

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

September 9, 2009

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2009 SEP -9 PM 4: 33
CHIEF CLERKS OFFICE

Les Trobman, General Counsel
Texas Commission on Environmental Quality
PO Box 13087
Austin Texas 78711-3087

VIA FACSIMILE 512/239-5533

Re: SOAH Docket Nos. 582-08-0861 and 582-08-4013; TCEQ Docket Nos. 2007-1820-AIR and 2008-1210-AIR; Application of NRG Texas Power LLC for State Air Quality Permit 79188, Prevention of Significant Deterioration Air Quality Permit PSD-TX-1072, and MACT HAP-14 Permit

Dear Mr. Trobman:

We have considered the exceptions to the Proposal for Decision (PFD) in the above-referenced case and, by this letter, are responding to certain issues. For the most part, we conclude that the PFD and the parties' replies to exceptions adequately address most issues raised in exceptions. Therefore, this letter is limited to just a few issues that merit additional comment by us.

First, there may be some confusion regarding the evidence in the record as to NRG's mercury control technology, as required for the MACT analysis. In its exceptions, NRG contends that it has adequately identified its mercury control technology in its application and evidence, when it identified the suite of emissions controls it will use at Limestone Unit 3. We disagree.

While NRG has identified its general suite of emissions controls, the suite identified is not expected to enable NRG to meet the proposed MACT limit for mercury. Therefore, NRG has also recognized the need for an additional mercury-specific measure, such as sorbent injection, designed to give NRG's emissions controls the "enhancement" necessary to enable it to meet the proposed MACT emissions limit for mercury. However, despite its assertions to the contrary, NRG has not specifically chosen and identified the mercury-specific measure to be used to allow it to meet the MACT standard.

In its exceptions, NRG contends that it has chosen sorbent injection as the specific mercury control enhancement method. However, the evidence in the record (including the testimony cited in NRG's exceptions), is equivocating. NRG's own MACT application states that "sorbent injection *or other effective mercury control*" will be used.¹ And, when identifying the specific mercury control technology to be used, NRG's witnesses continually noted it would be something "such as injection of sorbents or a fuel additive," or "such as halogen or sorbent addition."² The use of the phrase "such as" makes it clear that NRG has not committed to any particular mercury-specific control technology (or "control enhancement" technology, using NRG's characterization). This fact is further clarified by the extensive testimony cited in the PFD, whereby NRG's own witnesses stated that a specific mercury control technology has not been chosen.³

Even if the specific technology has been chosen, we still conclude that the application lacks the analysis and information required by 40 C.F.R. § 63.43(e)(2)(xi)-(xii)—namely "the technical information on the design, operation, size, and estimated control efficiency of each control technology," and "supporting documentation including identification of alternative control technologies considered by the applicant to meet the emission limitation, and analysis of cost and non-air quality health environmental impacts or energy requirements for the selected control technology." Accordingly, even if we concluded that NRG had demonstrated that sorbent injection was identified as the specific mercury control method to be used, our recommendation does not change because we still do not find the record contains the information required by 40 C.F.R. § 63.43(e)(2)(xi)-(xii) for sorbent injection.

We do agree with the following changes, raised by the parties in exceptions, to the proposed findings of fact (FOF), conclusions of law (COL), and ordering provisions in the proposed Final Order:

- Replace "non-metal" with "metal" in current FOF 308;
- Replace "tons" with "pounds" in the last sentence of ordering provision 1.a.;
- Strike current FOF 226;
- In current FOF 234, insert the word "draft" before "guidance document;"
- In current FOF 235, replace "Under the TCEQ's guidance document" with "Under the draft guidance document relied on by the ED in evaluating BACT;"

We also agree that it would be appropriate to require NRG to implement a continuous emissions monitoring system (CEMS) for particulate matter. However, we did not specifically include ordering language to that effect. If the Commission agrees with this requirement, then it may include the four FOFs and the modification to current COL 228 as proposed by Sierra Club on page 17 of their Exceptions to the PFD.

¹ NRG. Ex. 7, at 18 (emphasis added).

² See NRG Ex. 2, at 8; NRG Ex. 49, at 21.

³ See PFD, at 107-108.

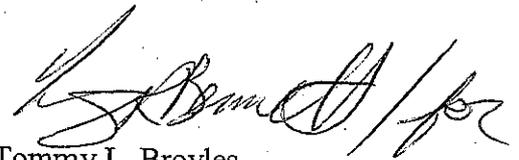
We continue to stand by the recommended language of Ordering Provision No. 43, believing it to be the best implementation language for NRG's commitment to no net increase in emissions. However, we take no strong position on this, and the language proposed by NRG, while providing less stringent limits than that provided under our proposed language, is also acceptable.

With those comments, we have nothing further to add at this time. However, we will appear at the Commission's Open meeting and will be prepared to answer any questions the Commissioners may have at that time.

Sincerely,



Craig R. Bennett
Administrative Law Judge



Tommy L. Broyles
Administrative Law Judge

CRB/lb
cc: Mailing List

STATE OFFICE OF ADMINISTRATIVE HEARINGS

AUSTIN OFFICE

**300 West 15th Street Suite 502
Austin, Texas 78701
Phone: (512) 475-4993
Fax: (512) 475-4994**

SERVICE LIST

AGENCY: Environmental Quality, Texas Commission on (TCEQ)
STYLE/CASE: NRG TEXAS POWER, LLC
SOAH DOCKET NUMBER: 582-08-0861
REFERRING AGENCY CASE: 2007-1820-AIR

**STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

**ADMINISTRATIVE LAW JUDGE
ALJ CRAIG R. BENNETT**

REPRESENTATIVE / ADDRESS

PARTIES

DEREK R. MCDONALD
BAKER BOTTS, L.L.P.
1500 SAN JACINTO CENTER
98 SAN JACINTO BOULEVARD
AUSTIN, TX 78701
(512) 322-2667 (PH)
(512) 322-8342 (FAX)
derek.mcdonald@bakerbotts.com

NRG TEXAS POWER LLC

GARRETT ARTHUR
STAFF ATTORNEY
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
OFFICE OF PUBLIC INTEREST COUNSEL
MC-175 P.O. BOX 13087
AUSTIN, TX 78711-3087
(512) 239-5757 (PH)
(512) 239-6377 (FAX)
garthur@tceq.state.tx.us

OFFICE OF THE PUBLIC INTEREST COUNSEL

WENDI HAMMOND
ATTORNEY
7325 AUGUSTA CIRCLE
PLANO, TX 75025
(972) 746-8540 (PH)
(469) 241-0430 (FAX)
wendi@TexasEnvironmentalLaw.net

ROBERTSON COUNTY: OUR LAND, OUR LIVES
(RCOLOL)

LES TROBMAN
GENERAL COUNSEL
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
MC-101 P.O. BOX 13087
AUSTIN, TX 78711-3087

(512) 239-5533 (FAX)

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

ILAN M. LEVIN
ATTORNEY
ENVIRONMENTAL INTEGRITY PROJECT
1303 SAN ANTONIO STREET, SUITE 200
AUSTIN, TX 78701
(512) 637-9477 (PH)
(512) 584-8019 (FAX)
ilevin@environmentalintegrity.org

SIERRA CLUB

BOOKER HARRISON
SENIOR ATTORNEY - AIR
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
ENVIRONMENTAL LAW DIVISION
MC-173 P.O. BOX 13087
AUSTIN, TX 78711-3087
(512) 239-4113 (PH)
(512) 239-0606 (FAX)
booharri@tceq.state.tx.us

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

THOMAS WEBER
MCELROY, SULLIVAN, MILLER LLP
200 P. O. BOX 12127
AUSTIN, TX 78711
(512) 327-8111 (PH)
(512) 327-6566 (FAX)
tweber@msmtx.com

VALENCE OPERATING COMPANY

CHARLES IRVINE
BLACKBURN & CARTER, P.C.
4709 AUSTIN
HOUSTON, TX 77004
(713) 524-1012 (PH)
(713) 524-5165 (FAX)
charles@blackburncarter.com

DOUGLAS W. RAY

CHARLES E. MORGAN
EXECUTIVE DIRECTOR
CITIZENS FOR ENVIRONMENTAL CLEAN-UP
609 E. F.M. 489
BUFFALO, TX 75831
(903) 389-5616 (PH)
cemorgan75831@yahoo.com

CITIZENS FOR ENVIRONMENTAL CLEAN-UP

LAYLA MANSURI
ATTORNEY
ENVIRONMENTAL INTEGRITY PROJECT
1303 SAN ANTONIO STREET
AUSTIN, TX 78701
(512) 637-9477 (PH)
(512) 584-8019 (FAX)
lmansuri@environmentalintegrity.org

SIERRA CLUB

JOHN M. QUINLAN
MCELROY, SULLIVAN & MILLER, L.L.P.
P. O. BOX 12127
AUSTIN, TX 78711
(512) 327-8111 (PH)
(512) 327-6566 (FAX)

VALENCE OPERATING COMPANY

xc: Docket Clerk, State Office of Administrative Hearings