

**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 BRIEF ON REMAND**

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

COMES NOW Sierra Club and offers this brief concerning the procedure and scope of remand required to comply with Judge Livingston's order ("Remand Order") in the above-referenced matter, as requested by the Office of General Counsel in its January 13, 2012 letter.

**I. Introduction and Summary**

On October 19, 2010 the Texas Commission on Environmental Quality ("TCEQ" or "Commission") issued an order approving White Stallion Energy Center, LLC's ("White Stallion") application for preconstruction permits to construct a large coal and petroleum coke-fired power plant in Matagorda County, Texas. Sierra Club and the Environmental Defense Fund ("EDF") both filed motions for rehearing, which were overruled by operation of law. On December 6, 2010, EDF filed a motion requesting that the Commission reopen the record, extend the time for filing a supplemental motion for rehearing, and extend the time for consideration of motions for rehearing. EDF filed this motion in response to new information it received after the deadline for submitting a motion for rehearing had passed regarding the site plan for the White Stallion facility. Specifically, EDF learned that shortly after the Commission issued its order granting White Stallion's air permits, White Stallion submitted a new site to the Army Corps of Engineers in support of an application for a wetlands dredge-and-fill permit. This new site plan

was plainly inconsistent with the site plan that White Stallion had submitted to the Commission as part of its air permit application, which White Stallion testified it “fully and completely” intended to build. The Commission did not respond to EDF’s motion.

EDF then filed a Motion for Remand under Tex. Gov’t Code § 2001.175(c) with the Travis County District Court based on its concern that the Commission had failed to properly consider White Stallion’s new site plan and that the public had been deprived of its opportunity to a full hearing on the plant that White Stallion intends to build. The District Court issued the Remand Order granting EDF’s Motion. White Stallion and the Commission unsuccessfully challenged the District Court’s Remand Order, first with the Third Court of Appeals and then with the Texas Supreme Court.

On January 13, 2012, the TCEQ’s Office of General Counsel requested briefs from parties to the White Stallion matter addressing questions arising from the District Court’s Remand Order. As EDF argues in its Brief on Remand, the Commission should withdraw its order granting White Stallion’s air permits and require White Stallion to re-file its application as Tex. Health & Safety Code § 382.0291(d) provides. Anything short of this will fail to give full effect to the Remand Order and the requirements of the federal Clean Air Act. However, if the Commission decides that further development of the record is necessary before it can find that the requirements of § 382.0291(d) have been triggered, the most efficient and effective way for the Commission to proceed is to: 1) nullify the administrative order granting White Stallion’s air permits; 2) reopen the White Stallion administrative record; 3) refer the matter back to SOAH for a contested case (with post-hearing briefing) on issues relating to White Stallion’s new site plan; 4) direct SOAH administrative law judges to write a proposal for decision, with proposed findings of facts and conclusions of law on issues and evidence presented at the hearing; and 5)

decide, at a regularly scheduled agenda, whether White Stallion's permit may be issued in light of the record as supplemented during the remand proceedings.

However the Commission decides to proceed, Protestants must have an opportunity to meaningfully participate in the Commission's evaluation of the plant White Stallion actually intends to build. 30 Tex. Admin. Code § 80.115(a); Remand Order at 1.

## **II. Brief on Remand**

### *A. Nullification is required by the Court's Order and the Clean Air Act*

The Remand Order requires public participation. Remand Order at 1. Construction of a major stationary source subject to the Prevention of Significant Deterioration provisions of the Clean Air, like the proposed White Stallion Energy Center, may not commence until after the public is offered such an opportunity. *See, e.g., 42 U.S.C. § 7470(5).*

The Commission cannot give full effect to the Remand Order without nullifying its previous decision. The Commission cannot meaningfully reconsider its decision to authorize construction of the White Stallion facility, and any public notice, comment, or hearing would be superfluous, so long as the original Commission Order granting the Final Permit remains in effect.

### *B. Motions for Rehearing*

While the Commission has not promulgated a rule that expressly establishes the procedure required to comply with Tex. Gov't Code § 2001.175(c) remand orders in cases such as this, the Commission's rule concerning motions for rehearing establishes a process for considering issues like those raised by EDF in its motion for remand. 30 Tex. Admin. Code § 80.272(d)(2). The Remand Order may reasonably be read as reversing the Commission's failure to grant EDF rehearing on issues related to White Stallion's revised site plan.

30 Tex. Admin. Code § 80.272 requires parties to file a motion for rehearing to preserve appeal from the Commission's decision after in a matter that has been the subject of a contested case hearing. If a party files a motion for rehearing, the Commission may grant that motion, in whole or in part, and remand the case for further proceedings necessary to supplement the record or correct legal errors. When the Commission grants a motion for rehearing, even if the motion is only granted in part, the Commission decision or order that is the subject of the motion is nullified. *Id.*

In this case, parties were denied the opportunity to timely request rehearing on the issue of White Stallion's new site plan, because evidence of the site plan was not made available until after the deadline for filing motions for rehearing had passed. When EDF became aware of White Stallion's revised site plan, it filed a motion requesting leave to late file a supplemental motion for rehearing, as allowed by 30 Tex. Admin. Code § 80.272(e). The Commission did not grant EDF's request. On appeal to state district court, EDF filed a motion for remand under Tex. Gov't Code § 2001.175(c). This motion explained why evidence relating to White Stallion's new site plan should have been considered by the Commission before it authorized construction of the White Stallion facility. This is the same evidence that EDF sought leave to address in a supplemental motion for rehearing. The Court granted EDF's motion for remand, because further development of the record is necessary to comply with public participation requirements. Order at 1.

Thus, the Court's Remand Order addresses the same issue that EDF would have raised in a supplemental motion for rehearing had the Commission granted EDF leave to file it. The Remand Order dictates that proceedings before the Commission and SOAH be reopened, so that parties may offer additional evidence and the Commission may consider this evidence and

modify its previous findings and decisions in light of that evidence as the law requires. Remand Order at 2. Such additional process would also have been required had the Commission granted a motion for rehearing on White Stallion's new site plan. Because the Remand Order addresses the same kind of problem the Commission's motion for rehearing rule addresses and offers the same kind of remedy that the Commission's motion for rehearing rule affords, the TCEQ should look to that rule to determine how to proceed in light of the Remand Order.

Moreover, the Remand Order is essentially a reversal of the Commission's failure to grant rehearing on White Stallion's new site plan. EDF informed the Commission that new evidence had come to light that should be considered before the Order authorizing construction of the White Stallion facility became final. EDF requested leave to file a motion for rehearing based on this evidence. The Commission could have granted EDF's request and reopened the hearing to consider evidence related to White Stallion's new site plan, but chose not to. The Remand Order effectively reverses the Commission's failure to act. Accordingly, it would be expedient and appropriate for the Commission to treat the Remand Order as granting a request for rehearing and proceed according to the requirements of 30 Tex. Admin. Code § 80.272(d)(2).

### *C. Proper Scope of Remand*

The Remand Order requires the Commission to take and consider new evidence concerning the site plan White Stallion submitted to the Corps on October 25, 2010 and its impacts on White Stallion's air permit application under applicable law. Remand Order at 1-2. There is sufficient evidence before the Commission to find that White Stallion has amended its application in violation of Tex. Health & Safety Code § 382.0291(d). The Commission should make this finding and require White Stallion to resubmit its entire application. However, if the Commission fails to require White Stallion to resubmit its entire application based on the record

currently before it, parties must be allowed discovery regarding the timing of White Stallion's development of its new site plan and an opportunity to present evidence concerning White Stallion's possible withholding of information concerning its changed site plan to circumvent § 382.0291(d).

Additionally, however the Commission decides to proceed, new modeling must be conducted to determine whether emissions from the White Stallion facility, as described in the new site plan submitted to the Corps, will comply with applicable laws, including 40 C.F.R. § 52.21(k).

**III. Conclusion**

Sierra Club respectfully requests that the Commission require White Stallion resubmit its air permit application consistent with § 382.0291(d). In the alternative, Sierra Club requests that the Commission nullify its October 19, 2010 order granting White Stallion's application, and remand the matter to the State Office of Administrative Hearings for consideration of issues raised in the Remand Order.

Respectfully Submitted,  
**ENVIRONMENTAL INTEGRITY PROJECT**

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**CERTIFICATE OF SERVICE**

This is to certify that on this the 23<sup>rd</sup> day of January, 2012, the foregoing document has been served by hand-delivery, email, facsimile or U.S. Mail to the addressees listed below:

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