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TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

September 24, 2009

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& Overnight Delivery

Ms. LaDonna Castanuela
Texas Commission on Environmental Quality
Office of the Chief Clerk (MC 105)
12100 Park 35 Circle
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Austin, Texas 78753

RE: Application by Aspen Power, L.L.C., for proposed Air Quality Permit Numbers:
81706, PSD-TX 1089, HAP 12; TCEQ Docket No. 2008-1145-AIR; SOAH
Docket No. 582-09-0636

Dear Ms. Castañuela:

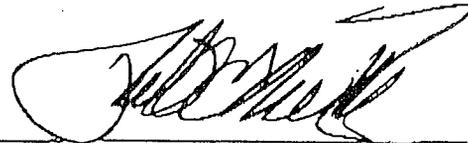
Enclosed please find an original and 7 copies of Applicant's Reply Brief.

Thank you for your attention to this matter.

Sincerely,

CRAIN, CATON & JAMES, P.C.

By:



Robert E. "Robin" Morse, III

REM/nm
Enclosure

cc: Honorable Judge Sarah Ramos
300 West 15th Street, Suite 502
Austin, Texas 78701

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September 24, 2009

Page 2

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SOAH DOCKET NO. 582-09-0636
TCEQ DOCKET NO. 2008-1145-AIR
TCEQ AIR QUALITY PERMIT NO. 81706,
PSD-TX-1089, HAP12

APPLICATION OF
ASPEN POWER, L.L.C. FOR
LUFKIN GENERATING PLANT
LUFKIN, ANGELINA COUNTY

§
§
§
§

BEFORE THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

2009 SEP 24 PM 4: 42
CHIEF CLERK'S OFFICE
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

APPLICANT'S REPLY BRIEF

TO THE HONORABLE COMMISSIONERS:

Applicant Aspen Power, LLC ("Aspen") files this reply in response to Annie Mae Shelton and Aligned Protestants' Response to Proposal for Decision and the Executive Director's Exceptions to the Administrative Law Judge's Proposal for Decision and Order.

**I.
REPLY TO PROTESTANTS**

Aspen continues to assert that the Protestants' position in this case is not supported by applicable law, regulations or the evidence and that the permit issued by the Executive Director on July 25, 2008 (herein "Draft Permit") contains the appropriate emission limitations and provisions to regulate the Aspen biomass power plant. As to the specific topics discussed in Annie Mae Shelton and Aligned Protestants' Response to Proposal for Decision, Aspen replies as follows:

1. The ALJ's Findings Regarding the Draft Permit's Start-Up, Shutdown, and Maintenance Requirements Should be Upheld.

The Draft Permit's start-up, shutdown, and maintenance ("SSM") requirements comply with the Clean Air Act. The Draft Permit requires that the total emissions of air contaminants must not exceed the values listed in the maximum allowable emission rate table ("MAERT") at any time. Exhibit ED-8 at 3 (General Condition 8). Based upon the plain language of General Condition 8, the permit does not exclude SSM emissions from compliance with the MAERT.

Protestants incorrectly analogize the lb/MMBtu SSM exception provided in Special Condition 9 of the Draft Permit to those in *In re RockGen Energy Center*, PSD Appeal No. 99-1 (Aug. 25, 1999). See Protestants' Response to Proposal for Decision at 2. The facts before the Environmental Appeals Board in *RockGen* are distinguishable because in *RockGen* the permitting authority acknowledged that emissions from the permitted facility may exceed permit requirements, yet no consideration was given to the design of the facility or other alternatives available to avoid excess emissions during SSM. *Id.* at 553. Here, testimony provided by Joseph Woolbert shows that SSM emissions will be lower than the emissions during normal operations, will not exceed the pound per hour emission limit in the MAERT and, therefore, SSM emissions do not represent the worst case scenario. Tr. 91 and 96. Finding this testimony persuasive, the ALJ emphasized that "the boiler will either not be operating at all (during maintenance), will be operating with biodiesel fuel at a lower capacity as it fires up, or will be operating at a lower capacity as it winds down." Proposal for Decision at 18-19.

However, there is a possibility of concentration spikes when temperatures are low during startup or shutdown, which could affect the efficiency of the combustion and the selective noncatalytic reduction ("SNCR"). *Id.* at 19. Therefore, Special Condition 33 of the Draft Permit requires that Aspen must minimize emissions during SSM through a written SSM plan that establishes procedures to follow during "readily foreseeable start-up scenarios." Exhibit ED-8 at 17 (Special Condition 33). As the ALJ found, the inclusion of this type of special condition "parallels the EPA requirement of secondary BACT limits during [SSM]." Proposal for Decision at 19. Even *RockGen*, a case which Protestants rely upon, acknowledges that secondary BACT limits are permissible. *RockGen*, slip op. at 554. Therefore, the Commission should uphold the ALJ's determination that no other SSM limitations are necessary.

2. The ALJ Properly Determined that the Three-Tiered BACT Approach Should Be Applied, But Erred in Evaluating the BACT Limits That Apply to the Draft Permit.

The Protestant's reference to a recent proposal from EPA Region 6 raising concerns about the Texas definition of BACT is a brief and long-shot attempt to challenge TCEQ's BACT process. See Protestants' Response to Proposal for Decision at 2 (citing to EPA Region 6's proposal to reject certain provisions in Texas' SIP). Brief, because the entire discussion included three sentences; a long-shot because, regardless of the TCEQ definition of BACT, the ALJ determined that, although formatted differently, the application of Texas' BACT analysis is equivalent to the BACT analysis mandated by EPA. Proposal for Decision at 21 (citing 54 Fed. Reg. 52,823 (Dec. 22, 1989)); Hughes Hearing Testimony Tr. 680; see also Letter from Mark R. Vickery (TCEQ) to Lawrence E. Starfield (EPA Region 6) (June 5, 2009), available at http://www.tceq.state.tx.us/assets/public/permitting/air/Announcements/tceq_airpermitting_epa.pdf.

Both EPA's and Texas' BACT definitions require the consideration of technical limitations, such as energy and environmental concerns, as well as the economic reasonableness of the emissions limitation, in order to determine BACT. Compare 40 C.F.R. 51.166(b)(12) with 30 T.A.C. § 116.111(2)(C). Further, both processes address same the fundamental concepts. The ALJ determined that Texas' BACT analysis requires the consideration of new technological developments and also requires an evaluation of "whether those technologies would be feasible for the specific facility under consideration, and whether that feasible technology is economically reasonable under the circumstances." Proposal for Decision at 22. As the ALJ noted, Protestants' own expert concurred that when BACT is appropriately evaluated using Texas' three-tiered method, the result should be "maximum emission reductions in light of energy, environmental, and economic impacts." Proposal for Decision at 22. As a result, the

ALJ found that "if the tiered approach is followed correctly, it should result in a fair, balanced consideration of both existing and emerging technology that will lower emissions." Proposal for Decision at 23.

Given the apparent equivalency of the result in applying the federal and Texas approaches to BACT analysis, it is unclear why Protestants have briefed "BACT Definition" as an issue. To the extent they are asserting that the TCEQ staff was required to follow the EPA "top down" approach to BACT analysis, such an argument has already been disclaimed by EPA and rejected by the U.S. Supreme Court. As stated by EPA when it actually approved the Texas PSD program in 1992,

"The EPA did not intend to suggest that Texas is required to follow EPA's interpretations and guidance issued under the Act in the sense that those pronouncements have independent status as enforceable provisions of the Texas PSD SIP, such that the mere failure to follow such pronouncements, standing alone, would constitute a violation of the Act." 57 Fed. Reg. 28095 (June 24, 1992) (Exhibit ED-16).

During this same approval promulgation, EPA expressly confirmed that the State of Texas is not required to follow the EPA "top down" approach to BACT. *Id.* at 28095-6. Likewise in the case of *Alaska Department of Environmental Conservation v. EPA*, 540 U.S. 461, 476 n. 7 (2004), the U.S. Supreme Court wrote: "Nothing in the act or its implementing regulations mandates top-down analysis."

As the Commission is aware, no final decision has been made yet related to any of the provisions that EPA has raised concerns about. See EPA Region 6, Texas Air Permitting Program, <http://www.epa.gov/region6/6xa/sippresrelease.html> (last visited Sept. 23, 2009). Without additional action by TCEQ, the current rules remain effective until revoked or amended by the state agency. See TEX. WATER CODE SECTION 5.103 (stating the Commission shall follow its own rules as adopted until it changes them in accordance with the Texas Administrative Procedure Act.); see also *TGS-NOPEC Geophysical Co. v. Combs*, 268 S.W.3d 637, 652 (Tex.

App. – Austin 2008, pet. filed) citing *Rodriguez v. Service Lloyds Ins. Co.*, 9975 S.W.2d 248, 255 (Tex. 199) and *PUC v. Gulf States Util. Co.*, 809 S.W.2d 201, 207 (Tex. 1991) [“an agency is bound to follow its own rules and procedures”]. Therefore, the Texas definition of BACT and TCEQ guidance (whether different or not) are the appropriate considerations for the Aspen application.

3. Protestants’ Proposed Pollutant Emission Limits are Not Supportable.

In Applicant’s Exceptions and Brief in Response to Proposal for Decision, Aspen set forth its analysis as to why the emission limits set forth in the Draft Permit were appropriately developed by the TCEQ staff and why alternate limits recommended by Protestants’ expert were not consistent with MACT/BACT requirements, especially when considered in light of the timing of the filing of the Aspen application, the TCEQ staff’s technical review and the close of the public comment period. To assist the Commission in its review of the emission limit issue, Aspen offers the attached chart summarizing the biomass facilities discussed in the PFD, the date of their permitting, their operational status and their control technologies on a pollutant-by-pollutant basis. As the chart indicates, no one operating biomass facility has the permit limits advocated by Protestants. Thus, it cannot be said that Protestants’ proposed limits have been “achieved in practice” as set forth in the definition of MACT at 30 T.A.C. § 116.15 or have been otherwise demonstrated to be consistently achievable under worst case conditions for compliance purposes.

Turning to Protestants’ recommended limits, Aspen further notes the following:

NO_x

The proposed 0.060 lb/MMBtu limit for NO_x only appears in the December 2008 permit for the Russell Massachusetts plant, which is not operational. Burlington/McNeil (permitted in April 2008), Bridgewater (permitted in September 2007) and Whitefield (permitted in 2005)

operate under a 0.075 lb/MMBtu limit in order to secure Renewable Energy Credits ("RECs") and actually have NO_x limits as high as 0.33 lb/MMBtu when not operating for REC subsidies.

CO

Protestants' recommended limit of 0.075 lb/MMBtu again only appears in the December 2008 permit for the proposed Russell facility. A 0.10 lb/MMBtu CO limit was put in the permit for the South Point, Ohio 2004 permit, another facility proposing to employ oxidation catalysts which has not been built and operated. Protestants' expert referenced the Bridgewater and Whitefield plants as employing oxidation catalysts, but the evidence does not reflect any emission limits for CO at the level now proposed by Protestants. At that, it is noteworthy that the evidence established that Bridgewater only added oxidation catalysts beginning in October 2007 on a pilot scale basis and that Whitefield added oxidation catalysts in June 2008, with the permitted limits for these two facilities being 0.253 lb/MMBtu and 0.26 lb/MMBtu, respectively.

VOC

Protestants' recommended VOC limit of 0.01 lb/MMBtu again only appears in the Russell December 2008 permit and has not been established operationally. No control limits were introduced into evidence for the other New England biomass plants relied upon by Protestants. The VOC limits developed by the TCEQ staff of 0.0214 lb/MMBtu therefore was not contradicted by the permit limit for any operating biomass facility.

PM

Protestants' proposed limit for particulate matter of 0.012 lb/MMBtu (filterable) is derived exclusively from the December 2008 Russell permit. The other facilities using ESP technology (as recommended by Protestants' expert) (Burlington/McNeil, Bridgewater, Boralex Stratton, Boralex Ashland, Whitefield and Rye Gate) all have higher limits for filterable PM, with the lowest being 0.020 lb/MMBtu at Burlington/McNeil, Boralex Ashland and Rye Gate.

Non-Mercury Metal HAPs

Non-mercury metal HAPs are controlled through a surrogate PM limit by EPA, TCEQ and other state agencies. Therefore, see discussion above on PM.

Organic HAPs

Like metal HAPs, organic HAPs are regulated through a surrogate limit, i.e., CO. Therefore, see discussion above on CO.

Mercury

Protestants contend that Aspen's boiler "will emit mercury" and fault the Draft Permit for not including an emission limit for mercury. However, Protestants have not proposed a mercury limit. The testimony during the hearing was that the TCEQ staff engineer took the potential for mercury emissions into account, determined that mercury would not be present from the wood combustion process in any significant concentration and therefore determined it was unnecessary to impose a mercury limit in the Draft Permit, Hughes Prefiled Testimony, pp. 19-20 (Exhibit ED-1). This decision was reasonable and appropriate.

II.

REPLY TO EXECUTIVE DIRECTOR

Aspen appreciates the diligent work performed by the TCEQ staff on its application and the Executive Director's continued support for the Draft Permit. The only correction/clarification that Aspen would note concerns Executive Director's proposed Conclusion of Law No. 4 with respect to operating hours. There, the Executive Director recommends the following:

"Upon issuance of Air Quality Permit No. 81706, PSD-TX-1089, and HAP 12 for Aspen Power, LLC, the permit should be amended to include a special condition that the permit [sic] operate for only 8,400 hours out of 8,760 hours, . . ."

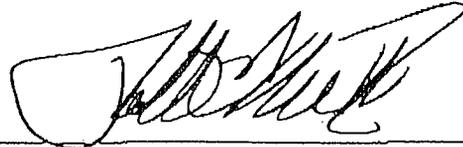
Aspen is agreeable to this restriction as it related to boiler operations, the primary emission source for the plant. Aspen would appreciate clarification that maintenance activities and non-

combustion wood fuel management activities would not be so restricted. Aspen believes that, consistent with air quality modeling aspects of its application, such activities should not be considered "operating" in the sense of actual electricity production.

Respectfully submitted,

CRAIN, CATON & JAMES, P.C.

By:



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PFD CITED PLANTS WITH ASSOCIATED CONTROL TECHNOLOGIES AND EMISSION LIMITS

| Plant | NO _x | CO (MACT surrogate for organic HAP) | PM (MACT surrogate for metal HAP) | VOC |
|--------------------------------------|--|--|--|---|
| Boralax, Stratton (1/4/2005 Permit) | <p>Ecotube (SNCR) R-SCR (SCR) - Optional</p> <p>Voluntarily installed SCR and SNCR. When getting RECs permitted limit is 0.075 lb/MMbtu; otherwise 0.24 lb/MMbtu</p> | <p>No control indicated in permit</p> <p>Permitted for 0.60 lb/MMbtu</p> | <p>Multicyclone ESP</p> <p>Permitted for 0.03 lb/MMbtu</p> | <p>No control indicated in permit</p> |
| Burlington/McNeil (4/21/2008 Permit) | <p>R-SCR</p> <p>Permitted for 0.075 lb/MMbtu and installed to comply with REC requirements; before using SCR permitted for 0.23 lb/MMbtu</p> <p>(Hearing testimony indicated they are using R-SCR)</p> | <p>Good Combustion Practices</p> <p>Permitted for 2.1 lb/MMbtu</p> | <p>Mechanical Collectors (cyclone) & ESP</p> <p>Permitted for 0.020 lb/MMbtu</p> | <p>No control indicated in the permit</p> |
| Bridgewater (9/12/2007 Permit) | <p>SNCR</p> <p>R-SCR- Optional</p> <p>One, not both, may be used at one time. When operating to obtain RECs permitted for 0.075 lb/MMbtu, when not obtaining RECS 0.33 lb/MMbtu.</p> | <p>Good Combustion Practices</p> <p>Permitted for 0.253 lb/MMbtu.</p> <p>(Not included in permit, but hearing testimony reflects they added an Oxidation Catalyst in October 2007 as a pilot test)</p> | <p>Multicyclone Gravel Bed Filter Baghouse</p> <p>Permitted for 0.10 lb/MMbtu</p> | <p>No control indicated in the permit.</p> <p>(Not included in permit, but hearing testimony reflects they added an Oxidation Catalyst in October 2007 as a pilot test)</p> |

| | | | | |
|---|--|--|---|---|
| Russell (12/2008 Permit) (Not Operational) | R-SCR Permitted for 0.60 lb/MMbtu | Oxidation Catalyst Permitted for 0.075 lb/MMbtu | Multicyclone & ESP Permitted for 0.012 lb/MMbtu | Oxidation Catalyst Permitted for 0.01 lb/MMbtu |
| Whitefield (9/30/2005 Permit) | RSCR Permitted voluntarily for state only limit of 0.075 lb/MMbtu for RECs over a calendar quarter; federal limit of 0.33 lb/MMbtu on a 24 hour calendar day | Optional Oxidation Catalyst Permitted for 0.26 lb/MMbtu (Not included in permit, but bearing testimony reflects they added an Oxidation Catalyst in June 2008) | Multicyclone & ESP Permitted for 0.10 lb/MMbtu | No control indicated in permit (Not included in permit, but bearing testimony reflects they added an Oxidation Catalyst in June 2008) |
| Rye Gate (9/15/97 Permit) | SNCR Permitted for 0.15 lb/MMbtu | No control indicated in permit | Mechanical Collectors /ESP Permitted for 0.020 lb/MMbtu | No control indicated in permit Permitted for 0.03 lb/MMbtu |
| South Point (2004 Permit) (Not Operational) | SCR No limit in evidence | Oxidation Catalyst Permitted for 0.10 lb/MMbtu | ESP with baghouse Permitted for 0.021 lb/MMbtu | Oxidation Catalyst No limit in evidence |
| Aspen Power, LLC | SNCR Permit limit of 0.15 lb/MMbtu | Good Combustion Advanced Stoker Technology Permit limit of 0.31 lb/MMbtu | Multicyclone & ESP Permit limit of 0.025 lb/MMbtu both filterable and condensable | Good Combustion Advanced Stoker Technology Permitted for 0.0214 lb/MMbtu |

CERTIFICATE OF SERVICE

I certify by my signature that on September 24, 2009, a complete and correct copy of the foregoing was served to the following party representatives as indicated:

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FROM: Robert E. "Robin" Morse, III
NUMBER OF PAGES: 14
(INCLUDING COVER PAGE)

DATE: September 24, 2009

C/M#: 5486/001

SUBJECT: SOAH Docket No. 582-09-0636; TCEQ Docket No. 2008-1145-AIR; TCEQ Air Quality Permit No. 81706, PSD-TX-1089, HAP12

MESSAGE: Attached is Applicant's Reply Brief.

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