process occurs under a different application. Applications not yet made can hardly be the subject of agency review.

White Stallion has not proposed a new site plan to be evaluated in the context of its Air Permit Special Conditions or under 30 Texas Administrative Code § 116.116 precisely because further revisions may be warranted.<sup>40</sup> Dr. Gasparini's opinions shed no light on "the plant WSEC intends to build" because White Stallion, like all developers of complex projects, necessarily must continue to refine its project in response to physical and regulatory requirements – always with an eye on its primary authorization (the Air Permit) and awareness of the need, at an appropriate time, to reconcile all authorizations.<sup>41</sup>

Now TCEQ has the opportunity to make clear (explicitly) that these site plans from other permitting actions are irrelevant to this proceeding; otherwise the same thinking that supports the present Remand Order could support another, ad infinitum. If a single transfer point moves 5 feet or 5000, no one should be surprised to find EDF clamoring for yet another remand. Rather than leaving to TCEQ's sound administration of a rigorous and extensive air permitting process, the permitting of substantial capital projects would become perpetual tail chases at the mercy of project

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<sup>40</sup> Any notion that the October 25, 2010 site plan reflects a final design has no support in the record. *See, e.g., supra* note 15, White Stallion Response to Exceptions, p. 6 ("it is quite possible that the exact locations of equipment at the as-built WSEC will not precisely conform to the site plans depicted in *any* of its currently pending applications") For example, water supply issues, geological studies, or engineering refinements may result in new variations of the site plan.

<sup>41</sup> EDF avers that White Stallion has attempted to "circumvent" (EDF's strained and wholly unsupported reading of) Texas Health & Safety Code § 382.0219(d). On the contrary, White Stallion sought and received an Air Permit, following over two years of TCEQ evaluation and public process. There is no reason to assume as of April 2009, as of February 2010, or as of today for that matter, that an amendment to White Stallion's Air Permit "would be necessary," under any applicable law. White Stallion will comply with its Air Permit and the Commission's rules (and/or those of other relevant agencies) and, when appropriate, engage in the required process for the degree of variations ultimately needed.

opponents. And environmental protection may suffer, as developers would become less willing than was White Stallion to proffer alternatives that mitigate environmental impacts.

### **III. PROFFERED EVIDENCE REGARDING SO<sub>2</sub> MODELING IS IRRELEVANT AND BEYOND THE SCOPE OF THE REMAND.**

EDF attempts to abuse this remand process by impermissibly supplementing the existing administrative record with proffered evidence regarding the 1-hour SO<sub>2</sub> National Ambient Air Quality Standard promulgated by EPA in August 2010 (the “2010 SO<sub>2</sub> NAAQS”).<sup>42</sup> Because the 2010 SO<sub>2</sub> NAAQS evidence is not related to the October 25, 2010 site plan and because the 2010 SO<sub>2</sub> NAAQS is not “applicable law,” White Stallion not only objects to its admission, but also asks that the Commission decline to receive it, or—if already “received”—moves to strike from the administrative record in this case as forwarded to the court on judicial review.

#### **A. The 2010 SO<sub>2</sub> NAAQS Evidence Is Not Related To the October 25, 2010 Site Plan and So Is Beyond the Scope of the Remand.**

The Remand Order was limited in scope to evidence regarding the October 25, 2010 site plan and its impacts on White Stallion’s Air Permit application under applicable law. TCEQ’s procedural order requested “[b]riefs with accompanying evidence, as authorized by the Court’s June 20, 2011 order.” EDF has proffered evidence regarding 2010 SO<sub>2</sub> NAAQS modeling, which (aside from being irrelevant for the reasons provided in Section II above and III.B below) is wholly outside the scope of these proceedings.<sup>43</sup> It should not be received by TCEQ or admitted, and it should be

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<sup>42</sup> 75 Fed Reg 35,520 (June 22, 2010) The 2010 SO<sub>2</sub> NAAQS is expressed not as a simple numeric value, but as post-mathematical processing concentrations monitored using techniques specified in the rule. The new 1-hour SO<sub>2</sub> NAAQS is met at a monitoring site when the 3-year average of the 99<sup>th</sup> percentile of the annual distribution of daily maximum 1-hour average concentrations is less than or equal to 75 ppb as determined in accordance with Appendix T to Part 50 of Title 40 of the Code of Federal Regulations 40 C.F.R. § 50.17(b)

<sup>43</sup> Remand Order ¶ 1, TCEQ procedural order. EDF does not and cannot argue that the SO<sub>2</sub> modeling of the October 25, 2010 site plan has any meaningful relationship to the difference in the site plans

stricken from the transmittal to the court and excluded from the record for judicial review.<sup>44</sup> Specifically, this out of bounds and irrelevant SO<sub>2</sub> evidence was proffered at EDF Remand Brief, p. 11, l. 10; p. 12, l. 7-21; p. 13, l. 1-12 Attachment 6 - Exhibit 200, p. 10, l. 29-39, p. 11, l. 1-36, p. 12, l. 1-36; Attachment 6 - Exhibit 207, table and graphics.

EDF's pending petition for judicial review of the Commission's order granting the Air Permit includes as a distinct point of error the Commission's alleged failure to require "the Applicant to demonstrate compliance with the new NAAQS."<sup>45</sup> EDF did not request, and the court did not grant, a remand for additional evidence on this issue.<sup>46</sup> Nor could EDF have met the standard for remand even had it asked, because this proffered evidence is not relevant (much less material), as explained below, and there was not good cause for failing to present it to TCEQ when TCEQ originally had jurisdiction.<sup>47</sup> EDF elected not to offer evidence of modeling regarding the 2010 SO<sub>2</sub> NAAQS to SOAH, and to raise it first as an issue in its Exceptions to the Proposal for Decision, filed July 26, 2010. Even then, EDF could have proffered this evidence by moving to reopen the record at any time TCEQ still had jurisdiction.<sup>48</sup> "Errors in judgment made during the agency hearing cannot constitute good reason for ordering the Commission to consider additional evidence."<sup>49</sup> Any "good cause" argument EDF could muster would only support the wisdom of

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<sup>44</sup> See 30 Tex. Admin. Code § 80.275(b), Tex. Gov't Code § 2001.175(e) (judicial review "confined to the agency record").

<sup>45</sup> EDF's Original Petition at 15, *Env'tl. Def. Fund, Inc. v. Tex. Comm'n on Env'tl. Quality*, No. D-1-GN-11-000011 (201st Dist. Ct., Travis County filed Jan. 3, 2011).

<sup>46</sup> See EDF Remand Brief, Attachment 3 (Motion for Remand Under APA § [sic] 2001.75(c)); Remand Order.

<sup>47</sup> See Tex. Gov't Code § 2001.175(c).

<sup>48</sup> See 30 Tex. Admin. Code § 80.272(d)(2) & (e); *City of San Antonio v. Tex. Dep't of Health*, 738 S.W.2d 52, 54 (Tex. App.—Austin 1987, writ denied) (discretion to reopen the proceeding).

<sup>49</sup> *Tex. Oil & Gas Corp. v. R.R. Comm'n*, 575 S.W.2d 348, 351-52 (Tex. App.—Austin 1978, no writ.)

TCEQ's long-standing policy, discussed below, of using the issuance of the draft permit as the end point for applying new standards.

In short, TCEQ has no obligation to receive proffered evidence beyond the bounds of the Remand Order.<sup>50</sup> EDF should not be allowed to use the court's order for remand on one issue to correct its failure to make the record it now wishes it had on appeal of another.

**B. Evidence Concerning the 2010 SO<sub>2</sub> NAAQS Is Not Relevant to White Stallion's Permit Application.**

The 2010 revisions to the NAAQS are not relevant considerations in the decision on White Stallion's Air Permit. The NAAQS are not self-executing conditions of permit approval and have not been added to the requirements for approvable permits under TCEQ's permit program rules. And even if they had been, any such new criteria for permit issuance would not apply to applications, such as White Stallion's, that already had undergone technical review. Accordingly, evidence concerning that NAAQS is properly excluded as irrelevant.

**1. The 2010 SO<sub>2</sub> NAAQS is not relevant to the White Stallion application because TCEQ has not incorporated it into Texas's permitting program.**

Standards not adopted by Texas are not relevant to the Commission's consideration of whether that application should be granted. Texas law requires TCEQ—and every other Texas agency—to follow its own rules until they are changed.<sup>51</sup> No sovereign can delegate to another the ability to make its laws, and so changes in federal ambient air quality standards must be amended by

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<sup>50</sup> Cf. *Lake Medina Conserv. Soc. v. Tex. Nat. Res. Conserv. Comm'n*, 980 S.W.2d 511, 519 (Tex. App.—Austin 1998) (“where re-opening the evidence is urged following judicial remand of a contested case to an agency, the agency need consider only those parts of its decision which were rejected by the reviewing court”)

<sup>51</sup> See Tex. Water Code § 5.103(c) (“The commission shall follow its own rules as adopted until it changes them in accordance with [the APA]”), *Rodriguez v. Service Lloyds Ins. Co.*, 997 S.W.2d 248, 255 (Tex. 1999) and *Publi Util. Comm'n v. Gulf States Util. Co.*, 809 S.W.2d 201, 207 (Tex. 1991) (if a Texas agency fails to follow the clear, unambiguous language of its own regulations, its action is arbitrary and capricious)

some affirmative act by the state regulatory body to update or ratify those federal law changes before they become effective.<sup>52</sup> TCEQ has taken no action to adopt the new standards promulgated by EPA, and so those standards have yet to take legal effect in Texas.

The 2010 SO<sub>2</sub> NAAQS was not even effective until August 23, 2010, almost a year and a half after White Stallion's Draft Permit was issued.<sup>53</sup> Even EPA had not yet had a chance to promulgate its own rules to announce requirements for approvable plans to implement the standards, and of course the states were well short of the minimum time frames required by the federal Clean Air Act for implementing a new NAAQS.<sup>54</sup> While EPA issued preliminary guidance for considering the 2010 SO<sub>2</sub> NAAQS in issuing permits on August 23, 2010,<sup>55</sup> of course such guidance applies only to jurisdictions in which EPA issues the permit. And even as to that preliminary guidance, EPA explained that it intended to evaluate the need for changes to the screening tools currently used under the NSR/PSD program for completing SO<sub>2</sub> modeling

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<sup>52</sup> See, e.g., *Ex parte Elliott*, 973 S.W.2d 737, 740 (Tex. App.—Austin 1998, pet. ref'd) (if Texas statute incorporating EPA definition of hazardous waste is read to mean that the definition changes from time to time at the will of EPA without intervention by or guidance from the Texas Legislature, then the constitutionality of the statute would be in doubt because it would essentially delegate lawmaking powers to a federal agency).

<sup>53</sup> 75 Fed. Reg. 35,520 (June 22, 2010).

<sup>54</sup> When a new NAAQS is promulgated, the federal Clean Air Act requires states to submit a list of all areas that should be designated as nonattainment, attainment, or unclassifiable by a date specified by EPA, but no sooner than 120 days after, and no later than 1 year after the promulgation of the new NAAQS. 42 U.S.C. § 7407(d)(1) (FCAA § 107(d)(1)). For the 2010 SO<sub>2</sub> NAAQS, EPA gave states until June 2, 2011, to submit designation recommendations. 75 Fed. Reg. 35569 (June 22, 2010). EPA is required to make designations within 2 years from the date of promulgation of a new NAAQS. 42 U.S.C. § 7407(d)(1)(B)(i) (FCAA § 107(d)(1)(B)(i)). Any state containing an area designated as nonattainment with respect to the 2010 SO<sub>2</sub> NAAQS must submit a SIP revision within 18 months of the effective date of an area's designation of nonattainment. 42 U.S.C. § 7514 (FCAA § 191(a)). If EPA takes the full amount of time allotted to it under the federal Clean Air Act to make nonattainment designations, states will not be required to submit any required SIP revisions for the 2010 SO<sub>2</sub> NAAQS until December 2013.

<sup>55</sup> EPA Memorandum from Anne Marie Wood to Regional Air Division Directors titled, "Guidance Concerning the Implementation of the 1-hour SO<sub>2</sub> NAAQS for the Prevention of Significant Deterioration Program," dated August 23, 2010.

analyses<sup>56</sup> And of course such EPA “guidance,” in any event, is not law that governs TCEQ permitting actions

The 2010 SO<sub>2</sub> NAAQS has yet to be adopted by Texas at all, and even permitting programs directly run by EPA lack complete and final guidance for undertaking such analyses. But, as explained next, even if EPA’s new NAAQS were (incorrectly) given self-executing effect as criteria for decision-making with respect to pending permit applications in Texas, those standards would not apply to White Stallion’s application because they were promulgated long after the Executive Director completed technical review of it and issued a Draft Permit.

## **2. Consideration of new permitting requirements ends at the conclusion of technical review upon issuance of the draft permit.**

TCEQ’s predecessor agency, the Texas Natural Resource Conservation Commission, previously addressed the question of how to handle new permitting standards issued after the conclusion of technical review upon the issuance of a draft permit, but prior to final and appealable permit issuance, in issuing a PSD permit to Mirant Parker, LLC (formerly SEI Texas, LLC) on January 7, 2002.<sup>57</sup> Mirant had applied for a PSD permit authorizing a new combined cycle gas-fired power plant on February 11, 1999,<sup>58</sup> when the BACT standard for NO<sub>x</sub> emissions was 9 parts per million.<sup>59</sup> After the Executive Director completed technical review and issued the draft permit,<sup>60</sup> TNRCC reduced its published BACT standard to 5 ppm<sup>61</sup>

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<sup>56</sup> See, e.g., *id.* at p 3 (“EPA intends to conduct an evaluation of these issues [relating to significant impact levels and significant monitoring concentrations] and submit our findings in the form of revised significance levels under notice and comment rulemaking if any revisions are deemed appropriate”)

<sup>57</sup> See TNRCC’s January 7, 2002 Order issuing permit numbers 40619 and PSD-Texas-933 to Mirant Parker, LLC, TNRCC Docket No 2000-0346-AIR, SOAH Docket No 582-00-1045

<sup>58</sup> *Id.* at Finding of Fact No 2

<sup>59</sup> *Id.* at Finding of Fact No 2

At the subsequent SOAH hearing, the protesting parties argued that Mirant should be held to the lower 5 ppm standard developed by the agency after issuing the draft permit,<sup>62</sup> raising a variety of arguments.<sup>63</sup> The Executive Director, applicant and OPIC argued that if the applicable BACT standards constantly changed it could prove impossible for an application review ever to become final.<sup>64</sup> They further argued that determining the BACT level during the technical review stage, and then adhering to that determination, has the benefit of treating similar facilities equally.<sup>65</sup> In other words, it avoids the problem of holding two contemporaneous applications to different standards simply because one avoids a hearing, and the other goes to a lengthy hearing during which time the applicable standards change.<sup>66</sup>

Both SOAH and the Commission agreed that staff's practice of foreclosing consideration of new standards after issuance of the draft permit was a reasonable one.<sup>67</sup> In issuing the permit to Mirant with the requirement to meet 9 ppm, the Commission found that "[d]etermining the BACT level early, and adhering to that determination, has the benefit of treating similar facilities equally;"

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<sup>60</sup> *Id.* at Findings of Fact Nos. 4 & 35.

<sup>61</sup> *Id.* at Findings of Fact Nos. 17 & 18.

<sup>62</sup> See SOAH's June 26, 2001, PFD, available at <http://www.soah.state.tx.us/pfdsearch/pfds/582/00/582-00-1045-pfd.pdf>, at p. 7.

<sup>63</sup> *Id.* at p. 11 (citing an excerpt from EPA's New Source Review Workshop Manual stating "The BACT emission limit in a new source permit is not set until the final permit is issued."); *id.* at p. 14-15 (citing Tex. Health & Safety Code § 382.0518(a) reference to "information presented at any hearing held under Section 382.056(k)" to argue standards apply at least until SOAH hearing complete). In our case, EDF is asking the Commission to apply SO<sub>2</sub> standards that not only did not exist when technical review was completed, but had still not yet taken effect for any purpose when the SOAH hearing was held or when the ALJs issued a PFD.

<sup>64</sup> *Id.* at p. 7.

<sup>65</sup> *Id.* at p. 11.

<sup>66</sup> *Id.* at p. 11.

<sup>67</sup> *Id.* at p. 13; TNRCC's January 7, 2002, Order.

that “[t]he staff’s practice of not revisiting BACT is a reasonable one;” and that “[t]he ‘information presented at any hearing’ language of Texas Health & Safety Code § 382.0518 refers to whether the facility met the BACT standard in place at the time the draft permit was issued ”<sup>68</sup>

The policy applied in the Mirant case remains the Commission’s policy today. For example, TCEQ’s Executive Director published interim guidance on the 2010 SO<sub>2</sub> NAAQS on August 4, 2010.<sup>69</sup> In identifying which applicants must demonstrate compliance with the new NAAQS, the guidance states:

Any permit and standard permit/PBR registration under technical review that specifically requires a NAAQS or SO<sub>2</sub> NAAQS compliance demonstration must demonstrate compliance with the 1-hour SO<sub>2</sub> standard.<sup>70</sup>

Putting aside questions about whether TCEQ can legally require demonstrations of compliance with standards it has not yet adopted, the underlined phrase makes clear that, according to the Executive Director’s guidance, only applications “under technical review” as of the date of the guidance (i.e., for which draft permits have not been issued), or the date the federal rule establishing the new NAAQS becomes effective (August 23, 2010 for SO<sub>2</sub>), are required to demonstrate compliance with the new NAAQS in the course of permitting. In other words, applications already through technical review as of those dates need not start a new technical review to make the demonstration.

This very case demonstrates the wisdom of ending consideration of new permitting requirements at the conclusion of technical review White Stallion filed its air permit application on

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<sup>68</sup> TNRCC’s January 7, 2002, Order, at Finding of Fact No 28, Finding of Fact No 32 & Conclusion of Law No 5

<sup>69</sup> “August 4, 2010 Interim NAAQS Guidance on Sulfur Dioxide,” *available at* [http://www.tceq.texas.gov/assets/public/permitting/air/memos/interim\\_guidance.pdf](http://www.tceq.texas.gov/assets/public/permitting/air/memos/interim_guidance.pdf)

<sup>70</sup> *Id.* at p 2 (emphasis added) (footnote explaining which PBRs and standard permits require a demonstration of NAAQS compliance omitted)

September 5, 2008, more than two years before the Commission's vote.<sup>71</sup> Technical review was completed on March 13, 2009, and the Executive Director issued the Draft Permit.<sup>72</sup> White Stallion's application was the subject of written comments, a public meeting, the Executive Director's Response to Comments, as well as a full contested case hearing at SOAH, followed by voluminous briefing, and issuance of a PFD. After all that, and even after the administrative record had been closed for months,<sup>73</sup> EDF asserted for the first time that there was a new requirement to consider.

If there's one thing constant about air permitting law, it is that it changes. There will always be new requirements. The fact that the new SO<sub>2</sub> standard only became effective about a month prior to the Agenda at which the Air Permit was issued affirms the wisdom of cutting off consideration of new requirements at the conclusion of technical review and issuance of the Draft Permit. Given that the delay between the end of technical review and Commission's permit issuance can be a matter of years (White Stallion took over 18 months), any other policy would draw permit applications into never-ending loops of review from which there is no escape.

Not that it is legally binding in this Texas air permitting proceeding,<sup>74</sup> but EPA's own permitting actions similarly end the applicability of new requirements before the administrative

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<sup>71</sup> White Stallion Vol. 1, Ex. 102 (White Stallion's Application, dated September 5, 2008).

<sup>72</sup> White Stallion Vol. 3, Ex. 111 (Technical Completeness Determination for the Application, dated March 13, 2009).

<sup>73</sup> The record closed on May 5, 2010. See PFD at p. 3.

<sup>74</sup> See White Stallion's Response to Exceptions at pp. 1-2, explaining that, to borrow the words of Judges Newchurch and Wilfong, arguments of federal law supremacy in the context of PSD permitting in Texas "lack important nuance and are overly broad and incorrect" (citing SOAH's February 8, 2010, proposal for decision in the case styled *Application of IPA Coletto Creek, LLC for State Air Quality Permit 83778 and Prevention of Significant Deterioration Air Quality Permit PSD-TX-1118 and for Hazardous Air Pollutant Major Source [FCAA § 112(g)] Permit HAP-18, SOAH Docket No. 582-09-2045, TCEQ Docket No. 2009-0032-AIR*, at p. 9).

adjudication that may follow and prior to the point that the permit becomes effective and appealable. EPA “final permit” issuance is akin to the Executive Director’s draft permit issuance because the Regional Administrator issues a “final permit” that is not effective and appealable until the Environmental Appeals Board review process is exhausted.<sup>75</sup> So in an EPA jurisdiction, the 2010 SO<sub>2</sub> NAAQS does not apply to any permit that the Regional Administrator had issued prior to August 23, 2010, even if it had not completed the EAB hearing process.<sup>76</sup> And in fact, going further, EPA recognizes the existence of discretion not to apply the 2010 SO<sub>2</sub> NAAQS under the federal Clean Air Act even for certain applications that had not received the EPA Regional Administrator’s initial, not-yet appealable permit “issuance” as of the NAAQS effective date, where the permitting authority finds that it is “appropriate and equitable under the circumstances.”<sup>77</sup>

Finally, while it is by no means determinative of any issue before the Commission, there is one last point to be made on the subject of the 2010 SO<sub>2</sub> NAAQS: This is not the Commission’s one and only chance to impose any necessary restrictions on SO<sub>2</sub> emissions from the White Stallion Energy Center. The Commission has the power to regulate emissions from all sources in Texas, as needed to achieve and maintain NAAQS compliance through the SIP process.<sup>78</sup> To the extent the Commission ever credibly determines it necessary to regulate sources like White Stallion’s to achieve or maintain compliance with the new short-term standards, it will be able to do so.

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<sup>75</sup> 40 C.F.R. §§ 124.15, 124.19.

<sup>76</sup> 75 Fed. Reg. 35520, 35578 (June 22, 2010); *see also* U.S. EPA, Response to Public Comments on the Proposed Prevention of Significant Deterioration Permit for the Avenal Energy Project, May 2011, at p. 55, *available at* <http://www.epa.gov/region9/air/permit/avenal/AvenalFinalResponse2Comments5-27-11.pdf> (describing its departure from the “general rule” that the NAAQS apply “as of the date a final PSD permit is initially issued (*before any administrative appeal proceeding commences*).” (emphasis added)).

<sup>77</sup> *See* Supplemental Statement of Basis, PSD Permit Application for Avenal Energy Project, March 2011, at p. 2, *available at* <http://www.epa.gov/region9/air/permit/avenal/Avenal-SuppStatemtBasisEjAnalysisApdxFinal-Eng3-2-11.pdf>.

<sup>78</sup> *See* Tex. Health & Safety Code § 382.011, General Powers and Duties.

#### IV. Prayer

White Stallion respectfully requests that the Commission:

1. Make no changes to its final and valid order issuing the White Stallion Air Permit;
2. Refuse admission of the proffered evidence into the evidentiary record, because it is all irrelevant under applicable law;
3. Reject receipt of or strike EDF's filing to the extent it contains proffered evidence regarding the 2010 SO<sub>2</sub> NAAQS; and
4. Explicitly inform the court of its statutory and regulatory interpretations, either by letter or by Commission resolution similar to the response to a certified question.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of the foregoing document has been served on the following via hand delivery, facsimile, electronic mail, first class mail, and/or overnight mail on this the **12th** day of **April**, 2012.

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