

**SOAH DOCKET NO. 582-09-2045
TCEQ DOCKET NO. 2009-0032-AIR**

APPLICATION OF IPA COLETO	§	BEFORE THE STATE OFFICE
CREEK LLC FOR AIR QUALITY	§	
PERMIT NO. 83778, PSD-TX-1118	§	OF
AND HAP-18	§	
	§	ADMINISTRATIVE HEARINNG

**PROTESTANT CITIZENS FOR A CLEAN ENVIRONMENT'S
EXCEPTIONS TO THE PROPOSAL FOR DECISION**

TO THE HONORABLE JUDGES OF THIS COURT:

COME NOW Protestant Citizens for a Clean Environment (CCE or Protestant) and files this its exceptions to the proposal for decision. In addition to the argument and proposals set forth below, Protestant also adopts and incorporates by reference any exceptions submitted by the other protestants in this matter that does not contradict the exceptions below. Furthermore, the exceptions below are not inclusive of the all issues that may be raised in a motion for rehearing, if the Commission eventually issues the permit and Protestant later files such a motion.

I. APPLICABLE LAW

EPA explained that its action to approve the Texas SIP had the effect of requiring Texas to follow EPA's current and future interpretations of the Federal Clean Air Act's (FCAA) prevention of significant deterioration (PSD) provisions and EPA regulations, as well as EPA's operating policies and guidance (to the extent those policies are intended to guide the implementation of the approved PSD program). Likewise, EPA's approval also had the effect of negating any interpretations or policies that Texas might otherwise

follow to the extent they are at variance with EPA's interpretation and applicable policies.¹

To demonstrate support of this Federal requirement for state PSD approval, the Executive Director stated in a September 5, 1989 letter to EPA that TCEQ² assures EPA that TCEQ's position "is, and will continue to be, committed to the implementation of the EPA decisions regarding PSD program requirements." EPA interpreted this letter as allowing Texas the freedom to follow their own course, provided Texas' actions are consistent with the letter and spirit of the SIP, when read in conjunction with the applicable federal statutory and regulatory provisions.³ In this case, the Executive Director's actions, and as a result the PFD, are not consistent with the letter and spirit of the SIP.

Obviously the Administrative Law Judges (ALJs) believe their jurisdiction is constrained and cannot "determine whether or not a state agency's rules comply with federal law and to strike them down if they do not." Rather the ALJs believe they "must apply the rules of the state agency for which the ALJs are preparing a Proposal for Decision (PFD)" and "give deference to an agency's interpretations of its own rules. The broad application of such a position over simplifies the entire contested case proceeding to the point of violating the public participation rules of the federal Clean Air Act (FCAA) and the Texas State Implementation Plan (SIP). The following illustrates problems arising from the ALJs' "applicable law" position. At times in the PFD, the ALJs' position accepts without question not only that an agency's rule is valid, but also the agency's interpretation of that rule is equally valid. However, at other times in the PFD, the ALJs disregard the agency's regulatory interpretation. A review of the PFDs decisions concerning ozone impacts and BACT exemplify the problems arising from this discrepancy.

¹ 54 Fed.Reg. 52823, 5264 (December 22, 1989).

² At the time, of the letter, the Commission was previously called the Texas Air Control Board or TACB.

³ 57 Fed.Reg. 28093, 28095.

II. OZONE IMPACTS

Based upon the Preliminary Determination Summary and the TCEQ staff's testimony during the contested case hearing, issuance of this draft permit would violate the Commission's legal requirement to determine whether the applicant or owner demonstrated that the projects' potential to cause and/or contribute to air pollution in violation of the ozone NAAQS in any air quality control region.⁴

A. Background

In this case, the Applicant provided in its application photochemical modeling concerning the project's potential impact on ambient ozone formation for not only the area in the vicinity of the site, but also for a few regional areas downwind. During the public comment process, the only publicly available TCEQ review and conclusions about ozone impacts was limited to the area in the vicinity of the site.

As a result, Protestant, its members, EPA and others provided written and oral comments about the projects' potential to cause and/or contribute to air pollution in violation of the ozone NAAQS in any air quality control region and TCEQ's failure to review any of the evidence bearing on this issue. The public comment period ended January 2, 2009.

On April 1, 2009, the executive director (ED) issued its response to public comments on the application, preliminary decision and draft permit. This document, which is known as the "response to comments" or "RTC," illuminated the basis for TCEQ's preliminary decision. Regarding ozone, the RTC explains that the preliminary determination was based solely on TCEQ's review of the Applicant's ozone analysis consistent with TCEQ's modeling guidance in RG-25, which determined that the Coletto Creek site is VOC-limited. The RTC further explained

⁴ 40 C.F.R. 52.21(k).

that in light of this finding (i.e., the Coletto Creek site is VOC-limited), TCEQ concluded that the project “would not expected to have a discernible impact on the maximum ozone concentration in an area.”⁵ Neither the Preliminary Determination Summary nor the RTC explained what “in the area” meant; however, the RTC did state that this conclusion was based on “historical analyses using the EKMA model.” The RTC further stated that “TCEQ addresses regional ozone formation through the SIP development process rather than through individual permitting actions because ozone is a regional issue.”⁶

Prior to the issuance of the RTC, the Applicant requested the application be directly referred to a contested case proceeding before the State Office of Administrative Hearings (SOAH). This hearing began on March 9, 2009, and the public could only request to be a party at that time. Protestant requested, and was granted, party status.

During the hearing on the merits, Protestant provided evidence and cross examined Applicant’s and TCEQ’s witnesses about the projects potential ozone impacts. Despite the comments provided during the public comment period and additional evidence provided during the contested case hearing, TCEQ staff still refused to review any additional evidence outside of the RG-25 guidance document provisions.

The contested case hearing, however, did illuminate whether the Executive Director’s conclusions about “predicted maximum ozone concentrations in the area” was limited to a small area in the vicinity of the Coletto Creek site or whether the conclusion was applicable to “any air quality control region”. Specifically, TCEQ’s staff admitted that the Executive Director’s conclusion of “no discernable impact on the maximum ozone concentration” was limited to an

⁵ Emphasis added.

⁶ Executive Director’s Response to Comments (RTC) No. 10.

area of 5 kilometers from the plant's stack.⁷ TCEQ's staff further admitted that the Executive Director's conclusion of "no adverse health effects" did not apply to the plant's potential ozone impact on areas outside this 5 kilometer area.⁸

B. Commission's Determination Fails to Address "Any" Air Quality Control Region

The Executive Director's RTC and the TCEQ staff's testimony unequivocally declare that the Commission specifically limits review of PSD ozone impacts to a small area in the vicinity of a proposed facility rather than its potential impact on "any" air quality control region. Protestants argue, and EPA has agreed, that this limitation is a violation of the Federal Clean Air Act and Texas Clean Air Act.

C. The ALJ's PFD Erroneously Attempts to Cure the Commission's Fundamental Failure

Although the Executive Director was a party to the matter to ensure the administrative record was complete, the Executive Director refused to make sure the administrative record was complete as to the ozone cause/contribute issue. Yet despite the Executive Director's position on limiting the application review, the ALJ's PFD makes conclusions of law based solely upon evidence and legal arguments submitted by the Applicant. Evidence not subjected to independent review by TCEQ, and legal arguments not advanced by the Executive Director. As a result, the ALJs' PFD improperly shifts the cause/contribute demonstration burden to Protestants.

For example, ALJ's PFD erroneously conclude that there is no need to further study CC2's potential impact on ozone because the proposed VOC emissions would fall below the established *de minimis* level for VOCs. Apparently, the ALJs believe that the only pollutant of concern for ozone is VOC. This is incorrect.

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⁸ ED Ex. 32, p. 878, ln. 19-33.

EPA regulations clearly state that:

No *de minimis* air quality level is provided for ozone. However, any net emissions increase of 100 tons per year or more of volatile organic compounds **or nitrogen oxides** subject to PSD would be required to perform an ambient impact analysis.⁹

The ALJ's findings and conclusions completely disregard the impacts the project's nitrogen oxide emissions may have in areas beyond the 5 kilometer area.

The Coletto Creek Unit 2 project will not be protective of the public's health, welfare and physical property because, *inter alia*, the proposed emissions from Unit 2 will contribute to air pollution in violation of the national ambient air quality standard (NAAQS) for ground level ozone in a downwind air quality control region.

C. Background of PSD permitting provision for “cause or contribute” demonstration

The purpose of the PSD program is to protect public health and welfare from any actual or potential adverse effect which may reasonably be anticipated to occur from air pollution, notwithstanding attainment and maintenance of all NAAQS. 42 U.S.C. §7470(1). The PSD permitting program assures that any decision to permit increased air pollution in an attainment area “is made only after careful evaluation of all the consequences of such a decision” and after “opportunities for informed public participation” in the decision making process. 42 U.S.C. § 7470(5) (emphasis added).

The PSD program imposes a regime governing areas designated as attainment or unclassifiable. 42 U.S.C. §7471. The PSD program imposes permitting requirements for any “major emitting facility” defined to include facilities which has the capability to emit more than

⁹ 40 C.F.R. 52.21(5)(i) FN.1 (emphasis added).

100 tons per year of any air pollutant such as ozone forming pollutants.¹⁰ 42 U.S.C. §§7475, 7479(1). Failure to comply with those permitting requirements dictates that “[n]o major emitting facility . . . may be constructed.” 42 U.S.C. §7475.

Approval of a state SIP is based upon an EPA determination that the state plan meets certain requirements of the federal CAA and EPA rules. 40 C.F.R. § 52.02(a). The Texas SIP has been approved by EPA and includes specific rules concerning permit applications, including a Prevention of Significant Deterioration (PSD) air permit that is at issue in this matter. 40 C.F.R. § 52.2270. In Texas, TCEQ is the state agency generally charged with protection of air quality and the issuance of air permits. See, e.g., Tex. Health & Safety Code Ann. §§ 382.011(a)(2) & (3), .012, .017, .019, & .039. TCEQ may not issue an air permit if there is an “indication that the emissions from the facility will contravene the intent of this chapter [the TCAA], including the protection of the public’s health and physical property.” Tex. Health & Safety Code § 382.0518(b)(2) & (d).

TCEQ’s PSD review rules state that “[e]ach proposed new major source . . . in an attainment or unclassifiable area shall comply with the Prevention of Significant Deterioration (PSD) of Air Quality regulations promulgated by EPA.” 30 TEX. ADMIN. CODE § 116.160(a). A person applying for an air quality permit shall submit to the TCEQ a permit application, copies of “all plans and specifications necessary to determine if the facility or source will comply with applicable federal and state air control statutes, rules and regulations, and the intent of the [TCAA]”, and other information that TCEQ considers necessary. Tex. Health & Safety Code § 382.0515. If a proposed facility, like Limestone Unit 3, is located in an attainment area, all applicable requirements of the PSD review shall be demonstrated in the application. 30 Tex. Admin. Code §116.111(2)(I).

¹⁰ Ozone forming pollutants include nitrogen oxides (NO_x) or volatile organic compound (VOC).

One of the applicable requirements of the PSD review include a showing that the emissions will not cause or contribute to air pollution. The federal CAA's PSD permitting program provisions expressly require, *inter alia*, that the owner or operator of a facility subject to the PSD permitting requirements:

demonstrates, as required pursuant to section 7410(j) of this title, that emissions from construction or operation of such facility will not cause, or contribute to, air pollution in excess of any . . . (B) national ambient air quality standard in any air quality control region.

42 U.S.C. §7475(a)(3)(B) (emphasis added).

EPA adopted regulations to implement this statutory provision, specifically 40 C.F.R. §52.21(k) provides the following:

Source impact analysis. The owner or operator of the proposed source or modification shall demonstrate that allowable emission increases from the proposed source or modification, in conjunction with all other applicable emission increases or reductions (including secondary sources) would not cause or contribute to air pollution in violation of: (1) any national ambient air quality standard in any air quality control region; or (2) Any applicable maximum allowable increase over the baseline concentration in any area.

40 C.F.R. § 52.21(k)(emphasis added).

The approved Texas SIP and PSD program incorporated by reference this demonstration requirement, providing that “[e]ach proposed new major source or major modification in an attainment or unclassifiable area shall comply with the Prevention of Significant Deterioration (PSD) of Air Quality regulations promulgated by the EPA in Title 40 Code of Federal Regulations (CFR) at 40 CFR §52.21.” 30 TEX. ADMIN. CODE § 116.160. Furthermore, TCEQ rules state that:

The commission may not issue a permit to any new major stationary source or major modification located in an area designated as attainment or unclassifiable, for any National Ambient Air Quality Standard (NAAQS) under FCAA §107, if ambient air impacts from the proposed source would cause or contribute to a violation of any NAAQS.

In order to obtain a permit, the source must reduce the impact of its emissions upon air quality by obtaining sufficient emission reductions to eliminate the predicted exceedances of the NAAQS.

A major source or major modification will be considered to cause or contribute to a violation of a NAAQS when the emissions from such source or modification would, at a minimum, exceed the de minimis impact levels specified in §101.1 at any locality that is designated as nonattainment or is predicted to be nonattainment for the applicable standard.
30 Tex. Admin. Code §116.161 (emphasis added).

A de minimis impact level for ozone simply does not exist. See, 30 Tex. Admin. Code §101.1(25). When EPA promulgated the de minimis exceptions adopted by TCEQ at 30 Tex. Admin. Code 101(25), several public commenters requested that EPA provide specific quantification as to the incremental level of pollution that would be considered as contributing to an existing violation. In response, EPA provided “significance levels” which are generally based on the Class I prevention of significant deterioration (PSD) increments contained in section 163 of the FCAA. Thus, EPA established de minimis exceptions such that a new or modified source will not be considered to cause or contribute to a violation of an NAAQS if the air quality impact is less than the “specified significance levels”. 44 Fed. Reg. 3274, 3277 (January 16, 1979). EPA limited the exceptions to specified criteria pollutants (SO₂, particulate matter, NO₂, and CO). 43 Fed. Reg. 26380, 26398 (June 19, 1978). EPA clearly stated that “significance increments are not specified for photochemical oxidants” (i.e., VOCs and NO_x which are emitted by the source and chemically form ozone). 44 Fed. Reg. 3274, 3277 (January 16, 1979). This remains EPA’s position still today.

D. TCEQ’s Ozone Analysis Policy Fails to Properly Analyze Ozone Impacts in Any Air Quality Region as Required by the Clean Air Act

Dan Shultz is the only expert that could provide testimony about the limitations of TCEQ’s Air Quality Modeling Guidelines based upon EPA’s EKMA model, and as a result, the PSD ozone ambient impact analysis performed by the Applicant. He testified that the only

analysis he reviewed was based on TCEQ's modeling guidelines, and that the analysis only reviews impacts limited to 5 kilometers from the stack.¹¹ As such, this analysis fails to address "any air quality region" as required by state and federal law. The D.C. Circuit Court has expressly stated that when Congress utilizes the word "any", the proper interpretation is to give it an expansive meaning and that courts must give effect to each word of a statute.¹²

Likewise, the Executive Director's response to comments claiming that it addresses regional ozone formation through the SIP development process, cannot excuse it from the equally applicable PSD permitting requirements, especially when evidence has been provided by the applicant or the public.

E. Applicant Improperly Relies on Prior TCEQ Rulings

The fact that TCEQ has erroneously applied the law in the past, does not dictate that SOAH must continue TCEQ's bidding and violate the law in its proposal for decision.

1. No *De Minimis* Level for Ozone Exists and TCEQ may not Spontaneously Create a *De Minimis* Level for Ozone Through the Adjudicative Process.

Federal regulations and interpretations state, without any ambiguity, that EPA has **"chosen to specify *de minimis* cutoffs in terms of emissions rate for applicability, BACT and air quality analysis purposes with no provisions for case-by-case demonstration of a source's air quality impact An air quality concentration *de minimis* level for each pollutant for which measurement methods are available is included in the regulations only for the purpose of providing a possible exemption from monitoring requirements. 45 Fed. Reg. 52707 (Aug. 7, 1980)(preamble to EPA's final rules on PSD and Offset Interpretative Ruling (40 C.F.R. Part 51, Appendix S)(emphasis added).**

¹¹ Ex. ED-19, p. 744 (stating that the "photochemical modeling included in section 6.1 was not reviewed."); Ex. ED-10, p. 459.; Transcript Vol. 5, p. 1168, ln. 2-7

¹² *New York v. EPA*, 443 F.3d. 880, 885-886 (D.C. Cir. 2006).

An EPA Policy Guidance memo discusses the PSD permitting requirement that an applicant must show that the proposed source would not contribute to the violation of any NAAQS.¹³ It states that since any source which would affect an area where a violation already exists would, to some extent, contribute to that violation without offsets, the PSD cause or contribute requirement “on its face seems to require an applicant to obtain offsets *no matter how insignificant the contribution.*” (emphasis added).¹⁴ Thus, in accordance with statutory requirements for rulemaking subject to public notice and comment, EPA created a rule that allows for specific exemptions to this general rule. The rule, however, does not specify an exemption for ozone. The doctrine of *expressio unis est exclusio alterius* (the expression of one thing is the exclusion of others) counsels against judicial recognition of additional exceptions.¹⁵

Moreover, TCEQ does not have agency discretion to create a de minimis level for ozone by simply issuing an order in response to an administrative contested case hearing. As previously discussed, TCEQ is bound by EPA’s interpretations and regulations concerning the PSD provisions:

In adopting the Clean Air Act, Congress designated EPA as the agency primarily responsible for interpreting the statutory provisions and overseeing their implementation by the states. The EPA must approve state programs that meet the requirements of . . . [EPA’s regulations]. Conversely, EPA cannot approve programs that do not meet those requirements. However, PSD is by nature a complex and dynamic program. It would be administratively impracticable to

¹³ See, EPA policy guidance is titled Issuance of PSD Permit to Sources Impacting Dirty and Clean Areas dated November 15, 1978, page 3, question 3. The guidance is available from EPA’s website address: <http://www.epa.gov/region07/programs/artd/air/nsr/nsrmemos/m111578.pdf>; and a copy of the policy guidance is provided in the Record at CCE X-Ex. 9. Note that the policy guidance references 40 C.F.R. § 52.1(l) as published at 43 Fed. Reg. 26379, 26407 (June 19, 1978), which the current 40 C.F.R. § 52.21(k) language evolved.

¹⁴ The guidance explains further that like the PSD permitting requirements the offset ruling, as amended on January 16, 1979, applies to only major sources (i.e., source with allowable emissions equal to or greater than 100 tons per year); therefore, minor sources are exempted.

¹⁵ See e.g., *Copeland v. Comm’r*, 290 F.3d 326, 334 (5th Cir. 2002); *Allstate Life Ins. Co. v. Miller*, 424 F.3d 1113, 1116 (11th Cir. 2005).

include all statutory interpretations in the EPA regulations and the SIPs of the various states, or to amend the regulations and SIPs every time EPA interprets the statute or regulations or issues guidance regarding the proper implementation of the PSD program, and the Act does not require EPA to do so. Rather, **action by the EPA to approve this [Texas'] PSD program as part of the SIP will have the effect of requiring the state to follow EPA's current and future interpretations of the Act's PSD provisions and EPA regulations**, as well as EPA's operating policies and guidance (but only to the extent that such policies are intended to guide the implementation of t approved state PSD programs). **Similarly, EPA approval also will have the effect of negating any interpretations or policies that the State might otherwise follow to the extent they are at variance with EPA's interpretation and applicable policies.** 54 Fed.Reg. 52823, 52824 (Dec. 22, 1989)(emphasis added).

EPA has made its position clear that no de minimis ozone levels exist for ozone.

Also, TCEQ decisions concerning a PSD permit are bound by the provisions and interpretations contained in the SIP. All SIP provisions must be submitted to and adopted by EPA prior to having any force or effect on the PSD permitting process, which requires notice and opportunity for public comment. *Id.* (stating that “[o]f course, any fundamental changes in the administration of the PSD program would have to be accomplished through amendments to the regulations in 40 CFR 52.21 and 51.165, and subsequent SIP revisions). TCEQ did not undertake any of these actions prior to creating its “measurable by monitor” standard.

Courts have long held that agency rules “must be enforced as long as it stands unmodified or unrepealed. . . . An agency is bound by its own valid and subsisting rules. It is not privileged to violate these rules, nor does its action in violation of a rule confer any vested right upon a party in whose favor it acted.”¹⁶ Likewise, SOAH is bound to uphold these laws and regulations.

2. The Recent Sandy Creek Court Ruling Is Limited to the Facts of That Case

¹⁶ *State v. Martin*, 347 S.W.2d 809 (Tex. App.–Austin 1961), writ refused n.r.e., (Oct. 11, 1961)(quoting 1 Tex. Jur.2d, Administrative Law, p.659, Sec. 14,)(emphasis added).

The most recent ruling from the Amarillo District Court concerning the Sandy Creek permit completely undermines Applicant's argument. The Amarillo Court concluded that "nothing in the record of the Sandy Creek case indicated that the TCEQ intended to or did create a rule of general applicability."¹⁷ Of course nothing in the Sandy Creek record would show that TCEQ or Applicants are generally applying the rule because Sandy Creek was the first case TCEQ created and applied a *de minimis* standard for ozone.

The record in this case, however, demonstrates that TCEQ did in fact illegally attempt to create a rule of general applicability that TCEQ and Applicants have been applying ever since TCEQ's Sandy Creek Final Order. Applicant concedes that TCEQ generally applied the standard in the Oak Grove matter, and Applicant clearly believes that the rule should be generally applied in this case as well. Thus, the Amarillo Court's ruling has no precedential value to SOAH on this issue.

However, if the ALJ's determine that their role is bound by policies adopted by the Commissioners, the ALJ's should make this statement clear in their proposal for decision. Yet the findings of fact should at least clearly state that the maximum potential contribution of ozone from Coletto Creek Unit 2 is 0.084 ppb in the Austin area and 0.374 ppb in the San Antonio area.

Furthermore, nothing Mr. Nally's reliance on the Alpine Geophysics photochemical modeling contradicts these findings. Although McNally opines about his additional analysis, the fact remains that Mr. McNally is not aware of EPA ever approving his additional analysis technique that utilizes the Attainment Demonstration Guidance to interpret factual findings from photochemical modeling in a PSD permit review.¹⁸ In fact, the Executive Director's response to comments specifically state that EPA has informed TCEQ that EPA's Attainment Demonstration

¹⁷ *Blue Skies Alliance v. TCEQ*, No. 07-07-0306-CV (Ct. App. – Amarillo [7th Dist], April 14, 2009)(withdrawing the opinion of January 29, 2009).

¹⁸ Transcript Vol. 3, p. 518, ln 10 – p. 524.

Guidance is not applicable to the PSD permit review.¹⁹ Rather EPA's Guideline on Air Quality Modeling specifically state that the model uses should consult with the Regional Office to determine the most suitable approach on a case-by-case basis.²⁰ Yet neither the Applicant nor TCEQ did this.

III. COAL DELIVERY BY TRUCK NOT ANALYZED

Both Applicant and TCEQ staff admit that the application contains absolutely no analysis about what impacts coal delivery by truck may cause nor does the draft permit impose any limitations. In its closing arguments, Applicant attempts to diminish this obvious omission by reiterating an out-of-context lone statement by Mr. Fields that he believes delivering coal by truck is a scenario "beyond reason."²¹

If, as Applicant argues, coal delivery by truck is truly "beyond reason," then there is absolutely no reason to have that condition in the application. Additionally, the possibility of delivery by truck should be prohibited by the draft permit. Yet throughout the 50+ year operating life of the plant, it is reasonably foreseeable that coal delivery by rail may be disrupted and that delivery by truck may be necessary. In fact, both Mr. Fields' testimony and other evidence in the hearing definitively establish that truck delivery is not only possible, but has already been required in the past.²² Yet despite this past experience, the Applicant amazingly still lacks any contingency plan to handle the situation when coal delivery by rail is disrupted.²³ Also, the Applicant failed to provide any evidence in the application or during the hearing to

¹⁹ Ex. ED-11, Response 9; see also, Ex. ED-17, pg. 553.

²⁰ Ex. ED-17, p. 553.

²¹ Applicant's closing brief, p.8.

²² 1 TR 109:20 – 110:25

²³ 6 TR 1441: 8-21.; 6 TR 1446:7-12 (Mr. Fields testified that one possible future option is building a second rail line, but that a separate permitting process would be required and that it would take a "several-year process to get a new rail line built.").

determine what the impacts would be. Furthermore, TCEQ failed to conduct any BACT review or health impacts review.

A. Applicant's Failure to Provide a Necessary Information

It is important to note that Mr. Fields' "beyond reason" statement was merely limited to the possibility of 360 truck deliveries in one day. The statement did not extend to the overall possibility of coal delivery by truck. Plus, Mr. Fields is not an expert. He is simply a fact witness. This distinction becomes important when analyzing Mr. Fields' factual testimony in light of his opinion testimony.

For example, Mr. Fields testified that one day's supply of coal is about 360 trucks or truck loads. He also testified that each truck holds about 25 tons of coal. That would mean one day's supply of coal for one unit is about 9000 tons of coal. Assuming Unit 2 will require approximately the same amount, a total day's work supply of coal for both Units 1 and 2 would be around 18,000 tons of coal.²⁴ In the past when coal delivery by truck occurred, one shipload of coal was "something less" than 60,000 tons.²⁵ Thus, one shipload would approximately provide a little more than three days supply of coal.

Based on Mr. Fields' past experience of coal delivery by truck, one shipload of coal would require approximately 2400 truck deliveries at the plant.²⁶ During that scenario, Mr. Fields testified that truck deliveries "ran approximately 12 hours a day and at least six days a week"²⁷ and approximately "40 or 50 trucks" could reasonably be dedicated for coal delivery, which would equal about 80 to 100 truck deliveries into Coletto Creek station in a single day.²⁸

²⁴ 6 TR 1441: 6-8. Calculating 60000 tons ÷ 18000 tons per day = 3.33 days.

²⁵ 1 TR 128: 12-14.

²⁶ 60000 tons ÷ 25 tons per truck = 2400 trucks.

²⁷ 1 TR 128: 15-19.

²⁸ 6 TR 1443: 13-21 thru 144: 1-9.

Therefore, truck deliveries for just one shipload of coal would last for approximately 30 to 24 days²⁹ or, in other words, last for 5 to 4 weeks.³⁰

Although Mr. Fields initially testified that in the past “it took a few weeks” to have the one shipload of coal trucked in, the math definitively establishes a much longer time frame, and to Mr. Fields’ commendable candor, he did initially clarify his testimony by stating that “I don’t know exactly how long it took.”³¹

Later Mr. Fields testified again on this issue during rebuttal; however, his rebuttal testimony did not really clarify the issue. Although he stated that the longest time period that trucks were needed to truck in coal was five or six weeks; he also stated that it would be only twenty trucks daily.³² This, however, would not mathematically work out to only five or six weeks. Rather it would have lasted ten weeks based upon his previous factual testimony.³³

B. TCEQ’s Failure to Conduct a Proper BACT Review or Health Impacts Review

Despite this past experience, TCEQ astonishingly failed to require any information in the application or to conduct any analysis of the impacts resulting coal delivery by truck, which the draft permit and application allow. TCEQ’s expert Mr. O’Brien testified that coal delivered by truck would potentially have higher levels of fine particulate dust when dumped and that he “would have to look at the design of the dumping area” to be sure. However, he did not conduct a BACT review of coal delivery by truck because he did not look at the design of the dumping

²⁹ $2400 \text{ truck deliveries} \div 80 \text{ truck deliveries per day} = 30 \text{ days}$. $2400 \text{ truck deliveries} \div 100 \text{ truck deliveries per day} = 24 \text{ days}$.

³⁰ $30 \text{ days} \div 6 \text{ days a week} = 5 \text{ weeks}$. $24 \text{ days} \div 6 \text{ days a week} = 4 \text{ weeks}$.

³¹ 1 TR 128: 10-14.

³² 6 TR 1446:4 – 1447:12.

³³ 20 trucks at two shipments a day (6 TR 1444:6-7) equals 40 truck deliveries per day. 40 truck deliveries at 25 tons per truck equals 1000 tons. One shipment of 60,000 tons of coal delivered to the site at 1000 tons per day equals 60 days or 10 six day weeks of deliveries.

area; and as a result, no information about coal delivery by truck was provided to TCEQ's modelers or toxicologists for review.³⁴

On the last day of hearing, Applicant valiantly attempts to reduce the damage exposed by these omissions by relying on its fact witness to provide testimony that: 1) many particulate matter emission sources would not be emitting if CC1 and CC2 were shut down³⁵ or when no coal deliveries were occurring at all, and 2) in his opinion the worst case scenario has been evaluated.³⁶

Yet this improper fact witness opinion testimony does not alleviate the glaring omissions associated with truck delivery because Mr. Fields also testified that during the past experience of coal delivery by truck, the coal stock pile was not completely consumed nor was the power plant load reduced over several months.³⁷ Therefore, with a stock pile capacity of 30 days, delivery by truck can occur simultaneously with Units 1 and 2 operating at full capacity. Likewise, Mr. Fields testimony fails to provide any evidence of potential impacts that would occur if Units 1 or 2 loads were reduced or going through start up or shut down during a coal shipment by truck delivery.

C. Conclusion

Even though the application clearly states that coal delivery may be supplemented by truck,³⁸ absolutely no evidence was provided or analysis conducted. Furthermore, the draft permit only conditions how coal delivered by rail shall be limited.³⁹ Without additional information, analysis or restrictions, the Applicant failed to prove by a preponderance of the

³⁴ 5 TR 1079: 5 thru 1080:23

³⁵ 6 TR 1435: 13-25.

³⁶ 6 TR 1437: 13 – 1438:10.

³⁷ 6 TR 1438: 4-13.

³⁸ Applicant Ex. 3 at IPA 0000023,

³⁹ Ex. Dir. Ex. ED-9 at 426, special condition 13.

evidence that the application is complete, that BACT is required when coal delivery by truck occurs, or that the application and the draft permit are protective of the public health and welfare.

II. PRAYER

WHEREFORE, based upon the foregoing, Protestant respectfully prays that the Commission reject the ALJ's PFD, recommend denial of applicant's permit, remand to the executive director to make a determination regarding "any air quality control region, and any other remedy to which protestants may be entitled.

Respectfully submitted,

/s/

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