

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

January 7, 2011

Les Trobman, General Counsel
Texas Commission on Environmental Quality
P.O. Box 13087
Austin Texas 78711-3087

Re: SOAH Docket No. 582-09-2005; TCEQ Docket No. 2009-0033-AIR; In Re: Application of Las Brisas Energy Center, LLC for State Air Quality Permit; Nos. 85013, HAP48, PAL41, and PSD-TX-1138

Dear Mr. Trobman:

We have reviewed the exceptions to the Proposal for Decision on Remand (Remand PFD) prepared in the above-referenced matter. At this time, we continue to stand by the findings, conclusions, and recommendations contained in the Remand PFD, along with those in our original PFD (except as addressed and modified by the Remand PFD). For the most part, we find that the parties' replies to exceptions adequately address the arguments raised in the exceptions. However, we do wish to offer some comments regarding the exceptions.

First, Applicant continues to assert that there will be no secondary emissions from the POCCA site because there are no emissions that are currently "specific, well-defined, and quantifiable."¹ The ALJs reiterate that this assertion stems from Applicant's own decision to not specify how it will get the needed seven million tons of raw materials (pet coke and limestone) to its site. Determining whether particular emissions should be classified and considered secondary emissions should be made objectively. Accordingly, an applicant cannot avoid calculating emissions simply by saying, "we have not decided how we intend to carry out our operations, therefore we do not have to calculate emissions"—which is essentially what Applicant is contending here. Emissions associated with off-site material handling from the POCCA site are objectively "specific, well-defined, and quantifiable."²

In its Response to Closing Arguments, Applicant urges that Protestants' theory regarding single stationary source classification is flawed because if it were correct, the theory would

¹ Applicant Las Brisas Energy Center LLC's Consolidated Reply to Exceptions to the Administrative Law Judges' Proposal for Decision on Remand, p. 5.

² If an applicant properly models for more than one material-handling option, this would be acceptable if all modeled options show compliance with air quality guidelines and the applicant is bound to use one of the modeled options.

“swallow the concept and consideration of secondary emissions entirely.” Applicant continues that it and the ED have instead correctly concluded that the POCCA material handling scenarios fall within the definition of secondary emissions. The ALJs agree. But, it is not lost on the ALJs that Applicant’s theory on when to consider secondary sources (only when an Applicant chooses to define them) and what to consider (hypothetical scenarios that may be wholly ignored during construction) achieve the same end result as Protestants’ theory: it swallows the concept and consideration of secondary emissions entirely. Accordingly, the ALJs continue to recommend the Commission find that the scenarios proposed by Applicant for material handling must be adopted by Applicant and that any deviations during construction or later may be addressed in the customary means with the ED’s oversight.

Second, in regard to our conclusion that the ED’s air dispersion modeling is necessary for the Applicant to meet its burden of proof, Applicant spends some time in its exceptions focusing on “when” the ED’s expert conducted his additional modeling. To be clear, the ALJs are not finding that the ED violated the Water Code simply by conducting additional modeling at any certain point in time. Rather, the decision is based upon evidentiary considerations in the context of the hearing and the evidentiary record—because that is what a “burden of proof” relates to and that is what the Water Code prohibition relates to. So, whether the ED was legally permitted (but not required) to conduct additional modeling has no effect on the ALJs’ recommendation. The ALJs presume the ED may conduct whatever modeling he chooses at any point during process so long as it is not offered into the evidentiary record at the hearing and is not necessary for Applicant to meet its evidentiary burden of proof. Only when these factors are considered is the applicable Water Code’s prohibition triggered.

It is similar to evidence that is admitted for a limited purpose. In such a case, the evidence cannot be used for other purposes.³ Similarly, the Water Code prohibits the ED from assisting an applicant in meeting its burden of proof. Therefore, regardless of whether the ED’s evidence is based upon lawful underlying conduct, it cannot be used to meet the Applicant’s burden of proof absent an exception or specific grant of authority. The TCEQ’s rules clarify and grant that exception for situations when the ED’s actions are “required,” determining that such evidence does not constitute “assistance” to an applicant in meeting its burden of proof. Accordingly, the ALJs focused their analysis on whether the ED was legally required to undertake the additional modeling. Ultimately, we found that the ED was not required to conduct additional modeling. Thus once the modeling was offered into evidence and that evidence was necessary for Applicant to meet its burden of proof, the Water Code prohibition was triggered. The remedy, as the ALJs recommend, is that the ED’s additional modeling may not be considered for any purpose that assists Applicant. When this additional modeling evidence is not considered for that purpose, we find a hole in Applicant’s evidence that renders it insufficient to meet its burden of proof.

³ For example, in a criminal trial, evidence of past criminal conduct may be allowed for punishment considerations after a conviction, but it would be error to consider past criminal behavior to find that the Defendant committed the crime charged in the trial.

To summarize, we have not concluded that the Water Code prohibits the ED from conducting its own modeling. But, we do find that it prohibits the ED from assisting the Applicant in meeting its burden of proof. So, if the ED's additional modeling is allowed to help Applicant meet its burden of proof, the Water Code would be violated—regardless of when the additional modeling was conducted.⁴

With these comments, the ALJs rely on the PFD on Remand and the replies to exceptions to adequately address the issues in this case. We will attend the Commission's open meeting and be prepared to answer any questions the Commissioners may have at that time.

Sincerely,



Tommy L. Broyles
Administrative Law Judge

Sincerely,



Craig R. Bennett
Administrative Law Judge

TLB/CRB:nl
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⁴ If the additional modeling was required by law, then our recommendation would be different.

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AGENCY: TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
(TCEQ)

STYLE/CASE: APPLICATION OF LAS BRISAS ENERGY CENTER, LLC FOR
STATE AIR QUALITY PERMIT; NOS. 85013, HAP48, PAL41, AND
PSD-TX-1138

SOAH DOCKET NUMBER: 582-09-2005

TCEQ DOCKET NUMBER:2009-0033-AIR

STATE OFFICE OF ADMINISTRATIVE HEARINGS	TOMMY L. BROYLES ADMINISTRATIVE LAW JUDGE
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