

Kathleen Hartnett White, *Chairman*
Larry R. Soward, *Commissioner*
H. S. Buddy Garcia, *Commissioner*
Glenn Shankle, *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

May 22, 2007

To: Persons on the attached mailing list (By mail and facsimile as indicated)

Re: Proposal for Decision and Proposed Order concerning the application by Oak Grove Management Company, LLC for Proposed Air Quality Permit No. 76474 and PSD-TX-1056; TCEQ Docket No. 2006-0195-AIR; SOAH Docket No. 582-06-1502.

This letter is to notify you that the Texas Commission on Environmental Quality (TCEQ or Commission) will consider the above-described matter and all related filings during the Commission's public meeting scheduled to begin at **1:00 P.M.** on **Wednesday, June 13, 2007**. The meeting will take place in Room 201S of Building E, 12118 N. Interstate 35, Austin, Texas.

During the public meeting, after hearing from the Administrative Law Judges, the Commission will accept oral presentations from the parties. The Applicant may speak first, followed by the Protestant, the Executive Director, and the Office of Public Interest Counsel, in that sequence. The Applicant, Protestant, Executive Director, and Office of Public Interest Counsel each have ten minutes for their oral presentations. The Applicant may save part of their time for rebuttal since the Applicant carries the burden of proof.

If you have any questions about the public meeting or related matters, please contact me at 512/239-3353.

Respectfully,

A handwritten signature in black ink, appearing to read "Derek Seal".

Derek Seal
General Counsel

Mailing List

CHIEF CLERK
MAY 22 2007
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

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TCEQ Docket No. 2006-0195-AIR; SOAH Docket No. 582-06-1502

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TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

2007 JAN -3 PM 4:54

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHIEF CLERKS OFFICE

Protecting Texas by Reducing and Preventing Pollution

January 3, 2007

To: Persons on the attached mailing list (By mail and facsimile as indicated)

Re: ALJs' Proposal for Decision and Proposed Order regarding the Application of Oak Grove Management Company, LLC for Proposed Air Quality Permit No. 76474 and PDS-TX-1056; TCEQ Docket No. 2006-0195-AIR; SOAH Docket No. 582-06-1502.

By letter dated November 2, 2006, the above-referenced matter was scheduled to be considered by the Texas Commission on Environmental Quality (Commission) at its January 10, 2007, public meeting. This letter is to notify the parties that this matter is being continued, and therefore will not be considered on January 10, 2007. The matter will be considered at a future Commission meeting, the date of which is to be determined. At such time as this matter is set on a future agenda, a separate letter will be sent notifying the parties.

If you have any questions about this matter, please contact Matt Beeter, Assistant General Counsel at (512) 239-1406.

Respectfully,

A handwritten signature in cursive script that reads "Derek Seal".

Derek Seal
General Counsel

Mailing List
H:\COUNSEL\BEETER\Letters\Continued\OakGrove4.con

Mailing list
Oak Grove Management Company, LLC
TCEQ Docket No. 2006-0195-AIR; SOAH Docket No. 582-06-1502

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The Honorable Carol Wood
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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

November 2, 2006

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2006 NOV - 6 PM 3:45
CHIEF CLERKS OFFICE

To: Persons on the attached mailing list (By mail and facsimile as indicated)

Re: ALJs' Proposal for Decision and Proposed Order regarding the Application of Oak Grove Management Company, LLC for Proposed Air Quality Permit No. 76474 and PDS-TX-1056; TCEQ Docket No. 2006-0195-AIR; SOAH Docket No. 582-06-1502.

On October 11, 2006, this office sent a letter notifying the parties in the above-referenced matter of the contingent agenda setting. Protestants did not substitute counsel by the date specified in the October 11th letter and, therefore, this matter has been rescheduled. This matter is hereby set on the Commission's public meeting of **Wednesday, January 10, 2007**. The meeting will begin at **1:00 P.M.** in Room 201S of Building E, 12118 N. Interstate 35, Austin, Texas.

If you have any questions about this matter, please contact Matt Beeter, Assistant General Counsel at (512) 239-1406.

Respectfully,

A handwritten signature in black ink that reads "Derek Seal".

Derek Seal
General Counsel

Mailing List

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TCEQ DOCKET NO. 2006-0195-AIR; SOAH DOCKET NO. 582-06-1502

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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

October 20, 2006

To: Persons on the attached mailing list (By mail and facsimile as indicated)

Re: ALJs' Proposal for Decision and Proposed Order regarding the Application of Oak Grove Management Company, LLC for Proposed Air Quality Permit No. 76474 and PDS-TX-1056; TCEQ Docket No. 2006-0195-AIR; SOAH Docket No. 582-06-1502.

On October 11, 2006, this office sent a letter notifying the parties in the above-referenced matter of the contingent agenda setting, which was scheduled after careful consideration of the interests of the parties. By letter dated October 18, 2006, Oak Grove Management Company, LLC requested a conference call to clarify or modify the October 11, 2006, letter. The requested conference call was convened this morning, October 20, 2006, and all parties were represented.

After deliberate review of the concerns raised by the parties, we have determined to maintain the schedule provided in our letter of October 11, 2006.

If you have any questions about this matter, please contact Matt Beeter, Assistant General Counsel at (512) 239-1406.

Respectfully,

A handwritten signature in black ink that reads "Derek Seal".

Derek Seal
General Counsel

Mailing List

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MAILING LIST
OAK GROVE MANAGEMENT COMPANY, LLC
TCEQ DOCKET NO. 2006-0195-AIR; SOAH DOCKET NO. 582-06-1502

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TEXAS
COMMISSION
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QUALITY
OCT 13 PM 3:15
CHIEF CLERK'S OFFICE

October 18, 2006

Via Facsimile No. 239-5533

Derek Seal
General Counsel
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, TX 78711-3087

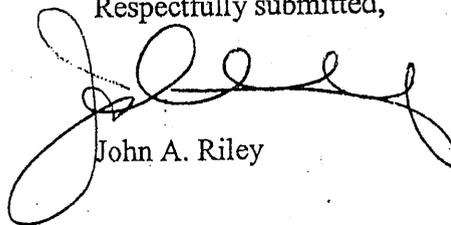
Re: SOAH Docket No. 582-06-1502; TCEQ Docket No. 2006-0195-AIR; Application of Oak Grove Management Company LLC for Proposed Air Permit No. 76474 and PSD-TX-1056

Dear Mr. Seal:

Oak Grove Management Company LLC ("Oak Grove") respectfully requests that the TCEQ General Counsel's office convene a conference call for the parties in the next several days for the purpose of clarifying or modifying the General Counsel's letter of October 11, 2006 pertaining to the setting of the above-referenced matter on the Commissioners' Agenda for November 15, 2006. Oak Grove understands that the General Counsel is attempting to balance the interests of the parties and appreciates the difficult circumstances that surround setting this matter for consideration by the Commission. However, Oak Grove is concerned that October 11, 2006 letter leaves open some questions as to when this matter will actually be heard by the Commissioners.

Therefore, Oak Grove requests that another conference call among the parties be scheduled at the earliest convenient time for the General Counsel.

Respectfully submitted,



John A. Riley

cc: Parties of Record

Austin 757761v1

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The Honorable Carol Wood
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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

October 11, 2006

To: Persons on the attached mailing list (By mail and facsimile as indicated)

Re: ALJs' Proposal for Decision and Proposed Order regarding the Application of Oak Grove Management Company, LLC for Proposed Air Quality Permit No. 76474 and PDS-TX-1056; TCEQ Docket No. 2006-0195-AIR; SOAH Docket No. 582-06-1502.

CHIEF CLERK'S OFFICE
OCT 11 PM
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

On September 20, 2006, Wendi Hammond, representing Robertson County: Our Land, Our Lives (Protestant), filed a request that the above referenced matter not be set on a public meeting of the Texas Commission on Environmental Quality (Commission) between November 2, 2006 and December 31, 2006 due to a scheduling conflict given medical circumstances. A response to the request was received on September 28, 2006 from John Riley, representing Oak Grove Management Company, LLC. On October 5, 2006, Ms. Hammond supplemented her request adding that the matter should not be set on November 1, 2006, and Mr. Riley responded on October 9, 2006.

Pursuant to the Commission's Resolution issued on August 14, 2006 in Docket No. 2006-0973-RES, the Office of General Counsel is charged with setting matters on the Commission's Agenda. This office carefully balances the interests of the parties in setting matters and takes very seriously the issues raised in the motions filed in this matter.

This matter is hereby set on the Commission's public meeting of **Wednesday, November 15, 2006**, subject to substitution of counsel for Protestant. The meeting will begin at **1:00 P.M.** in Room 201S of Building E, 12118 N. Interstate 35, Austin, Texas. We request that Protestant's counsel please notify the parties and this office by **October 31, 2006** whether counsel will be substituted. If counsel is not substituted and notification of substitution is not received by October 31, 2006, this matter will be continued by subsequent letter to the January 10, 2007 Commission Agenda at 1:00 P.M. in Room 201S of Building E, 12118 N. Interstate 35, Austin, Texas.

If you have any questions about this matter, please contact Matt Beeter, Assistant General Counsel at (512) 239-1406.

Respectfully,

A handwritten signature in black ink that reads "Derek Seal".

Derek Seal
General Counsel

Mailing List

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MAILING LIST
OAK GROVE MANAGEMENT COMPANY, LLC
TCEQ DOCKET NO. 2006-0195-AIR; SOAH DOCKET NO. 582-06-1502

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SOAH DOCKET NO. 582-06-1502
TCEQ DOCKET NO. 2006-0195-AIR

2006 OCT -9 AM 11:00

APPLICATION OF	§	BEFORE THE STATE OFFICE
OAK GROVE MANAGEMENT	§	CHIEF CLERKS OFFICE
COMPANY LLC FOR PROPOSED	§	OF
AIR PERMIT NO. 76474 AND	§	
PSD-TX-1056	§	ADMINISTRATIVE HEARINGS

APPLICANT OAK GROVE MANAGEMENT COMPANY LLC'S RESPONSE TO PROTESTANT'S AMENDED REQUEST TO SET TCEQ COMMISSIONERS' AGENDA DATE FOR CONSIDERATION OF THE PROPOSAL FOR DECISION

TO THE COMMISSIONERS AND GENERAL COUNSEL OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

COMES NOW Applicant Oak Grove Management Company LLC ("*Applicant*" or "*Oak Grove*") and files this response to Protestant Robertson County: Our Land, Our Lives' ("*Protestant*") amended request to set the Texas Commission on Environmental Quality ("*the Commission*") Commissioners' agenda date for consideration of the Proposal for Decision ("*PFD*") in the above-captioned matter. Oak Grove reiterates its understanding of the medical needs of Protestant's counsel and now better understands the uncertainty that surrounds the timing of counsel's recovery. Counsel may be skeptical but Applicant does wish her a speedy recovery. However, under these and other newly revealed circumstances, Oak Grove must withdraw its last proposal to bifurcate the agenda proceedings.

Oak Grove was recently informed that Protestant has retained the law firm of Locke Liddell & Sapp LLP, a firm of nearly 400 lawyers, to challenge Oak Grove's proposed power plant through a collateral lawsuit in federal court. By letter dated September 26, 2006, Mr. Frederick W. Addison, III, attorney for Robertson County: Our Land, Our Lives, notified Oak Grove of Protestant's intent to file suit against Oak Grove

in federal district court under the federal Clean Air Act. A copy of the letter that Oak Grove received is attached. It is apparent, even from a cursory review of the letter, that Protestant's new counsel is fully familiar with Oak Grove's application and has spent significant time evaluating the issues presented in this matter. Thus, the Commission can be assured that Protestant has retained additional experienced counsel, already familiar with the issues, that can represent Protestant's interests at an agenda in November, if Ms. Hammond cannot represent Protestant at the Commission meeting.

Under Ms. Hammond's preferred proposed option, should the Commission overrule the PFD, the Protestant would cut in half the time allowed by law to prepare a motion for rehearing before Ms Hammond's scheduled surgery. Furthermore, Oak Grove's reply to the motion¹ would be served on Protestant while Ms. Hammond is recuperating and uncertain of her ability to adequately represent Protestant consistent with her ethical obligations as an attorney.² Conversely, if the Commission agrees with the PFD, Ms. Hammond would not be in a position to reply to Applicant's motion for rehearing, as a reply would be due sometime in mid-November, when Ms. Hammond has explained she will be incapacitated.

Because there are clearly more equitable and better options, Oak Grove cannot agree to schedule that (1) does not allow sufficient time to respond to, and adequately consider, amicus filings; (2) postpones the Commission's consideration of the PFD for at least three months and, maybe, indefinitely pending counsel's recovery from surgery; and (3) is based on the erroneous premise that Protestant does not have the ability to

¹ See 30 Tex. Admin. Code § 80.272(c).

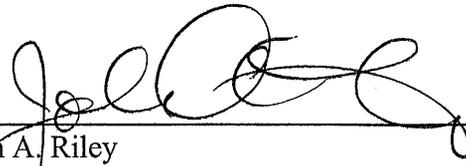
² See Protestant's Reply to Applicant's Response, p. 3.

substitute counsel for the agenda and post-agenda proceedings. Moreover, Oak Grove will not consent to, and the Commission should not order, a tortured schedule that may later be argued to have created legal error. By substituting its other counsel at this time, Protestant's lawyers will have more than sufficient time to review the administrative record and prepare for an agenda on November 15th. Under this option, no Commission practices will have to be altered, no rule deadlines will have to be changed, and no special considerations will be made for any party.

Oak Grove fully appreciates that Ms. Hammond may not be physically able to represent Protestant at the November 15th agenda due to her impending surgery and that her return to full health is uncertain. However, as demonstrated by the attached letter, Protestant has a substantial law firm representing it that is familiar with the relevant issues, and such counsel has more than adequate time to prepare for the agenda. Thus, if Ms. Hammond cannot represent Protestant at that agenda, Protestant will not be prejudiced or suffer hardship. Moreover, setting the agenda for November 15th should reasonably accommodate the time needed for additional briefing regarding the acceptance of the amicus briefs, responses to accepted amicus filings, and the Commissioners' review of any such additional briefing.

Therefore, Oak Grove agrees with Protestant that the agenda process should not be bifurcated and hereby withdraws its request that the Chief Clerk set oral arguments for this matter on the October 18th agenda. Oak Grove asks that the Commission accommodate Protestant in a manner that respects all interests. To facilitate such an accommodation, Oak Grove hereby requests that the PFD be set for consideration at the November 15, 2006 Commissioners' agenda.

Respectfully submitted,



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COUNSEL FOR APPLICANT OAK GROVE
MANAGEMENT COMPANY LLC

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing filing has been served on the following via hand delivery, facsimile, electronic mail, first class mail, and/or overnight mail on this the 9th day of October, 2006:

The Honorable Tom Walston
The Honorable Carol Wood
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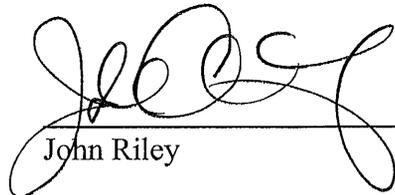
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John Riley

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Received
SEP 27 2006

September 26, 2006

C. John Wilder

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CT Corporation System, Registered Agent
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Re: Notice of Intent to File Suit Pursuant to Clean Air Act, Related Standards and Limitations, and Related Orders With Respect to Standards and Limitations

Dear Sir/Madam:

Please be informed we represent CleanCOALition and Robertson County Our Land, Our Lives (the "Noticing Citizens") in connection with their claims against Oak Grove Management Company LLC ("OGMC"), TXU Power, and TXU Corporation ("TXU"). This is the Noticing Citizens' Notice of Intent to File Suit pursuant to the Clean Air Act, related standards and limitations, and related orders with respect to standards and limitations.

After 60 days, if the violations set forth in this Notice have not been cured, the Noticing Citizens will bring a citizen's suit against OGMC, TXU Power, and TXU for civil penalties.

injunctive relief, and attorneys' fees in a United States District Court under the Clean Air Act (the "Citizen Suit"). See 42 U.S.C. § 7604. Pursuant to Section 7604, and pursuant to 40 C.F.R. §§ 54.2 and 54.3, this Notice is provided to OGMC, TXU Power, and TXU. Please be further informed that should OGMC, TXU Power, or TXU elect to resolve any of the violations set forth herein outside the context of the Citizen Suit, or because of it, the Noticing Citizens intend to seek appropriate relief and attorneys' fees as the "catalyst" for such resolution.

Entities to which notice is provided

Notice is provided to OGMC, TXU Power, and TXU. OGMC seeks permit(s) to construct and operate the Oak Grove Steam Electric Station in Robertson County, Texas, approximately 12 miles east of Bremond, Texas, and 12 miles north of Franklin, Texas ("Oak Grove Plant"). TXU Power has submitted documents on behalf of OGMC in, and otherwise participated in, seeking permit(s) for the Oak Grove Plant, as well as participating in the planning and implementation of plans for the Oak Grove Plant expansion. TXU is coordinating plans for multiple coal-fired power plants across Texas (including the Oak Grove Plant), has had input regarding the Oak Grove Plant, has rendered assistance to OGMC regarding the Oak Grove Plant, and is financially interested in the Oak Grove Plant. The registered agent in Texas for OGMC, TXU Power, and TXU is CT Corporation. See 40 C.F.R. § 54.2(c).

Violations for which notice is provided

The Noticing Citizens hereby provide notice of violations detailed below. Each violation described is separate from and independent of the others.

I. STATUTORY BACKGROUND

The Clean Air Act is designed to protect and enhance the quality of the nation's air, so as to promote the public health and welfare in the productive capacity of its population. Section 101(b) of the Clean Air Act (hereinafter the "Act"). The U.S. Environmental Protection Agency ("USEPA") has established National Ambient Air Quality Standards ("NAAQS") to protect human health and the environment from six "criteria pollutants." 42 U.S.C. § 7602(u); 40 C.F.R. part 50.¹ An area that meets the NAAQS for a particular criteria pollutant is deemed to be in "attainment" for that pollutant. 42 U.S.C. § 7407(d). An area that does not meet the NAAQS is a "non-attainment" area. *Id.* An area that cannot be classified due to insufficient data is "unclassifiable," a designation that allows an area to be treated for regulatory purposes as though it were an attainment area for the particular criteria pollutant in question. *Id.* The Oak Grove Plant is located in an area that has been classified as attainment or unclassified for all criteria pollutants.

Pursuant to 42 U.S.C. § 7410, each state must adopt and submit to USEPA for approval a State Implementation Plan ("SIP"). Among other things, the SIP provides for the attainment and

¹ The six "criteria pollutants" are sulfur dioxide, particulate matter (PM₁₀ and PM_{2.5}), carbon monoxide, ozone, nitrogen oxides, and lead.

maintenance of the NAAQS. If the USEPA approves a state's SIP in whole or part, the approved portions are then deemed incorporated into the state's applicable implementation plan. The applicable implementation plan may be enforced by the state, USEPA or citizens. 42 U.S.C. § 7604(a), (f). Over the years, USEPA has approved various portions of the SIP submitted by Texas (the "Texas SIP").

A. Prevention of Significant Deterioration

Part C of the Act (42 U.S.C. §§ 7470-7492) sets forth requirements for the Prevention of Significant Deterioration of air quality in those areas designated as either attainment or unclassifiable ("PSD") for purposes of meeting the NAAQS. Among other things, these requirements are designed to protect public health and welfare by maintaining continued compliance with NAAQS and ensuring that economic growth will occur in a manner consistent with the preservation of existing acceptable air quality. The PSD requirements also ensure that any decision to permit increased air pollution is made only after careful evaluation of all the consequences of such a decision and after public participation in the decision-making process.

Under 42 U.S.C. § 7471, each state's SIP must contain emissions limitations and other necessary measures to prevent significant deterioration of air quality, (a "PSD Program"). In 1992, after Texas incorporated by reference the PSD requirements of 40 C.F.R. § 52.21 into the Texas Administrative Code, USEPA promulgated federal regulations approving Texas' PSD Program. *See* 57 FED. REG. 28093 (June 24, 1992); 40 C.F.R. §§ 52.2270, 52.2303. Pursuant to its PSD Program, Texas issues permits governing the operation of regulated facilities. Texas has imposed hourly limits on heat input and established maximum emission rates for specific pollutants at facilities like the Oak Grove Plant. In addition, 42 U.S.C. § 7475(a) prohibits the construction and operation of a "major emitting facility" in an area designated as attainment or unclassifiable, unless, among other things: (1) a permit has been issued that comports with 42 U.S.C. § 7475(a); and (2) the facility employs the Best Available Control Technology ("BACT")² for each pollutant (a) subject to regulation under the Act (b) that is emitted from, or which results from, a facility.

42 U.S.C. § 7479(1) designates as "major emitting facilities" fossil fuel-fired steam electric plants of more than 250 million BTUs per hour heat input and that emit or have the potential to emit 100 tons per year or more of any air pollutant. According to the permit application papers regarding the Oak Grove Plant filed with the Texas Commission on Environmental Quality ("TCEQ") by OGMC and TXU Power (the "Permit Application"),³ Oak Grove Plant will have two supercritical cycle pulverized coal steam boilers, each with a maximum heat input of 8,970 million Btus per hour, and will emit, or have the potential to emit,

² *See also* 42 U.S.C. § 7479(3); 40 C.F.R. § 52.21(b)(12); 40 C.F.R. § 51.166(b)(12); 40 C.F.R. § 51.165(a)(1)(xl) (reiterating and defining the BACT requirement).

³ The "Permit Application" consists of: (A) the "Application for a TCEQ Air Permit and a Prevention of Significant Deterioration Permit for the Oak Grove Steam Electric Station," Oak Grove Management Company LLC (July 2005); and (B) the "Air Application Revision" submitted to TCEQ on or about December 16, 2005 by TXU Power.

over 100 tons per year of nitrogen oxides, carbon monoxide, sulfur dioxide, volatile organic compounds, sulfuric acid mist, and PM₁₀.

Applicable provisions in the federal PSD regulations incorporated by the Texas SIP have at all relevant times prohibited a "major stationary source" from being constructed in an area designated as attainment without, among other things, first obtaining a PSD permit, undergoing a new, complete and sufficient BACT determination, and applying BACT pursuant to that determination for each relevant pollutant. *See* 40 C.F.R. § 52.21(a)(2). The definitions contained in the PSD regulations incorporated in the Texas SIP for the PSD Program have at all relevant times defined "major stationary source" to include fossil fuel-fired steam electric plants of more than 250 million Btus per hour heat input. *See* 40 C.F.R. § 52.21(b)(1)(i)(a).

In the Permit Application, OCMG acknowledges that PSD permitting requirements apply to the application for the Oak Grove Plant.

B. Title V

Title V of the Act (42 U.S.C. §§ 7661-7661f) establishes an operating permit program for certain sources, including "major sources." The purpose of Title V is to ensure that all "applicable requirements" for compliance with the Act, including PSD requirements, are collected in one place. Texas implements the Title V program pursuant to USEPA-approved regulations in 30 Texas Administrative Code Chapter 122 (the "Texas Title V Operating Permit Program"). At all relevant times, the Texas Title V Operating Permit Program and:

- Section 502(a) of the Act (42 U.S.C. § 7661a(a)) made it unlawful for any person to violate any requirement of a permit issued under Title V or to operate a "major source" except in compliance with a permit issued by a permitting authority under Title V.
- Section 504(a) of the Act (42 U.S.C. § 7661a(c)) in implementing 40 C.F.R. part 70 required that each Title V permit include, among other things, enforceable emission limitations (including BACT) and such other conditions as are necessary to ensure compliance with applicable requirements of the Clean Air Act and the requirements of the applicable implementation plan.

Requirements of the applicable implementation plan include any applicable PSD Program provision requiring compliance with an emissions rate that meets BACT standards. Each violation of the Texas SIP constitutes a separate violation of the Clean Air Act.

II. SPECIFIC VIOLATIONS

A. Best Available Control Technology Violations

OGMC, TXU Power, and TXU are responsible for the below-described violations of 42 U.S.C. § 7475(a)(4) and Texas Health and Safety Code § 382.0518(b)(1). OGMC and TXU

Power also are responsible for the below-described violations of 30 Texas Administrative Code § 116.111(a)(2)(C). The violations described below occurred during the planning of, and the process of seeking air permits for, the Oak Grove Plant, and continue through the present day.

1. Failure to consider alternative fuel sources for the Oak Grove Plant. Lignite coal is proposed as the fuel source for the Oak Grove Plant. Lignite coal contains higher concentrations of pollutants (e.g., nitrogen oxide (NO_x) and mercury) than other types of coals, such as sub-bituminous coal. Regardless of the control technologies that might be used at Oak Grove Plant to reduce NO_x and mercury emissions, the emissions will substantially exceed those that could be realized if the same controls were used in a sub-bituminous coal-fired plant. In addition, the mercury emissions from Texas lignite coal will require advanced control technology in order to attempt to meet mercury emissions limits and caps, none of which technology has been shown to be as effective on Texas lignite as other types of coal. The failure to analyze fully and determine objectively whether alternative fuel sources would achieve lower NO_x and mercury emissions constitutes a violation of 42 U.S.C. § 7475(a)(4), Texas Health and Safety Code § 382.0518(b)(1), and 30 Texas Administrative Code § 116.111(a)(2)(C). The failure to use such alternative fuel sources to accomplish BACT also violates 42 U.S.C. § 7475(a)(4), Texas Health and Safety Code § 382.0518(b)(1), and 30 Texas Administrative Code § 116.111(a)(2)(C). In addition, "energy environmental and economic impacts and other costs" are required to be analyzed and taken into account when determining the benefit of alternative fuel sources in a proper BACT analysis. The failure to do so regarding the Oak Grove Plant constitutes a further violation of 42 U.S.C. § 7475(a)(4), Texas Health and Safety Code § 382.0518(b)(1), and 30 Texas Administrative Code § 116.111(a)(2)(C).

2. Failure to consider or implement integrated gasification combined cycle ("IGCC") technology. A proper, complete and sufficient BACT analysis for the Oak Grove Plant requires consideration of IGCC. IGCC technology is inherently lower emitting than pulverized coal technology, even when control technology such as that proposed for the Oak Grove Plant are used.⁴ The failure to analyze fully and determine objectively whether BACT requires using IGCC at Oak Grove Plant constitutes a violation of 42 U.S.C. § 7475(a)(4), Texas Health and Safety Code § 382.0518(b)(1), and 30 Texas Administrative Code § 116.111(a)(2)(C). The failure to implement IGCC as BACT also violates 42 U.S.C. § 7475(a)(4), Texas Health and Safety Code §

⁴ By way of example only, and without limitation, the proposed BACTs to control the emissions of NO_x at the Oak Grove Plant are primarily selective catalytic reduction ("SCR"), low-NO_x burners, and overfire air for NO_x. Collectively, this technology will purportedly achieve NO_x emissions of 0.08 pounds per million British Thermal Units (lb/MMBtu). (The Oak Grove Plant originally projected NO_x rates of 0.10 lb/MMBtu. For reasons not entirely clear, nor supported by the proposed control technologies or fuel source for Oak Grove, OGMC has lowered the projection to 0.08 lb/MMBtu.) IGCC plants burning sub-bituminous coal, like Powder River Basin coal, could reduce NO_x emissions to 0.01 lb/MMBtu with selective-catalytic reduction ("SCR"), and 0.044 lb/MMBtu without any added NO_x controls, both of which are far below the emissions proposed by TXU for the Oak Grove Plant.

382.0518(b)(1), and 30 Texas Administrative Code § 116.111(a)(2)(C). In addition, "energy environmental and economic impacts and other costs" are required to be analyzed fully and taken into account when determining the benefit of using IGCC as BACT. The failure to do so regarding the Oak Grove Plant constitutes a further violation of 42 U.S.C. § 7475(a)(4), Texas Health and Safety Code § 382.0518(b)(1), and 30 Texas Administrative Code § 116.111(a)(2)(C).

3. Failure to consider or implement atmospheric circulating fluidized bed (CFB) technology. A proper BACT analysis for the Oak Grove Plant requires consideration of CFB technology. By way of example only, and without limitation, Oak Grove's proposed BACT to control the emissions of sulfur dioxide (SO₂) from the new pulverized coal-fired boiler is alkali wet scrubbing, commonly referred to as wet flue gas desulfurization (wet FGD). This technology is proposed to achieve SO₂ emissions of 0.20 lb/MMBtu. CFB can achieve controlled SO₂ emission at a rate of 0.038 lb/MMBtu. The failure to analyze fully and determine objectively whether BACT requires using CFB at Oak Grove Plant constitutes a violation of 42 U.S.C. § 7475(a)(4), Texas Health and Safety Code § 382.0518(b)(1), and 30 Texas Administrative Code § 116.111(a)(2)(C). The failure to implement CFB as BACT also violates 42 U.S.C. § 7475(a)(4), Texas Health and Safety Code § 382.0518(b)(1), and 30 Texas Administrative Code § 116.111(a)(2)(C). In addition, "energy environmental and economic impacts and other costs" are required to be analyzed fully and taken into account when determining the benefit of using CFB as BACT. The failure to do so regarding the Oak Grove Plant constitutes a further violation of 42 U.S.C. § 7475(a)(4), Texas Health and Safety Code § 382.0518(b)(1), and 30 Texas Administrative Code § 116.111(a)(2)(C).

4. Failure to consider or implement dry sorbent injection technology. A proper BACT analysis for the Oak Grove Plant requires consideration of dry sorbent injection technology. The failure to analyze fully and determine objectively whether BACT requires using dry sorbent injection technology at Oak Grove Plant constitutes a violation of 42 U.S.C. § 7475(a)(4), Texas Health and Safety Code § 382.0518(b)(1), and 30 Texas Administrative Code § 116.111(a)(2)(C). The failure to implement dry sorbent injection as BACT also violates 42 U.S.C. § 7475(a)(4), Texas Health and Safety Code § 382.0518(b)(1), and 30 Texas Administrative Code § 116.111(a)(2)(C). In addition, "energy environmental and economic impacts and other costs" are required to be analyzed fully and taken into account when determining the benefit of using dry sorbent injection as BACT. The failure to do so regarding the Oak Grove Plant constitutes a further violation of 42 U.S.C. § 7475(a)(4), Texas Health and Safety Code § 382.0518(b)(1), and 30 Texas Administrative Code § 116.111(a)(2)(C).

5. Failure to consider or implement spray dryer absorption technology. A proper BACT analysis for the Oak Grove Plant requires consideration of spray dryer absorption technology. The failure to analyze fully and determine objectively whether BACT requires using spray dryer absorption technology constitutes a violation of 42 U.S.C. § 7475(a)(4), Texas Health and Safety Code § 382.0518(b)(1), and 30 Texas

Administrative Code § 116.111(a)(2)(C). The failure to implement spray dryer absorption as BACT also violates 42 U.S.C. § 7475(a)(4), Texas Health and Safety Code § 382.0518(b)(1), and 30 Texas Administrative Code § 116.111(a)(2)(C). In addition, “energy environmental and economic impacts and other costs” are required to be analyzed fully and taken into account when determining the benefit of using spray dryer absorption as BACT. The failure to do so regarding the Oak Grove Plant constitutes a further violation of 42 U.S.C. § 7475(a)(4), Texas Health and Safety Code § 382.0518(b)(1), and 30 Texas Administrative Code § 116.111(a)(2)(C).

6. Failure to consider fuel cleaning or treatment. A proper BACT analysis for the Oak Grove Plant requires consideration of fuel cleaning or treatment. The failure to analyze fully and determine objectively whether BACT requires using fuel cleaning or treatment technology at Oak Grove Plant constitutes a violation of 42 U.S.C. § 7475(a)(4), Texas Health and Safety Code § 382.0518(b)(1), and 30 Texas Administrative Code § 116.111(a)(2)(C). The failure to implement fuel cleaning or treatment as BACT also violates 42 U.S.C. § 7475(a)(4), Texas Health and Safety Code § 382.0518(b)(1), and 30 Texas Administrative Code § 116.111(a)(2)(C). In addition, “energy environmental and economic impacts and other costs” are required to be analyzed fully and taken into account when determining the benefit of using fuel cleaning or treatment as BACT. The failure to do so regarding the Oak Grove Plant constitutes a further violation of 42 U.S.C. § 7475(a)(4), Texas Health and Safety Code § 382.0518(b)(1), and 30 Texas Administrative Code § 116.111(a)(2)(C).

7. Failure to consider newer and/or unstored power boiler components. A proper BACT analysis for the Oak Grove Plant requires consideration of newer power boilers. The failure to analyze and determine objectively whether BACT requires using newer power boiler components than those fabricated approximately a decade ago for a previously permitted project (“Newer Boiler Components”), and power boiler components that have not been in storage for approximately a decade (“Unstored Boiler Components”), constitutes a violation of 42 U.S.C. § 7475(a)(4), Texas Health and Safety Code § 382.0518(b)(1), and 30 Texas Administrative Code § 116.111(a)(2)(C). OGMC, TXU Power, and TXU propose using old pressure parts of the Unit 1 and Unit 2 boilers, which were fabricated years ago in connection with a previously permitted project. *See* Permit Application at 4-1. OGMC, TXU Power, and TXU further propose using old turbine generators that were fabricated years ago in connection with the previously permitted project. *Id.* at 4-1, 4-2. OGMC and TXU Power acknowledge that upgrades are necessary to use the old power boiler components (*id.* at 4-2) but there is no information or BACT analysis regarding alternative power boiler components currently available. Furthermore, there is no information regarding the quality, condition, or design parameters of the old, stored power boiler components. The failure to use Newer Boiler Components and Unstored Boiler Components as BACT also violates 42 U.S.C. § 7475(a)(4), Texas Health and Safety Code § 382.0518(b)(1), and 30 Texas Administrative Code § 116.111(a)(2)(C). In addition, “energy environmental and economic impacts and other costs” should have been analyzed and taken into account

when determining the benefit of using Newer Boiler Components and Unstored Boiler Components as BACT. The failure to do so regarding the Oak Grove Plant constitutes a further violation of 42 U.S.C. § 7475(a)(4), Texas Health and Safety Code § 382.0518(b)(1), and 30 Texas Administrative Code § 116.111(a)(2)(C).

8. Failure to provide design parameters for control technology. A proper BACT analysis requires, among other things, the provision of design parameters for the control technology reviewed. The BACT analysis for the Oak Grove Plant does not include sufficient design parameter information for SCR (e.g., Permit Application at 4-7) or the proposed carbon injection system (e.g., Permit Application (supplemental) at 4-20). Design parameters needed for the BACT analysis of SCR include space velocity, ammonia to NOx molar ration, pressure drop, and catalyst life. Design parameters needed for the BACT analysis of carbon injection systems include injection concentration of the sorbent measured in lb/MMacf, expected flue gas conditions (including temperature and concentrations of HCl and SO₃, the air pollution control configuration, the characteristics of the sorbent, and the method of injecting the sorbent). The omission of this information from the BACT analysis constitutes a violation of 42 U.S.C. § 7475(a)(4), Texas Health and Safety Code § 382.0518(b)(1), and 30 Texas Administrative Code § 116.111(a)(2)(C).

9. Failure to provide necessary emissions calculations information. The annual "potential to emit" calculations regarding the Oak Grove Plant do not take into account, and there is no information about, Oak Grove Plant emissions from: (a) a start-up, shutdown or maintenance activity; or (b) a malfunction event. A proper BACT analysis requires consideration of such omitted emissions and their impact on emissions calculations. Without the omitted information, it is not possible to determine whether the Oak Grove Plant could or will comply with BACT emission limits. The omission of the information constitutes a violation of 42 U.S.C. § 7475(a)(4), Texas Health and Safety Code § 382.0518(b)(1), and 30 Texas Administrative Code § 116.111(a)(2)(C). In addition, the concomitant failure to demonstrate compliance with short-term and long-term emission limits during start-up, shutdown, maintenance, or malfunctions also is a violation of 42 U.S.C. § 7475(a)(4), Texas Health and Safety Code § 382.0518(b)(1), and 30 Texas Administrative Code § 116.111(a)(2)(C) because, *inter alia*, it fails to demonstrate that the Oak Grove Plant is subject to BACT regarding the source and control and/or reduction of such emissions.

10. Failure to analyze environmental impacts and other costs associated with carbon dioxide (CO₂) emissions from the Oak Grove Plant. There is no information regarding environmental impacts and the other costs associated with emissions of carbon dioxide (CO₂) from the Oak Grove Plant. A proper BACT analysis requires consideration of the energy, environmental, and economic impacts and other costs. 42 U.S.C. § 7479(3); *see also* 30 TEX. ADMIN. CODE § 116.10(3) (incorporating meaning for BACT generally ascribed to it in field of air pollution control). By failing to consider the environmental impacts and other costs associated with CO₂ emissions, with the

technology and emissions proposed for the Oak Grove Plant, the BACT analysis is defective and incomplete. The BACT analysis also is defective and incomplete because of the failure to compare CO₂ emissions associated with the technology and emissions proposed for the Oak Grove Plant with the CO₂ emissions associated with alternative control technologies and related emissions calculations. These failures violate 42 U.S.C. § 7475(a)(4), Texas Health and Safety Code § 382.0518(b)(1), and 30 Texas Administrative Code § 116.111(a)(2)(C).

11. Failure to analyze health costs. There is no information regarding health costs associated with the technology and emissions proposed for the Oak Grove Plant. A proper BACT analysis requires consideration of the energy, environmental, and economic impacts and other costs. 42 U.S.C. § 7479(3); *see also* 30 TEX. ADMIN. CODE § 116.10(3). By failing to consider health costs associated with the technology and emissions proposed for the Oak Grove Plant, the BACT analysis is defective and incomplete. The BACT analysis also is defective and incomplete because of the failure to compare health costs associated with the technology and emissions proposed for the Oak Grove Plant with health costs associated with alternative control technologies and related emissions calculations. These failures violate 42 U.S.C. § 7475(a)(4), Texas Health and Safety Code § 382.0518(b)(1), and 30 Texas Administrative Code § 116.111(a)(2)(C).

12. Failure to analyze additional "other costs." There is no information regarding additional "other costs," such as regional air quality compliance or non-compliance costs. A proper BACT analysis requires consideration of the energy, environmental, and economic impacts and other costs. 42 U.S.C. § 7479(3); *see also* 30 TEX. ADMIN. CODE § 116.10(3). By failing to consider other costs associated with the technology and emissions proposed for the Oak Grove Plant, the BACT analysis is defective and incomplete. The BACT analysis also is defective and incomplete because of the failure to compare other costs associated with the technology and emissions proposed for the Oak Grove Plant with other costs associated with alternative control technologies and related emissions calculations. These failures violate 42 U.S.C. § 7475(a)(4), Texas Health and Safety Code § 382.0518(b)(1), and 30 Texas Administrative Code § 116.111(a)(2)(C).

13. Failure to properly employ economic reasonableness factors in the BACT analysis. When considering economic factors in a BACT analysis, incremental cost effectiveness between control options should be used. *See Evaluating Best Available Control Technology (BACT) in Air Permit Applications* at 3-4, Draft RG-383, Texas Commission on Environmental Quality (April 2001) ("TCEQ BACT Report").⁵ Instead of using incremental cost effectiveness, the BACT analysis performed for the Oak Grove Plant judged BACT according to which control technology was less expensive in itself.

⁵ The TCEQ BACT Report is available online at <http://www.tceq.state.tx.us/assets/public/permitting/air/Guidance/NewSourceReview/bactdoc.pdf>.

By way of example only, and without limitation, wet limestone was chosen over wet lime for use in the proposed wet FGD control technology because "the higher cost of lime makes wet limestone scrubbing the more attractive option." Permit Application at 4-9. The use of cost instead of incremental cost effectiveness and other proper economic reasonableness factors in the BACT analysis constitutes a violation of 42 U.S.C. § 7475(a)(4), Texas Health and Safety Code § 382.0518(b)(1), and 30 Texas Administrative Code § 116.111(a)(2)(C).

14. Failure to undertake detailed BACT analysis. There is no indication that a step-by-step BACT analysis was employed for portions of the analysis subject to Tier II and Tier III analysis under TCEQ guidance, policy, and regulations regarding BACT. A Tier I review is appropriate only if the TCEQ has approved a permit application using the same controls for the same type of process. *TCEQ BACT Report* at 3. At the time of the Permit Application, TCEQ had not approved any of the permits referenced in the Permit Application using the same controls for the same type of process. *See, e.g.,* Permit Application § 4. Therefore, the BACT portion of the Permit Application required Tier 2 or Tier 3 analyses.⁶ *See TCEQ BACT Report* at 3-4.

The Permit Application references only one permit application previously approved by TCEQ: TCEQ Air Permit No. 48437 (Alcoa Rockdale Permit). Permit Application at 4-6. The only portions of the BACT analysis that could possibly have fallen under Tier II review are those directly relating to the Alcoa Rockdale Permit. This permit is for a different industry (*i.e.*, aluminum) and different boiler type (*i.e.*, CFB). Other differences also may exist. It is questionable whether this permit may be used at all for purposes of invoking a Tier II analysis, since the permit resulted from the compromises and special process created by a July 2003 Consent Decree. *See Consent Decree*, No. 01-cv-00881-SS, U.S. District Court, Western District of Texas, Austin Division (July 28, 2003). Even if the Alcoa Rockdale Permit could trigger Tier II as to portions of the BACT analysis, it would not have supported treating the entire BACT analysis for the Oak Grove Plant as Tier II.

Tier II requires a detailed analysis to demonstrate that a technology previously approved by the TCEQ for a different type of process can be (*i.e.*, a different industry or different type of coal) transferred to the type of process for which the permit is sought. *TCEQ BACT Report* at 3. Among the information necessary to conduct the detailed analysis required at Tier II are design parameters and operational information for the control technologies, stream comparison, an analysis of differences in overall performance of a particular emission reduction option, and technical differences between the processes and the industries at issue (*i.e.*, the processes/industries subject to a referenced TCEQ-approved permit and the processes/industry relevant to the Oak Grove

⁶ Moreover, even when a Tier I analysis is acceptable, BACT from previously approved permits for the same type of process in the same industry requires evaluation of whether any new technological developments are economically or technically reasonable. *TCEQ BACT Report* at 3.

Plant). *See id.* On the other hand, Tier III requires a detailed study of various control options. *TCEQ BACT Report* at 3-4. A Tier III analysis requires a step-by-step analysis that identifies all emission control options, eliminates technically infeasible options, ranks remaining emission reduction options by emissions reduced, performs a quantitative cost analysis to determine cost-effectiveness (using incremental cost analysis), and selects BACT based on cost-effectiveness and performance. *TCEQ BACT Report* at 4.

No Tier II or Tier III analysis was conducted as to control technology at the Oak Grove Plant for auxiliary boilers, material handling, emergency engines, generator cooling tower, fuel oil storage tanks, and ammonia handling and storage facilities. The "analysis" performed regarding control technology at the Oak Grove Plant for power boiler emissions of SO₂, PM₁₀, CO and VOC, HCl, HF, H₂SO₄, lead, mercury (Hg), and ammonia does not provide either the detailed analysis or the step-by-step analysis required by either Tier II or Tier III.

These failures violate 42 U.S.C. § 7475(a)(4), Texas Health and Safety Code § 382.0518(b)(1), and 30 Texas Administrative Code § 116.111(a)(2)(C).

B. Cumulative Impacts Violations

Prior to obtaining permits from TCEQ, OGMC and TXU Power are required to perform a cumulative impacts analysis that demonstrates allowable emissions increases from the Oak Grove Plant in conjunction with all other applicable emissions increases or reductions (including secondary emissions). The required cumulative impacts analysis also must demonstrate that emissions increases will not cause or contribute to air pollution in violation of any NAAQS or any applicable maximum allowable increase over baseline concentrations in any area. OGMC and TXU Power failed to perform a cumulative impacts analysis that makes these demonstrations. These failures violate 40 C.F.R. § 52.21(k) (the requirements regarding source impact analysis are incorporated into and made applicable by 30 Texas Administrative Code § 116.160(c)(2)(B)), 30 Texas Administrative Code § 116.160(c)(2)(B), and 30 Texas Administrative Code § 116.161. These failures also violate 42 U.S.C. § 7475(a)(1), (2), (3), (6), (7), and (8), and 42 U.S.C. § 7475(e). The violations described above occurred during the process of seeking air permits for the Oak Grove Plant, and continue through the present day.

C. Mercury Violations

It has not been shown that the Oak Grove Plant complies with applicable federal and state statutes, regulations, and rules governing mercury emissions. The violations described below occurred during the planning of, and the process of seeking air permits for, the Oak Grove Plant, and continue through the present day.

1. The proposed permit for the Oak Grove Plant has not been subject to a review of mercury usage and emissions in accordance with 42 U.S.C. § 7475, as contemplated by 40 C.F.R. § 60.45a and 40 C.F.R. part 60 subpart HHHH (the USEPA's

Clean Air Mercury Rule), including but not limited to 40 C.F.R. §§ 60.4106, 60.4120, 60.4121-60.4124, 60.4140-60.4142, 60.4151, and 60.4154. As required by Texas Health & Safety Code § 382.0173(a), the TCEQ adopted and requires compliance with 40 C.F.R. part 60 subpart HHHH in 30 Texas Administrative Code § 101.602; thus, the above-stated violation is also a violation of 30 Texas Administrative Code § 101.602. The failure to conduct the required review also violates 42 U.S.C. § 7475(a)(2). OGMC's, TXU Power's, and TXU's plans to construct and operate the Oak Grove Plant without such review likewise violates 42 U.S.C. § 7475(a)(2).

2. OGMC and TXU Power have failed to establish an accurate and complete mercury budget for the Oak Grove Plant in order to satisfy mercury emission requirements. This failure violates 40 C.F.R. §§ 60.4106(a),(b), and (c), 60.4121, and 60.4122, and 30 Texas Administrative Code § 101.602.

3. OGMC and TXU Power have failed to provide a complete certificate of representation for a mercury designated representative for the Oak Grove Plant. This failure violates 40 C.F.R. §§ 60.4110 and 60.4113, and 30 Texas Administrative Code § 101.602.

4. There has not been a proper analysis of air quality impacts from mercury projected for the area as a result of the growth associated with the Oak Grove Plant, which violates 42 U.S.C. § 7475(a)(6), 30 Texas Administrative Code § 116.160(c)(2)(C), and 40 C.F.R. § 52.21(m) (incorporated by reference through 30 TEX. ADMIN. CODE § 116.160(c)(2)(C)). OGMC, TXU Power, and TXU are responsible for these violations.

5. OGMC, TXU Power, and TXU have failed to conduct such monitoring as necessary to determine the effects mercury emissions will have on air quality in those areas affected by mercury emissions from the Oak Grove Plant, including but not limited to the DFW non-attainment areas, the Central Texas Compact area, and East Texas, which is in violation of 42 U.S.C. § 7475(a)(6), 30 Texas Administrative Code § 116.160(c)(2)(C), and 40 C.F.R. § 52.21(m) (incorporated by reference through 30 TEX. ADMIN. CODE § 116.160(c)(2)(C)).

D. Modeling Violations

Models 3 CMAQ and CAMx that replicate the photochemical reactions occurring in the atmosphere should have been, and were not, performed regarding the Oak Grove Plant. Photochemical grid models have been used for more than 3-decades to model ozone in urban non-attainment areas, and for more than 20-years to model ozone over regional scale domains that include rural areas. Recent versions of these models are currently being used in attainment demonstrations for ozones in numerous urban areas, including areas in Texas. Photochemical grid models represent the current state-of-the-art models, and are BACT, for the purpose of predicting expected ozone concentrations that will result from adding new sources of NOx and VOCs to the regional air shed. Rather than a photochemical model, the modeling for the Oak

Grove Plant used a screening source that does not satisfy the requirements for modeling. The failure to properly and completely perform modeling regarding the Oak Grove Plant in a representative manner violates 40 C.F.R. § 52.21(m). OGMC, TXU Power, and TXU are responsible for this violation. In addition, the violation of 40 C.F.R. § 52.21(m) also constitutes a violation of 30 Texas Administrative Code § 116.160(c)(2)(C) and § 116.161, for which OGMC and TXU Power are responsible. The violations described in this paragraph occurred during the process of seeking air permits for the Oak Grove Plant, and continue through the present day.

Furthermore, the modeling performed for the Oak Grove Plant violates 40 C.F.R. § 51.166(l) in that the model used for air impacts analysis did not comply with either that section or 40 C.F.R., part 51, Apdx.W. The modeling performed for the Oak Grove Plant was not approved by USEPA and there was no opportunity for public comment. *See generally* 42 U.S.C. §§ 7410 (a)(2)(B)(i), 7471. OGMC, TXU Power, and TXU are responsible for these violations. The violations described in this paragraph occurred during the planning of, and the process of seeking air permits for, the Oak Grove Plant, and continue through the present day.

E. Violations Regarding "Cause or Contribute" Requirements

OGMC, TXU Power, and TXU have failed to determine that increases in NO_x, mercury, SO₂, PM_{2.5}, PM₁₀, CO₂, and ozone resulting from the Oak Grove Plant, in conjunction with all other applicable emissions increases, will not cause or contribute to air pollution in violation of NAAQS or applicable maximum allowable increases over baseline concentrations. This failure violates 42 U.S.C. § 7475(a) and 40 C.F.R. § 52.21(k). OGMC and TXU Power also have failed to demonstrate in their Permit Application or otherwise to TCEQ that increases in NO_x, mercury, SO₂, PM_{2.5}, PM₁₀, and CO₂ resulting from the Oak Grove Plant, in conjunction with all other applicable emissions increases, will not cause or contribute to air pollution in violation of NAAQS or applicable maximum allowable increases over baseline concentrations. This failure violates 42 U.S.C. § 7475(a), 40 C.F.R. § 52.21(k), and 30 Texas Administrative Code § 116.160(c)(2)(B). The violations described in this paragraph occurred during the planning of, and the process of seeking air permits for, the Oak Grove Plant, and continue through the present day.

F. NO_x Impacts Violations

OGMC, TXU Power, and TXU have failed to evaluate the impacts on ozone by NO_x emitted from the Oak Grove Plant. This failure violates 42 U.S.C. § 7475(a)(6). OGMC and TXU Power also have failed to provide in their Permit Application or otherwise to TCEQ an evaluation of the impacts on ozone by NO_x emitted from the Oak Grove Plant. This failure violates 42 U.S.C. § 7475(a)(6) and 30 Texas Administrative Code § 116.160(c)(2)(B). With the addition of NO_x as an ozone precursor under the 8-Hour Phase I Regulations (*EPA Final Rule, "Air Quality Designations and Classifications for the 8-Hour Ozone National Ambient Air Quality Standards; Early Action Compact Areas with Deferred Effective Dates,"* at 9 (April 15,

2004))⁷ and the promulgation of the 8-Hour Phase II Regulations (70 Fed. Reg. 71612-71705), an ozone impact analysis is required when NO_x, as an ozone precursor, is greater than 100 tons per year. *See* 40 C.F.R. §§ 51.166(i)(5)(i), 52.21(i)(5)(i). The failure to perform such analysis is a violation of 42 U.S.C. § 7475(a)(6) and 40 C.F.R. § 52.21(i)(5)(i). The violations described in this paragraph occurred during the planning of, and the process of seeking air permits for, the Oak Grove Plant, and continue through the present day.

G. Permitting Violations

OGMC and TXU Power – both of whom have participated in the process of applying to the TCEQ for permits for the Oak Grove Plant – are responsible for the below-described violations, which occurred during the process of seeking air permits for the Oak Grove Plant and continue through the present day:

1. Failure to provide necessary emissions calculations information. The annual “potential to emit” calculations in the Permit Application do not take into account, and there is no showing that they take into account or include, emissions from: (a) a start-up, shutdown or maintenance activity; or (b) a malfunction event. Texas Health and Safety Code § 382.0515 (“Section 382.0515”) requires the submission of copies of all plans and specifications necessary to determine if the facility or source will comply with applicable federal and state air control statutes, rules, and regulations and the intent of chapter 382 of the Texas Health and Safety Code. Without the omitted information, it is not possible to determine whether the Oak Grove Plant will comply with applicable federal and state air control statutes, rules, and regulations and the intent of chapter 382 of the Texas Health and Safety Code. By way of example only, and without limitation, the omitted information is required to determine whether the Oak Grove Plant could or will comply with BACT emission limits. Thus, the omitted information results in a violation of Section 382.0515. The omitted information also results in a violation of 30 Texas Administrative Code §§ 116.111(a)(2)(C) and (I).

2. Failure to provide information regarding health costs. OGMC and TXU Power have failed to provide information regarding health costs associated with the technology and emissions proposed for the Oak Grove Plant. Without the omitted information, it is not possible to determine whether the Oak Grove Plant will comply with applicable federal and state air control statutes, rules, and regulations and the intent of chapter 382 of the Texas Health and Safety Code. By way of example only, and without limitation, the omitted information is required to be considered in a proper BACT analysis. Thus, the omitted information results in a violation of Section 382.0515. The omitted information also results in a violation of 30 Texas Administrative Code §§ 116.111(a)(2)(C) and (I).

3. Failure to provide information regarding additional “other costs.” OGMC and TXU Power have failed to provide information regarding additional “other costs,” such as, without limitation, regional air quality compliance or non-compliance costs. Without the omitted

⁷ Available online at <http://www.epa.gov/ozonedesignations/nfr41604.pdf>.

information, it is not possible to determine whether the Oak Grove Plant will comply with applicable federal and state air control statutes, rules, and regulations and the intent of chapter 382 of the Texas Health and Safety Code. By way of example only, and without limitation, the omitted information is required to be considered in a proper BACT analysis. Thus, the omitted information results in a violation of Section 382.0515. The omitted information also results in a violation of 30 Texas Administrative Code §§ 116.111(a)(2)(C) and (I).

4. Failure to consider newer and/or unstored power boiler components. OGMC and TXU Power have failed to provide information regarding newer power boiler components than those fabricated approximately a decade ago for a previously permitted project ("Newer Boiler Components"), and power boiler components that have not been in storage for approximately a decade ("Unstored Boiler Components"). OGMC and TXU Power also have failed to provide information regarding the quality, condition, or design parameters of the old, stored power boiler components that they propose to use at the Oak Grove Plant. Without the omitted information, it is not possible to determine whether the Oak Grove Plant will comply with applicable federal and state air control statutes, rules, and regulations, and without limitation, the intent of Chapter 382 of the Texas Health and Safety Code. By way of example only, the omitted information is required to be considered in a proper BACT analysis. Thus, the omitted information results in a violation of Section 382.0515. The omitted information also results in a violation of 30 Texas Administrative Code §§ 116.111(a)(2)(C) and (I).

5. Failure to provide design parameters for control technology. OGMC and TXU Power have failed to provide necessary design parameters for the control technology reviewed in the BACT analysis for the Oak Grove Plant. Necessary design parameter information regarding SCR and the proposed carbon injection system is absent. Without the omitted information, it is not possible to determine whether the Oak Grove Plant will comply with applicable federal and state air control statutes, rules, and regulations, and without limitation, the intent of Chapter 382 of the Texas Health and Safety Code. By way of example only, the omitted information is required to be considered in a proper BACT analysis. Thus, the omitted information results in a violation of Section 382.0515. The omitted information also results in a violation of 30 Texas Administrative Code §§ 116.111(a)(2)(C) and (I).

6. Failure to provide proper detail in BACT analysis. OGMC and TXU Power have failed to provide proper detail in the BACT analysis undertaken regarding the Oak Grove Plant. The deficiencies described in Section II(A)(14) are incorporated into this paragraph fully by reference. Without the omitted information, it appears that there has not been a proper BACT analysis, and it is not possible to determine whether the Oak Grove Plant will comply with applicable federal and state air control statutes, rules, and regulations, and without limitation, the intent of Chapter 382 of the Texas Health and Safety Code. Thus, the omitted information results in a violation of Section 382.0515. The omitted information also results in a violation of 30 Texas Administrative Code §§ 116.111(a)(2)(C) and (I).

7. Failure to provide information regarding source impact analysis. OGMC and TXU Power have failed to provide information showing the results of a source impact analysis

for the Oak Grove Plant. Without the omitted information, it is not possible to determine whether the Oak Grove Plant will comply with applicable federal and state air control statutes, rules, and regulations and the intent of Chapter 382 of the Texas Health and Safety Code. By way of example only, and without limitation, the omitted information is required to be provided and considered under 40 C.F.R. § 52.21(k), 30 Texas Administrative Code §§ 116.160 and 116.161. Thus, the omitted information results in a violation of Section 382.0515. The omitted information also results in a violation of 30 Texas Administrative Code §§ 116.111(a)(2)(C) and (I).

8. Failure to provide proper modeling information. OGMC and TXU Power have failed to provide proper modeling results for the Oak Grove Plant. The modeling results provided use inadequate models that are not representative of air quality conditions resulting from plant operation. *Inter alia*, the modeling is of insufficient scope, duration and breadth. Without the omitted information, it is not possible to determine whether the Oak Grove Plant will comply with applicable federal and state air control statutes, rules, and regulations and the intent of chapter 382 of the Texas Health and Safety Code. Thus, the omitted information results in a violation of Section 382.0515. The omitted information also results in a violation of 30 Texas Administrative Code §§ 116.111(a)(2)(D), (E), and (I).

9. Failure to provide information regarding whether the Oak Grove Plant's emission will cause or contribute to air pollution. OGMC and TXU Power have failed to provide information showing that increases in NO_x, mercury, SO₂, PM_{2.5}, PM₁₀, and CO₂ resulting from the Oak Grove Plant will not cause or contribute to air pollution in violation of NAAQS or applicable maximum allowable increases over baseline concentrations. Without the omitted information, it is not possible to determine whether the Oak Grove Plant will comply with applicable federal and state air control statutes, rules, and regulations and the intent of chapter 382 of the Texas Health and Safety Code. By way of example only, and without limitation, the omitted information is required to be provided and considered under 42 U.S.C. § 7475(a), 40 C.F.R. § 52.21(k), and 30 Texas Administrative Code § 116.160(c)(2)(B). Thus, the omitted information results in a violation of Section 382.0515. The omitted information also results in a violation of 30 Texas Administrative Code §§ 116.111(a)(2)(A)(i) and 116.111(a)(2)(I).

10. Failure to provide a NO_x impacts analysis. OGMC and TXU Power have failed to provide information regarding the impacts on ozone by NO_x emitted from the Oak Grove Plant. NO_x is required to be analyzed as a precursor ozone component. Without the omitted information, it is not possible to determine whether the Oak Grove Plant will comply with applicable federal and state air control statutes, rules, and regulations and the intent of chapter 382 of the Texas Health and Safety Code. Thus, the omitted information results in a violation of Section 382.0515. The omitted information also results in a violation of 30 Texas Administrative Code §§ 116.111(a)(2)(D), (E), and (I).

11. Failure to provide information regarding air quality analysis for carbon dioxide. OGMC and TXU Power have failed to provide information regarding an analysis of ambient air quality, in the area affected by emissions from the Oak Grove Plant, that included carbon

dioxide. Without the omitted information, it is not possible to determine whether the Oak Grove Plant will comply with applicable federal and state air control statutes, rules, and regulations and the intent of Chapter 382 of the Texas Health and Safety Code. By way of example only, and without limitation, the omitted information is required to be provided and considered under 42 U.S.C. § 7475(a), 40 C.F.R. § 52.21(m), and 30 Texas Administrative Code § 116.160(c)(2)(C). Thus, the omitted information results in a violation of Section 382.0515. The omitted information also results in a violation of 30 Texas Administrative Code § 116.111(a)(2)(I).

12. Failure to provide information regarding emissions measuring and monitoring. OGMC and TXU Power have failed to provide information regarding emissions measuring and monitoring at the Oak Grove Plant. Without the omitted information, it is not possible to determine whether the Oak Grove Plant will comply with applicable federal and state air control statutes, rules, and regulations and the intent of Chapter 382 of the Texas Health and Safety Code. Thus, the omitted information results in a violation of Section 382.0515. In addition, the omitted information is required to be provided under 30 Texas Administrative Code § 116.111(a)(2)(B). Furthermore, without the omitted information, it is not possible to determine whether the Oak Grove Plant will comply with applicable NSPS (40 C.F.R. § 60.47a) and NESHAP (40 C.F.R. § 63.8) regulations regarding emissions monitoring. Therefore, the omitted information also results in a violation of 30 Texas Administrative Code §§ 116.111(a)(2)(B), (D), and (E).

13. Failure to provide information required by TCEQ permit application. The TCEQ application for an air permit includes, among other things, TCEQ Form 10181, Table 13 "Scrubbers or Wet Washers." Table 13 requires the submission of additional information on separate sheets. See Permit Application, Apdx. A at Table 13. OGMC and TXU Power did not submit the additional information on separate sheets. This omission violates Section 382.0515 and 30 Texas Administrative Code §§ 116.111(a)(2)(C) and (I).

H. Texas SIP Violations

1. BACT violations. Pursuant to 40 C.F.R. § 51.166(j)(2), a SIP is required to provide that a new major stationary source shall apply BACT for each regulated NSR pollutant that it would have the potential to emit in significant amounts. The Texas SIP includes this requirement. *E.g.*, 1976 *Texas State Implementation Plan* § XIV (Rules & Regulations) at Rule 603.16 (as revised Aug. 15, 1976). Thus, each of the BACT violations set forth in Section II(A) of this Notice – which are incorporated fully by reference in this Section II(H)(1) – also constitutes a violation of the Texas SIP. Each violation of the Texas SIP constitutes a violation of the Clean Air Act. The violations described in this paragraph occurred during the planning of, and the process of seeking air permits for, the Oak Grove Plant, and continue through the present day.

2. Failure to perform or provide information regarding cumulative impacts analysis. Pursuant to 40 C.F.R. § 51.166(k), a SIP is required to include source impact analysis requirements. The Texas SIP includes source impact analysis requirements. *See, e.g.*, 1976

Texas State Implementation Plan § XIV (Rules & Regulations) at Rule 603.23, 603.24. Thus, each of the cumulative impacts analysis violations set forth in Section II(B) of this Notice – which are incorporated fully by reference in this Section II(H)(2) – also constitutes a violation of the Texas SIP. The violations described in this paragraph occurred during the process of seeking air permits for, the Oak Grove Plant, and continue through the present day.

3. Failure to perform required modeling. Pursuant to 40 C.F.R. § 51.166(l), a SIP is required to include proper air quality models. The Texas SIP includes modeling requirements. *See, e.g., 1976 Texas State Implementation Plan § XIV (Rules & Regulations)* at Rule 603.23, 603.24. Thus, each of the modeling violations set forth in Section II(D) – which are incorporated fully by reference in this Section II(H)(3) – also constitutes a violation of the Texas SIP. The violations described in this paragraph occurred during the planning of and/or the process of seeking air permits for the Oak Grove Plant (as described in Section II(D)), and continue through the present day.

4. Omissions of necessary information. Pursuant to 40 C.F.R. § 51.166(n), a SIP is required to provide that a permit applicant must submit all information necessary to perform any required analysis or make any required determination. The Texas SIP includes this requirement. *E.g., 1976 Texas State Implementation Plan § XIV (Rules & Regulations)* at Rules 603.11, 603.17, 603.18 (as revised Aug. 15, 1976). Each of the permitting violations set forth in Section II(G) of this Notice – which are incorporated fully by reference in this Section II(H)(4) – is based on information omitted by OGMC and TXU Power that is necessary to perform required analyses or to make required determinations. Thus, each of the permitting violations set forth in Section II(G) of this Notice also constitutes a violation of the Texas SIP. The violations described in this paragraph occurred during the process of seeking air permits for the Oak Grove Plant and continue through the present day.

I. Failure to Perform Pre-Application Air Quality Analysis for Carbon Dioxide

OGMC and TXU Power were required to include in the Permit Application an analysis of ambient air quality, in the area affected by emissions from the Oak Grove Plant, that included carbon dioxide. *See* 30 TEX. ADMIN. CODE § 116.160(a)(2)(C) (incorporating the requirements of 40 C.F.R. § 52.21(m)). Such analysis should have included the amount of carbon dioxide that the Oak Grove Plant would have the potential to emit (*see* 40 C.F.R. § 52.21(m)(1)(i)(a)), an analysis of carbon dioxide that would result in a significant net emissions increase of that pollutant (*see* 40 C.F.R. § 52.21(m)(1)(i)(b)), and because carbon dioxide is a pollutant for which no NAAQS exists, air quality monitoring results necessary to assess ambient air quality for carbon dioxide in the area that the emissions of carbon dioxide from the Oak Grove Plant would affect (*see* 40 C.F.R. § 52.21(m)(ii)). These failures violate 42 U.S.C. § 7475(a), 40 C.F.R. § 52.21(m)(1)(i), and 30 Texas Administrative Code § 116.160(a)(2)(C). The violations described in this paragraph occurred during the process of seeking air permits for the Oak Grove Plant and continue through the present day.

J. Violations of the Same Type and Closely Related Violations

This Notice further encompasses:

- any and all violations that are closely related to the violations specified in this Notice.
- any and all violations that occur after the date of this Notice that are a continuation of the same type of violation as contained in this Notice.
- any and all violations that occur after the date of this Notice as a result of alterations, revisions, or other changes made in an effort to remedy, obscure, or avoid liability for the violations described in this Notice.

III. PERSONS GIVING NOTICE

The full names and addresses of the persons giving this Notice (*i.e.*, the Noticing Citizens) are:

CleanCOALition
Albert D. Huddleston, President
5910 North Central Expressway
Suite 1350
Dallas, Texas 75206

Robertson County Our Land, Our Lives
P.O. Box 987
Hearne, Texas 77859

The Noticing Citizens are represented by counsel in this matter. Counsel's contact information is:

Frederick W. Addison, III
Kirsten M. Castañeda
Nolan Knight
Locke Liddell & Sapp LLP
2200 Ross Avenue, Suite 2200
Dallas, Texas 75201
214-740-8670
214-740-8800 (fax)

IV. AUTHORITY TO BRING CIVIL ACTION

Following 60-days after the date of this Notice, the Noticing Citizens will institute a civil action against OGMC and/or TXU based on any or all of the violations noticed above. *See* 42

OGMC, TXU Power, & TXU
September 26, 2006
Page 20

U.S.C. § 7604(b). Should you wish to resolve these matters prior to litigation, please contact me or, if you will be represented by counsel in this matter, please have your counsel contact me.

Very truly yours,

LOCKE LIDDELL & SAPP LLP
Attorneys & Counselors

By: 
Frederick W. Addison, III

*Attorneys for CleanCOALition
and Robertson County Our Land, Our Lives*

FWA:kp

cc (by first-class US certified mail, RRR):

Stephen L. Johnson, Administrator, Environmental Protection Agency
Richard Greene, Regional Administrator, Environmental Protection Agency
Glenn Shankle, Executive Director, Texas Commission on Environmental Quality
Kathleen Hartnett White, Chairman, Texas Commission on Environmental Quality
Rick Perry, Governor, State of Texas

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

SOAH DOCKET NO. 582-06-1502

TCEQ DOCKET NO. 2006-0195-AIR

2006 SEP 28 PM 3:24

APPLICATION OF § BEFORE THE STATE OFFICE
OAK GROVE MANAGEMENT §
COMPANY LLC FOR PROPOSED § CHIEF CLERK'S OFFICE
AIR PERMIT NO. 76474 AND § OF
PSD-TX-1056 § ADMINISTRATIVE HEARINGS

**APPLICANT OAK GROVE MANAGEMENT COMPANY LLC'S RESPONSE TO
PROTESTANT'S REQUEST TO SET TCEQ COMMISSIONERS' AGENDA
DATE FOR CONSIDERATION OF THE PROPOSAL FOR DECISION**

TO THE COMMISSIONERS AND GENERAL COUNSEL OF THE TEXAS
COMMISSION ON ENVIRONMENTAL QUALITY:

COMES NOW Applicant Oak Grove Management Company LLC ("*Applicant*"
or "*Oak Grove*") and files this response to Protestant Robertson County: Our Land, Our
Lives' ("*Protestant's*") request to set the Texas Commission on Environmental Quality
("*TCEQ*" or "*the Commission*") Commissioners' agenda date for consideration of the
Proposal for Decision ("*PFD*") in the above-captioned matter. While Oak Grove
understands the pressing need of Protestant's counsel to undergo surgery, Oak Grove
does not believe that the various agenda scheduling options proposed by Protestant in its
request adequately address or provide for the other considerations that should inform the
scheduling of the PFD for consideration by the TCEQ Commissioners ("*the
Commissioners*").

Specifically, in addition to the current medical hardships of Protestant's counsel,
the schedule set forth by the TCEQ General Counsel and Chief Clerk should provide the
parties to this proceeding adequate time to object, respond, or otherwise address any
amicus briefs or filings that have been or may be submitted to the Commissioners
regarding this matter. Obviously, the Commissioners should have ample time to review
any such responsive briefs, as well as the evidentiary record. To that end, Oak Grove

respectfully requests that the Chief Clerk set oral arguments for this matter on the October 18, 2006 Commissioners' agenda and schedule the issuance of the Commissioners' decision on the PFD for the November 15, 2006 agenda. As set forth more fully below, Oak Grove believes that, unlike the various agenda scheduling options suggested by Protestant, this proposed schedule is considerate of the medical needs of Protestant's counsel and should reasonably accommodate the time needed for additional briefing regarding the acceptance of the amicus briefs, responses to accepted amicus filings, and the Commissioners' review of any such additional briefing.

I. ARGUMENT

As noted in Protestant's request, shortly after the Administrative Law Judges' ("*ALJs*") issuance of the PFD, Oak Grove's counsel contacted Protestant's counsel, Ms. Wendi Hammond, to discuss the possibility of expediting the schedule, pursuant to 30 TEX. ADMIN. CODE § 80.257(b), established by the ALJs for filing exceptions to the PFD and reply briefs. During this conversation, Ms. Hammond explained that an expedited briefing schedule, with the proposed filing deadlines set for September 6 and 13, 2006, would directly conflict with surgery that she was scheduled to undergo. Naturally, Oak Grove was sensitive to Ms. Hammond's medical needs and did not, as a result, request an expedited post-PFD briefing schedule for this matter. Moreover, Oak Grove wishes to continue to accommodate, as best it reasonably can, the medical requirements of Protestant's counsel and believes that it can do so without prejudicing any other interests in this case.

Oak Grove is not, and does not expect to be, privy to details regarding Ms. Hammond's medical condition or treatment, including her decision to schedule

surgery for November 3, 2006. Relevant to the issue presented by Ms. Hammond's request is the fact that at least two substantial amicus briefs have been filed in this matter and the parties should be afforded time to object or respond to these briefs, should the General Counsel determine that the briefs will go to the Commissioners and the parties so choose to object or respond. Given the present date, scheduling a ruling on the PFD at either the October 4 or 18, 2006 agendas, as requested by Protestant, would not allow time for such responsive briefing. Further, in view of the mandates of Executive Order No. RP49, scheduling the matter for an agenda in 2007 is clearly not a reasonable or viable option.

While Oak Grove is willing to take reasonable steps to accommodate counsel's medical needs (as evidenced by Oak Grove's prior decision to not request an expedited briefing schedule in order to avoid conflicts with Ms. Hammond's surgery), we cannot acquiesce to postponing the Commissioners' decision on the PFD until sometime in 2007. Oak Grove understands that Ms. Hammond is a solo practitioner and cannot, consequently, simply seek assistance from a fellow firm member. However, the interests of the parties should be balanced and a reasonable alternative exists that allows Ms. Hammond to actively represent Protestant during the coming months.

Oak Grove believes that the best path forward is to set oral arguments on the PFD for the October 18, 2006 Commissioners' agenda and schedule the issuance of the Commissioners' decision on the PFD for the November 15, 2006 agenda. This proposed schedule will permit Ms. Hammond to participate in the oral arguments prior to her November 3, 2006 surgery as she requested. Additionally, this will facilitate a briefing schedule regarding the amicus briefs that gives the parties appropriate time to prepare

responsive briefs, while also avoiding any conflict with Ms. Hammond's medical treatment.

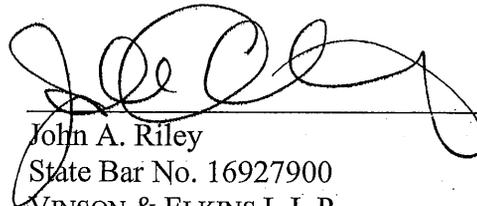
Further, pursuant to the proposed schedule, Ms. Hammond will have approximately two weeks to recuperate between her operation and the November 15, 2006 agenda, at which time the Commissioners will render their decision on Oak Grove's application. If necessary, Ms. Hammond could attend the TCEQ's November 15 agenda electronically. Finally, this proposed schedule will give Ms. Hammond approximately six weeks of recovery time between her pending surgery and the deadline to file a motion to overturn or other subsequent appellate pleadings.

Thus, Oak Grove's proposed agenda schedule appropriately balances the needs of Protestant's attorney, the Applicant's desire for a complete but expeditious hearing before the Commission, the interests of the amici, and a proper amount of time for the Commissioners to consider and make their decision. Moreover, this proposed schedule also satisfies the requirement of Executive Order No. RP49 for the Commission to "consider this proposal for decision at its earliest agenda meeting, as allowed by law" by moving this matter forward in the most expeditious manner possible with consideration given to the foregoing intervening factors.

II. CONCLUSION

As set forth more fully above, Oak Grove respectfully requests that the TCEQ Chief Clerk set oral arguments for the above-captioned matter on the October 18, 2006 Commissioners' agenda and schedule the issuance of the Commissioners' decision on the PFD for the November 15, 2006 agenda.

Respectfully submitted,



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COUNSEL FOR APPLICANT OAK
GROVE MANAGEMENT COMPANY
LLC

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing filing has been served on the following via hand delivery, facsimile, electronic mail, first class mail, and/or overnight mail on this the 28nd day of September, 2006.

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The Honorable Carol Wood
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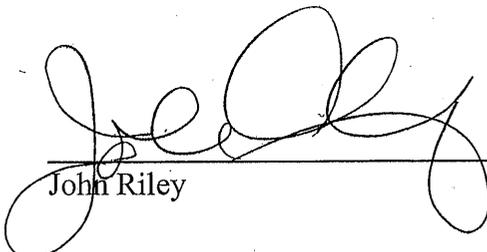
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FX: (469) 241-0430

October 5, 2006

VIA FAX: (512) 239-3311

LaDonna Castanuela and TCEQ Commissioners
TCEQ Office of the Chief Clerk; MC 105
P.O. Box 13087
Austin, TX 78711-3087

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2006 OCT -5 PM 3:10
CHIEF CLERKS OFFICE

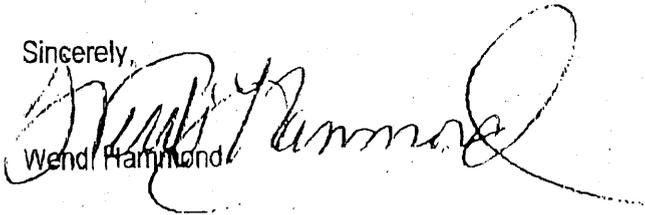
RE: SOAH Docket No. 582-06-1502; TCEQ Docket No. 2006 0195-AIR
Application of Oak Grove Management Co., LLC for Proposed
Air Permit No. 76474 and PSD-TX-1056

Dear Chief Clerk:

Please find enclosed for filing, in the above named and numbered matter, a copy of Protestant's request for scheduling the ALJ's proposal for decision on the Commissioners' agenda as requested in the pleading. This copy is being faxed today for filing and the original and 11 copies are being mailed for receipt within 3 days. Copies of the same have been sent to the parties as listed on the certificate of service.

Thank you for your immediate attention to this matter. If you have any questions, feel free to contact me.

Sincerely,


Wendi Hammond

Encl.

CC: Certificate of Service List (w/ encl.)

SOAH DOCKET NO. 582-06-1502
TCEQ DOCKET NO. 2006-0195-AIR

APPLICATION OF OAK GROVE
MANAGEMENT COMPANY, LLC
FOR PROPOSED AIR PERMIT NO.
76474 AND PSD-TX-1056

§
§
§
§

BEFORE THE STATE OFFICE OF
ADMINISTRATIVE HEARINGS

CHIEF CLERK OFFICE

OCT - 5 PM 3:11

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

**PROTESTANT'S REPLY TO APPLICANT'S RESPONSE AND
PROTESTANT'S AMENDED REQUEST TO SET TCEQ COMMISSIONER'S AGENDA
DATE FOR CONSIDERATION OF PROPOSAL FOR DECISION,
OR IN THE ALTERNATIVE,
REQUEST FOR EXTENSION OF DEADLINE TO FILE MOTION FOR REHEARING,
OR IN THE ALTERNATIVE, MOTION FOR CONTINUANCE**

TO THE HONORABLE COMMISSIONERS AND GENERAL COUNSEL OF THE TEXAS
COMMISSION ON ENVIRONMENTAL QUALITY:

COMES NOW Protestant Robertson County: Our Land, Our Lives (Robertson County
OLOL) and files these requests and motion in order to update the parties of recent changes
concerning the medical issues that require Protestant's counsel to know as soon as possible a
date certain on which the TCEQ will schedule the Administrative Law Judges' Proposal for
Decision (PFD) for consideration on the TCEQ Commissioners' agenda.

On September 20, 2006, Protestant's counsel filed a motion informing all parties of
pending medical issues and proposing various options for proceeding with this matter in light of
these unforeseen and uncontrollable medical issues and suggesting (with additional
considerations) the following currently scheduled agenda dates: October 4 or 18, November 1, or
an agenda date in 2007.

The matter was not scheduled for the October 4th agenda date, and on September 28,
2006, Applicant filed a response to Protestant's requests, which requested that the matter be set

on the October 18th agenda date but to refrain from issuing a decision until the November 15th agenda.¹

Since these filings, Protestant's counsel has also been informed by MD Anderson that some pre-operative procedures must take place in Houston on November 1 starting at 7:45 A.M. in addition to November 2nd; therefore, Protestant's counsel will not be able to attend any currently scheduled agenda dates in 2006 after the October 18th agenda date. This scheduling conflict is beyond counsel's control.

In light of Applicant's response and the change of medical circumstances, Protestant files this response and amended request that the matter be handled in one of the following ways (as listed below according to priority):

- 1) schedule the matter on the October 18, 2006, Commissioners' agenda date, 2) immediately issue notice to all of the parties, 3) immediately issue the final order and serve the order on all the parties no later than October 20, 2006, and 4) if the order is contrary to the ALJ's PFD recommendation, then serve the order on Protestant's counsel via facsimile; or in the alternative,
- 1) scheduled the matter for the October 18, Commissioners' agendas, 2) immediately issue notice to all of the parties, 3) rule on the issue at the agenda, but serve the Commissioners' final order in a manner that allows the Commissioners and/or General Counsel to grant Protestant an extension until December 15, 2006, to file post-agenda

¹ Contrary to Applicant's assertion in its response, Protestant's counsel never stated that an expedited briefing schedule would directly conflict with a scheduled surgery. Rather Protestant's counsel informed Applicant that Protestant simply could not formally agree to the expedited schedule due to the pending medical issues. Protestant's counsel made it perfectly clear that Applicant was free to file its motion for expedited scheduling, and if a conflict arose, then Protestant would file any necessary response.

As previously stated in its initial request, Protestant was informed by Applicant's counsel shortly thereafter that rather than request an expedited schedule, Applicant would file a letter requesting confirmation that the matter would be set for the October 4, 2006 agenda in accordance with the Governor's Executive Order. However, this was never done.

Always mindful of the Executive Order's scheduling demands, Protestant's counsel attempted to make arrangements in time to allow for recovery and participation during the October 4th agenda. However, obtaining a second opinion took longer than expected at MD Anderson, and it became obvious that surgery could not be scheduled as quickly as previously hoped. As such, counsel prepared for the next available surgery date which would have been October 13th; however, after further consultation it became apparent that requirements for pre-operative blood donation necessitated moving the surgery to November 3rd.

pleadings (i.e., motion for rehearing and/or reply), and 4) automatically grant such an extension based upon this request; or in the alternative.

- if an order cannot be issued and extension granted as requested above or if additional briefing is required, then schedule the matter for the first scheduled agenda date in 2007 or later because Protestants' counsel will be unable to travel and attend any currently scheduled agenda dates after October 18, 2006 and likewise would be unable to timely file any necessary post-agenda pleadings or district court appeal, if necessary.

I. ARGUMENT

Protestant agrees with Applicant that the matter should be scheduled for the October 18th agenda date. Protestant, however, disagrees that the Commissioners' ruling and notification should be deferred until the November 15th agenda date. Historically, the Commissioners issue their ruling at the agenda and notify the parties of their written final order shortly thereafter. Protestant respectfully requests that the Commissioners do not bifurcate the process in the manner requested by Applicant because that would only create additional hardships for the Protestant.

First, Protestant's counsel simply cannot in good conscience agree to attend the November 15th agenda date in person or electronically. Although touched by Applicant's optimism that physical and cognitive recovery is possible just twelve days after having major surgery, Protestant's counsel believes that prudence and ethical obligations require heeding the advice of experienced medical experts who all state that activity will be strictly limited under even the best of outcomes.² Although electronic participation would minimize physical exertion, it would be unethical (if not malpractice) for an attorney to represent a client in a legal

² As previously stated in the initial request, major thoracic surgery will remove the heart lining, a portion of the left lung and a fairly large (10 cm) rare solitary fibrous tumor that wraps around the heart and invades the left lung cavity. Similar to open heart surgery, the sternum will be cracked and a rib spreader will be used. Recovery after the surgery could take several months; however, due to the location and nature of the tumor, the extent of possible surgery and post-surgery complications will not be known until after the surgery takes place (e.g., whether the tumor is benign or malignant). Even under the best case scenario, strict bed rest will be required for at least 2-3 weeks after surgery and all physical activity, work and travel will be very restricted for at least six weeks after surgery (e.g., no lifting of more than 5 pounds, no long distance traveling, pain medication will interfere with work, etc.).

proceeding while knowingly under the influence of powerful pain medication and still recovering from recent extensive medical trauma. Protestant's counsel hopes the Commissioners will not place counsel in such a difficult position.

Second, contrary to Applicant's assertion, its proposal does not provide six weeks of recovery time between surgery and Protestant's deadline to file any necessary post-decision pleadings should the Commissioners disregard the judges' recommendation to deny the permit. A motion for rehearing must be filed 30 days after notification,³ which if this occurred on November 15th, would place the deadline on December 5th or shortly thereafter, which is only four weeks after the surgery and only one week after the end of strict bed rest.

Rather, Protestant still respectfully requests that the matter be scheduled for the October 18th agenda, for TCEQ to immediately issue its ruling (which enables Protestant's counsel to prepare for future filing needs), and for TCEQ to serve notification of the final order on all parties no later than October 20th. Protestant would also request that if the final order is contrary to the ALJ's recommendation that TCEQ serve the order via facsimile to Protestant's counsel, who is located in the Dallas area. This would definitely afford Protestant's counsel at least 10 days to prepare a motion for rehearing and appellate pleadings prior to surgery rather than having to grapple with these matters while recuperating. Plus, this scenario is much more accommodating to all of the parties' interests.

If notification by October 20th is not possible, then Protestant requests that the Commissioners provide notification in a manner that allows the Commissioners and/or General Counsel to grant Protestant an extension until after December 15, 2006, to file post-agenda pleadings (i.e., motion for rehearing and/or reply), and automatically grant such an extension based upon this request. However, Protestant still requests that the Commissioners provide their

³ 30 TEX. ADMIN. CODE § 80.272.

ruling at the October 18th agenda so Protestant may prepare as much as possible prior to surgery (while understanding that complete preparation still requires a final order because case law dictates that motions for rehearing must include references to specific findings of facts and conclusions of law).

Third, if Applicant was genuinely concerned about the filed amicus briefs, then Applicant should have pursued clarification from the General Counsel much sooner or simply filed a response. Clearly, Applicant is familiar with procedure following unsolicited amicus briefs considering Applicant late-filed such an unsolicited amicus brief in the prior Sandy Creek coal-fired power plant case.

If, however, the Commissioners agree with Applicant that additional briefing would be helpful, then a single agenda date should be set after all briefing has been concluded. It would be a waste of valuable resources and time to purposely schedule the matter for two separate agenda dates. Considering the extenuating medical circumstances, Protestant respectfully requests that this date be the first agenda date in 2007.

If time was truly of the essence, then requests for additional briefing and a set agenda date would have already been issued. However, Protestant is still waiting for an official response from the agency on this matter. It appears highly disingenuous for the Applicant and TCEQ staff to continually claim the need for expeditiously processing coal-fired power plant permits under the Governor's Executive Order when both the Applicant and agency staff take action contrary to the Order's directives when it suits their needs but ignores the legitimate needs of the Protestant.

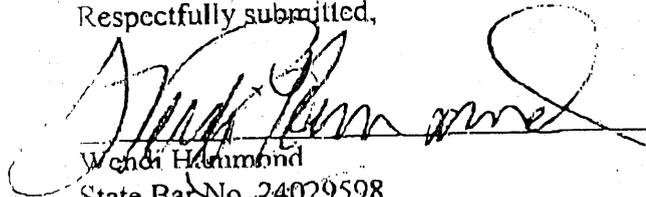
II. CONCLUSION AND PRAYER

WHEREFORE, based upon the foregoing, Protestant respectfully prays that the Administrative Law Judges, General Counsel, Commissioners and/or Chief Clerk grant

Protestant's requests and schedule the matter for the Commissioners' agenda in one of the following ways (as listed below according to priority):

- 1) schedule the matter on the October 18, 2006, Commissioners' agenda date, 2) immediately issue notice to all of the parties, 3) immediately issue the final order and serve the order on all the parties no later than October 20, 2006, and 4) if the order is contrary to the ALJ's PFD recommendation, then serve the order on Protestant's counsel via facsimile; or in the alternative,
- 1) scheduled the matter for the October 18, Commissioners' agendas, 2) immediately issue notice to all of the parties, 3) rule on the issue at the agenda, but serve the Commissioners' final order in a manner that allows the Commissioners and/or General Counsel to grant Protestant an extension until after December 15, 2006, to file post-agenda pleadings (i.e., motion for rehearing and/or reply), and 4) automatically grant such an extension based upon this request; or in the alternative,
- if an order cannot be issued and extension granted as requested above or if additional briefing is required, then schedule the matter for the first scheduled agenda date in 2007 or later because Protestants' counsel will be unable to travel and attend any currently scheduled agenda dates after October 18, 2006 and likewise would be unable to timely file any necessary pre-agenda or post-agenda pleadings or district court appeal, if necessary.

Respectfully submitted,



Wendi Hammond
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Wendi_Hammond@sbcglobal.net (email)

Attorney for Robertson County: Our Land, Our Lives

CERTIFICATE OF SERVICE

I hereby certify that on this the 5th day of October, 2006, a true and correct copy of the foregoing has been sent by U.S. mail, facsimile and/or email (as indicated below) to the following:

VIA: Fax

The Honorable Tom Walston
The Honorable Carol Wood
Administrative Law Judges
State Office of Administrative Hearings
300 West 15th St.
Austin, TX 78701
PH: 512/475-4993
FAX: 512/475-4994

VIA: Fax

State Office of Administrative Hearings
Attn: SOAH Docket Clerk
P.O. Box 13025
Austin, TX 78711-3025
PH: 512/475-4993
FAX: 512/475-4994

VIA: Fax & mail

LaDonna Castanuela
TCEQ Office of the Chief Clerk; MC 105
P.O. Box 13087
Austin, TX 78711-3087
PH: 512/239-3300
FAX: 512/239-3311

Via: Fax

Derek Scals, TCEQ General Counsel

VIA: Fax

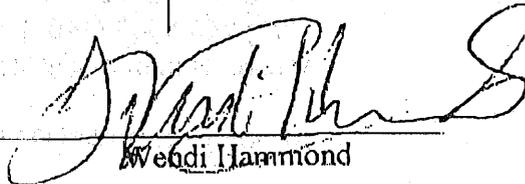
Christina Mann
Texas Commission on Environmental Quality
Office of Public Interest Counsel; MC-103
P.O. Box 13087
Austin, TX 78711-3087
PH: 512/239-6363
FAX: 512/239-6377
cmann@tceq.state.tx.us

VIA: Fax

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Erin Selvera
Texas Commission on Environmental Quality
MC-173
P.O. Box 13087
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Weddi Hammond

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John A. Riley jriley@velaw.com
Tel 512 542 0520 Fax 512 230 3329

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
SEP 28 PM 3:42
CHIEF CLERK'S OFFICE

September 28, 2006

Via Hand Delivery and Facsimile No. 239-3311

LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
12100 Park 35 Circle, Building F, 1st Floor
Austin, Texas 78753

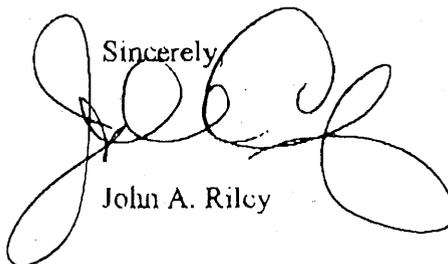
Re: SOAH Docket No. 582-06-1502; TCEQ Docket No. 2006-0195-AIR
Application of Oak Grove Management Company LLC For Proposed
Air Permit No. 76474 and PSD-TX-1056

Dear Ms. Castañuela:

Enclosed for filing in the above-referenced and numbered proceeding is one original and twelve copies of Applicant Oak Grove Management Company LLC's Response to Protestants' Request to Set TCEQ Commissioners' Agenda Date for Consideration of the Proposal for Decision. Please date stamp one of the twelve copies and return it to the awaiting counter. The remaining eleven copies are for the TCEQ Commissioners.

Thank you for your attention to this matter.

Sincerely,



John A. Riley

Enclosures

cc: Service List (via facsimile)
Honorable Carol Wood
Honorable Thomas Walston
SOAH Docket Clerk

Austin 750481 v 1

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
SEP 28 PM 3:42
CHIEF CLERK'S OFFICE

SOAH DOCKET NO. 582-06-1502
TCEQ DOCKET NO. 2006-0195-AIR

APPLICATION OF § BEFORE THE STATE OFFICE
OAK GROVE MANAGEMENT §
COMPANY LLC FOR PROPOSED § OF
AIR PERMIT NO. 76474 AND §
PSD-TX-1056 § ADMINISTRATIVE HEARINGS

APPLICANT OAK GROVE MANAGEMENT COMPANY LLC'S RESPONSE TO
PROTESTANT'S REQUEST TO SET TCEQ COMMISSIONERS' AGENDA
DATE FOR CONSIDERATION OF THE PROPOSAL FOR DECISION

TO THE COMMISSIONERS AND GENERAL COUNSEL OF THE TEXAS
COMMISSION ON ENVIRONMENTAL QUALITY:

COMES NOW Applicant Oak Grove Management Company LLC ("*Applicant*" or "*Oak Grove*") and files this response to Protestant Robertson County: Our Land, Our Lives' ("*Protestant's*") request to set the Texas Commission on Environmental Quality ("*TCEQ*" or "*the Commission*") Commissioners' agenda date for consideration of the Proposal for Decision ("*PFD*") in the above-captioned matter. While Oak Grove understands the pressing need of Protestant's counsel to undergo surgery, Oak Grove does not believe that the various agenda scheduling options proposed by Protestant in its request adequately address or provide for the other considerations that should inform the scheduling of the PFD for consideration by the TCEQ Commissioners ("*the Commissioners*")

Specifically, in addition to the current medical hardships of Protestant's counsel, the schedule set forth by the TCEQ General Counsel and Chief Clerk should provide the parties to this proceeding adequate time to object, respond, or otherwise address any amicus briefs or filings that have been or may be submitted to the Commissioners regarding this matter. Obviously, the Commissioners should have ample time to review any such responsive briefs, as well as the evidentiary record. To that end, Oak Grove

respectfully requests that the Chief Clerk set oral arguments for this matter on the October 18, 2006 Commissioners' agenda and schedule the issuance of the Commissioners' decision on the PFD for the November 15, 2006 agenda. As set forth more fully below, Oak Grove believes that, unlike the various agenda scheduling options suggested by Protestant, this proposed schedule is considerate of the medical needs of Protestant's counsel and should reasonably accommodate the time needed for additional briefing regarding the acceptance of the amicus briefs, responses to accepted amicus filings, and the Commissioners' review of any such additional briefing.

I. ARGUMENT

As noted in Protestant's request, shortly after the Administrative Law Judges' ("ALJs") issuance of the PFD, Oak Grove's counsel contacted Protestant's counsel, Ms. Wendi Hammond, to discuss the possibility of expediting the schedule, pursuant to 30 TEX. ADMIN CODE § 80.257(b), established by the ALJs for filing exceptions to the PFD and reply briefs. During this conversation, Ms. Hammond explained that an expedited briefing schedule, with the proposed filing deadlines set for September 6 and 13, 2006, would directly conflict with surgery that she was scheduled to undergo. Naturally, Oak Grove was sensitive to Ms. Hammond's medical needs and did not, as a result, request an expedited post-PFD briefing schedule for this matter. Moreover, Oak Grove wishes to continue to accommodate, as best it reasonably can, the medical requirements of Protestant's counsel and believes that it can do so without prejudicing any other interests in this case.

Oak Grove is not, and does not expect to be, privy to details regarding Ms. Hammond's medical condition or treatment, including her decision to schedule

surgery for November 3, 2006. Relevant to the issue presented by Ms. Hammond's request is the fact that at least two substantial amicus briefs have been filed in this matter and the parties should be afforded time to object or respond to these briefs, should the General Counsel determine that the briefs will go to the Commissioners and the parties so choose to object or respond. Given the present date, scheduling a ruling on the PFD at either the October 4 or 18, 2006 agendas, as requested by Protestant, would not allow time for such responsive briefing. Further, in view of the mandates of Executive Order No. RP49, scheduling the matter for an agenda in 2007 is clearly not a reasonable or viable option.

While Oak Grove is willing to take reasonable steps to accommodate counsel's medical needs (as evidenced by Oak Grove's prior decision to not request an expedited briefing schedule in order to avoid conflicts with Ms. Hammond's surgery), we cannot acquiesce to postponing the Commissioners' decision on the PFD until sometime in 2007. Oak Grove understands that Ms. Hammond is a solo practitioner and cannot, consequently, simply seek assistance from a fellow firm member. However, the interests of the parties should be balanced and a reasonable alternative exists that allows Ms. Hammond to actively represent Protestant during the coming months.

Oak Grove believes that the best path forward is to set oral arguments on the PFD for the October 18, 2006 Commissioners' agenda and schedule the issuance of the Commissioners' decision on the PFD for the November 15, 2006 agenda. This proposed schedule will permit Ms. Hammond to participate in the oral arguments prior to her November 3, 2006 surgery as she requested. Additionally, this will facilitate a briefing schedule regarding the amicus briefs that gives the parties appropriate time to prepare

responsive briefs, while also avoiding any conflict with Ms. Hammond's medical treatment.

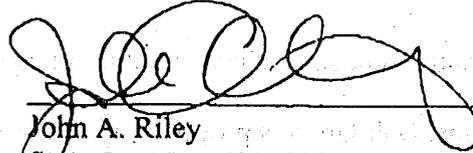
Further, pursuant to the proposed schedule, Ms. Hammond will have approximately two weeks to recuperate between her operation and the November 15, 2006 agenda, at which time the Commissioners will render their decision on Oak Grove's application. If necessary, Ms. Hammond could attend the TCEQ's November 15 agenda electronically. Finally, this proposed schedule will give Ms. Hammond approximately six weeks of recovery time between her pending surgery and the deadline to file a motion to overturn or other subsequent appellate pleadings.

Thus, Oak Grove's proposed agenda schedule appropriately balances the needs of Protestant's attorney, the Applicant's desire for a complete but expeditious hearing before the Commission, the interests of the amici, and a proper amount of time for the Commissioners to consider and make their decision. Moreover, this proposed schedule also satisfies the requirement of Executive Order No. RP49 for the Commission to "consider this proposal for decision at its earliest agenda meeting, as allowed by law" by moving this matter forward in the most expeditious manner possible with consideration given to the foregoing intervening factors.

II. CONCLUSION

As set forth more fully above, Oak Grove respectfully requests that the TCEQ Chief Clerk set oral arguments for the above-captioned matter on the October 18, 2006 Commissioners' agenda and schedule the issuance of the Commissioners' decision on the PFD for the November 15, 2006 agenda.

Respectfully submitted,



John A. Riley

State Bar No. 16927900

VINSON & ELKINS L.L.P.

The Terrace 7

2801 Via Fortuna, Suite 100

Austin, Texas 78746

Telephone: (512) 542-8520

Facsimile: (512) 236-3329

COUNSEL FOR APPLICANT OAK
GROVE MANAGEMENT COMPANY
LLC

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing filing has been served on the following via hand delivery, facsimile, electronic mail, first class mail, and/or overnight mail on this the 28nd day of September, 2006.

The Honorable Tom Walston
The Honorable Carol Wood
Administrative Law Judges
State Office of Administrative Hearings
P.O. Box 13025
Austin, TX 78711-3025
300 West 15th Street
Austin, TX 78701
PH: (512) 475-4993
FAX: (512) 475-4994
c/o Donna Swope:
donna.swope@soah.state.tx.us

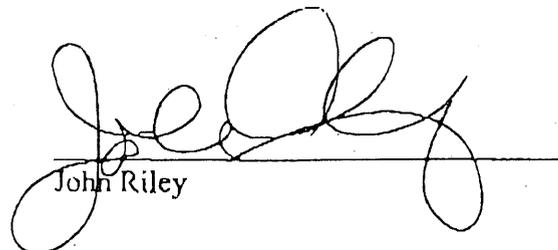
Christina Mann
Office of Public Interest Counsel
TCEQ, MC-103
P.O. Box 13087
Austin, TX 78711-3087
12100 Park 35 Circle, Bldg. F
Austin, TX 78753
PH: (512) 239-4014
FAX: (512) 239-6377
cmann@tceq.state.tx.us

State Office of Administrative Hearings
ATTN: SOAH Docket Clerk
P.O. Box 13025
Austin, TX 78711-3025
300 West 15th Street
Austin, TX 78701
PH: (512) 475-4993
FAX: (512) 475-4994

Erin Selvera
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FAX: (512) 239-0606
eselvera@tceq.state.tx.us

LaDonna Castañuela
Chief Clerk
Office of the Chief Clerk
TCEQ, MC-105
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Austin, TX 78711-3087
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Wendi Hammond
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John Riley

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Wendi_Hammond@shglobal.net

FX: (469) 241-0430

September 20, 2006

TEXAS
COMMISSIONERS
ON ENVIROMENTAL
QUALITY
SEP 20 PM 1:46
CHIEF CLERK'S OFFICE

VIA FAX: (512) 475-4994
The Honorable Judge Wood
The Honorable Judge Walston
State Office of Administrative Hearings
300 West 15th St.
Austin, TX 78701

VIA FAX: (512) 239-5533
Derek Seal, TCEQ General Counsel
Mathew Beeter, TCEQ General Counsel's Office

VIA FAX: (512) 239-3311
LaDonna Castanueia and TCEQ Commissioners
TCEQ Office of the Chief Clerk; MC 105
P.O. Box 13087
Austin, TX 78711-3087

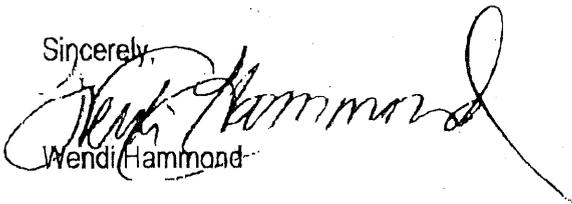
RE: SOAH Docket No. 582-06-1502; TCEQ Docket No. 2006-0195-AIR
Application of Oak Grove Management Co., LLC for Proposed
Air Permit No. 76474 and PSD-TX-1056

Dear Honorable Judges Wood and Walston, Honorable TCEQ Commissioners, General Counsel and Chief Clerk:

Please find enclosed for filing, in the above named and numbered matter, a copy of Protestant's request for scheduling the ALJ's proposal for decision on the October 4, 2006 Commissioners' agenda or, if absolutely unavoidable, later as requested in the pleading.

Thank you for your attention to this matter. If you have any questions, feel free to contact me.

Sincerely,



Wendi Hammond

Encl.

CC: Certificate of Service List (w/ encl.)

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
2006 SEP 20 PM 1:46
CHIEF CLERK'S OFFICE

**SOAH DOCKET NO. 582-06-1502
TCEQ DOCKET NO. 2006-0195-AIR**

**APPLICATION OF OAK GROVE § BEFORE THE STATE OFFICE OF
MANAGEMENT COMPANY, LLC §
FOR PROPOSED AIR PERMIT NO. §
76474 AND PSD-TX-1056 § ADMINISTRATIVE HEARINGS**

**PROTESTANT'S REQUEST TO SET TCEQ COMMISSIONER'S AGENDA DATE FOR
CONSIDERATION OF PROPOSAL FOR DECISION,
OR IN THE ALTERNATIVE,
REQUEST FOR EXTENSION OF DEADLINE TO FILE MOTION FOR REHEARING,
OR IN THE ALTERNATIVE, MOTION FOR CONTINUANCE**

TO THE HONORABLE TCEQ COMMISSIONERS, TCEQ GENERAL COUNSEL, TCEQ
CHIEF CLERK AND SOAH JUDGES WOOD AND WALSTON:

COMES NOW Protestant Robertson County: Our Land, Our Lives (Robertson County
OLOL) and files these requests and motion in order to appraise TCEQ, the Administrative Law
Judges, and Parties of medical issues that require Protestant's counsel to know as soon as
possible a date certain on which the TCEQ will schedule the Administrative Law Judges'
Proposal for Decision (PFD) for consideration on the TCEQ Commissioners' agenda.

TCEQ's rule requires the following procedures for scheduling the presentation of the
PFD at a commission agenda:

- 1) the Chief Clerk shall coordinate with the ALJs to schedule the presentation of the PFD;
- 2) the ALJs shall notify the parties of the date of the commission meeting when it issues the PFD;
- 3) the General Counsel may reschedule the presentation of the PFD on his own motion or by agreement of the parties and the ALJs; and
- 4) the Chief Clerk shall notify the parties of the rescheduled meeting no later than 10 days before the rescheduled meeting.

See, 30 TEX. ADMIN. CODE § 80.261.

In this matter, however, the ALJs did not notify the parties of a specific Commissioners' agenda date when the PFD was issued, rather the scheduling responsibilities were left to the Chief Clerk, who has yet to notify the parties of an agenda date.

Despite the lack of official notification, all parties are aware that the Governor's Executive Order RP49, which this application has been processed under, dictates that the matter "shall" be scheduled for presentation of the PFD on the October 4, 2006, Commissioners' agenda.

Due to medical reasons, Protestant's counsel requests that the ALJs, Commissioners, General Counsel, and/or Chief Clerk immediately notify all of the parties of the date for the presentation of the PFD on the Commissioner's agenda by scheduling the matter in one of the following ways (as listed below according to priority):

- 1) immediately scheduled the matter for the October 4, 2006, agenda date as Governor Perry's Executive Order RP49 expedited process requires and 2) immediately issue notice to all of the parties; or in the alternative,
- 1) schedule the matter on the October 18, 2006, Commissioners' agenda date, 2) immediately issue notice to all of the parties, 3) immediately issue the final order and serve the order on all the parties no later than October 20, 2006, and 4) if the order is contrary to the ALJ's PFD recommendation, then serve the order on Protestant's counsel via facsimile; or in the alternative,
- 1) scheduled the matter for the October 18 or November 1, 2006, Commissioners' agendas, 2) immediately issue notice to all of the parties, 3) rule on the issue at the agenda, but serve the Commissioners' final order in a manner that allows the Commissioners and/or General Counsel to grant Protestant an extension until December 15, 2006, to file post-agenda pleadings (i.e., motion for rehearing and/or reply), and 4) automatically grant such an extension based upon this motion; or in the alternative,
- if an order cannot be issued and extension granted as requested above and if the matter is not scheduled for an agenda date on or before October 18, 2006, then schedule the matter for the first scheduled agenda date in 2007 or later because Protestants' counsel will be unable to travel and attend any currently scheduled agenda dates after November 1, 2006 and likewise would be unable to timely file any necessary post-agenda pleadings or district court appeal, if necessary.

I. BACKGROUND

The application in this matter has proceeded in accordance with Governor Perry's Executive Order RP49 issued on October 27, 2005. The Executive Order states:

- TCEQ "shall apply the full resources of the agency to prioritize and expedite" the processing of power plant applications that will use Texas' natural resources and shall "avoid any delays";
- SOAH shall set a hearing schedule that returns a PFD to TCEQ no later than six months from the date of referral to a contested case hearing; and
- TCEQ "shall give priority" to the PFD issued by SOAH and "shall consider this proposal for decision at its earliest agenda meeting."

In response to the Executive Order, TCEQ's resources have been prioritized to expedite not only Oak Grove's permit application for a coal-fired power plant burning only Texas lignite, but also all other pending coal-fired power plant permit applications that burn only Wyoming coal.

Also in order to comply with the Executive Order in the Oak Grove matter, the Administrative Law Judges (ALJs) set a schedule that required the hearing on the merits to be held just over two months – exactly 70 days – after the preliminary hearing. Compliance with the Governor's Executive Order placed extreme burdens on all the parties, especially on Protestant who, unlike the Applicant or Executive Director, did not have the same benefit of time to review the amended application or prepare for a hearing because as soon as the application was determined to be technically complete, the Executive Director issued his preliminary determination and the Applicant directly referred the matter to SOAH for hearing. Despite these burdens, Protestant complied with the expedited hearing schedule.

On August 23, 2006, the ALJs filed their Proposal for Decision (PFD) and Proposed Order in this matter for Commission approval and set deadlines for the parties to file their exceptions to the PFD by September 12, 2006, and any replies to those exceptions by September 22, 2006.¹ The judges further stated that the matter "will be considered by the Texas Commission on Environmental Quality on a date and time to be determined by the Chief Clerk's Office." As previously discussed, no such notification has occurred.

Shortly after the issuance of the PFD, Applicant's counsel contacted Protestant about the possibility of expediting the schedule for filing exceptions and replies so that the matter could be scheduled for consideration on the September 20, 2006, Commissioners' agenda. Protestant's counsel, however, was not able to agree to such a schedule due to pending medical issues. Shortly thereafter, Applicant's counsel informed Protestant that rather than request an expedited schedule, Applicant would file a letter requesting confirmation that the matter would be set for the October 4, 2006 agenda in accordance with the Governor's Executive Order.

To date, Protestant is not aware of such a letter being filed; therefore, Protestant's counsel contacted the Chief Clerk's Office and General Counsel's Office to determine the Commissioners' agenda date for this matter. The General Counsel's office stated that:

- possible agenda dates are currently being discussed,
- October 4th is not one of those dates, and
- the matter could possibly be scheduled for the mid-November agenda.

Due to medical reasons, Protestant's counsel will not be able to attend any currently scheduled commission agendas in 2006 after November 1st. In late July, Protestant's counsel was diagnosed with a rare tumor. Since that diagnosis, a second opinion and guidance on the

¹ Also, on September 18, 2006, the General Counsel granted the Executive Director's request for an extension to file supplemental exceptions by 5:00 p.m. on September 15, 2006.

best course of treatment has been sought from experts at M.D. Anderson Cancer Center in Houston. Doctors state that the best course of treatment for this type of tumor is major thoracic surgery for complete removal of the tumor, heart lining and portion of the left lung. Surgery is recommended to occur "the sooner the better," which is currently scheduled for November 3, 2006.²

Recovery after the surgery could take several months; however, due to the location and nature of the tumor, the extent of possible surgery and post-surgery complications will not be known until the surgery takes place. Even under the best case scenario, strict bed rest will be required for at least 2-3 weeks after surgery and all physical activity, work and travel will be very restricted for at least six weeks after surgery (e.g., no lifting of more than 5 pounds, no long distance traveling, pain medication will interfere with work, etc.).

II. PROTESTANT'S REQUEST FOR THE MATTER TO BE SCHEDULED ON THE COMMISSIONERS' OCTOBER 4, 2006, AGENDA

As previously discussed, this entire matter has proceeded in accordance with the Governor's Executive Order, which also would require the matter to be scheduled for agenda on October 4, 2006. Based upon the foregoing reasons and medical issues, Protestant requests that the matter be scheduled for this date and notification be immediately provided to all parties.

A Commissioners' decision on this date would give Protestant the time allowed by law and TCEQ's rules to prepare and file prior to surgery a motion for rehearing and petition for appeal should the Commission decision be contrary to the ALJ's recommendation. Likewise,

² Mindful of the Executive Order's scheduling demands, counsel attempted to make arrangements in time to allow for recovery and participation during the October 4th agenda; however, obtaining a second opinion took longer than expected. As such, counsel was preparing for the first available surgery date immediately after the October 4th agenda; which would be October 13th; however, pre-operative blood donation requires the surgery to be scheduled later.

should the Commissioners decide to approve the ALJ's PFD, Protestant would be able to timely file a response, if necessary, to any motion for rehearing that may be filed by Applicant or others.

Protestant understands that a new Commissioner has recently been appointed and that the General Counsel's office states that a backlog of agenda items exists. Although mindful of these issues, Protestant must still respectfully urge that the matter be scheduled for October 4th. All of the parties have suffered under the burdens of the Executive Order's expedited process. Before this matter was even referred to SOAH, both the Governor and TCEQ were aware that a new Commissioner would need to be appointed and that appointment delays would create a backlog. Over five months have passed since the scheduling order was issued in this matter at which time TCEQ became aware of when the PFD would be issued and that the agenda date would be October 4th. Yet despite this knowledge, neither the Governor nor TCEQ took any action to alleviate the burdens imposed by the Executive Order. Since circumstances at TCEQ have remained unchanged for the past five months, it would be fundamentally unfair to have deprived the Protestant and other parties of much needed additional time for the hearing process only to now postpone the agenda date until after October 4th, even worse until mid-November, especially in light of the medical circumstances facing Protestant's counsel.

Most importantly, the October 4th agenda date is simply the best available date for all of the parties. If the matter is scheduled for a later date, Protestant's counsel will be under extreme burden to comply with requisite deadlines for filing post-order pleadings considering the time constraints associated with the surgery. Protestant's counsel is a sole-practitioner. Unlike the Applicant, Executive Director, or Office of Public Interest Council, Protestant does not have another attorney familiar with this case and able to attend a later agenda date and file timely post-agenda pleadings.

Also, Protestant's counsel communicated with all of the parties prior to filing this pleading. While the Executive Director does not intend to take a position on this issue, the Office of Public Interest Counsel (PIC) prefers that the matter be set for the October 4th agenda because counsel of record, Christina Mann, will be out of the country on October 18th. And although Applicant has not responded to Protestant's phone messages, it is unlikely that scheduling the matter for the October 4th agenda date would cause any hardship or prejudice considering the previous conversations with Applicant's counsel.

III. OR IN THE ALTERNATIVE, SCHEDULE THE MATTER FOR THE OCTOBER 18, 2006, COMMISSIONER'S AGENDA AND IMMEDIATELY ISSUE AND SERVE ON THE PARTIES THE COMMISSIONERS' FINAL ORDER

If the matter cannot conceivably be scheduled for the October 4th agenda, then Protestant respectfully requests that the matter be scheduled for the October 18th agenda and for TCEQ to immediately issue and serve the final order on all of the parties no later than October 20th. Protestant would also request that if the final order is contrary to the ALJ's recommendation that TCEQ serve the order via facsimile to Protestant's counsel, who is located in the Dallas area. This would afford Protestant's counsel at least 10 days to prepare a motion for rehearing and appellate pleadings prior to leaving for Houston on November 1st for additional pre-operative procedures and surgery.

IV. OR IN THE ALTERNATIVE, SCHEDULE THE MATTER FOR THE NOVEMBER 1, 2006, COMMISSIONER'S AGENDA, IMMEDIATELY RULE ON THE ISSUE, BUT SERVE THE FINAL ORDER AT SUCH A TIME THAT WILL ALLOW FOR AN EXTENSION TO FILE POST-AGENDA PLEADINGS ON OR AFTER DECEMBER 15, 2006, AND AUTOMATICALLY GRANT SUCH AN EXTENSION BASED UPON THIS MOTION

If the matter cannot conceivably be scheduled on either October 4th or 18th, Protestant's counsel would be able to attend the November 1st agenda; however, as previously discussed counsel would then immediately proceed to Houston for surgery and would be unable to prepare

or timely file post-agenda pleadings as necessary. Therefore, Protestant respectfully requests that if the matter ultimately is scheduled for November 1st, that the Commissioners immediately rule on the issue at agenda, but postpone serving the final order until such time as would allow for an extension to file post-agenda pleadings until on or after December 15, 2006. Protestant further requests that based upon this pleading, the Commission and/or General Counsel automatically grant such an extension at the same time the order is issued and served.

V. OR IN THE ALTERNATIVE, SCHEDULE THE MATTER FOR THE FIRST SCHEDULED AGENDA DATE IN 2007 OR LATER

If the matter cannot conceivably be scheduled on or before November 1st, then Protestant respectfully requests that the entire agenda matter be postponed until the first scheduled agenda date in 2007 or later because Protestant's counsel will be unable to attend another currently scheduled agenda date in 2006 for reasons previously discussed. If the matter cannot possibly be scheduled on October 4th as Executive Order's expedited process requires or on the other agenda dates as requested by Protestant, then the urgency assumed by the Executive Order simply does not exist and no extreme hardship would be created by postponing the matter until 2007.

VI. CONCLUSION AND PRAYER

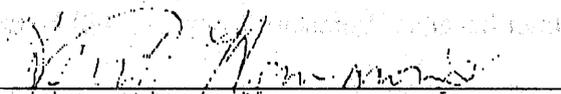
WHEREFORE, based upon the foregoing, Protestant respectfully prays that the Administrative Law Judges, General Counsel, Commissioners and/or Chief Clerk grant Protestant's requests and schedule the matter for the Commissioners' agenda in one of the following ways (as listed below according to priority):

- 1) immediately scheduled the matter for the October 4, 2006, agenda date as Governor Perry's Executive Order RP49 expedited process requires and 2) immediately issue notice to all of the parties; or in the alternative,
- 1) schedule the matter on the October 18, 2006, Commissioners' agenda date, 2) immediately issue notice to all of the parties, 3) immediately issue the final order and serve the order on all the parties no later than October 20, 2006, and 4) if the order is

contrary to the ALJ's PFD recommendation, then serve the order on Protestant's counsel via facsimile, or in the alternative,

- 1) scheduled the matter for the October 18 or November 1, 2006, Commissioners' agendas, 2) immediately issue notice to all of the parties, 3) rule on the issue at the agenda, but serve the Commissioners' final order in a manner that allows the Commissioners and/or General Counsel to grant Protestant an extension until December 15, 2006, to file post-agenda pleadings (i.e., motion for rehearing and/or reply), and 4) automatically grant such an extension based upon this motion; or in the alternative,
- if an order cannot be issued and extension granted as requested above and if the matter is not scheduled for an agenda date on or before October 18, 2006, then schedule the matter for the first scheduled agenda date in 2007 or later because Protestants' counsel will be unable to travel and attend any currently scheduled agenda dates after November 1, 2006 and likewise would be unable to timely file any necessary post-agenda pleadings or district court appeal, if necessary.

Respectfully submitted,


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Attorney for Robertson County: Our Land, Our Lives

CERTIFICATE OF SERVICE

I hereby certify that on this the 20 day of September, 2006, a true and correct copy of the foregoing has been sent by U.S. mail, facsimile and/or email (as indicated below) to the following:

VIA: Fax

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The Honorable Carol Wood
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FAX: 512/475-4994

VIA: Fax

State Office of Administrative Hearings
Attn: SOAH Docket Clerk
P.O. Box 13025
Austin, TX 78711-3025
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Wendi Hammond

The purpose of this report is to describe the results of the experiment conducted on the subject of the effect of the temperature on the rate of the reaction between hydrogen peroxide and potassium iodide in the presence of ceric sulfate as a catalyst.

The reaction between hydrogen peroxide and potassium iodide in the presence of ceric sulfate as a catalyst is a well-known reaction. The rate of the reaction is known to be dependent on the temperature. The purpose of this experiment is to determine the effect of the temperature on the rate of the reaction.

The experiment was conducted by measuring the rate of the reaction at different temperatures. The rate of the reaction was determined by measuring the amount of iodine produced in a given time interval. The results of the experiment are shown in the following table.

The results of the experiment show that the rate of the reaction increases with increasing temperature. This is in agreement with the Arrhenius equation, which states that the rate constant of a reaction increases exponentially with increasing temperature.

The rate of the reaction was found to be dependent on the concentration of the reactants. The rate of the reaction increases with increasing concentration of hydrogen peroxide and potassium iodide. The rate of the reaction is also dependent on the concentration of the catalyst, ceric sulfate.

The experiment was conducted under the following conditions: the concentration of ceric sulfate was kept constant at 0.01 M, the concentration of hydrogen peroxide was 0.1 M, and the concentration of potassium iodide was 0.01 M. The temperature was varied from 20°C to 40°C.

The results of the experiment show that the rate of the reaction increases with increasing temperature. This is in agreement with the Arrhenius equation, which states that the rate constant of a reaction increases exponentially with increasing temperature.