

Environmental Integrity Project
1303 San Antonio, Suite 200
Austin, Texas 78701
Phone: (512) 637-9477
Fax: (512) 584-8019
www.environmentalintegrity.org

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

2009 JUL 23 PM 4: 29

CHIEF CLERKS OFFICE

July 23, 2009

Ms. LaDonna Castañuela
Chief Clerk, MC-105
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, TX 78711-3087
Fax: (512) 239-3311

Via Hand-Delivery

Re: TCEQ Docket No. 2007-1820-AIR; SOAH Docket No. 582-08-0861; *Application of NRG Texas Power LLC for State Air Quality Permit 79188 and Prevention of Significant Deterioration Air Quality Permit PSD-TX-1072*

and

TCEQ Docket No. 2007-1210-AIR; SOAH Docket No. 582-08-4013; *Application of NRG Texas Power LLC for Hazardous Air Pollutant Major Source [FCAA § 112(g)] Permit HAP-14*

Dear Ms. Castañuela:

Enclosed for filing in the above-referenced cause, please find the original and seven (7) copies of Protestant Sierra Club's Reply to the Exceptions to the Proposal for Decision of NRG Texas Power LLC and the Executive Director.

Thank you for your attention to this mater. Please call me at (512) 637-9477 should you have any questions.

Sincerely,



Christina Mann

Enclosure

cc: SOAH Docketing Clerk (*via Hand-Delivery*)
Service List (*via Electronic Mail*)

CONSOLIDATED SOAH DOCKET NO. 582-08-0861 2009 JUL 23 PM 4: 29

TCEQ DOCKET NOS. 2007-1820-AIR AND 2008-1210-AIR CHIEF CLERKS OFFICE

APPLICATION OF NRG TEXAS POWER § BEFORE THE STATE OFFICE
 LLC FOR STATE AIR QUALITY §
 PERMIT 79188 AND PREVENTION OF § OF
 SIGNIFICANT DETERIORATION AIR §
 QUALITY PERMIT PSD-TX-1072 AND §
 FOR HAZARDOUS AIR POLLUTANT §
 MAJOR SOURCE PERMIT NO. HAP-14 § ADMINISTRATIVE HEARINGS

**PROTESTANT SIERRA CLUB'S REPLY TO THE EXCEPTIONS TO THE PROPOSAL
 FOR DECISION OF NRG TEXAS POWER LLC AND THE EXECUTIVE DIRECTOR**

TO THE HONORABLE CHAIRMAN GARCIA AND COMMISSIONERS SHAW AND
 SOWARD:

COMES NOW, Sierra Club, and pursuant to Commission Rule 80.257, presents this
 reply to the exceptions to the proposal for decision (PFD) submitted by NRG Texas Power LLC
 (NRG) and the Executive Director (ED) of the Texas Commission on Environmental Quality
 (TCEQ).

NRG's MACT application remains incomplete

NRG dismisses the regulatory requirement to identify a selected control technology in its
 MACT application, arguing that, MACT, after all, is an emission limitation, not a requirement
 for a specific device.¹ The MACT regulations, however, require identification of the selected
 control technology in the initial application. 40 C.F.R. § 63.43(e). Only then can the permitting

¹ See NRG Texas Power LLC's Exceptions to the Proposal for Decision and Order of the State Office Of
 Administrative Hearings, Consolidated SOAH DOCKET NO. 582-08-0861; TCEQ DOCKET NOS. 2007-1820-AIR
 AND 2008-1210-AIR, page 5.

authority and the public adequately evaluate the selected technology's capability to "meet the MACT emission limitation."²

In addition to arguing that NRG is not required to "specify a control technology selected by the owner or operator that, if properly operated and maintained, will meet the MACT emission limitation,"³ NRG argues that it has actually identified the control technology by its suite of controls already confirmed (a low-NOx combustion system, a selective catalytic reduction (SCR) system, a wet Flue Gas Desulfurization (wet FGD) system using limestone as the scrubber agent, *sorbent injection or other effective mercury control*, and a fabric filter) as the required identification of the control technology. NRG has not selected the mercury-specific control. Indeed, NRG experts never testified that the suite of controls identified actually addresses the requirement to identify a technology for reducing mercury emissions. Instead, as the ALJs note, NRG's expert, Mr. Colin Campbell argues that NRG does not have to provide any information on any control technologies.⁴ In its application and throughout the hearing process, NRG ignored the plain language of the regulation which obligates an applicant to "specify a control technology selected by the owner or operator that, if properly operated and maintained, will meet the MACT emission limitation" as part of the application.⁵ Sierra Club disagrees with Mr. Campbell's opinion and with NRG's argument that the previously identified, non-mercury specific control technologies somehow complies with the clear language in the MACT

² TCEQ's SIP approval requires public participation in the preconstruction permitting process, including the MACT determination. Therefore, by refusing to identify the technology on which the public has a right to comment, NRG minimizes the role of public participation in the process by removing the public's opportunity to comment and evaluate the capability of the selected technology.

³ 40 C.F.R. § 63.43(e).

⁴ See the Proposal for Decision of the State Office Of Administrative Hearings, Consolidated SOAH DOCKET NO. 582-08-0861; TCEQ DOCKET NOS. 2007-1820-AIR AND 2008-1210-AIR, page 108, footnote 246.

⁵ 40 C.F.R. § 63.43(e).

regulations that requires specification and selection of mercury controls in *the application* for a case by case MACT determination.

Reply to the Executive Director's Exceptions

Sierra Club is concerned about the content and tone of the exceptions filed by the Executive Director. The Executive Director's legal and factual exceptions appear to go well beyond what is expected from a party whose participation is "for the sole purpose of providing information to complete the administrative record."⁶ In arguing for his own conclusory assertions to be considered above that of the fact finder (the ALJs), the ED goes beyond completing the administrative record. For example, in his exceptions related to BACT for NOx, SO₂, and CO, the ED summarizes the initial review, suggesting that the occurrence of that initial review is enough evidence to "substantiate" his initial conclusions, ignoring the entirety of the record evidence in this contested case hearing. It is not the ED's role to advocate for the ED's Preliminary Determination or even to find a way to "substantiate" his earlier decisions. The ED points to no evidence in the record that was overlooked by the ALJs. His exceptions are clearly unnecessary and beyond his statutorily defined role to complete the record, and should be stricken.

Additional Issues

While the two separate Dockets have been consolidated in this matter, the permits have not. The PSD and HAP permits contain duplicative (e.g., fuel specifications in PSD permit Special Condition 6, HAP permit Special Condition 5) as well as conflicting (e.g., the mercury limit in PSD permit Special Condition 8A is higher than HAP permit Special Condition 6A; the

⁶ TEXAS WATER CODE Sec. 5.228 (c).

filterable PM limit in PSD permit Special Condition 8B is higher than HAP permit Special Condition 6B) conditions. The permits should be remanded to the Executive Director in order to truly consolidate the two permits to avoid confusion and potential compliance issues.

As a related matter, Sierra Club respectfully re-urges the ALJs to recommend that the Draft Permit be altered to require the recommendation on page 115 of the Proposal for Decision relating to Particulate Matter Continuous Monitoring Systems ("PM CEMS"). Incorporating the requirement for PM CEMS would entail alterations to several special conditions, of both the PSD and HAP permits, such as the conditions for Testing and Monitoring as well as Initial and Continuous Demonstration of Compliance sections, which is yet another reason why a remand may be the only reasonable remedy in order for the TCEQ staff to deliberatively incorporate certain changes to the Draft Permit.

Sierra Club incorporates Protestant Douglas Ray's Reply to the Exceptions of NRG Texas Power LLC and the Executive Director.

Respectfully Submitted,

ENVIRONMENTAL INTEGRITY PROJECT

By:

Christina Mann

Ilan Levin

Texas Bar No. 00798328

Layla Mansuri

Texas Bar No. 24040394

Christina Mann

Texas Bar No. 24041388

1303 San Antonio Street, Suite 300

Austin, Texas 78701

Phone: 512-637-9477

Fax: 512-584-8019

**ATTORNEYS FOR PROTESTANT
SIERRA CLUB**

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct original and seven (7) copies of Sierra Club's Reply to the Exceptions to the Proposal for Decision of NRG Texas Power LLC and the Executive Director on this 23rd day of July, 2009 to the Chief Clerk of the Texas Commission on Environmental Quality and provided true and correct copies to the service list below.



Christina Mann
Attorney for Sierra Club

CHIEF CLERKS OFFICE

2009 JUL 23 PM 4: 29

TEXAS
COMMISSION
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State Office of Administrative Hearings

Via Electronic Mail

Administrative Law Judge Bennett
Administrative Law Judge Broyles
State office of Administrative Hearings
300 West 15th Street
Austin, TX 78701
PH: (512) 475-4993
FAX: (512) 475-4994
Craig.bennett@soah.state.tx.us
Tommy.broyles@soah.state.tx.us

For the Applicant

Via Electronic Mail

Derek R. McDonald
Whitney Swift
Baker Botts,, L.L.P.
1500 San Jacino Center
98 San Jacinto Blvd.
Austin, Texas 78701-4039
PH: (512) 322 - 2667
FAX: (512) 322 - 8342
derek.mcdonald@bakerbotts.com
whitney.swift@bakerbotts.com

For the Executive Director

Via Electronic Mail

Booker Harrison
TCEQ
Environmental Law Division, MC - 173
P. O. Box 13087
Austin, Texas 78711-3087
PH: 512-239-4113
FAX: 512-239-0606
booharri@tceq.state.tx.us

For the Public Interest Counsel

Via Electronic Mail

Garret Arthur
TCEQ
Office of Public Interest Counsel, MC - 175
P. O. Box 13087
Austin, Texas 78711-3087
PH: 512-239-5757
FAX: 512-239-6377
garthur@tceq.state.tx.us

For Robertson County: Our Land, Our Lives

Via Electronic Mail

Wendi Hammond
7325 August Circle
Plano, Texas 75025
PH: (972) 746 - 8540
FAX: (469) 241 - 0430
wendi@TexasEnvironmentalLaw.net

For Citizens for Environmental Clean-Up

Via Electronic Mail

Charles E. Morgan
Route 2, Box 92A
Buffalo, Texas 75831
Phone (903) 389-5616
Cemorgan75831@yahoo.com

For Valence Operating Company

Via Electronic Mail

Thomas Weber
Paul Tough
McElroy, Sullivan, & Miller, L.L.P.
P.O. Box 12127
Austin, Texas 78711
Phone: (512) 327-8111
Fax: (512) 327-6566
tweber@msmtx.com
ptough@msmtx.com

For Douglas W. Ray

Via Electronic Mail

James Blackburn, Jr.
Charles Irvine
Blackburn & Carter, P.C.
4709 Austin Street
Houston, Texas 77004
Phone: (713) 524-1012
Fax: (713) 524-5165
jbb@blackburncarter.com
Charles@blackburncarter.com