

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

**APPLICATIONS OF ASPEN POWER, §  
L.L.C. FOR TCEQ AIR QUALITY §  
PERMIT NO. 81706, PREVENTION §  
OF SIGNIFICANT DETERIORATION §  
AIR QUALITY PERMIT PSD-TX- §  
1089, AND HAP 12 §** **BEFORE THE STATE OFFICE  
OF  
ADMINISTRATIVE HEARINGS**

**ALIGNED PROTESTANTS' RESPONSE TO ASPEN POWER LLC AND THE  
EXECUTIVE DIRECTOR'S EXCEPTIONS AND BRIEFS IN RESPONSE TO THE  
PROPOSAL FOR DECISION**

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**INTRODUCTION**

Aspen Power is proposing to construct and operate a power plant that will be a major source of both criteria and hazardous air pollutants in Lufkin, Texas, which is an attainment area for purposes of the federal Clean Air Act. App Ex. 5, p. 45; ED Ex. 1, p.14:19-26. Aspen is, therefore, required to comply with the federal Clean Air Act's (CAA's) Prevention of Significant Deterioration (PSD) permitting provisions, which require the use of Best Available Control Technology (BACT) for controlling emissions and a demonstration that the plant's emissions will not cause or contribute to an exceedance of the National Ambient Air Quality Standards or PSD increments. 42 U.S.C. § 7475. In addition, the facility must comply with the CAA's requirement to submit a case-by-case Maximum Achievable Control Technology (MACT) application and meet MACT emission limits. 42 U.S.C. § 7412(g)(2)(B).

This permit was initially issued on July 2008 as an uncontested matter. Protestants Hartfield filed a Motion for Rehearing alleging fraud in the submittal of hearing request withdrawals. The Commission granted the Motion and the case was referred back to the Executive Director and the State Office of Administrative Hearing with instructions that review be "expedited." TCEQ subsequently entered into an agreed order with Aspen Power, citing it for violating the Texas Clean Air Act by constructing without a permit and yet allowing Aspen to continue construction "at its own risk." Construction was only stopped when U.S. EPA issued a stop work order, citing the federal Clean Air Act prohibition on construction without a valid permit. PROT EX 25 TCEQ Compliance Agreement.

While biomass plants are often thought of as "green," Aspen Power's proposed plant would emit almost ten times as much Volatile Organic Compound (VOC) per unit of heat input as some Texas' recently permitted coal-fired power plants. Tr. Vo. 3, p. 475 lines 2-17. Likewise, it is proposed to emit two times as much CO as the Sandy Creek and Spruce coal fired plants. The plant would be located in a low-income, community of color, within 600 yards of a daycare facility. Locating a major source of criteria and hazardous air pollutants so close to a residential area calls for careful scrutiny to assure all legal requirements are met. Neither Aspen Power nor TCEQ, however, has given the application and pollution control determinations the required scrutiny. The result of this rush to allow Aspen Power to begin operation is that the application and draft permit fail to meet minimum federal and state standards.

## ARGUMENT

### 1. BURDEN OF PROOF

Applicant Aspen Power bears the burden of demonstrating by a preponderance of the evidence that its application satisfies all applicable legal requirements. See, 30 Tex. Admin. Code §§ 52.21(b) and 80.17(a). Additionally, Rule 80.117 required that the Applicant meet its burden of proof in its presentation of the case-in-chief:

"(b) The applicant shall present evidence to meet its burden of proof on the application, followed by the protesting parties, the public interest counsel, and, if named as a party, the executive director. In all cases, the applicant shall be allowed a rebuttal. Any party may present a rebuttal case when another party presents evidence that could not have been reasonably anticipated."

30 Tex. Admin. Code. § 80.117(b).

All information required to meet this burden must be in the permit application. TCEQ Rule 116.111(a) requires that "in order to be granted a permit, amendment, or special permit, the application must include" information demonstrating that emissions from the facility will comply with all rules of the commission, including requirements concerning PSD review. 30 Tex. Admin. Code § 116.111(a)(emphasis added). At the close of Applicant's direct case Protestants moved for directed judgment because Applicant's direct case did not meet its burden of proof. See *Qantel Bus. Sys. V. Custom Controls Co.*, 761 S.W.2d 302, 304 (Tex. 1988). (Directed judgment against a party with the burden of proof is appropriate when that party has rested its direct case without proving the necessary elements).

At hearing Applicant attempted to cure the numerous deficiencies in its application on rebuttal rather than in its case in chief. For example, no cost analysis to support Applicant's arguments regarding cost effectiveness is in application. Mr. Woolbert's cost analysis provided on day three of the hearing should have been part of Applicant's direct case but was offered instead as rebuttal. It shouldn't be considered. But even if it is, Mr. Woolbert's cost analysis fails to demonstrate SCR is not cost effective. There is no showing of different costs at other facilities that have installed SCR. Both Babcock Power and Mr. Powers' cost estimates are consistent with each other.

## **2. DIRECT REFERRAL**

Aspen's permit was direct referred to SOAH. Executive Director's Closing Argument, p. 2; 30. As a result all issues were open - regardless of whether they were raised during the comment period. Tex. Admin. Code §§ 55.200 and 55.210. Aspen's arguments regarding whether or not specific technologies were referenced in comments filed during the public comment period are irrelevant. Further, as Aspen itself notes, EPA did comment regarding the inadequacy of the BACT analysis.

## **3. MAXIMUM ACHIEVABLE CONTROL TECHNOLOGY REQUIREMENTS**

### **A. The Proposal for Decision Properly Recommends Denial Based on Aspen Power's Failure to Submit a Maximum Achievable Control Technology Application.**

Aspen Power LLC did not file a MACT application. As the PFD finds, this failure alone is grounds for denying Aspen's permit. TCEQ's rules state:

Consistent with the requirements of 40 Code of Federal Regulations §60.43 (concerning maximum achievable control technology

determination for constructed and reconstructed major sources), the owner or operator of a proposed affected source (as defined in §116.15(1) of this title (relating to Section 112(g) definitions)) shall submit a permit application as described in §116.110 of this title (relating to Applicability).

30 Tex. Admin. Code 116.404.

The Executive Director argues that, "the sole requirement of 30 TAC § 116.404 ... is that an applicant apply for a permit as required by 30 TAC § 116.110." Because Aspen's PSD application was submitted pursuant to section 116.110, the ED argues the PSD application was sufficient to satisfy the requirement for a hazardous air pollutant application. (ED's Exceptions at p. 4). The ED's argument ignores entirely the text of section 116.404 requiring that a MACT permit application be submitted "consistent with the requirements of 40 Code of Federal Regulations §60.43." Section 60.43 specifies that MACT applications must include: identification of a MACT floor, selection of a control technology and information on its design, operation size and control efficiency, identification of alternative control technologies considered, and an analysis of cost and non-air quality health environmental impacts or energy requirements for the control technology. 40 CFR §§ 63.42 & 63.43. Aspen's PSD permit included none of these. To the contrary, Aspen's PSD application affirmatively stated that MACT §112(g) was not applicable.

The ED's interpretation of the MACT rules renders meaningless the entire first clause of section 116.404. The ED's approach is thus contrary to accepted rules of statutory construction. See *Barron v. Cook Children's Health Care Sys., et al.*, 218 S.W.3d 806 (Tx.Ct.App. -Ft. Worth [2nd Dist] 2007). In its rule adoption, TCEQ clearly stated its intent to incorporate by reference the application and other

requirements of 40 CFR §60.43, 23 Tex.Reg. 6973, 6976 (1998). TCEQ was in fact required to draft its regulations and MACT program as "necessary to properly effectuate §§63.40 through 63.44" and was required to "certify that the program satisfies all applicable requirements established by §§63.40 through 63.44." 40 CFR § 63.42(a).

Aspen and the ED argue that the permitting engineer's analysis was sufficient to make up for the lack of Aspen's MACT application. Aspen also makes the novel legal argument that it is the ED who bears the sole burden of conducting and documenting a "beyond-the-floor" MACT analysis. As noted above, the applicant is clearly required to conduct a full MACT analysis as part of its application. 40 CFR §63.43(e)(2). Further, even if it were somehow possible for a proper TCEQ MACT analysis to excuse Aspen's failure to file an application, the permitting engineer's MACT analysis was plainly inadequate.

Aspen Power was required to submit a separate MACT application, or to amend its PSD application to include a MACT application. Aspen chose not to do either. As a result, Aspen not only failed to comply with section 116.404, but also failed to do the investigation necessary to identify the best-controlled similar source and to identify the maximum achievable control technology.

**B. Information is "Available" for Purposes of a MACT Determination if It is Available as of the Date of Final Permit Action**

A central issue raised by Aspen is the cut-off date for consideration in a MACT analysis of technological innovations. Aspen argues that requiring consideration of available controls up to the time of permit issuance is a game of "gotcha." Regardless whether one views the policy decision as a game of "gotcha" or

as furthering the act's technology forcing provisions, federal law requires permitting authorities to consider all information available up to the time of final permit issuance or denial.

Federal regulations state that a MACT analysis must be based on "available information," which is defined to include any information provided to the permitting authority "as of the date of approval of the MACT determination by the permitting authority." 40 CFR §63.41. In the preamble to this rule, EPA clearly states that information is to be considered available "if it is available as of the permitting authority's final determination." 61 Fed.Reg. 68383, 68389 (Dec. 27, 1996) (emphasis added). EPA actually considered and rejected arguments that only information available as of the date of application submittal should be considered "available." *Id.* In addition, in this case, there was no MACT application filed and, on the date the PSD application was filed, the 112(g) requirements were not even yet applicable. It is, therefore, particularly nonsensical to argue that MACT application had to be made based on information available at that time.

Finally, Aspen argues that even if facilities were permitted with limits below the limits in Aspen's draft permit, they had not been operating long enough to assume they were achieving those limits. As noted below, however, many of the better performing facilities have been operating for years achieving limits far lower than those in the Aspen draft permit.

**C. The Proposal for Decision Properly Finds that Aspen and the Permitting Engineer Failed to Conduct an Adequate MACT Analysis and Failed to Include MACT Limits in Aspen's Permit**

Neither the permitting engineer nor Aspen's expert claimed that the better performing facilities cited by Protestant's were either: (1) not similar to Aspen's proposed facility or (2) not achieving at least the emissions levels cited by Protestants. Aspen's only relevant MACT argument is that the facilities cited by Protestants did not have to even be considered as part of a MACT analysis because information regarding the plants was not "available." As explained above, Aspen's argument lacks legal merit. As noted below, it also is factually inaccurate.

**1. Particulate Matter:** As of the date of Aspen's application, there were three permitted wood-fired, stoker biomass facilities with limits lower than the 0.025 lb/MMBtu proposed in Aspen's draft permit. See Table 1. At least two of these facilities had been operating for more than two years at the time Aspen's application was submitted. 4 Tr. 538: 6-9. Testing in 2007 demonstrated that one of the facilities, Rygate, was achieving a limit of 0.012 lb/MMBtu.

As of the date of the close of technical review, an additional facility, Burlington, was permitted with limits below those proposed in the Aspen draft permit. Testing in 2008 showed that Burlington was achieving a 0.002 lb/MMBtu emission rate for PM. As of the close of the evidentiary record in this case, there was yet a fifth facility, Russell Biomass, permitted with limits below Aspen's. Russell's PM limit is 0.012 lb/MMBtu. Aspen offered absolutely no evidence to dispute the fact that there are, and were even at the time of application, similar facilities operating and achieving a 0.012 lb/MMBtu PM emission rate.

[REDACTED]

[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED] nine fields, guaranteed efficiency 99.97%
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED] five fields, guaranteed efficiency 99.504%

a) Title V air permit is re-issued every 5 years. Most recent issuance of permit was April 21, 2008.

2. **Carbon Monoxide:** Aspen Power's draft permit includes a CO limit of 0.31 lb/MMBtu. At the time of Aspen's application, the Ohio Southpoint facility had been permitted with an oxidation catalyst as BACT. 3 TR 464: 5. See Table 2. EPA's comments on the draft permit stated, "[t]he TCEQ should discuss in its evaluation why the emission concentration for Permit No. OH-0307 in the state of Ohio was not

considered and whether there are more stringent values that would be applicable.”

Pro. Ex. 3. The permit engineer’s only response was that the Ohio Southpoint facility had not been built. This, however, is an insufficient analysis for purposes of MACT. A MACT beyond-the-floor analysis requires consideration of technologies that are achievable, even if they have not yet been demonstrated as achieved. The permit engineer testified that he had seen Babcock Power’s website and know that biomass plants were using oxidation catalysts to control CO emissions. 5 Tr. 671:2-4, 674:23 – 678:13., 686:3-14. Neither Aspen nor the permit engineer offered any evidence suggesting that the use of an oxidation catalyst to achieve lower CO limits was not “achievable” at Aspen.

Further, federal law clearly requires consideration of technologies developed after the application was submitted but prior to a final determination on the permit. Since Aspen submitted its application. The record shows that Bridgewater began using an oxidation catalyst in October 2007, Whitefield began using an oxidation catalyst in June 2008 and Russell was permitted to use an oxidation catalyst and achieve a 0.075 lb/MMBtu emission rate in December 2008.

Clearly Aspen and the permitting engineer were obligated to at least examine the possibility of using oxidation catalyst to control CO and related organic hazardous air pollutants. Neither the application nor the permitting engineers review included any analysis of using oxidation catalyst at Aspen Power.

[REDACTED]

[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	2004	[REDACTED]	0.10	NA	[REDACTED]

## 2. BEST AVAILABLE CONTROL TECHNOLOGY REQUIREMENTS

### A. Recent EPA Action Confirms that the Federal Definition of BACT is Applicable to Aspen's Permit.

As Protestants argued in their initial brief, TCEQ is required to apply the federal definition of BACT in issuing PSD permits in Texas. In proposing disapproval of many of Texas current permitting rules, EPA recently stated:

"Section 165 of the Act provides that "No major emitting facility ... may be constructed [or modified] in any area to which this part applies unless - (1) a permit has been issued for such proposed facility in accordance with this part setting forth emission limitations for such facility which conform to the requirements of this part ... (4) the proposed facility is subject to the best available control technology for each pollutant subject to regulation under this chapter. ..." Id. 7475(a). Accordingly, under the plain language of Section 165 a facility may not be constructed unless it will comply with BACT limits, which conform to the requirements of the Act. As BACT is a defined term in the Act, see CAA 169(3), we interpret this to mean that a facility may not be constructed unless the permit it has been issued conforms to the Act's definition of BACT.

Fed.Reg. 9/23/2009, Vol. 74, No. 183 (Page 48472), available at <http://edocket.access.gpo.gov/2009/E9-22806.htm>

Contrary to Aspen's arguments, TCEQ is not permitted to use its own flexible definition of BACT. Texas is obligated to apply the federal definition, which is the definition in Texas' current State Implementation Plan, and to ensure that the BACT analysis conducted for each permit meets minimum federal standards. As the Environmental Appeals Board has repeatedly noted, a BACT analysis requires a searching review of control options and detailed analysis. See, *In re. Northern Michigan University Ripley Heating Plant*, 2009 EPA Ap. LEXIS 5,8 (Feb. 18, 2009); PSD Appeal No. 08-02. The Environmental Appeals Board has found the failure to consider all potentially applicable control alternatives to be clear error and grounds

for remand. *In re. Prairie State Generating Co*, 2006 EPA App LEXIS 38 (Aug. 24, 2006); PSD Appeal No. 05-05.

**B. The BACT Analysis Conducted by Aspen Power and the Executive Director Was Inadequate**

As argued in Protestant's prior briefing, Aspen's BACT analysis was inadequate because it failed to consider all potentially applicable control alternatives, and failed to identify the best available control technology. The Aspen and Executive Director arguments addressed below cannot alter these basic facts.

**1. Timing of BACT "cut-off"** – As noted above, federal law is clear as to the cut off date for consideration of new technologies for purposed of the MACT review. It is the date of final permit issuance. Likewise, for BACT, EPA has issued guidance stating that the cut-off date for technology review for BACT is the date of final permit issuance. Pro. Ex. 17. Aspen's CO and PM emission rates are ultimately limited by MACT. The only other pollutant discussed by the parties with regard to a cut-off date is NOX. There is, however, no question that there were wood-fired, stoker biomass facilities operating with SCRs and demonstrating emissions of 0.075 lb/MMBtu at the time of Aspen's application. See Table 3 below. One of these facilities, Boralex Stratton, is essentially the same capacity as Aspen Power.

[REDACTED]

- a) 1<sup>st</sup> quarter 2009 average NOx concentration.
- b) September 2008 average NOx concentration.

[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

2. It is irrelevant that the best performing facilities were not listed in the RACT/BACT/LAER Clearinghouse. Aspen argues that it should not be held responsible for considering technologies in use by similar facilities in other areas of the country because those facilities were not reported in the RBLC. As Mr. Powers testified, the RBLC is a voluntary database to which many states do not report. Pro. Ex. 1, p. 9-10. The Clean Air Act requires applicants to perform a "searching review of industry practices and control options." *In re. Northern Michigan University Ripley Heating Plant*, 2009 EPA App. LEXIS 5, 8 (Feb. 18, 2009); PSD Appeal No. 08-02. A

BACT analysis that consists solely of a review of the RBLC is on its face inadequate, and the failure to consider all potentially applicable control alternatives is "clear error." *In re. Prairie State Generating Co.*, 2006 EPA App. LEXIS 38 (Aug. 24, 2006); PSD Appeal No. 05-05. See also, Aligned Protestants Final Argument at p.38-40. TCEQ's own guidance document acknowledges that a review of limits in prior permits alone is not adequate where, as here, "new technical developments have been made that indicate additional reductions are economically or technically reasonable." ED Ex. 3, p.5 (TCEQ BACT Guidance).

**3. Neither local economic impacts nor the Renewable Energy Credits obtained by Northeastern facilities are relevant to Aspen's BACT analysis.**

Aspen cites from a 1979 EPA Guidance document for the proposition that consideration of local and site-specific economic considerations are relevant to a BACT analysis. Applicant's Exceptions and Brief, p. 12. This guidance has been clearly overruled by subsequent EPA guidance. EPA's New Source Review Workshop Manual states:

In the economic impact's analysis, primary consideration should be give to quantifying the cost of control and not the economic situation of the individual source. Consequently, applicants generally should not propose elimination of control alternatives on the basis of economic parameters that provide an indication of the affordability of a control alternative relative to the source. BACT is required by law. Its cost are integral to the overall cost of doing business and are not to be considered an afterthought.

Pro. Exh. 15, p. B-31 (New Source Review Workshop Manual). EPA has made it clear that, to the extent a control technology has been used on a similar source, a high burden rests with on the applicant to demonstrate why unique circumstances make that technology infeasible for the applicant. The cost analysis developed by Babcock

Power for Aspen shows that installing a RSCR system is cost effective for Aspen.

The fact that northeastern facilities were able to qualify for RECS as a result of installation of RSCR may have made RCSR extremely cost-effective for those sources, but it does affect the cost-effectiveness determination for Aspen.

## **CONCLUSION**

Aspen never submitted the required MACT case-by-case application. Instead of requiring the application, TCEQ attempted to construct a MACT application and analysis out of Aspen's BACT application. The resulting permit fails to require the maximum achievable control technology "floor" and allows Aspen to meet emission limits significantly less stringent than those achieved by similar sources. Similarly, Aspen's BACT analysis not only failed to meet the required EPA and SIP standard but even fell short of TCEQ own lax "Three Tier" standard. The Federal Definition of BACT is applicable to Aspen's permit. It is irrelevant that the best performing facilities were not listed in the Clearinghouse. Likewise, neither local economic impacts nor the renewable energy credits obtained by Northeastern facilities are relevant to Aspen's BACT analysis.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

On the 24th day of September 2009, the foregoing ANNIE MAE SHELTON AND ALIGNED PROTESTANTS' REPLY TO EXCEPTIONS AND BRIEFS was provided to the parties listed below via email, fax and/or regular mail



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September 24, 2009

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VIA FAX No. (512) 475-4994  
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Re: Aspen Power, LLC Application for Air Quality Permit Nos 81706, PSD-TX 1089, SDAP  
**SOAH DOCKET NO. 582-09-0636, TCEQ DOCKET NO. 2008-1145-AIR.**

Subject: ANNIE MAE SHELTON AND ALIGNED PROTESTANTS' RESPONSE TO  
ASPEN POWER AND THE EXECUTIVE DIRECTOR'S EXCEPTIONS AND  
BRIEFS

Dear Judge Ramos:

Enclosed please find the above referenced pleading. Please call if you have any questions.

Sincerely,

Enrique Valdivia  
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CC: TCEQ Chief Clerk w/ enclosure original and seven copies  
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Service list

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