



1303 San Antonio Street, Suite 200  
Austin TX, 78701  
p: 512-637-9477 f: 512-584-8019  
www.environmentalintegrity.org

April 26, 2012

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

*via electronic submission*

Attn: Agenda Docket Clerk

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

Dear Ms. Bohac:

Enclosed please find Sierra Club's Reply to White Stallion's Response to Environmental Defense Fund's Remand Evidence. If you have any questions concerning this filing, please contact me at the number above.

Sincerely,

A handwritten signature in black ink, appearing to read 'G. Clark-Leach', written in a cursive style.

Gabriel Clark-Leach

Enclosure

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

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

<b>APPLICATION OF WHITE STALLION ENERGY CENTER, L.L.C. FOR STATE AIR QUALITY PERMIT NOS. 86088; HAP28, PAL26, AND PSD-TX-1160 HEARINGS</b>	§ § § § §	<b>BEFORE THE TEXAS COMMISSION  ON  ENVIRONMENTAL QUALITY</b>
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**SIERRA CLUB’S REPLY TO WHITE STALLION ENERGY CENTER, LLC’S  
RESPONSE TO ENVIRONMENTAL DEFENSE FUND, INC’S REMAND EVIDENCE**

To the Honorable Commissioners:

The District Court remanded the White Stallion matter to the Commission so that additional evidence concerning the October 25<sup>th</sup> Site Plan (“new Site Plan”) submitted by White Stallion Energy Center, LLC (“White Stallion”) to the Army Corps of Engineers and its impacts on White Stallion’s air permit application under applicable law could be taken and considered by the Commission. This remand was *proper*, because evidence concerning the new Site Plan and its impacts on White Stallion’s air permit application is *material* and parties did not have an opportunity to present such evidence at the contested case hearing on White Stallion’s air permit application.<sup>1</sup> Material evidence, by definition, is relevant evidence that could affect the Commission’s decision in a contested case.<sup>2</sup> As the Remand Order makes clear, the remand was *necessary* to ensure meaningful public participation in the permitting process.

Consistent with the Remand Order, the Texas Health and Safety Code, and the Commission’s rules, Sierra Club and the Environmental Defense Fund (“EDF”) requested that the Commission nullify White Stallion’s permit and remand the matter back to SOAH for further discovery and a contested case hearing on issues within the scope of the District Court’s Remand

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<sup>1</sup> Tex. Gov’t Code § 2001.175(c) (Remand is appropriate if the court is satisfied that additional evidence is material and that there were good reasons for the failure to present it in the proceeding before the state agency.).

<sup>2</sup> *Smith Motor Sales, Inc. v. Texas Motor Vehicle Com’n*, 809 S.W.2d 268, 270 (Tex.App.—Austin 1991).

Order.<sup>3</sup> At the Commission's agenda meeting on February 22, 2012, the Commission declined to grant these requests and directed parties to submit briefs and accompanying evidence. This decision improperly limited Sierra Club and EDF's ability to participate in the permitting process in the way required by the Commission's contested case hearing rules and the Remand Order. The Commission's decision to minimize public participation on remand was likely based on the Commission's mistaken determination, encouraged by briefing filed by the Executive Director and White Stallion, that any evidence within the scope of the Remand Order is necessarily legally irrelevant.<sup>4</sup> The Executive Director and White Stallion's oft repeated position that evidence within the scope of the Remand Order is necessarily legally irrelevant is not only unsupported by, and contrary to, the plain language of applicable rules and statutes,<sup>5</sup> it also ignores the District Court's holding that evidence related to White Stallion's October 25<sup>th</sup> Site Plan is *material*. Material evidence should not be presumed to be irrelevant.

Even with the inadequate process afforded by the Commission, EDF has offered evidence within the scope of the Remand Order that is clearly relevant and material to the Commission's decision whether or not to grant White Stallion's air permit. In light of this evidence, the Commission must either remand the matter back to the State Office of Administrative Hearings for a full hearing, with discovery, on issues within the scope of the Remand Order or require White Stallion to re-submit and re-notice its application. White Stallion asks the Commission to send the Court a letter or resolution indicating that, as a matter of law and policy, "[e]vidence of

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<sup>3</sup> See, e.g., Sierra Club's Response to Parties' Briefs Concerning Procedures for Addressing New Evidence on Remand at 2-8.

<sup>4</sup> See e.g., Executive Director's Response Brief on Submission at 1-2 ("As noted in prior briefings on this matter, the ED maintains the same position since the contested case hearing[.] . . . [W]hen reviewing an air permit application, the Air Permit Division is not required to, and does not consider, the entire universe of permits or other authorizations the applicant is required to obtain[.] . . . It is irrelevant to the validity of the air authorization whether the applicant submits conflicting information in other media applications or to other state or federal agencies.").

<sup>5</sup> Sierra Club's Response to Parties' Briefs Concerning Procedures for Addressing New Evidence on Remand at 4, n18; Sierra Club's Response To Environmental Defense Fund, Inc.'s Objections and Brief with Accompanying Remand Evidence at 3-7.

site plans other than the one for which a permit is being issued are irrelevant to the decision to issue that permit.”<sup>6</sup> White Stallion’s request fails to comply with applicable statutes and rules, and does not honor the letter or the spirit of the Remand Order. The Commission should decline to grant it.

## **I. BACKGROUND**

On March 22, 2012, EDF submitted its Brief with Accompanying Remand Evidence (“Evidence Brief”). The accompanying evidence consists of the new Site Plan along with the results of air dispersion modeling based on the new Site Plan conducted by EDF’s modeling expert, Dr. Gasparini, and Dr. Gasparini’s written testimony based upon this modeling.<sup>7</sup> As EDF and Sierra Club have argued, this evidence is clearly relevant. It establishes that the site plan White Stallion submitted with its air permit application is outdated, and that it was likely outdated at the time the contested case hearing on White Stallion’s air permit application was held. The new Site Plan also undermines Frank Rotondi’s testimony that White Stallion “fully and completely” intended to build the site plan included in White Stallion’s air permit application, which the Administrative Law Judges relied upon in their PFD. Rotondi’s testimony is no longer credible and it was likely false or at least misleading when given. The new Site Plan moves 73 out of 84 emission points used by White Stallion in its air dispersion modeling.<sup>8</sup> These substantial changes undermine the credibility of White Stallion’s air dispersion modeling. Moreover, EDF’s air dispersion modeling based on the new Site Plan predicts violations of the PM<sub>10</sub> 24-hour PSD Increment and the 1-hour SO<sub>2</sub> National Ambient Air Quality Standards. Even if the Commission is not convinced, based on this evidence, that White Stallion’s permit

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<sup>6</sup> White Stallion Response Brief at 1.

<sup>7</sup> EDF Ex. Nos. 200-207.

<sup>8</sup> EDF Exhibit 200 at 5:31-39.

demonstrations have been undermined, EDF and Sierra Club have demonstrated that the evidence is at least relevant. Accordingly, we are entitled to an opportunity to develop it through cross-examination at a contested case hearing.<sup>9</sup>

In response to EDF's evidence, the Executive Director and White Stallion have maintained their mistaken position that the evidence is irrelevant as a matter of law. While Sierra Club will not revisit its briefing regarding this incorrect claim, several problems with White Stallion's Response Brief should be addressed.

## **II. The Commission's Order Granting White Stallion's Air Permit Does Not Implicitly Include any Finding Regarding the Relevance of Representations in Applications for Other Permits**

In its Response Brief, White Stallion asks the Commission to

clarify for the court. . .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.<sup>10</sup>

This statement of general policy is not implicit in the Commission's order. Evidence concerning White Stallion's site plan representations in its wastewater permit application and its Army Corps of Engineers permit application was admitted into evidence at the contested case hearing over White Stallion's objection that such evidence was irrelevant.<sup>11</sup> Moreover, in their Proposal for Decision ("PFD"), the Administrative Law Judges expressed concern about the conflicting site plans, but decided that such concerns were adequately addressed by Frank Rotondi's testimony that White Stallion "fully and completely" intended to build the power plant

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<sup>9</sup> *Geeslin v. State Farm Lloyds*, 255 S.W.3d 786, 802-804 (Tex.App.—Austin 2008) (Due process requires that parties be afforded a fair hearing on dispute fact issues. A full and fair hearing necessarily includes the right to conduct discover and cross-examination).

<sup>10</sup> White Stallion Energy Center, LLC's Response to Environmental Defense Fund's Objections and Brief with Accompanying Remand Evidence ("White Stallion's Response Brief") at 1.

<sup>11</sup> 1 Tr. 52:24-53:10 (White Stallion's objection to site plan evidence from other applications), 54:12-17 (Judge Qualtrough admits evidence over White Stallion's objection).

consistent with its air permit application site plan.<sup>12</sup> Thus, the PFD indicates that representations in other White Stallion permit applications are relevant.

In relevant part, Texas Government Code § 2003.047(m) states that:

[T]he commission shall consider the proposal for decision prepared by the administrative law judge, the exceptions of the parties, and the briefs and argument of the parties. The commission may amend the proposal for decision, including any finding of fact, but any such amendment thereto and order shall be based solely on the record made before the administrative law judge. Any such amendment by the commission shall be accompanied by an explanation of the basis of the amendment.

The Commission's Order granting White Stallion's air permit application does not indicate that the Commission disagreed with the ALJs' decision to admit evidence regarding White Stallion's conflicting site plans into the record or the ALJs' determination in the PFD that such evidence was relevant. Thus, the Commission's Order does not implicitly find or conclude that evidence of site plans other than the one for which a permit is being issued is irrelevant to the decision to issue that permit. To the extent that the Commission's Order is read in this way, it violates Texas Government Code § 2003.047(m).

Moreover, the "finding" that White Stallion asks the Commission to adopt in response to the Court's Remand Order is a *new* policy regarding certain kinds of evidence. Neither White Stallion nor the Executive Director has identified any guidance, rules, or statutes indicating that representations in applications for permits other than the one that is being issued are irrelevant. The policy that White Stallion asks the Commission to adopt fits the Texas Administrative

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<sup>12</sup> PDF at 13-14 ("We found that no Commission rule of procedure or policy directly addressed the issue. In their absence, we ultimately relied on two points to deny Protestants' motion. First, the Commission had referred this application to SOAH for a contested case hearing on the merits of this application. Second, Mr. Rotondi testified that WSEC intended to build the facility as stated in this application. Although we were concerned about WSEC's actions in filing other site plans, we concluded that those actions did not change the facts that led the Commission to refer this case to SOAH. If WSEC intended to build the proposed facility as shown in the site plan in this application, then Protestants' concerns did not rise to the level of a legal basis for continuing the hearing.").

Procedure Act's ("TAPA") definition of a rule.<sup>13</sup> Rules should be promulgated according to the rulemaking process laid out by TAPA and not through adjudicative proceedings like these, unless the dispute addresses a problem that requires ad hoc resolution because the issue cannot be captured within the bounds of a general rule.<sup>14</sup> Neither White Stallion nor the Executive Director have offered any reason to think that the policy they would like the Commission to adopt addresses an issue that cannot be captured within the bounds of a general rule. To the contrary, the policy concerns they raise are quite universal and, if warranted, could clearly be addressed within the bounds of a general rule.<sup>15</sup> Thus, it would not be proper for the Commission to adopt a new rule regarding the relevance of any application materials in the context of these remand proceedings.

### **III. The Fact that White Stallion May Authorize Changes to its Site Plan Without an Amendment Undermines Rather than Supports its Claim that EDF's Evidence is Irrelevant**

The Commission may only issue an air permit if an application includes information that demonstrates that emissions from the facility will not cause or contribute to a violation of any NAAQS or PSD Increment.<sup>16</sup> The commission may not issue a permit to any major new stationary source if ambient air impacts from the proposed source would cause or contribute to a violation of any NAAQS."<sup>17</sup> White Stallion argues that the Commission needn't consider

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<sup>13</sup> A rule is a "state agency statement of general applicability that: (1) implements, interprets, or prescribes law or policy; (2) describes the procedural or practice requirements of a state agency." Tex. Gov't Code § 2001.003(6).

<sup>14</sup> *Rodriguez v. Service Lloyds Insurance Company*, 997 S.W.2d 249 at 255 (Texas, 1999).

<sup>15</sup> *See, e.g.,* White Stallion Response Brief at 4 and 12. And to be clear, neither the Executive Director nor White Stallion has offered any factual support or convincing argument that industrial development will actually end unless the Commission adopts a general policy forbidding the consideration of representations in other permit applications on a case-by-case basis when offered into evidence by a party to a contested case hearing. The fact that industrial development has continued in Texas in the absence of such a policy certainly calls into question merit of this claim.

<sup>16</sup> 30 Tex. Admin. Code § 116.111(a)(2), 116.160, 116.161.

<sup>17</sup> 30 TEX. ADMIN. CODE § 116.161; 67 Fed. Reg. 58,697, 58,709-10 (Sept. 18, 2002) (approving 30 TEX. ADMIN. CODE § 116.161 into the Texas SIP).

evidence indicating that an applicant intends to build a facility that differs from representations made in its application when it issues a permit, because the Commission's Changes to Facilities rule provides a process for the Commission to consider and authorize such changes after the permit has been issued.<sup>18</sup> However, according to White Stallion's Response Brief, "[c]hanges to the location of facilities generally require permit alterations, not amendments, and may not even invoke the Commission's permitting authority."<sup>19</sup> If it is true that White Stallion may make changes to the location of emission sources at its power plant without even invoking the Commission's permitting authority, and such changes could result in the violation of air quality standards, then the Commission's Changes to Facilities rule cannot ensure compliance with applicable air quality standards. Accordingly, the Commission absolutely should consider EDF's evidence indicating that White Stallion intends to build a power plant that differs significantly from the site plan included in its air permit application. As EPA points out in its comment letter addressing White Stallion's conflicting site plans, accepting White Stallion's unsupported policy argument leaves us in with a "bait-and switch" scenario where an applicant can propose one site plan during the original permit application process, navigate through Texas's public participation process for permits, obtain a permit, and then immediately change the site plan in such a way that would cause PSD Increment and NAAQS violations with no substantial review.<sup>20</sup>

In this case, White Stallion submitted a new site plan in support of its Army Corps of Engineers permit application six days after the Commission issued its Order granting White Stallion's air permit. The new Site Plan moves 73 out of 84 emission points described in White

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<sup>18</sup> White Stallion Response Brief at 12.

<sup>19</sup> White Stallion Response Brief at 11.

<sup>20</sup> Letter from Jeff Robinson, Chief, Air Permits Section, U.S. EPA Region 6 to Steve Hagle, Director, Air Permit Division, TCEQ, Re: White Stallion Energy Center (May 13, 2011).

Stallion's air permit application. EDF's modeling demonstrates that emissions from the facilities described in the new Site Plan will cause PSD Increment and NAAQS violations. White Stallion has not offered any evidence in response to EDF's evidence indicating that it will not construct its power plant according to the new Site Plan or that emissions from the power plant it intends to build will not cause PSD Increment or NAAQS violations.<sup>21</sup> Accordingly, based on the most current and reliable evidence available, the Commission should find that White Stallion has not demonstrated that emissions from the White Stallion energy center will comply with all applicable standards.

#### **V. EDF's SO<sub>2</sub> Modeling is Evidence Within the Scope of the Remand Order**

The District Court remanded White Stallion's permit back to the Commission "for the taking of additional evidence on the October 25, 2010 site plan submitted by WSEC to the U.S. Army Corps of Engineers ("Site Plan 4") and on its impacts on WSEC's TCEQ air permit application under applicable law." Dr. Gasparini conducted PM<sub>10</sub> and SO<sub>2</sub> dispersion modeling based on White Stallion's new Site Plan.<sup>22</sup> This modeling was necessary to determine the impacts of White Stallion's new Site Plan on White Stallion's air permit application under applicable law.<sup>23</sup> White Stallion objects to EDF's SO<sub>2</sub> modeling, because "the SO<sub>2</sub> modeling of the October 25, 2010 site plan [does not have]. . .any meaningful relationship to the difference in

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<sup>21</sup> In fact, according to White Stallion's Response Brief, the reason White Stallion has not proposed a new site plan for its air permit application is that "further revisions may be warranted." White Stallion Response Brief at 12. If, as White Stallion argues, EDF's modeling sheds "no light" on the plant that White Stallion intends to build, because that plan may yet change, then White Stallion's air permit application demonstration fails to illuminate for the same reason. *Id.* Conversely, if White Stallion's demonstration carries some weight, because it is based on White Stallion's sworn representations regarding the plant it intends to build, then White Stallion's more recent sworn representations should be given more weight. This is especially so given White Stallion's acknowledgement that it may be able to make changes to its air permit application representations without even invoking the Commission's permitting authority.

<sup>22</sup> EDF Ex. 200 at 11:16-23.

<sup>23</sup> *Id.* at 8:5-10.

the site plans.”<sup>24</sup> First, White Stallion has not offered any evidence, expert or otherwise, that supports its claim that EDF’s SO<sub>2</sub> modeling has no “meaningful relationship to the difference in the plans.” Second, the Remand Order does not limit remand evidence to evidence meaningfully related to the *difference* in site plans. Rather, the Remand Order directs the Commission to take evidence on the new Site Plan and its impacts on White Stallion’s air permit application under applicable law. EDF’s modeling demonstrates, based on the new Site Plan, that emissions from the White Stallion power plant will violate the 1-hour SO<sub>2</sub> NAAQS. Thus, so long as the 1-hour SO<sub>2</sub> NAAQS are “applicable law,” EDF’s dispersion modeling clearly addresses impacts related to the new Site Plan on White Stallion’s air permit application, and falls within the scope of the Remand Order.

## **VI. The 1-Hour SO<sub>2</sub> NAAQS are “Applicable Law”**

White Stallion argues that 1-hour SO<sub>2</sub> NAAQS are not applicable law in Texas, because Texas has not taken any specific action to adopt those standards.<sup>25</sup> However, the Commission’s rules clearly indicate that “[t]he commission may not issue a permit to any major new stationary source or major modification located in an area designated attainment or unclassifiable, for any National Ambient Air Quality Standard (NAAQS) under [federal Clean Air Act], § 107, if ambient air impacts from the proposed source would cause or contribute to a violation of any NAAQS.”<sup>26</sup> The 1-hour SO<sub>2</sub> NAAQS were adopted under § 107 of the federal Clean Air Act. Time and time again, EPA has confirmed that NAAQS become applicable to PSD permits, like the one White Stallion has applied for, when they become effective, *unless* EPA adopts a transition period for implementation of the NAAQS to PSD permitting by rule. Unlike the 1997

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<sup>24</sup> White Stallion Response Brief at 13, n43.

<sup>25</sup> *Id.* at 15-16.

<sup>26</sup> 30 TEX. ADMIN. CODE § 116.161; 67 Fed. Reg. 58,697, 58,709-10 (Sept. 18, 2002) (approving 30 TEX. ADMIN. CODE § 116.161 into the Texas SIP).

PM<sub>2.5</sub> NAAQS, for example, EPA did not adopt such a policy for the one-hour SO<sub>2</sub> NAAQS. Moreover, and contrary to White Stallion's legal argument, the Commission has in fact acknowledged that, as of August 23, 2010, the 1-hour SO<sub>2</sub> NAAQS apply to new and modified major and minor facilities with increases of SO<sub>2</sub>.<sup>27</sup> White Stallion's argument is without merit.<sup>28</sup>

Even if the Commission finds that the 1-hour SO<sub>2</sub> NAAQS are not yet directly applicable, this standard is still relevant to the merits of White Stallion's application. The Commission may not issue a permit unless an applicant demonstrates that emissions from its facility are adequately controlled to protect human health.<sup>29</sup> The NAAQS, including the 1-hour SO<sub>2</sub> NAAQS, are health based standards that establish limits on ambient concentrations of criteria pollutants requisite to protect public health.<sup>30</sup> Thus, ambient concentrations of SO<sub>2</sub> that exceed the NAAQS, likely endanger public health. Therefore, even if the 1-hour SO<sub>2</sub> NAAQS is not applicable law in Texas, emissions in excess of this limit will likely harm public health. Because EDF's modeling predicts that emissions from the White Stallion power plant will cause ambient concentrations that substantially exceed the 1-hour SO<sub>2</sub> NAAQS, White Stallion has failed to demonstrate that emissions from its power plant will be sufficiently controlled to protect human health as required by 30 Tex. Admin. Code § 116.111(a)(2)(A).

## **VII. Mirant Parker and the Executive Director's Interim Guidance do not Render the 1-Hour SO<sub>2</sub>NAAQS Inapplicable**

According to White Stallion, a TCEQ order issued more than a decade ago and interim TCEQ guidance on the one-hour NAAQS dictate that consideration of new NAAQS ends at the

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<sup>27</sup> "August 4, 2010 Interim NAAQS Guidance on Sulfur Dioxide," at 2, 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>28</sup> White Stallion correctly points out that Section 110 of Clean Air Act requires states to adopt and submit a plan to EPA, which demonstrates that program elements have been addressed within three years of the promulgation of any new or revised NAAQS. White Stallion Response Brief at 16, n54. However, this is completely separate from the Clean Air Act requirement that prohibits issuance of a permit authorizing construction of a new source that would cause or contribute to the violation of a newly promulgated NAAQS.

<sup>29</sup> Tex. Admin. Code § 116.111(a)(2)(A).

<sup>30</sup> 42 U.S.C. § 7409.

conclusion of the TCEQ's technical review of an air permit application.<sup>31</sup> TCEQ guidance and a decade old Order do not trump the plain language of the Act and Texas rules.

In 2002, TCEQ issued an order granting Mirant Parker, LLC a PSD permit ("Mirant Order"),<sup>32</sup> which stated that the best available control technology ("BACT") requirement freezes at the conclusion of the Executive Director's technical review of the air permit application. In the decade following issuance of the Mirant Order, TCEQ has not treated this order as binding precedent on the agency.<sup>33</sup> In fact, the Mirant Order is inconsistent with TCEQ's BACT reviews in numerous other contested permitting cases, including the recent Las Brisas case, where BACT emission limits are routinely strengthened based on technological and permitting developments that occur long after the completion of the Executive Director's technical review.<sup>34</sup> Thus, TCEQ does not currently follow this 2002 order, and TCEQ's consideration of BACT can and does extend beyond the conclusion of the TCEQ Executive Director's technical review. In fact, the Commission itself recognized that the Mirant Order was inconsistent with its BACT review in multiple permitting matters, and that a future rulemaking (or some other action) would be necessary to establish the BACT cut-off as a generally applicable policy.<sup>35</sup> Regardless, the Mirant Order involved a BACT determination, rather than a newly promulgated NAAQS applies to a Texas air permit, and thus does not address the issue in this case.

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<sup>31</sup> White Stallion Response Brief at 17-20.

<sup>32</sup> See Texas Natural Resource Conservation Commission's (TCEQ predecessor agency) 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 (Jan 7, 2002).

<sup>33</sup> Plaintiffs have been unable to find any SOAH Proposals for Decision that refer to the Mirant Order, nor has the Mirant Order ever been cited in any Texas state or federal court case. While the Mirant Order was appealed, Mirant went bankrupt before briefs were submitted and the case was dropped. The proposed facility was never constructed.

<sup>34</sup> For example, TCEQ lowered the mercury limit originally proposed in Las Brisas' Draft Permit based on a lower limit in the White Stallion Energy Center's Final Order. TCEQ issued the White Stallion order after it completed technical review of Las Brisas' permit application. See TCEQ Order Granting the Application of White Stallion Energy Center LLC for Air quality Permit Nos. 86088, HAP28, PAL26, and PSD-TX-1160 (Dec. 16, 2010).

<sup>35</sup> See TCEQ Order Regarding the Application by Tenaska Trailblazer Partners, LLC for State Air Quality Permit 84167, Prevention of Significant Deterioration Air Quality Permit PSD-TX-1123, and Hazardous Air Pollutant Major Source Permit No. HAP-13; TCEQ Docket No. 2009-1093-AIR; SOAH Docket No. 582-09-6185 at 47.

Furthermore, the Executive Director’s “interim guidance” does not trump the Clean Air Act or TCEQ’s own duly promulgated rules. TCEQ’s “guidance” is not a rule, let alone incorporated into the Texas SIP. Accordingly, the date upon which TCEQ completed technical review of White Stallion’s permit application has no impact on the applicability of the 1-hour SO<sub>2</sub> NAAQS in this case.

### **VIII. EDF’s SO<sub>2</sub> Modeling is Relevant Even if White Stallion was not Required to Demonstrate Compliance with the 1-Hour SO<sub>2</sub> NAAQS**

White Stallion argues that EDF’s SO<sub>2</sub> modeling evidence improperly addresses EDF’s allegation in its currently pending petition for judicial review of the Commission’s Order granting White Stallion’s permit application that White Stallion failed to demonstrate compliance with the 1-hour SO<sub>2</sub> NAAQS.<sup>36</sup> This is improper, White Stallion contends, because EDF did not request, and the court did not grant, a remand for additional evidence on this issue.<sup>37</sup> White Stallion misunderstands the relevance of EDF’s SO<sub>2</sub> modeling. EDF’s demonstration that emissions from the White Stallion Energy Center will in fact violate the 1-hour SO<sub>2</sub> NAAQS has no bearing on the merits of its legal claim that White Stallion’s permit was improperly issued because the record contained no evidence demonstrating that White Stallion would not violate the 1-hour SO<sub>2</sub> NAAQS. The claim in EDF’s petition is that White Stallion was required to, but failed to demonstrate compliance with this standard. EDF’s SO<sub>2</sub> modeling addresses a related but distinct issue: even if White Stallion was not required to affirmatively demonstrate compliance with the 1-hour SO<sub>2</sub> NAAQS, the Commission may not issue the requested permit because EDF has demonstrated that emissions from the White Stallion Energy Center *will* violate

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<sup>36</sup> White Stallion Response Brief at 14.

<sup>37</sup> *Id.*

that standard.<sup>38</sup> EDF's modeling cannot be taken as an attempt to bolster its claim that White Stallion failed to make any demonstration regarding the 1-hour SO<sub>2</sub> NAAQS. Accordingly, White Stallion's argument is without merit.

#### **IX. Sierra Club's Response Brief was Timely Filed**

White Stallion contends that because we support admission of EDF's evidence, our brief in response to EDF's Evidence Brief is not actually a "response brief."<sup>39</sup> While Sierra Club did incorporate by reference EDF's objections to the Commission's procedure on remand, we did not so incorporate EDF's proffered evidence. Instead, we explained to the Commission why EDF's evidence is relevant and why it should be admitted into the record. It is unclear why White Stallion believes that this is not a response to EDF's proffered evidence. It is, and thus Sierra Club's *response* brief was timely filed.

#### **X. Conclusion**

Sierra Club respectfully requests that the Commission:

1. Admit into evidence all exhibits offered by EDF;
2. Issue a New Order that:
  - A. Nullifies White Stallion's Air Permit and Reverses Findings of Fact Nos. 248.a, 347.b, c, p, q, and bb; and Conclusions of Law Nos. 7, 14, 23, 43, 73, 77, and 78 in the Commission's October 19, 2010 Order granting White Stallion's Air Permit;
  - B. Requires White Stallion to submit and re-notice a new application pursuant to Texas Health and Safety Code § 382.0291(d); or
  - C. Remands White Stallion's permit application back to SOAH for further discovery and a contested case hearing on issues within the scope of the District Court's Remand Order; and

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<sup>38</sup> 30 TEX. ADMIN. CODE § 116.161; 67 Fed. Reg. 58,697, 58,709-10 (Sept. 18, 2002) (approving 30 TEX. ADMIN. CODE § 116.161 into the Texas SIP).

<sup>39</sup> White Stallion Reply Brief at 1.

3. Transmit to the New Order to the District Court, along with EDF's evidence.

Respectfully Submitted,

**ENVIRONMENTAL INTEGRITY PROJECT**

By:

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

Gabriel Clark-Leach  
Texas Bar No. 24069516  
1303 San Antonio Street, Suite 200  
Austin, Texas 78701  
Phone: 512-637-9477  
Fax: 512-584-8019

**ATTORNEY FOR PROTESTANT  
SIERRA CLUB**

**CERTIFICATE OF SERVICE**

This is to certify that on this the 26th day of April, 2012, the foregoing document has been served by hand-delivery, email, facsimile or U.S. Mail to the addressees listed below:

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

Thomas M. Weber  
Paul R. Tough  
McElroy, Sullivan & Miller, LLP  
P.O. Box 12127  
Austin, Texas 78711  
Phone: 512/327-8111  
Fax: 512/327-6566

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

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

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

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

A handwritten signature in black ink, appearing to read 'G. Clark-Leach', written in a cursive style.

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Gabriel Clark-Leach