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Mark R. Vickery, P.G., *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

September 14, 2009

LaDonna Castañuela, Chief Clerk
Texas Commission on Environmental Quality
P.O. Box 13087, MC 105
Austin, Texas 78711-3087

CHIEF CLERKS OFFICE

2009 SEP 14 PM 4: 54

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

Re: Aspen Power LLC, Contested Case Hearing for Application for Air Permit No. 81706, PSD-TX-1089, HAP12
SOAH Docket #582-09-0636; TCEQ Docket # 2008-1145-AIR
Executive Director's Exceptions to the Administrative Law Judge's Proposal for Decision and Order

Dear Ms. Castañuela:

Enclosed please find a copy of the Executive Director's Exceptions to the Administrative Law Judge's Proposal for Decision and Order for the contested case hearing listed above.

If you have any questions, please do not hesitate to call me at (512) 239-0891.

Sincerely,

A handwritten signature in black ink, appearing to read "Amy Browning", with a long, sweeping underline that extends to the right.

Amy L. Browning
Staff Attorney
Environmental Law Division

Enclosures

SOAH DOCKET NO. 582-09-0636
TCEQ DOCKET NO. 2008-1145-AIR

APPLICATION OF
ASPEN POWER, LLC
FOR PROPOSED AIR PERMIT
NOS. 81706, PSD-TX-1089, AND
HAP12

§ BEFORE THE STATE OFFICE OF
§
§ ADMINISTRATIVE HEARINGS
§

CHIEF CLERKS OFFICE

2009 SEP 14 PM 4:54

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

EXECUTIVE DIRECTOR'S EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGES' PROPOSAL FOR DECISION AND ORDER

TO: HONORABLE ADMINISTRATIVE LAW JUDGE SARAH G. RAMOS

COMES NOW the Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) and files the Executive Director's Exceptions to the Administrative Law Judges' Proposal for Decision and Order, and in support thereof shows the following:

I. INTRODUCTION/BACKGROUND

On April 23, 2007, Aspen Power, LLC (Aspen) submitted a new source review application to the Texas Commission on Environmental Quality (TCEQ) for State Air Quality Permit No. 81706 and Prevention of Significant Deterioration (PSD) Air Quality Permit No. PSD-TX-1089 which would authorize construction and operation of the Lufkin Generating Plant, a biomass fired electric generating facility in Lufkin, Texas.¹ The original application included a review based on 40 CFR Part 63, Subpart DDDDD, the National Emission Standards for Hazardous Air Pollutants for Industrial, Commercial, and Institutional Boilers and Process Heaters, however, this standard was vacated on June 8, 2007, by the United States Court of Appeals for the D.C. Circuit.² The application then required a case-by-case §112(g) maximum

¹ Applicant's Exhibit No. 5.

² *Natural Res. Def. Council v. E.P.A.*, 489 F.3d 1250 (D.C.Cir. 2007).

achievable control technology (MACT) analysis for hazardous air pollutants (HAPs).³ This application was also accepted as the application for a case by case maximum achievable control technology (MACT) determination for Hazardous Air Pollutant (HAP) Permit 12.

TCEQ staff from the Air Permits Division and the Air Dispersion Modeling Team reviewed the documentation submitted by Aspen in the application. Upon completing the review, the Executive Director issued the Notice of Application and Preliminary Decision, which includes the Preliminary Determination Summary and draft permit. In issuing the draft permit, the ED concluded that: Aspen's proposed controls constitute best available control technology (BACT) for criteria pollutants and maximum achievable control technology (MACT) for hazardous air pollutants; and the modeling analysis demonstrates that the proposed project will not violate the National Ambient Air Quality Standards (NAAQS) or have any adverse impacts on the public health, soils, or the environment. TCEQ received hearing requests for Aspen's permit, however, letters withdrawing all of these requests were also received; therefore, the permit was issued by the ED on July 25, 2008.⁴

The commission subsequently received a Motion to Overturn (MTO) the ED's issuance of the permit. The commission heard arguments on the MTO at a regularly scheduled commission meeting on October 10, 2008, granted the motion, and directed the ED to direct refer the permit to the State Office of Administrative Hearings (SOAH) for a determination of affected party status. The preliminary hearing on the permit application was held on November 17, 2008, and the hearing on the merits was held April 27 – 30 and May 8, 2009.

³ Executive Director Exhibit ED – 1, 18:2-12 and 18:24-37; Applicant's Exhibit No. 5.

⁴ Executive Director Exhibit ED – 8.

There was no new information presented during the contested case hearing that would alter the conclusions of ED staff regarding BACT, MACT, demonstration of the NAAQS, and health effects review. Therefore, the Executive Director recommends issuance of the air permit to Aspen.

II. MACT Analysis

In Section IV.D. of the proposal for decision (PFD), the ALJ found that Aspen did not meet its burden to provide a MACT case-by-case analysis, and that the case-by-case MACT review conducted by ED staff was legally inadequate. At the time of the technical review of the permit, Mr. Hughes testified that he considered facilities listed in the BACT analysis of the permit, searched the RACT/BACT/LAER clearinghouse (RBLC) for similar permitted sources, and considered the permit of the only other recently permitted biomass plant in Texas, Nacogdoches Power, to find the "MACT floor."⁵ The MACT floor is established by comparing the application to the best controlled similar sources to determine if such sources are meeting an emission limit more stringent than that proposed for the permit.⁶ Mr. Hughes then performed a "beyond the floor" analysis to see if there were other methods for potentially reducing emissions to a greater degree, considering factors such as the cost of achieving such emissions reductions and any non-air quality health and environmental impacts and energy requirements to establish whether these reductions are achievable.⁷ Mr. Hughes testified that he was unable to identify any such cases, and therefore the BACT limits Aspen had proposed for hydrogen chloride (HCl), carbon monoxide (CO), and total particulate matter (PM) would be sufficient for the MACT

⁵ Executive Director Exhibit ED – 1, 18:26-37, Tr. Vol. 5, 675:3 – 678:13.

⁶ Executive Director Exhibit ED – 1, 18:26-37.

⁷ Executive Director Exhibit ED – 1, 19: 1-37.

limits, as well.⁸ Upon completing his review, Mr. Hughes concluded that the proposed MACT limits should be accepted for the Aspen permit.⁹

The ALJ acknowledges the procedural difficulty that Aspen faced when 40 CFR Part 63, Subpart DDDDD was vacated after Aspen had submitted its application to the ED. The vacatur resulted in the necessity of a case-by-case MACT review of the Aspen permit as required by FCAA § 112(g) and 40 CFR § 63.43, the first such review conducted in Texas for a biomass fueled electric generating unit.¹⁰ Specifically, 40 CFR § 63.43(c)(2)(ii) requires that an owner or operator shall:

Apply for a MACT determination under any other administrative procedures for preconstruction review and approval established by the permitting authority for a State or local jurisdiction which provide for public participation in the determination, and ensure that no person may begin actual construction or reconstruction of a major source in that State or local jurisdiction unless the permitting authority determines that the MACT emission limitation for new sources will be met.¹¹

The sole requirement of 30 TAC § 116.404, the TCEQ rule that is applicable for permits that require a §112(g) case-by-case MACT determination, is that an applicant apply for a permit as required by 30 TAC § 116.110.¹² Aspen applied for such a permit.¹³ ED staff conducted the required case-by-case MACT review based on the information provided by Aspen in its original application, specifically using the vacated Subpart DDDDD MACT documentation as a starting

⁸ Executive Director Exhibit ED – 1, 19: 1-37.

⁹ Executive Director Exhibit ED – 1, 20: 16-19.

¹⁰ Executive Director Exhibit ED – 1, 17-20.

¹¹ 40 CFR § 63.43(c)(2)(ii)

¹² 30 TAC §§ 116.110 & 116.404.

¹³ Applicant's Exhibit No. 5. Aspen originally applied for an air quality permit that covered both state and federal PSD requirements, which were identified by permit numbers 81706 and PSD-TX-1089. When the case-by-case MACT determination was required for the permit, the designation HAP12 was added to the permit.

point.¹⁴ Although Aspen did not submit a formal amendment requesting a §112(g) authorization to its application, the information that had been provided in the air permit application was used by ED staff for the case-by-case MACT review.¹⁵ The review performed by staff met the applicable requirements for the §112(g) case-by-case MACT determination even though the review of the Aspen permit was unique because of the timing of the vacatur of Subpart DDDDD.

With respect to the basis of the Subpart DDDDD vacatur, Subpart DDDDD was vacated by the D.C. Court of Appeals on specific issues that did not relate to the scientific validity of the standard.¹⁶ The Court did not comment on the scientific basis of Subpart DDDDD, nor did it reach any conclusions about the appropriateness of the standard.¹⁷ Therefore, ED staff logically relied on a standard that had been researched and peer-reviewed as the starting point for the case-by-case MACT review for Aspen. However, considering the vacatur, Mr. Hughes proceeded to compare currently permitted and operating similar facilities to the proposed Aspen biomass plant to determine the correct case-by-case MACT emission limits.¹⁸ The §112(g) case-by-case MACT determination of ED staff was included in the draft permit that was prepared for the Aspen biomass facility.¹⁹ The §112(g) case-by-case MACT determination was included in the Notice of

¹⁴ Executive Director Exhibit ED – 1, 18-20.

¹⁵ *Id.*

¹⁶ *Natural Res. Def. Council v. E.P.A.*, 489 F.3d 1250, 1261 (D.C.Cir. 2007) (The Court vacated Subpart DDDDD because of the effect of Court's reversal of the CISWI definitions rule on the "universe of boilers subject to its standards." The Court did not specifically address other challenges to Subpart DDDDD.)

¹⁷ *Id.*

¹⁸ Executive Director Exhibit ED – 1, 18:2-12 and 18:24-37; Executive Director Exhibit ED – 6; Executive Director Exhibit ED – 7; Executive Director Exhibit ED – 8.

¹⁹ Executive Director Exhibit ED – 6; Executive Director Exhibit ED – 7; Executive Director Exhibit ED – 8.

Preliminary Determination (NAPD) that was published for the Aspen permits, affording a proper notice and comment period for the public as required by 40 CFR § 63.43(h).²⁰

Mr. Hughes' analysis was thorough and complete at the time it was conducted. Evidence in the record shows that *during the review of the application* Mr. Hughes considered other permits with permitted limits that were stricter than Aspen and concluded that either: 1) those permits were not in operation, and therefore had not demonstrated that such lower limits were achievable; or 2) that those permits were for sources that had enough differences from Aspen that they were not "similar sources".²¹ For example, the Southpoint, Ohio source referenced by EPA in their formal comment, the protestants, and the ALJ has not yet been built, and is therefore not operating.²² Because that potential source has never operated, it cannot be considered to have "achieved in practice" a lower CO limit than that proposed for Aspen. Furthermore, the other sources considered by Mr. Hughes with lower permitted limits for CO were "significantly different" and were therefore not considered as similar sources for the MACT analysis. The evidence in the record, therefore, substantiates the case-by-case MACT review conducted by ED staff, and the MACT limits that were developed from that review.

III. Oxidation Catalyst and Lower CO Limit

In Section IV.F. of the PFD, the ALJ states that, should the commission grant Aspen's permit, it should require the addition of an oxidation catalyst for control of CO. The ALJ points to permits issued *after the technical review* of the Aspen permit was complete as examples of oxidation catalysts currently in use at permitted facilities. The ALJ does not, however, identify

²⁰ Applicant Exhibit No. 1.

²¹ Executive Director Exhibit ED – 15, at 3, Response 2; Executive Director Exhibit ED – 1, 19 – 20.

²² Executive Director Exhibit ED – 15, at 3, Response 2

what would be an appropriate CO limit. MACT and BACT limits within a permit are emission limits set by the TCEQ. These limits are not, in themselves, requirements for specific control technologies. Both the EPA and TCEQ have a definition for MACT emissions limits (emphasis added):

Maximum achievable control technology (MACT) emission limitation for new sources--The emission limitation which is not less stringent than the emission limitation **achieved in practice** by the best controlled **similar source**, and which reflects the maximum degree of reduction in emissions that the executive director, taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements, determines is achievable by the constructed or reconstructed major source.²³

The CO emission limit set by the ED for Aspen's air permit was set after a technical review of the permit application as required by TCEQ rules, and a case-by-case MACT review for hazardous air pollutants (HAP), as discussed above.²⁴ That technical review was complete at the time of the permit's original issuance in July 2008, and was conducted primarily by Mr. Richard Hughes. As discussed above, Mr. Hughes considered facilities listed in the BACT analysis of the permit, searched the RACT/BACT/LAER clearinghouse (RBLC) for similar permitted sources, and considered the permit of the only other recently permitted biomass plant in Texas, Nacogdoches Power.²⁵ The ALJ relies on the fact that oxidation catalysts for CO control have been permitted for Russell Biomass, Southpoint, Whitefield Power & Light, and Bridgewater. The Southpoint facility was considered by Mr. Hughes; however, as has been discussed previously, it has not been built and therefore was not considered to have "achieved in

²³ The EPA definition is found at 40 C.F.R. §63.41; the TCEQ definition is found at 30 T.A.C. § 116.15(7).

²⁴ Executive Director Exhibit ED - 1, 17-20.

²⁵ Executive Director Exhibit ED - 1, 18:26-37, Tr. Vol. 5, 675:3 - 678:13.

practice" a lower CO limit that that proposed for Aspen.²⁶ Russell Biomass was permitted after the draft permit was issued for Aspen Power; therefore it was not built at the time, and could not have been considered to have "achieved in practice" a lower CO limit that that proposed for Aspen.²⁷ The use of oxidation catalysts at Bridgewater and Whitefield were not specifically required by their permits.²⁸

Upon reviewing the sources available at the time, Mr. Hughes concluded that the appropriate MACT limit for CO was 0.31 lb/MMBTU.²⁹ Although the opportunity for a contested case hearing is required by TCEQ rules, there is not a requirement for additional technical review throughout the pendency of the application.³⁰ The evidence in the record substantiates the ED's review of the permit, including the determination that the appropriate MACT emission limit for CO is 0.31 lb/MMBTU. Therefore, the ED considers that the ALJ's recommendation of a requirement for an oxidation catalyst, in the absence of a lower CO limit, is unnecessary.

IV. BACT for NO_x

In section V.E. of the PFD, the ALJ reviews BACT for NO_x. The ALJ concluded that the BACT emission limit for NO_x should be 0.075 lb/MMBtu. A Tier I BACT analysis requires comparison with other like facilities.³¹ The ALJ states that evidence presented during the hearing should be used to determine the appropriate BACT limit for NO_x, despite the fact that the

²⁶ Executive Director Exhibit ED – 15, at 3, Response 2

²⁷ Protestants' Exhibit 7.

²⁸ Protestants' Exhibit 8 and Protestants' Exhibit 9.

²⁹ Executive Director Exhibit ED – 1, 19:27-34.

³⁰ If the technical review was not final, and staff continued to change the technical review after contested case hearings were granted, there would be no official draft permit to be reviewed, and issues of notice and equity would result.

³¹ Executive Director Exhibit ED – 3, p. 3.

information was not available during the period of the technical review of the permit. The information was unavailable either because the permits had not yet been issued, or they were not part of the RBLC, and therefore were not found during Mr. Hughes search for similar sources to Aspen. As he testified, Mr. Hughes also conducted internet searches for information relevant to his review; to the extent that additional information about possible lower NO_x limits for similar sources was found by Mr. Hughes during these searches it did not change his reasoned conclusion that the appropriate NO_x limit for Aspen was 0.15 lb/MMBtu.³²

Mr. Hughes reviewed the information regarding NO_x and concluded that BACT for Aspen is 0.15 lb/MMBtu.³³ Mr. Hughes determined that this limit was consistent with BACT determinations from other similar sources identified from the RBLC and appropriately represented BACT for Aspen.³⁴ Therefore, the evidence in the record substantiates the ED's review and concurrence that 0.15 lb/MMBtu constitutes BACT for NO_x.

V. Filterable PM

In section IV.E. of the PFD, the ALJ reviews the draft permit's limit on PM emissions. The PM limit currently in the permit, 0.025 lb/MMBtu is the limit for total PM (both filterable and condensable).³⁵ Mr. Hughes testified that this limit corresponds to a limit of 0.013 lb/MMBtu for filterable PM.³⁶ The ALJ states that the permit should be amended to specify that there is a limit for filterable PM of 0.013 lb/MMBtu. Given Mr. Hughes testimony that the limit

³² Tr. Vol. 5, 686:7-14; 687:20 - 688:9.

³³ Executive Director Exhibit ED - 1, 10: 21-35.

³⁴ *Id.*

³⁵ Executive Director Exhibit ED - 1, 19: 22-25.

³⁶ *Id.*

already in the permit corresponds to 0.013 lb/MMBtu for filterable PM, the ED does not object to the addition of a filterable PM limit of 0.013 lb/MMBtu to the permit.

VI. Special Condition for Operating Schedule and Biodiesel

In Section VI.B. of the PFD, the ALJ recommends that special conditions be added to the permit limiting Aspen to operation for 50 weeks out of a 52 week rolling period, and allowing the plant to only use biodiesel when the plant is operated at 25% of less of capacity. The ED does not specifically object to the addition of a Special Condition requiring that operation 50 weeks out of a 52 week rolling period. The ED would, however, prefer to accomplish this limitation by specifying in the maximum allowable emissions rate table (MAERT) that the site is only permitted for 8400 hours of operation, instead of the 8760 that is currently allowed in the MAERT. The ED also has no objections to the additional of a special condition to the permit that would allow the plant to only use biodiesel when the plant is operated at 25% or less of capacity.

VI. Exceptions to the Findings of Fact and Conclusions of Law

A. Findings of Fact

1. The ED excepts to Findings of Fact No. 28 and respectfully requests that the finding be deleted and replaced by a Finding of Fact which states "The MACT review conducted by the Executive Director's staff was sufficient to constitute a case-by-case MACT review, and contains all of the required elements of an FCAA section 112(g) preconstruction permit application filed under Chapter 116 of TCEQ's rules."
2. The ED excepts to Findings of Fact No. 30 and respectfully requests that the finding be deleted.
3. The ED excepts to Findings of Fact No. 31 and respectfully requests that the finding be deleted.
4. The ED excepts to Findings of Fact No. 32.

5. The ED excepts to Findings of Fact No. 33 and respectfully requests that the finding be deleted.
6. The ED excepts to Findings of Fact No. 34 and respectfully requests that the finding be deleted and replaced by a Finding of Fact which states "The MACT floor for emissions of organic HAP was adequately established."
7. The ED excepts to Findings of Fact No. 38 and respectfully requests that the finding be deleted and replaced by a Finding of Fact which states "Staff's MACT analysis indicates that although Staff was aware of other facilities that have been permitted with lower CO limits, those facilities either had not yet been built at the time of the technical review of Aspen's permit, or had such differences that Staff did not consider them to be similar sources."
8. The ED excepts to Findings of Fact No. 39 and respectfully requests that the finding be deleted.
9. The ED excepts to Findings of Fact No. 46 and respectfully requests that the finding be deleted.
10. The ED excepts to Findings of Fact No. 47 and respectfully requests that the finding be deleted.
11. The ED excepts to Findings of Fact No. 48 and respectfully requests that the finding be deleted.
12. The ED excepts to Findings of Fact No. 49 and respectfully requests that the finding be deleted.
13. The ED excepts to Findings of Fact No. 50 and respectfully requests that the finding be deleted.
14. The ED excepts to Findings of Fact No. 51 and respectfully requests that the finding be deleted.
15. The ED excepts to Findings of Fact No. 52 and respectfully requests that the finding be deleted and replaced by a Finding of Fact which states "A NOx limit of 0.15 lb/MMBtu represents the best achievable control technology emission limitation for Aspen."

B. Conclusions of Law

1. The ED excepts to Conclusion of Law No. 9 and respectfully requests that the finding be deleted.
2. The ED excepts to Conclusion of Law No. 14 and respectfully requests that the finding be deleted and replaced with a Conclusion of Law that states "An adequate case-by-case MACT analysis for Aspen's permit was conducted, which established federally enforceable MACT emission limits for the Lufkin generating plant, as required by 30 TEX. ADMIN. CODE §116.111(a)(2)(K) and 40 C.F.R. § 63.43(e)."
3. The ED excepts to Conclusion of Law No. 15 and respectfully requests that the finding be deleted.
4. The ED excepts to Conclusion of Law No. 21 and respectfully requests that the finding be deleted and replaced with a Conclusion of Law that states "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 operate for only 8400 hours out of 8760 hours, and a special condition that the plant may only use biodiesel when the plant is operated at 25% or less of capacity."

C. Order by the Texas Commission on Environmental Quality

1. The ED excepts to the Ordering Provision No. 1 and respectfully requests that the finding be deleted and replaced by an Order Provision which states "The application Aspen Power LLC for Air Quality Permit No. 81706, PSD-TX-1089, and HAP 12 is granted."

VII. Conclusion.

Based on evidence admitted and disputed issues identified in the record, the Executive Director contends that all procedures and analysis required for an air permit review were followed in accordance with applicable rules and guidance established by the TCEQ. Therefore the TCEQ Executive Director respectfully requests that the Commission: grant the exceptions to the proposed order; issue the State Air Quality Permit Number 81706 and PSD permit PSD-TX-

1089; find that the MACT demonstration is appropriate and complete; and issue the HAP-12 permit.

Respectfully submitted,

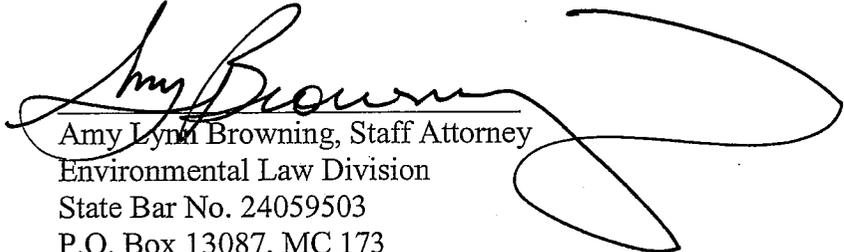
Texas Commission on Environmental Quality

Mark R. Vickery, P.G., Executive Director

Stephanie Bergeron Perdue, Deputy Director

Office of Legal Services

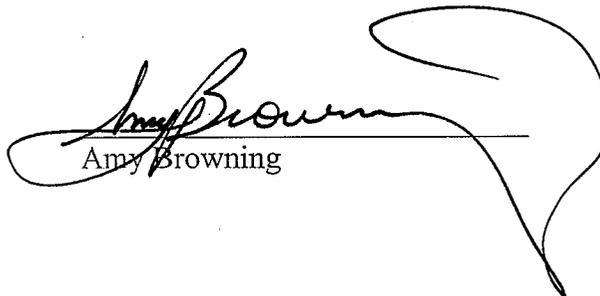
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REPRESENTING THE
EXECUTIVE DIRECTOR OF THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

CERTIFICATE OF SERVICE

On this 14th day of September, 2009, a true and correct copy of the foregoing instrument (TCEQ Executive Director's Exceptions to Administrative Law Judge's Proposal for Decision and Order) was served on all persons on the attached mailing list by the undersigned via deposit into the U.S. Mail, inter-agency mail, facsimile, electronic mail, or hand delivery.


Amy Browning

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Service List
Aspen Power, LLC
SOAH Docket No. 582-09-0636
TCEQ Docket No. 2008-1145-AIR

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