

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

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

**WHITE STALLION ENERGY CENTER LLC'S RESPONSE BRIEF CONCERNING
PROCEDURE FOR ADDRESSING "NEW EVIDENCE" REMAND**

TO THE HONORABLE COMMISSIONERS:

The parties present—to no one's surprise—divergent suggestions for how the Commission may, or should, respond to the Court's limited remand. The White Stallion project opponents dedicate much briefing to their views of what conclusions the Commission should draw from "evidence" not yet even formally presented. Given that the General Counsel asked only for suggestions with regard to process and scope, not outcome, White Stallion limits this Response accordingly.

**I. THE PARTIES AGREE THAT THE REMAND ORDER PROVIDES THE
COMMISSION WITH THE OPPORTUNITY TO CONFIRM ITS VIEWS ON THE
APPLICABLE LAW.**

The Order granting White Stallion an Air Permit did not specifically explain why the Commission disregarded EDF's repeated attempts to derail the Air Permit application as filed by White Stallion based on site plans filed in connection with other permit applications. And, as EDF complained to the District Court and reminds the Commission, "TCEQ did not rule on, or even mention, EDF's motion to reopen the record based on this newly discovered evidence [of the October 2010 Wetlands Mitigation Site Plan]," which EDF filed after the deadline for Motions for

Rehearing. EDF Brief at p.7, ¶11 & Attachment I, ¶13. The Remand Order can and should rightly be seen as EDF's opportunity to now proffer its "new evidence" and obtain a ruling from the Commission.

The parties agree that the Remand Order provides the Commission the opportunity to confirm its views on the applicable law, and specifically whether Texas Health & Safety Code § 382.0291(d) compels the Commission to consider site plans at issue in applications other than the one for the Air Permit. *Sæ* EDF Brief, p. 9; Sierra Club Brief, p. 5; Exec. Dir. Brief, p. 4-5; OPIC Brief, p. 2. The Commission's disposition of the threshold legal question of whether the Commission may grant a final permit for a project undergoing ordinary-course development will determine what, if any, additional proceedings are warranted. Accordingly, White Stallion reurges the process set out in its initial brief:

- EDF files a motion to amend the Air Permit Order (which motion, no doubt, would bear many similarities to the brief EDF just filed, except that it would need to specifically identify the changes to the Order that EDF believes to be justified by its "new evidence");
- White Stallion and others respond;
- EDF replies;
- and the Commission can take up the motion by public hearing at an Agenda.

Depending on the Commission's deliberations, the Commission can either (1) deny the motion and report back to the District Court that it took no action with respect to the Commission's October 2010 Order now pending judicial review in the District Court, or (2) direct further proceedings appropriate to the requirements of the law as understood by the Commission.

II. THE PROPOSED PROCEDURE PROVIDES THE OPPORTUNITY FOR MEANINGFUL PARTICIPATION IN THE COMMISSION'S DECISION-MAKING.

The District Court, after having considered a variety of arguments, issued a Remand Order consistent with the limits of authority granted by Tex. Gov't Code § 2001.175(c).¹ The Remand Order mandates only taking evidence of one specific site plan so the Commission may consider its possible effect on the WSEC Air Permit application under applicable (but unspecified) law. Remand Order ¶1. The proposed procedure provides EDF the opportunity to squarely present its “new evidence” to the Commission for its deliberation, and for EDF and the other parties to “meaningful participat[e] in the permit application review process” by presenting argument as to the effect of *that particular* Wetlands Mitigation Site Plan on the Order as issued by the Commission. Remand Order, Preamble & ¶1. White Stallion's procedure, in short, gives full effect to everything directed within the four corners of the Remand Order.²

III. THIS REMAND HAS NO EFFECT ON THE COMMISSION'S ORDER OR THE AIR PERMIT, ABSENT AN EXPLICIT COMMISSION DECISION TO CHANGE THE EXISTING FINDINGS OR DECISION.

EDF, Sierra Club, and OPIC ask the Commission to simply “nullify” its October 2010 Order, which was the culmination of an application review process lasting over two years, with no proceedings whatsoever, and then have a hearing on an air permit application that no one has filed.

¹ White Stallion does not concede that the Remand Order was properly granted under the statutory criteria set forth in Tex. Gov't Code § 2001.175(c), but that—had its issuance been an appropriate exercise of discretion—an order under § 2001.175(c) can direct an agency only to consider whether specific new evidence might affect its decision.

² EDF claims that nothing but re-application and a full SOAH do-over gives it all the process it is due. EDF Brief, p. 10. But EDF already had its hearing on the application as filed by White Stallion, and the permit as issued by the Commission. The process suggested by White Stallion allows EDF to proffer to the Commission “evidence and argument on each issue remanded for the taking of additional evidence,” which is far more limited. *Id.* EDF can proffer the evidence submitted to the District Court and can argue as to its significance under “applicable law.” There is no factual dispute about White Stallion's submission of the Wetlands Mitigation Site Plan to the U.S. Army Corps of Engineers, nor are any witnesses necessary. Accordingly, giving EDF full briefing gives full effect to the “Rights of Parties” to the extent those rules counsel the Commission's actions. *Cf.* 30 TEX. ADMIN. CODE § 80.115. This proceeding is a *limited* remand from the District Court; accordingly, the Commission can set limits on any proceeding consistent with that Court order.

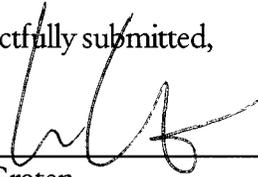
EDF Brief, pp. 8-9; Sierra Club Brief, pp. 5-6; OPIC Brief, pp. 2-3.³ This wishful thinking aside, the Commission's Order remains valid throughout the remand process, unless and until the Commission ultimately acts to expressly change its findings, conclusions and order. Tex. Gov't Code § 2001.175(c) creates only a permissive remand – a chance for the Commission to decide whether *it* wishes to change its Order *or not*. White Stallion has proposed a procedure by which the Commission may make that decision without foreordaining it.

IV. CONCLUSION

The purpose of the Remand Order and the statute under which it was issued is for the Commission to decide “whether to change its findings and decision by reason of the additional evidence.” Remand Order ¶2; TEX. GOV'T CODE § 2001.175(c). White Stallion's recommended procedure, which is consistent with the options as laid out by the Executive Director, provides a reasonable and appropriate means to take the “additional evidence” that EDF and then the Court wanted squarely before the Commission.

³ Although EDF and Sierra Club would wish it otherwise, EDF Brief, p. 2, 10; Sierra Club Brief, p. 3, the Remand Order assuredly does *not* order the taking of evidence on the site plan White Stallion “actually intends to build...” See Remand Order ¶ 1. Nor, as explained in White Stallion's Brief, did or could the Court have done anything to invalidate the Air Permit. White Stallion Brief, pp. 3-4; *see also BFI v Martinez Emul. Group*, 93 S.W.3d 570, 581 (Tex. App.—Austin 2002) (district court has no authority to vacate a Commission order). OPIC goes so far as to assert that “Judge Livingston agreed with EDF that the permit should not have been granted” and that “Judge Livingston determined that the modeling upon which the Commission relied to grant the permit was inapplicable and unreliable.” OPIC Brief, p. 1-2 Certainly no such determinations appear in White Stallion's copy of the Remand Order.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document has been served on the following via hand delivery, facsimile, electronic mail, first class mail, and/or overnight mail on this the 30th day of January, 2012.

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