

**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

April 26, 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 Environmental Defense Fund's Reply to WSEC's and the Executive Director's Responses to EDF's Objections and Brief with Accompanying Remand Evidence. The original and seven copies are being hand delivered to your office.

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

Sincerely,



Thomas M. Weber  
Attorney for Environmental Defense Fund, Inc.

TMW/jam  
5043-11  
Enclosure

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

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

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

**ENVIRONMENTAL DEFENSE FUND’S REPLY TO WSEC’S AND THE EXECUTIVE  
DIRECTOR’S RESPONSES TO EDF’S OBJECTIONS AND BRIEF WITH  
ACCOMPANYING REMAND EVIDENCE**

**TO THE HONORABLE COMMISSIONERS AND GENERAL COUNSEL TROBMAN:**

COMES NOW Environmental Defense Fund, Inc. (“EDF”) and files this Reply to WSEC’s and the Executive Director’s Responses to EDF’s Objections and Brief with Accompanying Remand Evidence, and would respectfully show the following:<sup>1</sup>

**I. INTRODUCTION.**

The Final Order in this case was based on a specific site plan (“the Air Permit Site Plan”) that White Stallion certified was “true and correct” and that White Stallion’s CEO Frank Rotondi testified was the site plan White Stallion “fully and completely” intended to build “in every respect.” See EDF’s Brief with Accompanying Remand Evidence Exhibit B, p. 12 and Exhibit C, p. 77 to Attachment 3. Before TCEQ issued its Final Order, however, White Stallion made wholesale revisions to its Air Permit Site Plan moving 73 out of 84 emissions points. We know White Stallion made the decision to change its site plan well before issuance of the Final Order because the new site plan (the “October 25<sup>th</sup> Site Plan”) was dated a mere six (6) days after the

---

<sup>1</sup> In its Objections and Brief with Accompanying Remand Evidence, EDF objected to the remand procedure implemented by TCEQ on the grounds that it: (1) violates Texas Health & Safety Code § 382.0291(d); (2) violates EDF’s due process rights and TCEQ’s own rules by illegally shifting the burden of proof to EDF; and (3) violates EDF’s due process rights by denying EDF a full evidentiary hearing on remand, including the right to discovery and cross examination. This Reply is filed subject to and without waiving those objections.

date of the Final Order and because changes to billion dollar power plants, especially ones that move 73 out of 84 emissions points, take months to engineer and design. But what we don't know (and what TCEQ must determine) is exactly when White Stallion made this decision. WSEC has had ample opportunity in numerous pleadings filed before three courts and the TCEQ to come clean and provide this information. To date, however, White Stallion has failed to do so. Its silence speaks volumes. White Stallion knows that once it made the decision to change its Air Permit Site Plan, it was required by law to correct its sworn and certified application, correct its sworn hearing testimony and amend its air permit application. Sworn statements in applications to government bodies and sworn testimony under oath have to mean something and the persons making them have to be held accountable. Otherwise, public confidence in the integrity of the entire TCEQ permitting process is undermined.

In their Responses, White Stallion and the Executive Director ("the ED") ignore the District Court's Remand Order opting instead to raise the same old tired arguments previously raised with, and rejected by, the District Court and raised in separate petitions for writ of mandamus respectively denied by the Third Court of Appeals and the Texas Supreme Court. The underlying premise of White Stallion's and the ED's position is that all three courts simply do not understand TCEQ policies even though White Stallion and the ED have explained their interpretation of those policies in three separate legal proceedings.

The fact is White Stallion is playing a shell game with its ever-changing site plans and has made a mockery of TCEQ's air permitting process. White Stallion's response is akin to a bad magic show where its misdirection might have worked but for its bumbling sleight of hand that revealed the changed site plans. However, White Stallion has now backed itself and TCEQ into a legal and procedural corner. The District Court ordered remand for TCEQ to consider new

evidence on (1) the October 25<sup>th</sup> Site Plan and (2) the new site plan's **impacts** on WSEC's TCEQ air permit application "under applicable law." But rather than require White Stallion to amend its application as mandated under Texas Health & Safety Code § 382.0291(d) or convene an evidentiary hearing before the State Office of Administrative Hearings ("SOAH") to consider the evidence on remand, TCEQ has implemented a procedure that: (1) violates § 382.0291(d) by failing to require White Stallion to re-file its air permit application; (2) violates EDF's due process rights and TCEQ's own rules by illegally shifting the burden of proof to EDF; and (3) violates EDF's due process rights by denying EDF a full evidentiary hearing on remand, including the right to conduct discovery and cross examination. In the meantime, White Stallion chose not to offer any evidence on the impacts associated with its latest site plan. As a result, the **only** evidence regarding the impacts associated with the new October 25<sup>th</sup> Site Plan establishes that the new site plan violates the short-term PM<sub>10</sub> Prevention of Significant Deterioration ("PSD") increment standard and the short-term SO<sub>2</sub> National Ambient Air Quality Standard ("NAAQS"). As a result, White Stallion has not and cannot meet its burden under 40 CFR § 52.21(k) and TCEQ's own rules which require White Stallion to demonstrate that emissions from the plant it actually intends to build will not cause or contribute to a violation of any NAAQS or PSD increment standard.

TCEQ should require that White Stallion resubmit its application and publish new notice as required under § 382.0291(d) and uphold the integrity of its air permitting process.

## **II. ARGUMENT & AUTHORITY.**

White Stallion's and the ED's responses can be boiled down to three core, but odd, arguments: (1) that the evidence submitted by EDF on the impacts of the October 25<sup>th</sup> Site Plan is irrelevant because only an applicant can decide whether an amendment "would be necessary"

under § 382.0291(d); (2) that the changes made by White Stallion to its site plan *might* constitute an “alteration” rather than an amendment under TCEQ’s rules; and (3) the SO<sub>2</sub> impacts associated with White Stallion’s new plant were not among the impacts contemplated by the District Court. All three arguments take the adage “form over substance” to new heights. As discussed below, both the law and the particular facts of this case require amendment of the permit application or, absent amendment, an evidentiary hearing before SOAH.

**A. White Stallion Turns § 382.0291(d) on Its Head Rendering it Nonsensical.**

White Stallion (but interestingly, not the ED) takes the position that it and it alone can decide when changes to its site plan constitute an amendment under § 382.0291(d). Of course, the plain language of § 382.0291(d) contains no such sweeping grant of authority and does not, as White Stallion suggests, strip TCEQ of its power to regulate.

It is clear that § 382.0291(d) is designed as a limit on applicants. It provides that an applicant “may **not** amend the application after the 31<sup>st</sup> day before the date on which a public hearing on the application is scheduled to begin.” If an amendment “would be necessary,” the applicant “**shall resubmit the application**” to TCEQ and “**must again comply with the notice requirements.**”<sup>2</sup> (emphasis added). It does **not** say that the applicant may at its discretion bait the public with an application for one plant and then supplant it with another once the hearing process has run its course. Rather, § 382.0291(d) is designed to prevent the very type of “bait-and-switch” that White Stallion is attempting to perpetrate here and of which the EPA warned of in its May 13, 2011 letter to the ED. (See Exhibit A attached hereto).

---

<sup>2</sup> Section 382.0291(d) provides in its entirety: 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 31<sup>st</sup> 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.

White Stallion spends much of its Response stating the obvious: that plans for large industrial plants change. In support of its position, White Stallion quotes statements made by one of the SOAH ALJs at the hearing on the merits well before White Stallion's latest site-plan subterfuge was uncovered (i.e., well before EDF found the October 25<sup>th</sup> Site Plan in a response to its Freedom of Information Act request filed with the U.S. Army Corps of Engineers after the air permit hearing).<sup>3</sup> It is undisputed that White Stallion is free to change its plans. However, White Stallion's decision to change its plan cannot be done at the expense of the public's statutory right to notice and hearing on the plant White Stallion actually intends to build or at the expense of making the demonstrations required by law under 40 CFR § 52.21(k) and TCEQ's own rules. The real questions here are: (1) when did White Stallion and its CEO decide to change its site plan; and (2) what are the consequences of deciding to make those changes before the Final Order was issued? As White Stallion points out, it is bound by the terms of its sworn, certified application. However, when it changes its site plan and swears to that changed plan before a federal agency, it must correct its outdated air permit application; otherwise the sworn statements upon which the public and the agency relied become false.

White Stallion conveniently omits from its Response the more relevant statements made by the ALJs in their Proposal for Decision ("PFD") wherein the ALJs state that they expressly relied on CEO Rotondi's sworn testimony that White Stallion "fully and completely" intended to build the Air Permit Site Plan "in every respect." See EDF's Brief with Accompanying Remand Evidence Exhibit B, p. 12 and Exhibit C, p. 77 to Attachment 3. The ALJs wrote:

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**

---

<sup>3</sup> See WSEC's Response at pp. 7-8.

**Protestants' concerns did not rise to the level of a legal basis for continuing the hearing.**

The TCEQ issued its Final Order with this PFD in hand—a PFD that we now know was based on inaccurate, outdated or potentially false testimony. To date, despite numerous opportunities to do so, White Stallion has never disputed that it made the decision to change its plans well before TCEQ issued its Final Order. It must live with the consequences of that decision.

**B. The October 25<sup>th</sup> Site Plan Itself Establishes that White Stallion Must Amend Its Application.**

In its Response, White Stallion pretends that it is routine for applicants to move 73 out of 84 emissions points following a hearing on the merits and before issuance of a Final Order. If that is the case, the process is broken. White Stallion also suggests that the changes it made to its site plan might amount to a permit “alteration” rather than an amendment to its application.<sup>4</sup> There are two major problems with this argument. First, as EDF’s expert dispersion modeler, Roberto Gasparini, Ph.D., testifies, the changes made to the site plan (as evidenced by the October 25<sup>th</sup> Site Plan itself), result in an increase in PM<sub>10</sub> emission rates.<sup>5</sup> Under 30 TAC § 116.116(b)(1)(C), increases in emission rates necessitate an amendment, not a permit alteration with its less strenuous regulatory demonstrations. In his written testimony on remand, Dr. Gasparini explains how new emissions points in White Stallion’s October 25<sup>th</sup> Site Plan (including “Conveyor 3”) result in increases in emission rates that necessitate an amendment as opposed to an alteration, stating:

---

<sup>4</sup> See White Stallion’s Response, p. 11, citing to TCEQ’s rules at 30 TAC 116.116.

<sup>5</sup> See EDF’s Brief with Accompanying Remand Evidence, Exhibit 200, p. 7; see also EDF’s Brief with Accompanying Remand Evidence, Exhibit A, Attachment 4, p. 2 (stating “[f]or every additional 300 feet of conveyor length . . . 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.”).

Q: WHAT IS THE SIGNIFICANCE OF INCREASING THE LENGTH OF A CONVEYOR?

A: Emission rates from conveyors, like Conveyor 3, are based in part on conveyor length. Based on TCEQ guidance, for every additional 300 feet of conveyor length (approximately 91 meters), the emission rate from a conveyor is increased. The lengthening of Conveyor 3 by more than 1,230 feet means that the emission rate from that source will increase. An increase in emission rate will affect the emission impact caused by this source and require an amendment of the application. Under 30 TAC § 116.116(b)(1)(C), an amendment is required if the change will cause an increase in the emission rate of any air contaminant.

Furthermore, Dr. Gasparini's dispersion modeling established that these increased emission rates, along with the changed location of 73 emissions points, result in off-property impacts that exceed the short-term PM<sub>10</sub> PSD increment standard. As discussed in his written testimony and accompanying exhibits, Dr. Gasparini ran dispersion modeling using White Stallion's own emissions data and modeling inputs, changing only what was necessary to reflect the 73 moved emissions points per White Stallion's October 25<sup>th</sup> Site Plan. His modeling shows that White Stallion's new site plan will exceed the short-term PM<sub>10</sub> PSD increment standard at 32 locations and on 194 occasions in just one year.<sup>6</sup> Dr. Gasparini's testimony is completely unchallenged as White Stallion opted not to file any evidence on remand.

A second problem with White Stallion's permit alteration argument is that White Stallion changed its site plan **before** issuance of either the Final Order or the air permit thereby rendering its application (along with its sworn certification) false and any permit issued on that false information invalid. As a result, the invalidly issued permit is subject to neither amendment nor alteration under 30 TAC § 116.116. Rather, under the plain language of § 382.0291(d), White

---

<sup>6</sup> See EDF's Brief with Accompanying Remand Evidence, Direct Testimony of Dr. Roberto Gasparini, Ph.D., Ex. 200, pp. 10 and Ex. 206.

Stallion is required to amend its application and re-issue public notice on the plant White Stallion actually intends to build.

**C. The New SO<sub>2</sub> NAAQS Applies to White Stallion and EDF's Modeling Shows that Emissions from the Plant Will Cause or Contribute to a NAAQS Violation.**

The District Court ordered remand for TCEQ to consider new evidence on the October 25<sup>th</sup> Site Plan and the new site plan's **impacts** on White Stallion's TCEQ air permit application "under applicable law." Air quality permit applicants like White Stallion are required to demonstrate that the emissions impacts from a proposed source will comply with the NAAQS and PSD standards. *See* 40 CFR § 52.21(k) (entitled "Source **Impact** Analysis")(emphasis added). As Dr. Gasparini points out in his testimony, an "impacts" analysis necessarily requires air dispersion modeling.<sup>7</sup>

TCEQ's February 23, 2012, letter outlining the remand procedure effectively shifted the burden of proof from the applicant to EDF. In its Brief with Accompanying Remand Evidence, EDF objected to this burden shifting but, subject to that objection, EDF submitted impacts modeling consistent with the District Court's Remand Order. EDF's modeling included off-property impacts associated with SO<sub>2</sub> emissions and a comparison of those impacts to the legally applicable 1-hour SO<sub>2</sub> NAAQS—a standard adopted on June 22, 2010 (effective August 23, 2010) long before issuance of the Final Order.<sup>8</sup> Without new modeling, White Stallion cannot demonstrate that the October 25<sup>th</sup> Site Plan complies with "applicable law" including 40 CFR § 52.21(k) – the EPA rule which lies at the very heart of federal and state air quality regulation.<sup>9</sup>

---

<sup>7</sup> See EDF's Brief with Accompanying Remand Evidence, Direct Testimony of Dr. Roberto Gasparini, Ph.D., Ex. 200, p.5.

<sup>8</sup> 75 FR 35520 (June 22, 2010).

<sup>9</sup> EPA's rules at 40 CFR § 52.21(k) provide as follows:

In fact, EDF's modeling showed that emissions impacts from the Air Permit Site Plan and the October 25<sup>th</sup> Site Plan respectively shatter the applicable 1-hour SO<sub>2</sub> NAAQS at over 400 hundred off-property receptors on more than 3,400 occasions.<sup>10</sup>

Though the ED raises no objection to the SO<sub>2</sub> modeling offered by EDF, WSEC disputes the applicability of the 1-hour SO<sub>2</sub> NAAQS to its application and moves to strike EDF's SO<sub>2</sub> NAAQS modeling on the grounds that: (1) EDF's SO<sub>2</sub> impacts modeling was not within the scope of the District Court's Remand Order; (2) EDF's SO<sub>2</sub> impacts modeling is irrelevant because TCEQ has not incorporated the new SO<sub>2</sub> NAAQS into its rules; and (3) somehow TCEQ policies trump TCEQ's own rules which require compliance with the NAAQS. Each of these arguments is fatally flawed.

**(1) White Stallion Ignored the District Court's Order By Failing To Model SO<sub>2</sub> Impacts.**

First, the District Court ordered remand and the taking of additional evidence on the new site plan's **impacts** on White Stallion's TCEQ air permit application "under applicable law." The Remand Order does not limit the term "impacts" to certain types of impacts (e.g. just PM<sub>10</sub> emissions impacts)—it says only "impacts." 40 CFR § 52.21(k) is entitled "Source ***Impact***

---

(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. It is incorporated at 30 TAC § 116.160(c)(2)(B).

<sup>10</sup> EDF's Brief with Accompanying Remand Evidence on Remand, Ex. 207.

Analysis.” It requires demonstrating compliance with the NAAQS, including the NAAQS established for SO<sub>2</sub>. As Dr. Gasparini points out in his direct testimony, a 40 CFR § 52.21(k) impacts analysis is performed through dispersion modeling. And, as Dr. Gasparini further testifies, White Stallion’s October 25<sup>th</sup> Site Plan moves at least one SO<sub>2</sub> emissions source when compared to the Air Permit Site Plan upon which the Final Order is based. Therefore, analyzing the “impact” of moving the SO<sub>2</sub> emissions source is entirely consistent with the District Court’s Remand Order and “applicable law” (i.e. 40 CFR § 52.21(k) as incorporated in TCEQ’s rules). White Stallion, as the applicant, has the burden to make the compliance demonstration required under 40 CFR § 52.21(k). But it chose not to do so. By failing to submit an SO<sub>2</sub> impacts analysis of its own, White Stallion (not EDF) flaunts the District Court’s Order.

**(2) TCEQ’s Failure to Adopt the SO<sub>2</sub> NAAQS into Its Own Rules Does Not Allow It To Issue Permits in Violation of Its Own Rules.**

White Stallion, **but not the ED**, takes the position that the 1-hour SO<sub>2</sub> NAAQS is not applicable in Texas until TCEQ amends its rules to incorporate the SO<sub>2</sub> NAAQS by reference.<sup>11</sup> If TCEQ were to do otherwise, WSEC argues, Texas would be delegating its “sovereign” authority to make laws. This is a silly argument. EPA is charged with adopting the National Ambient Air Quality Standards for criteria pollutants such as SO<sub>2</sub> under the federal Clean Air Act.<sup>12</sup> The State is not improperly delegating its legislative authority to the EPA when the EPA establishes a new NAAQS.<sup>13</sup> Nor is the ED taking this position. Based on its interim guidance

---

<sup>11</sup> See White Stallions’ Response Brief at pp. 15-16.

<sup>12</sup> 42 U.S.C. § 7409.

<sup>13</sup> In fact, in this very case and prior to TCEQ issuing the Final Order, EPA sent the ED a letter stating:

The TCEQ should transmit for review to EPA **a copy of an amended permit application** or other records **which contain demonstrations that the proposed facility will not contribute to NO<sub>2</sub> and SO<sub>2</sub> NAAQS violations**, and provide notice to EPA of TCEQ’s action related to the consideration of such information. **Neither EPA nor the public have**

issued before the effective date of the new standard, the new standard is effective immediately. Specifically, the guidance states that “[a]s of August 23, 2010, applicants must demonstrate compliance with the 1-hour SO<sub>2</sub> NAAQS.”<sup>14</sup>

More importantly, TCEQ’s own rules and its State Implementation Plan (SIP) (i.e. the set of rules adopted by TCEQ that must be approved by EPA before TCEQ can implement the Clean Air Act in Texas) require TCEQ to adopt the new NAAQS before it can issue federal PSD permits such as the one sought by White Stallion. TCEQ’s rules provide as follows:

**§ 101.21. The National Primary and Secondary Ambient Air Quality Standards**

The National Primary and Secondary Ambient Air Quality Standards as promulgated pursuant to section 109 of the Federal Clean Air Act, as amended, will be enforced throughout all parts of Texas. (emphasis added)

...

**§ 116.161. Source Located in an Attainment Area with a Greater Than De Minimis Impact**

The commission may not issue a permit to any new major stationary source or major modification located in an area designated as attainment or unclassifiable, for any National Ambient Air Quality Standard (NAAQS) under FCAA, § 107, if ambient air impacts from the proposed source would cause or contribute to a violation of any NAAQS. In order to obtain a permit, the source must reduce the impact of its emissions upon air quality by obtaining sufficient emission reductions to eliminate the predicted exceedances of the NAAQS.

---

**had their rights under the Clean Air Act to review the demonstration of compliance for these standards.**

See attached Letter dated September 29, 2010 from EPA Deputy Regional Administrator Lawrence Starfield to Executive Director Mark Vickery, P.G., see Exhibit B attached hereto (emphasis added).

<sup>14</sup> TCEQ’s Interim 1-Hour Sulfur Dioxide (SO<sub>2</sub>) NAAQS Implementation Guidance, August 1, 2010, 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) (emphasis added).

So even under White Stallion's tortured theory that TCEQ cannot apply the new standard until TCEQ expressly adopts that standard by rule amendment, TCEQ's own rules at 30 TAC § 116.161 expressly prohibit TCEQ from issuing new permits until it adopts the new NAAQS.

**(3) TCEQ Policies Cannot Trump TCEQ Rules.**

White Stallion (but again, not the ED) takes the position that TCEQ policies prevent TCEQ from applying the 1-hour SO<sub>2</sub> NAAQS.<sup>15</sup> That is, White Stallion argues that policies trump rules. Agency policies or guidance that act to circumvent the plain language of agency's rules are by definition arbitrary and capricious.

TCEQ's rules and the Texas SIP require demonstrations of compliance with *any* NAAQS.<sup>16</sup> TCEQ can either enforce the new NAAQS or decide not to process air permit applications pending adoption of rules implementing the new NAAQS. It cannot issue permits ignoring the new NAAQS which its own rules require it to enforce "as amended . . . throughout all of Texas."

**D. The Only Evidence Proffered Establishes as a Matter of Law that White Stallion is Not Entitled to a Permit.**

The only evidence presented by any party on remand demonstrates that White Stallion has not made the required demonstration for the plant it now plans to build. The uncontroverted evidence presented by EDF in its Brief with Accompanying Remand Evidence establishes as a matter of law that the emissions from the October 25<sup>th</sup> Site Plan will exceed both the short-term PM<sub>10</sub> PSD increment standard and the 1-hour SO<sub>2</sub> NAAQS. Therefore, White Stallion has not made the demonstrations required under 40 CFR § 52.21(k) and TCEQ's own rules and is, therefore not entitled to a permit.

---

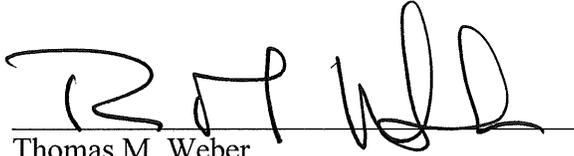
<sup>15</sup> See White Stallion's Brief in Response, pp. 17-19.

<sup>16</sup> 30 TAC § 116.161; 30 TAC § 116.160 (incorporating by reference 40 CFR § 52.21(k)); 30 TAC § 101.21.

#### **IV. CONCLUSION AND REQUEST FOR RELIEF.**

The evidence presented by EDF proves that White Stallion is not entitled to a permit and EDF requests that TCEQ admit all of the proffered evidence contained within its Brief with Accompanying Remand Evidence. Without waiving its objections or its request for resubmission under § 382.0291(d), EDF requests that TCEQ find that White Stallion failed to meet its burden of proof by failing to demonstrate compliance with the NAAQS and PSD increments based on EDF's remand evidence. Alternatively, EDF respectfully requests that TCEQ require the Applicant to comply with § 382.0291(d) and resubmit its application and issue new notice. Absent that, and without waiving its objections or its request for resubmission under § 382.0291(d), EDF respectfully requests that TCEQ remand this proceeding to SOAH for discovery and a full and fair hearing on the issues raised in the Remand Order. Finally, EDF respectfully requests a formal ruling on its prior requests for discovery and on its objections made in its Brief with Accompanying Remand Evidence.

Respectfully submitted,



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**

I certify that on April 26, 2012, a true and correct copy of the foregoing has been sent to the representatives of parties on the official service list by email and certified mail, return receipt requested.



Thomas M. Weber

Mailing List  
White Stallion Energy Center, L.L.C.  
TCEQ Docket No. 2009-0283-AIR  
SOAH Docket No. 582-09-3008

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  
512/463-2012 / Fax 512/320-0052  
[nancy.olinger@oag.state.tx.us](mailto:nancy.olinger@oag.state.tx.us)  
[cynthia.Woelk@oag.state.tx.us](mailto:cynthia.Woelk@oag.state.tx.us)

Gabriel Clark Leach  
Ilan Levin  
Environmental Integrity Project  
1303 San Antonio St., Suite 200  
Austin, Texas 78701  
512/637-9477 / Fax 512/584-8019  
[gclark-leach@environmentalintegrity.org](mailto:gclark-leach@environmentalintegrity.org)  
[ilevin@environmentalintegrity.org](mailto:ilevin@environmentalintegrity.org)

Eric Groten  
Paulina Williams  
Vinson & Elkins  
2801 Via Fortuna, Suite 100  
Austin, Texas 78746-7568  
512/542-8400 / Fax 512/542-8612  
[egroten@velaw.com](mailto:egroten@velaw.com)  
[pwilliams@velaw.com](mailto:pwilliams@velaw.com)

Stephanie Bergeron Perdue  
Booker Harrison  
TCEQ Legal Division MC-218  
P.O. Box 13087  
Austin, Texas 78711-3087  
512/239-0600 / Fax 512/239-0606  
[stephanie.bergeron\\_perdue@tceq.texas.gov](mailto:stephanie.bergeron_perdue@tceq.texas.gov)  
[booharri@tceq.state.tx.us](mailto:booharri@tceq.state.tx.us)

Scott Humphrey  
TCEQ Office of the Public  
Interest Counsel MC-103  
P.O. Box 13087  
Austin, Texas 78711-3087  
512/239-6363 / Fax 512/239-6377  
[scott.humphrey@tceq.texas.gov](mailto:scott.humphrey@tceq.texas.gov)

Docket Clerk  
TCEQ Office of the Chief Clerk MC-105  
P.O. Box 13087  
Austin, Texas 78711-3087



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?

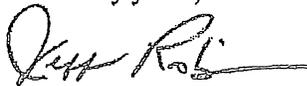
WSEC obtained an air quality permit from TCEQ on December 16, 2011. Prior to permit issuance, WSEC's permit application, the site plan, and the associated air modeling were subject to public review and comment. If WSEC elects to change the site plan from the site plan represented by WSEC in the air quality 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



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

REGION 6

1445 ROSS AVENUE, SUITE 1200

DALLAS, TX 75202-2733

September 29, 2010

Mr. Mark Vickery, P.G.  
Executive Director  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, TX 78711-3087

Re: White Stallion Energy Center, PSD-TX-1160, PAL 26, and HAP 28, Matagorda County, Texas.

Dear Mr. Vickery,

The Environmental Protection Agency (EPA) has strong concerns about the public health and environmental impacts of the planned White Stallion Energy Center, based on a review of the proposed air quality permits. EPA previously wrote to TCEQ on several occasions about this matter, including on April 14, 2009, April 20, 2009, and February 10, 2010. Some of EPA's concerns included, but were not limited to the following summary:

- EPA expressed concerns about the lack of a proper demonstration that the proposed facility will not cause or contribute to violations of the National Ambient Air Quality Standard (NAAQS) for ozone, and requested that the applicant generate a modeling protocol and provide a copy to EPA for review. EPA indicated that it might be compelled to consider available Clean Air Act enforcement authorities or objecting to the subsequent Title V permit if an appropriate ozone analysis was not conducted. (April 14, 2009 - Item #5; February 10, 2010 - Item #1).
- EPA indicated that there were problems with the issuance of a federal plant-wide applicability limit (PAL) to the facility. (February 10, 2010 - Item #2).
- EPA asked for the record to support the use of  $PM_{10}$  as a surrogate for  $PM_{2.5}$ . (February 10, 2010 - Item #3).
- EPA asked the TCEQ and applicant to specifically address and provide a rationale that considered IGCC and clean fuels options in the determination of Best Available Control Technology (BACT) emissions limitations. (February 10, 2010 - Items #4 and #5).

- EPA provided information for case-by-case MACT determinations regarding the use of wet FGD and fabric filters to control certain HAP emissions at a similar facility. (April 20, 2009 - Items #1 and #2).

In addition, EPA has finalized new NAAQS standards, and federal law, the Texas SIP, and PSD regulations require that emissions from construction or operation of a permitted facility will not cause, or contribute to, a violation of any NAAQS:

- EPA proposed a revision to the NAAQS for nitrogen dioxide (NO<sub>2</sub>) on July 15, 2009 (74 FR 34404), finalized the standard on February 9, 2010 (75 FR 6474), and the standard became effective on April 12, 2010.
- EPA proposed a revision to the NAAQS for sulfur dioxide (SO<sub>2</sub>) on December 8, 2009 (74 FR 64810), finalized the standard on June 22, 2010 (75 FR 35520), and the standard became effective on August 23, 2010.

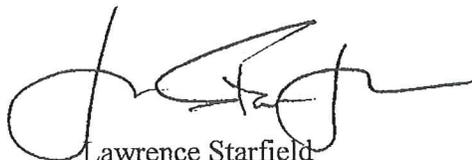
The TCEQ should transmit for review to EPA a copy of an amended permit application or other records which contain demonstrations that the proposed facility will not contribute to NO<sub>2</sub> and SO<sub>2</sub> NAAQS violations, and provide notice to EPA of TCEQ's action related to the consideration of such information. Neither EPA nor the public have had their rights under the Clean Air Act to review the demonstrations of compliance for these standards.

Because of the deficiencies identified in our written correspondence and the lack of required NAAQS demonstrations, if TCEQ were to issue the permits as they are proposed they would not be consistent with federal requirements and the Agency might have to consider available Clean Air Act authorities under Sections 113 and 167, and/or object to the subsequent Title V permit.

EPA is requesting that TCEQ withhold action on this permit application for the next 90 days, so that TCEQ and EPA can discuss the permit record. In addition, I would propose that we have TCEQ and applicant staff communicate closely with their EPA counterparts on the technical demonstrations needed to show that this facility will not adversely impact public health and will in fact protect the National Ambient Air Quality Standards.

Please contact me at (214) 665-2100, or Carl Edlund of my staff at (214) 665-7200, if you should have any questions concerning this matter.

Sincerely yours,



Lawrence Starfield  
Deputy Regional Administrator

Enclosures

cc: TCEQ Commissioners  
Richard Hyde, TCEQ  
Les Trobman, TCEQ



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 6  
1445 ROSS AVENUE, SUITE 1200  
DALLAS, TX 75202-2733

APR 14 2009

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

RE: Prevention of Significant Deterioration (PSD) Draft Permit, White Stallion Energy  
Center, PSD-TX-1160, HAP28, and PAL26, Matagorda County, Texas

To Whom It May Concern:

We have reviewed the draft Prevention of Significant Deterioration (PSD) permit for the White Stallion Energy Center located in Matagorda County, Texas. We received it in our office on March 13, 2009. The draft permit was evaluated to ensure consistency with the Texas PSD State Implementation Plan (SIP) and Federal Clean Air Act requirements. Our comments on the permit are enclosed.

We look forward to working with the Texas Commission on Environmental Quality (TCEQ) to address the issues identified in our comments and to ensure that the final permit is consistent with the requirements of the Texas PSD SIP. This letter is not a final position by the U.S. Environmental Protection Agency (EPA) concerning the disposition of the application and draft permit. Please contact me at (214) 665-7250, or Stephanie Kordzi of my staff at (214) 665-7520, if you have questions. Thank you for your cooperation.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Jeff Robinson".

Jeff Robinson  
Chief  
Air Permits Section

Enclosures

cc: Mr. Randy Hamilton  
Texas Commission on Environmental Quality

Mr. Steve Hagle  
Texas Commission on Environmental Quality

## ENCLOSURE

### Permit

1. Page 18, Permit Condition 32 - We recommend that TCEQ consider requiring particulate matter (PM) Continuous Emission Monitoring Systems (CEMS) to monitor filterable PM. PM CEMS was mentioned in the Preliminary Determination Summary (See Comment Number 4 below). PM CEMS measures the pollutant of interest, which periodic performance testing also measures, but it provides a greater degree of confidence that the PM control device is operating as intended. We believe PM CEMS for filterable particulate matter have been adequately demonstrated, and we are aware of a number of successful applications in industries such as pulp and paper, hazardous waste incineration, copper smelting, and no fewer than six electric generating units. We are aware of additional plans for installation of PM CEMS on electrical generating units. The capital and operating costs of PM CEMS are comparable to those of Continuous Opacity Monitoring Systems (COMS). Also, we note that revisions to the New Source Performance Standards for electric utility boilers allow PM CEMS to be used in lieu of opacity limits and COMS. Direct, continuous measurement of the pollutant of concern, as can be provided only by PM CEMS, will help ensure proper monitoring of the PM control equipment to the source, the environmental agency, and the public.
2. Page 20, Permit Condition 39.C. - The permit condition states that compliance with the Plantwide Applicability Limit (PAL) will be demonstrated by using CEMS. However, CEMS are not required for PM monitoring. Please reconcile.
3. Page 20, Permit Condition 39.D. - The permit states that the PAL is subject to the requirements of 30 Texas Administrative Code (TAC) Chapter 116, Subchapter C. However, EPA is currently reviewing these state regulations and has not yet taken action to approve or disapprove these regulations into the Texas State Implementation Plan (SIP). Accordingly, Texas must demonstrate that all emissions units at this source continue to meet all requirements of the currently approved SIP, including the requirements of any existing permits issued under the approved SIP. If any requirement of an existing permit is changed, the record for this permit action must demonstrate that such change meets the applicable SIP approved requirements in 30 TAC section 116.116. In addition, we strongly encourage TCEQ to ensure that all facets of EPA's PAL provisions are adequately addressed by this permit. (Please see *Federal Register* (FR), 67 FR 80186, December 31, 2002.)

### Preliminary Determination Summary

4. Page 9, BACT for Emissions during Startup/Shutdown - Please have the permittee forward a final copy of the final Startup/Shutdown written plan, when prepared.

5. Page 13, Section VII, Ozone Analysis – The EPA is concerned about the TCEQ guidance referenced by the applicant in the Modeling Report that was submitted to TCEQ regarding assessing the ozone impacts from the proposed unit in its PSD permit application. Specifically, it was determined that the location is ozone neutral. If the TCEQ guidance that was used is based on the Scheffe Point Source Screening Tables, then EPA has commented and provided information to TCEQ on the inaccuracy of using Scheffe Point Source Screening Tables for determining ozone ambient impacts in previous permit comment letters. While Scheffe tables have been previously used in PSD permit applications to assess ozone impacts in the absence of other accepted techniques, use of the Scheffe Point Source Screening Tables or similar screening processes are not EPA-approved PSD modeling protocols.<sup>1</sup> TCEQ Air Quality Modeling Guidelines establish a process by which the permit applicant communicates with TCEQ staff and develops a modeling protocol that will be followed. We could not see where a modeling protocol was developed or submitted by White Stallion. Please forward it to our office if it was prepared. The TCEQ has numerous nitrogen oxide control strategies throughout East Texas and in the Houston-Galveston-Brazoria (HGB) area to reduce ozone levels, but the comment that the proposed source, considering its proposed location, is ozone neutral is in direct conflict with control strategies developed to reduce ozone in the nearby HGB Nonattainment Area. EPA Region 6 will consider available Clean Air Act enforcement authorities or objecting to the subsequent Title V permit for this facility if an appropriate ozone analysis is not conducted for this facility. In addition, since this facility is proposed immediately outside the HGB non-attainment area, please provide EPA appropriate air quality modeling for ozone impacts that clearly demonstrates what the project's impact will be at specific monitors in the HGB area and that the construction of the facility will not significantly impact ozone levels at the HGB area. At this point, the only modeling technique that would seem technically appropriate for this source would be a CAMx based analysis using available modeling databases. We look forward to working together with the source in developing a modeling protocol for the ozone analysis. Please remember that EPA does not have an established significant impact level for ozone and TCEQ should not assume that the threshold for PSD purposes is an impact of 2.0 parts per billion or more.

---

<sup>1</sup> We have enclosed the Richard Scheffe letter on the Scheffe Point Source Screening Tables for TCEQ and the source's reference



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
RESEARCH TRIANGLE PARK, NC 27711

JUL 28 2006

Rec'd  
SP - AR

AUG - 3 2006

Dial \_\_\_\_\_  
Staff \_\_\_\_\_

Ms. Abigail Dillen  
209 South Willson Avenue  
Bozeman, Montana 59715

OFFICE OF  
AIR QUALITY PLANNING  
AND STANDARDS

Dear Ms. Dillen:

This letter is in response to your inquiry regarding applicability of the Scheffe Point Source Screening Tables.

I developed the screening tables in 1988 as a screening test to estimate the contribution to ambient ozone associated with increased non-methane organic carbon (NMOC) emissions arising from new or modified point sources. The tables never achieved a level of EPA certification associated with EPA guideline models and consequently were not endorsed by the Agency. After publication (non peer reviewed literature) of the tables in 1989, the American Petroleum Institute enlisted renowned atmospheric modeling experts, Drs. John Seinfeld and Panos Georgopoulos of the California Institute of Technology, to review the technique. Based on their input and our own analysis, the EPA decided at that time that the tables did not adhere to an adequate level of scientific credibility to be recommended for their intended purpose.

Ozone science has advanced markedly since 1988 with substantial improvements in the characterization of emissions, meteorological, and atmospheric chemistry processes, paralleling an equivalent improvement in computational processing capability, all of which constitute the principal features of a modeling framework. As a result, the Scheffe method, which was deemed "not adequate" in 1989, would be even less adequate today.

Please do not hesitate to contact me (919-477-7955) regarding any further questions.

Sincerely,

Richard D. Scheffe, PhD  
Senior Science Advisor  
OAQPS, EPA

cc: Richard Long, Region 8  
Tom Curran  
Valerie Broadwell

Internet Address (URL) • <http://www.epa.gov>

Recycled/Recyclable • Printed with Vegetable Oil Based Inks on Recycled Paper (Minimum 25% Postconsumer)



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

APR 20 2009

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

RE: White Stallion Energy Center, LLC (WSEC), Permits 86088, HAP28, PAL26 and  
PSD-TX-1160, Matagorda County, Texas

To Whom It May Concern:

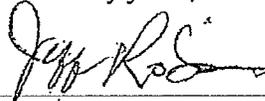
We appreciate the opportunity to provide you with information in your efforts to establish a case-by-case maximum achievable control technology (MACT) determination for the proposed construction of the White Stallion Energy Center, LLC (WSEC), 1200 megawatt (MW) power plant, Matagorda County, Texas. The Texas Commission on Environmental Quality (TCEQ) is the permitting authority required to make the section 112(g) MACT determination for the construction of the WSEC. However, consistent with the U.S. Environmental Protection Agency's (EPA) regulations implementing section 112(g), EPA can provide information to permitting authorities if that "information can be expeditiously provided by the Administrator." See 40 Code of Federal Regulations (CFR) §63.43(d) (requiring, among other things, that the 112(g) limit be based on "available information") 40 CFR § 63.41 (defining "available information"). Consistent with these provisions, we are providing the following information for you to consider as you develop the case-by-case section 112(g) MACT standard for the WSEC.

- Item 1. With respect to the proposed MACT to control emissions of Hydrogen Chloride (HCL) from the four circulating fluidized bed (CFB) boilers, in Permits 86088, HAP28, PAL26 and PSD-TX-1160, which we received in March 2009, WSEC proposes dry flue gas desulfurization (FGD) and fabric filter (FF). One example we have identified is a January 2008 permitting action for a petroleum coke, coal, and biomass fired, 230 MW, CFB boiler unit by the State of Louisiana at Louisiana Generating LLC's, Big Cajun I Power Plant (Unit I) which will utilize dry FGD and FF technology to control emissions of HCL.
- Item 2. With respect to the proposed MACT to control emissions of Hydrogen Fluoride (HF) from the four CFB boilers, in Permits 86088, HAP28, PAL26 and PSD-TX-1160, which we received in March 2009, WSEC

proposes dry FGD and FF. One example we have identified is a January 2008 permitting action for a petroleum coke, coal, and biomass fired, 230 MW, CFB boiler unit by the State of Louisiana at Louisiana Generating LLC's, Big Cajun I Power Plant (Unit I) which will utilize dry FGD and FF technology to control emissions of HF.

The TCEQ may obtain additional information concerning the above-referenced permitting actions to assist it in the MACT determination for the proposed WSEC plant. See 40 CFR 63.41. Should TCEQ have any questions about the requirements of Section 112(g) of the Clean Air Act, please contact me or Rick Barrett of my staff at (214) 665-7227.

Sincerely yours,



Jeff Robinson  
Chief  
Air Permits Section

cc: Ms. Toni Oylar  
Texas Commission on Environmental Quality

Mr. Steve Hagle  
Texas Commission on Environmental Quality



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 6  
1445 ROSS AVENUE, SUITE 1200  
DALLAS, TX 75202-2733

FEB 10 2010

Mr. Richard Hyde, P.E.  
Deputy Director  
Office of Permitting and Registration  
Texas Commission on  
Environmental Quality  
P.O. Box 13087  
Austin, TX 78711-3087

Re: White Stallion Energy Center, PSD Permit Nos. PSD-TX-1160, PAL 26, and HAP 28,  
Matagorda County, Texas

Dear Mr. Hyde:

Enclosed is the U.S. Environmental Protection Agency (EPA) analysis of the above-referenced permit actions. We performed this analysis in light of the recent issuance of the Texas Commission on Environmental Quality (TCEQ) Response to Comments (RTC) regarding this matter on October 2, 2009, and the upcoming "Hearing on the merits", scheduled to begin on February 10, 2010. Our comments focus on aspects of the permit actions that appear to be inconsistent with the requirements of the federal Clean Air Act and the implementing regulations, including the federally-approved Texas State Implementation Plan (SIP).

If the issues detailed in this letter are not appropriately responded to by TCEQ prior to final resolution of this permitting action, EPA may consider using Clean Air Act authorities to object to the subsequent Title V operating permit for this facility, or other remedies under the statute. Please contact me at (214) 665-7200, or Jeff Robinson of my staff at (214) 665-6435, if you should have any questions concerning this matter.

Sincerely yours,

Carl E. Edlund, P.E.  
Director  
Multimedia Planning  
and Permitting Division

Enclosure

cc: TCEQ Commissioners  
Mark Vickery, TCEQ Executive Director  
Steve Hagle, TCEQ

Internet Address (URL) • <http://www.epa.gov>

Recycled/Recyclable • Printed with Vegetable Oil Based Inks on Recycled Paper (Minimum 25% Postconsumer)

## ENCLOSURE

### I. Air Quality Impacts Analysis

We commented on the draft permit for the proposed White Stallion facility on April 14, 2009. In the Executive Director's response to comments (RTC), the TCEQ disagreed with our comments that photochemical modeling for ozone was needed to demonstrate that the proposed source would cause or contribute to violation of the National Ambient Air Quality Standards (NAAQS). TCEQ also disagreed with our comment that the ozone analysis performed by the applicant was in direct conflict with NO<sub>x</sub> control strategies developed to reduce ozone in the nearby Houston, Galveston, Brazoria (HGB) non-attainment area. TCEQ indicated if an evaluation of ozone impacts on a non-attainment area is needed, that the non-attainment SIP process is best suited for such an evaluation. As you are aware, 40 CFR § 51.165 and 51.166 requires permitting authorities to demonstrate that the proposed source will not cause or contribute to violation of the ozone NAAQS per 40 CFR 52.21(k). However, since this facility is proposed immediately outside the HGB non-attainment area, we continue to believe that appropriate air quality modeling must be conducted to clearly demonstrate that the project will not negatively impact ozone concentrations at specific monitors in the HGB area.

The TCEQ also stated in its RTC that EPA has no preferred model to determine impacts from a single source; no requirement for photochemical modeling; and no requirement for applicant to conduct regional ozone analysis. Our PSD regulations at 40 CFR § 51 Appendix W 5.2.1 recommend models for evaluating ozone impacts. Specifically, control agencies with jurisdiction over areas with ozone problems are encouraged to use photochemical grid models such as Models-3/Community Multi-scale Air Quality (CMAQ) modeling system to evaluate the relationship between precursor species and ozone. In our April 14, 2009 comment letter to TCEQ on the draft permit we also discussed potentially using a CAMx based analysis, since TCEQ has multiple episode databases that evaluate ozone levels in the Houston area. Appendix W 5.2.1 also recommends that permitting authorities consult with EPA on estimating the impacts of individual sources to determine the most suitable approach for estimating ozone impacts on a case-by-case basis. In an effort to determine that the proposed source will not cause or contribute to an air pollution in violation of ozone NAAQS standard, we have offered to work on a modeling protocol with TCEQ for this facility. To date, neither TCEQ nor the applicant have elected to consult with us on use of a modeling protocol that would estimate potential ozone impacts from the proposed source despite EPA's direct comment to TCEQ on this matter.

In addition, the TCEQ RTC expressed concern that the scope of the modeling and associated review required for multiple episodes and monitors (and potential control scenarios for any monitors currently above the ozone standard) would be costly, take up to a year to complete, and still not provide information to definitively address EPA's concerns, since the EPA does not have an established significant impact level (SIL) for ozone. Other permit applicants and permitting authorities in Region 6 (including TCEQ) have worked with us to conduct photochemical modeling to demonstrate that a proposed source would not cause or contribute to a violation of the ozone NAAQS. These projects have typically only taken a few months to

conduct and the cost, when a contractor has been used, is minimal with most analyses costing less than the other criteria pollutant modeling.

TCEQ also stated that EPA does not have a requirement for photochemical modeling of SIP attainment demonstration modeling techniques for NSR permitting purposes for sources of VOC or NO<sub>x</sub> within 100 and 200 kilometers, respectively of these precursors outside a non-attainment area. However, the TCEQ has developed multiple ozone SIPs where sources of NO<sub>x</sub>, that were at least 100-200 km outside the non-attainment areas, have been controlled to yield ozone decreases in the non-attainment areas (DFW and HGB SIPs in 2000/2001, DFW SIP 2007). TCEQ also commented that winds would not transport the proposed source's emissions to the HGB nonattainment area, but considering the proximity of the source to the HGB area, we are concerned because previous modeling episodes have had multiple days with winds from the west that could transport emissions towards the HGB nonattainment area.

We remain extremely concerned about the TCEQ guidance referenced by the applicant in the Modeling Report that was submitted as an assessment of the ozone impacts from the proposed source in its PSD permit application. Based on the results of this guidance, TCEQ and the applicant determined that the project is "ozone neutral." In the past, TCEQ has relied upon large NO<sub>x</sub> reductions to decrease ozone levels in ozone SIPs for the HGB and DFW areas. The current TCEQ approach for this permit relies upon science that assumes that the source has to emit VOCs at a sufficient level to chemically react with the source's NO<sub>x</sub> emissions to generate ozone. We disagree that VOC emissions have to be co-emitted at the source to cause impacts on ozone levels. Although TCEQ indicated this analysis is not based on the Scheffe Point Source Screening Tables for determining ozone ambient impacts, the approach and interpretation does not clearly demonstrate that the source will not adversely impact control strategies developed to reduce ozone in the nearby HGB non-attainment area. TCEQ and the applicants should utilize a technically appropriate modeling technique and should work with us (in accordance with PSD regulations and Appendix W) to determine whether a potential impact from this facility would cause or contribute to a potential violation of the ozone NAAQS standards or impacts on nearby non-attainment areas. TCEQ has not provided us a demonstration that this facility will not negatively impact ozone levels in Matagorda County or the HGB non-attainment area. If such modeling has been prepared by the applicant or TCEQ, we request that it be made available to us and the public for review.

## **II. Plantwide Applicability Limit (PAL)**

Since EPA has not approved TCEQ's PAL provisions into the SIP and proposed disapproval of such provisions on September 23, 2009, (74 FR 48474), any PAL permit issued by TCEQ to a new major stationary source may be considered a non-SIP-approved permit by EPA. We identified in our Federal Register notice that PAL permits can only be issued to *existing* major stationary sources, which precludes applicability of a PAL to a new major stationary source, as required under 40 CFR §§ 51.165(f)(1)(i) and 51.166(w)(1)(i). Without at least 2 years of operating history, a potential source like White Stallion Energy Center has not established actual emissions to facilitate development of a PAL.

required under 40 CFR §§ 51.165(f)(1)(i) and 51.166(w)(1)(i). Without at least 2 years of operating history, a potential source like White Stallion Energy Center has not established actual emissions to facilitate development of a PAL.

### **III. Particulate Matter (PM) 2.5**

We reviewed the TCEQ's Response No. 4 in the RTC filed on October 2, 2009, regarding PM<sub>2.5</sub>. However, we have concerns regarding TCEQ's reliance on the PM<sub>10</sub> surrogate policy. It is now necessary to provide a demonstration to support the use of PM<sub>10</sub> as a surrogate for PM<sub>2.5</sub>. The applicant should submit a revised application or demonstration addressing PM<sub>2.5</sub> emissions. See, *In re Louisville Gas and Electric*, Petition No. IV-2008-3 (Order on Petition). The additional information should either address PM<sub>2.5</sub> emissions directly or show how compliance with the PSD requirements for PM<sub>10</sub> will serve as an adequate surrogate for meeting the PSD requirements for PM<sub>2.5</sub> in this specific permit, after considering and identifying any remaining technical difficulties with conducting an analysis of PM<sub>2.5</sub> directly. The permit record must reflect a demonstration to support the use of PM<sub>10</sub> as a surrogate for PM<sub>2.5</sub>. We have worked with other permitting authorities and permit applicants to establish an appropriate PM<sub>2.5</sub> modeling protocol. If the applicant chooses to model for PM<sub>2.5</sub> impacts directly, please contact us to develop a methodology that will ensure that an appropriate analysis is performed.

### **IV. Integrated Gasification Combined Cycle (IGCC) Consideration**

The TCEQ indicated in its RTC on page 29 of 61 in the Executive Director's Response to Comments that neither the applicant nor TCEQ evaluated any other electrical generation methods such as IGCC or pulverized coal (PC) boilers. TCEQ indicated that inclusion of IGCC in the Best Available Control Technology (BACT) evaluation would require substantial redesign of the applicant's proposed facility. Later in the same response, TCEQ indicates that it does not require a review of IGCC as part of the BACT review for electric generating units (EGUs).

In at least one federal permitting action, IGCC was considered an available control option in the BACT analysis for a facility proposed to generate electricity from coal. See *Prairie State Generating Company (Illinois)*. Further, in a recent decision, the EPA Environmental Appeals Board (EAB) remanded the permit because it did not contain an adequate justification for excluding IGCC from the BACT analysis for a coal fired power EGU. See *Desert Rock Energy Company, LLC*, PSD Appeal Nos. 08-03 et.al. Slip. Op. at 76-77 (EAB Sept. 25, 2009). This EAB decision was followed in the Title V order for the petition on the American Electric Power Service Corporation, Southwestern Public Service Company John W. Turk order responding to a Title V petition (Petition Number VI-2008-1), where the EPA Administrator found that the Arkansas Department of Environmental Quality (ADEQ) failed to provide an adequate justification to support its conclusion in the PSD BACT analysis that IGCC technology should be eliminated from consideration on the grounds that it would "redefine" the proposed source. To meet the applicable legal criteria under the PSD program, a BACT analysis for each pollutant must consider "application of production processes or available methods, systems, and techniques ... for control of such pollutant." See 40 C.F.R. §§ 51.166(b)(12) and 40 C.F.R. § 52.21(b)(12). Therefore,

when a potential pollution control strategy is not considered in a BACT analysis, the record should provide a reasoned basis to show why that option is not available in a particular instance. We recognize that TCEQ has made a good faith effort to address this issue consistent with prior EPA determinations. However, in light of the EAB's recent conclusions, we strongly recommend that TCEQ and the permit applicant specifically address any IGCC technology considerations as a part of their BACT analysis and provide a reasoned explanation consistent with the EAB's position to support any decision to eliminate such an option or to exclude it altogether from a BACT analysis for this proposed source.

#### **V. BACT Limits Based on Clean Fuels**

It is unclear if the TCEQ or the applicant considered "clean fuels" in its BACT analysis. Comment 27 in the response to comments indicates that commenters stated that the applicant and TCEQ failed to consider alternative fuels to reduce emissions such as using only Powder River Basin (PRB) coals. TCEQ stated in its response that the "applicant proposes the facility to accomplish its objective based upon its business decisions. Those decisions include the applicant's choice of fuels. The applicant designed the plant using its choice of fuels and TCEQ reviewed the application as it was submitted. TCEQ does not specify the type of fuel to use in a fossil fuel electric generation plant because the cost of fuel is a primary business decision consideration that is up to the applicant to determine."

We believe the TCEQ should analyze the possibility of cleaner fuels as an alternative primary fuel source in the RTC. At this time, TCEQ does not include a federally approved definition of BACT in its State rules. The Clean Air Act includes the term "clean fuels" in the definition of BACT after the term "fuel cleaning." 42 U.S.C. § 7479(1). Thus, when a potential pollution control strategy is not evaluated in detail in a BACT analysis, the record should provide a reasoned basis to show why that option is not "available" in a particular instance. EPA has recognized that "available" options for a particular facility do not necessarily have to include options that would fundamentally "redefine" the source proposed by the permit applicant. See, e.g., *In re: Desert Rock Energy Company, LLC, PSD Appeal No. 08-03 et al*, slip op. at 59-65 (EAB, September 24, 2009). However, EPA interprets the Act to require a reasoned justification, based on an analysis of the underlying administrative record for each permit, to support a conclusion that an option is not "available" in a given case on the grounds that it would fundamentally "redefine the source." *Desert Rock*, slip op. at 63-72, 76. Based on the record here, it does not appear that TCEQ has provided a reasoned explanation demonstrating why the option of using PRB coals is not "available" for this facility.

We believe TCEQ must clearly provide a rationale for why utilizing fuels other than Illinois coal and/or petroleum coke, or blends from each of the proposed identified fuels constitutes "redefining the source". Further, the rationale should state if there are economic, environmental, or energy impacts from the use of PRB coals (or lower sulfur petroleum coke) that weigh against its selection as BACT. We acknowledge that States with SIP-approved PSD programs have independent discretion and are not necessarily required to follow all EPA policies or interpretations. See, e.g., 57 Fed. Reg. 28093, 28095 (June 24, 1992). However, states that issue PSD permits under SIP-approved regulations are required to conduct a BACT analysis that is

reasoned and faithful to the statutory framework. See *Alaska Dept of Env'tl Conservation v. EPA*, 540 U.S. 461, 484-91 (2004).

On the question of whether an option may be excluded because it redefines the proposed source, the EAB has developed an analytical framework that EPA uses to assess this issue in its own permitting decisions. See, e.g., *Prairie State*, slip op. at 26-37 ; *Desert Rock*, slip op. at 59-65. Since the EAB has articulated a foundation for its approach that has been upheld by one U.S. Court of Appeals, we strongly recommend that SIP-approved States follow the framework articulated by the EAB. We are not concluding that the present permit limits do not represent BACT - only that the present permit record does not appear to provide a sufficient rationale to demonstrate the adequacy of the BACT determinations for this facility. In addition, we are not expressing a policy preference for utilization of a particular coal type, or coal from a particular coal basin. EPA supports the development and use of a broad range of fuels and technologies across the energy sector including those that will enable the sustainable use of coal. Our primary concern is the adequacy of TCEQ's response and rationale for excluding PRB or the possibility of utilizing lower sulfur coal or lower sulfur petroleum coke as fuel options.