

Bryan W. Shaw, Ph.D., *Chairman*
Buddy Garcia, *Commissioner*
Carlos Rubinstein, *Commissioner*
Mark R. Vickery, P.G., *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

April 19, 2010

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

Re: Executive Director's Exceptions to the ALJs' Proposal for Decision; Las Brisas Energy Center, LLC, Permit Nos. 85013, HAP48, PAL41, and PSD-TX-1138; SOAH Docket No. 582-09-2005; TCEQ Docket No. 2009-0033-AIR.

Dear Ms. Castañuela:

Enclosed, please find the original and seven copies of the Executive Director's Exceptions to the ALJs' Proposal for Decision for the above-referenced matter.

If you have any questions, please call me at 239-6033.

Sincerely,

A handwritten signature in cursive script that reads "Erin Selvera".

Erin Selvera
Staff Attorney
Environmental Law Division

Enclosures

cc: service list

Bryan W. Shaw, Ph.D., *Chairman*
Buddy Garcia, *Commissioner*
Carlos Rubinstein, *Commissioner*
Mark R. Vickery, P.G., *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

April 19, 2010

The Honorable Tommy Broyles
The Honorable Craig Bennett
Administrative Law Judges
State Office of Administrative Hearings
300 W. 15th St., Suite 502
Austin, Texas 78701

Re: Executive Director's Exceptions to the ALJs' Proposal for Decision; Las Brisas Energy Center, LLC, Permit Nos. 85013, HAP48, PAL41, and PSD-TX-1138; SOAH Docket No. 582-09-2005; TCEQ Docket No. 2009-0033-AIR.

Dear Judge Broyles and Judge Bennett:

Enclosed please find a copy of the Executive Director's Exceptions to the ALJs' Proposal for Decision for the above-referenced matter.

If you have any questions, please call me at 239- 6033.

Sincerely,

A handwritten signature in cursive script that reads "Erin Selvera".

Erin Selvera
Staff Attorney
Environmental Law Division

Enclosures

**SOAH DOCKET NO. 582-09-2005
TCEQ DOCKET NO. 2008-0033-AIR**

APPLICATION OF LAS BRISAS	§	BEFORE THE STATE OFFICE
ENERGY CENTER, LLC	§	
FOR PERMIT NOS. 85013, HAP48,	§	OF
PAL41, AND PSD-TX-1138	§	
CORPUS CHRISTI, NUECES COUNTY	§	ADMINISTRATIVE HEARINGS

TABLE OF CONTENTS

I.	INTRODUCTION/BACKGROUND	1
II.	PROCEDURAL ISSUES	3
	A. Report Approach under Texas Clean Air Act § 382.0518.....	3
	B. Remand Approach	5
III.	PFD	7
	A. MACT, Secondary Emissions, Modeling, and PAL.....	7
	1. MACT	7
	2. Secondary Emissions from material handling	9
	3. Air Dispersion Modeling	10
	4. PAL	11
	B. PM CEMS and PM ₁₀ /PM _{2.5} Surrogacy Policy.....	11
	C. State Health Effects Review and BACT for Total PM/PM ₁₀ , CO, and H ₂ SO ₄	12
	D. BACT for Mercury	13
IV.	CONCLUSION.....	16

**SOAH DOCKET NO. 582-09-2005
TCEQ DOCKET NO. 2008-0033-AIR**

APPLICATION OF LAS BRISAS	§	BEFORE THE STATE OFFICE
ENERGY CENTER, LLC	§	
FOR PERMIT NOS. 85013, HAP48,	§	OF
PAL41, AND PSD-TX-1138	§	
CORPUS CHRISTI, NUECES COUNTY	§	ADMINISTRATIVE HEARINGS

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

TO HONORABLE CHAIRMAN SHAW, AND COMMISSIONERS GARCIA AND RUBINSTEIN

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 (PFD), and in support thereof shows the following:

I. INTRODUCTION/BACKGROUND

On May 19, 2008, Las Brisas Energy Center, LLC, (Las Brisas, Applicant, or LBEC) applied to the TCEQ for issuance of State Air Quality Permit Number 85013, Hazardous Air Pollutant (HAP) Major Source [FCAA § 112(g)] Permit Number HAP48, Plant-Wide Applicability Limit (PAL) Permit Number PAL41, and Prevention of Significant Deterioration (PSD) Air Quality Permit Number PSD-TX-1138, which would authorize construction and operation of a petroleum coke-fired power plant at 6059 Joe Fulton Corridor, Corpus Christi, Nueces County, Texas.¹

TCEQ staff from the Air Permits Division, Air Dispersion Modeling Team, and Toxicology Division reviewed the documentation submitted by Las Brisas in the application.

¹ Las Brisas Ex. 31 at bates page 1.

Executive Director's Exceptions to the ALJs' Proposal for Decision
Application of Las Brisas Energy Center, LLC for Permit Nos. 85013, HAP48, PAL 41, and
PSD-TX-1138

Upon completing the review, the Executive Director issued the Notice of Application and Preliminary Decision which was published on January 14, 2009 and includes the Preliminary Determination Summary and draft permit. In issuing the draft permit, the ED concluded that: LBEC'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 and toxicology review demonstrates that the proposed project will not violate the National Ambient Air Quality Standards (NAAQS) or have any adverse impacts on the public health or the environment.

The Application was direct referred to the State Office of Administrative Hearings (SOAH) at the request of the Applicant on January 9, 2009. A preliminary hearing on the matter was held on February 17, 2009 in Corpus Christi. The hearing on the merits was held November 2, 2009 through November 12, 2009 in Corpus Christi.

On March 29, 2010, the ALJs issued their Proposal for Decision to the Commission (PFD). In their proposal, the ALJs recommend remand or denial of the application based on several issues.² Specifically, the ALJs' recommended action included the following issues: Maximum Achievable Control Technology (MACT) review, the applicant's secondary emissions from material handling sources, deficiencies in the air dispersion modeling for the application, the Permit Applicability Limit (PAL), Particulate Matter Continuous Emissions Monitoring

² The ALJs conclude that "LBEC has failed to meet its burden of proof on a number of required issues" and "given these failures, the permits sought by LBEC may not issue at this time." PFD at 120.

Executive Director's Exceptions to the ALJs' Proposal for Decision
Application of Las Brisas Energy Center, LLC for Permit Nos. 85013, HAP48, PAL 41, and
PSD-TX-1138

Systems (PM CEMS), and the use of the PM₁₀ surrogacy policy for PM_{2.5} emissions.³ In addition, the ALJs recommended changes to the BACT limits for four pollutants: total particulate matter, including particulate matter with a diameter of less than 10 microns (PM/PM₁₀), carbon monoxide (CO), sulfuric acid (H₂SO₄), and mercury (Hg).

II. PROCEDURAL ISSUES

In the cover letter to the PFD, the ALJs request briefing on the different possible methods for handling this case procedurally, including whether Texas Health and Safety Code §§ 382.0158 (d) and (e) apply and, if so, what they may require.⁴ As discussed below, the ED asserts that although §§ 382.0518 (d) and (e) (the report approach) would apply, the ALJs' recommendation to conduct additional review, which would likely include additional notice, would mitigate against this approach. The specifics of the report approach and the remand approach under TCEQ rule 30 TAC § 80.265 are addressed in more detail below.

A. Report Approach under Texas Clean Air Act § 382.0518

Texas Health and Safety Code (THSC) § 382.0518(d) provides that if the commission finds that the emissions from the proposed facility will contravene the standards under subsection (b), referring to BACT and protection of public health and physical property, or will contravene the intent of chapter 382, the commission may not grant the permit, permit amendment, or special permit, and shall set out in a report to the applicant the Commission's

³ PFD at 23, 47, 50, 55, 110 and 112.

⁴ Letter to Les Trobman, General Counsel, Re: SOAH Docket No. 582-09-2005; TCEQ Docket No. 2009-0033-AIR; In Re: Application for Las Brisas Energy Center, LLC for State Air Quality Permit Nos. 85013, HAP48, PAL41, and PSD-TX-1138, dated March 29, 2010.

Executive Director's Exceptions to the ALJs' Proposal for Decision
Application of Las Brisas Energy Center, LLC for Permit Nos. 85013, HAP48, PAL 41, and
PSD-TX-1138

specific objections to the submitted plans of the proposed facility.⁵ Furthermore, § 382.0518(e) states: "if the person applying for a permit, permit amendment, or special permit makes the alterations in the person's plans and specifications to meet the commission's specific objections, the commission shall grant the permit, permit amendment, or special permit. If the person fails or refuses to alter the plans and specifications, the commission may not grant the permit, permit amendment, or special permit. The commission may refuse to accept a person's new application until the commission's objections to the plans previously submitted by that person are satisfied."⁶

Application of this mechanism for the LBEC application pursuant to TCAA § 382.0518(d) would be a case of first impression, as it has not previously been applied to an application for a new air permit.⁷ The provisions of the statute allow for the Commission to address any questions or issues they find in the LBEC application based on the ALJs' PFD and the parties' briefings. These provisions would also allow for the applicant to submit additional information to address unresolved issues or provide new information to resolve any additional concerns. However, application of this process would eliminate any further hearing (and probable notice) before the ALJs. For this reason, and because there is another viable alternative

⁵ Tex. Health & Safety Code § 382.0518(d), also known as the Texas Clean Air Act or TCAA.

⁶ TCAA § 382.0518(e).

⁷ A similar provision was applied pursuant to the Commission's Interim Order of March 10, 2006, to the application for renewal of the ASARCO, Inc. Air Quality Permit No. 20345; TCEQ Docket No. 2004-0049-AIR; SOAH Docket No. 582-05-0593. *See also*, K&K Tank Cleaning, TCEQ Docket No. 2008-1760-AIR; SOAH Docket No. 582-09-1236 and Tex Art Stone, TCEQ Docket No. 2008-1761-AIR; SOAH Docket No. 582-09-1237 where the applications were found to not meet the requirements for renewal and thus the ED issued a report to the applicant listing the deficiencies forming the basis for the ED's determination. In accordance with THSC § 382.055 (g), these cases were subsequently direct referred to SOAH for a hearing to allow the applicant to show why the permit should not immediately expire. Unlike the report provision in the 382.055(g), the hearing process is not listed as an option in for applications under THSC § 382.0518. Instead, the statute states that the commission may not issue the permit and may not accept the person's new application until the commission's objections to the plans are satisfied.

that allows for participation of the parties, the ED does not recommend the "report approach" as the best means for addressing the issues remaining in the matter, but acknowledges that it is a potential option for Commission consideration.

B. Remand Approach

The ALJs recommend remand to the ED for further technical review to address the requirement for a MACT analysis, secondary emissions from materials handling, and concerns regarding the applicant's air dispersion modeling.⁸ The ED will address the technical issues individually and in more detail below, but as indicated in post-hearing briefings, concurs that two of these issues may require additional evidence.

Although TCEQ rule 80.101 allows for remand of an application to the ED in situations where no issues remain controverted, there are no rules that specifically address situations where an application may be remanded to the ED for additional technical review.⁹ However, TCEQ rule 80.265 states: "The Commission, on the motion of any party or its own motion, may order the judge to reopen the record for further proceedings on specific issues in dispute. The commission's order shall include instructions as to the subject matter of further proceedings and the judge's duties in preparing supplemental materials or revised orders based upon those proceedings for the commission's adoption."¹⁰ The Commission has exercised this option in several prior applications that were subject to contested case hearings to allow the ALJs to take

⁸ PFD at 23, 47, and 51.

⁹ 30 TAC § 80.101 addresses remand to the ED in situations where all timely hearing requests have been withdrawn or denied or, if parties have been named, all parties to a contested case reach a settlement so that no facts or issues remain controverted.

¹⁰ 30 TAC § 80.265

Executive Director's Exceptions to the ALJs' Proposal for Decision
Application of Las Brisas Energy Center, LLC for Permit Nos. 85013, HAP48, PAL 41, and
PSD-TX-1138

additional evidence on specific issues that remained unresolved or for which no evidence was submitted in the original hearing, but was necessary for the Commissions' decision on the application.¹¹ For the LBEC application, the Commission has the discretion to remand this matter back to the ALJs to take additional evidence on any of the issues raised by the ALJs within the Commission's jurisdiction as it relates to this application. Therefore, this alternative would allow the opportunity for additional evidentiary hearing, with additional notice of the hearing as appropriate.

¹¹ For example, the Commission remanded the matter of HHJ, Inc. dba Decker Utilities, TCEQ Docket No. 2008-0164-UCR; SOAH Docket No. 582-08-1719, to allow the Applicant to submit additional information to support its request for a water utility rate increase. Specifically, in the Commission's Interim Order dated July, 21, 2009, the Commission remanded the matter to SOAH to conduct an additional hearing on the issue of the undocumented cost of service expenses to give the parties the opportunity to more fully address that issue. This process involved review of the additional evidence by the parties, including the ED's audit of the new receipts and invoices, and an additional hearing (including notice of that hearing). The Commission's previous direction in the HHJ matter reflects that remand to SOAH may a viable option for this application. Similarly, in the Commission's Interim Order concerning the Administrative Law Judges' Proposal for Decision and Order concerning TexCom Gulf Disposal L.L.C.'s application for Underground Injection Control Permit Nos. WDW410, WDW412, and WDW413; TCEQ Docket No. 2007-0204-WDW; SOAH Docket No. 582-07-2673, the Commissioners remanded the matter to SOAH with instructions to abate the hearing in order to allow analysis to be conducted using the 80.9 milidarcy permeability and with an assumption that the fault in question is non-transmissive in the horizontal direction, and bring that back to the Commission, to include any relevant evidence on the public interest requirements, and alternative disposal options. *See also*, the Commission's Interim Order concerning the Administrative Law Judges' Proposal for Decision and Order concerning TexCom Gulf Disposal L.L.C.'s application for nonhazardous Industrial Solid Waste Permit no. 87758; TCEQ Docket No 2007-0362-IHW; SOAH Docket No. 582-07-2674, where the Commission remanded the matter to SOAH for additional consideration and taking any evidence needed to determine if the surface facility permit satisfies applicable standards utilizing 30 TAC chapters 305, 331, and 335; The Commission's Marked Agenda for February 10, 2010 regarding Consideration of the Administrative Law Judges' Proposal for Decision and Order regarding the applications of Texas Landing Utilities, TCEQ Docket No. 2007-1867-UCR; SOAH Docket No. 582-08-1023. (remand language in the marked agenda comments reflects remand of the matter to the ALJ to address seven issues); *Cf.* the Commission's Interim Order concerning the application filed by the City of Weston for Water Quality permit No. WQ0014602001; TCEQ Docket No. 2006-0199-MWD; SOAH Docket No. 582-06-2770, (Commission remanded the City's application first to the Executive Director so that the City may submit and the Executive Director may review a detailed geologic and hydrologic assessment of the site, a detailed flood analysis, and an irrigation management plan, and based on that review, the Commission directed the Executive Director to develop additional specific or modified specific provisions to ensure the protection of ground and surface water; and if a major amendment is not required, directed the application be referred directly to SOAH for a supplemental hearing).

III. PFD

The ALJs have made essentially four categories of recommendations for this application: some issues for remand or denial; some issues for Commission consideration and discretion regarding remand; issues that do not require remand unless additional information establishes otherwise; and finally, recommended some changes to the draft permit without the need for remand. The ED has grouped the issues based on these categories.

A. MACT, Secondary Emissions, Modeling, and PAL

The ALJs recommend remand or denial of the application based on specific concerns regarding MACT, secondary emissions from material handling, the applicant's air dispersion modeling, and the PAL.¹² Each of these concerns and the ED's exceptions regarding the ALJ's recommendations are discussed below.

1. MACT

In Section IV A, the ALJs discuss the parties' positions regarding applicability of MACT to the LBEC pet coke-fired boilers.¹³ The ALJs analyze the issue from both a strict constructionist legal basis and the practical technical engineering perspective, ultimately concluding that MACT is applicable to the pet coke-fired boilers. The ED excepts to this conclusion because the record evidence supports a finding that the LBEC pet-coke fired boilers

¹² In accordance with THSC § 382.0518, denial of the application is not an option until, and unless the applicant refuses, or is unable to meet the conditions set out in the report issued by the Commission.

¹³ PFD at 6-23.

Executive Director's Exceptions to the ALJs' Proposal for Decision
Application of Las Brisas Energy Center, LLC for Permit Nos. 85013, HAP48, PAL 41, and
PSD-TX-1138

are not subject to MACT.¹⁴ The ALJs appropriately identify the necessary legal analysis, focusing on two issues: 1) whether pet coke is a fossil fuel, and 2) if so, whether pet coke-fired boilers are subject to EPA's 2000 listing decision.¹⁵ The record reflects the ED's position and the general consensus of the experts, that pet coke is a fossil fuel.¹⁶ The remaining issue then, is the effect of EPA's 2000 listing decision. Here, the record evidence also supports a finding that LBEC's pet coke-fired boilers are not subject EPA's 2000 listing decision because pet coke is not included in the definition of coal under 40 CFR § 60.41Da.¹⁷

However, if the Commission finds that the ALJs' conclusion is proper, and that MACT is applicable, the Applicant would need to comply with the requirements of CAA § 112g, and the applicable TCEQ rules in 30 TAC Chapter 116 Subchapter E. To the extent the ALJs have recommended remand on the MACT issue, the ED notes that in the NRG application, the ALJs successfully abated the pending NSR/PSD application while the applicant developed, and the ED

¹⁴ The ALJs even concede that "from a strict constructionist approach to interpreting the legal definitions involved, then LBEC appears correct that pet coke-fired boilers are not coal-fired or oil-fired. Thus they would not be subject to EPA's 2000 listing decision." However, using the same strict constructionist approach, the ALJs determine that pet coke would also not be considered a fossil fuel and thus LBEC would not be a fossil fuel-fired boiler. Instead it would be an industrial, commercial or institutional boiler subject to MACT.

¹⁵ The ALJs also appropriately acknowledge that the issue is difficult because the legal authority involved does not directly address pet coke-fired boilers clearly. They also note that EPA has wrestled with the correct treatment of pet coke over the years citing to the numerous times EPA has modified its proposed treatment of pet coke, including it within the definition of coal at times and then including it within the definition of petroleum at other times - and then removing it from each at times. PFD at 20-21. *See also*, PFD footnotes 31 and 32.

¹⁶ PFD at 14 (citing Tr. at 1878 and 1937.)

¹⁷ PFD at 15.

Executive Director's Exceptions to the ALJs' Proposal for Decision
Application of Las Brisas Energy Center, LLC for Permit Nos. 85013, HAP48, PAL 41, and
PSD-TX-1138

reviewed and created, a draft HAP permit for the MACT analysis.¹⁸ The two applications were later consolidated by the ALJs.¹⁹

2. Secondary Emissions from material handling

In Section IV B, the ALJs discuss the evidence presented regarding secondary emissions and recommend denial or remand of the application to the ED for further technical review.²⁰ The ALJs focus their review on the Applicant's evidence regarding the Port of Corpus Christi Authority (POCCA) authorizations that the Applicants now argue will serve as the materials handling source for LBEC.²¹ In coming to their conclusion, the ALJs found the following deficiencies in the Applicant's evidence regarding secondary emissions and material handling:

1. Insufficient evidence to show that the permitted emission limits for the POCCA docks are sufficient for LBEC's material handling needs.²²
2. No accounting for material handling for stockpiles of pet coke, lime stone, and other material handling and storage processes (unlike White Stallion application).²³
3. No evidence on how the transfer of materials would happen without any emissions.²⁴
4. No indications in the record of how LBEC materials would be processed at POCCA nor how the materials would be transported to the LBEC material transfer tower.²⁵

¹⁸ Application of NRG Texas Power, LLC for State Air Quality Permit No 79188, PSD-TX-1072, and HAP 14; TCEQ Docket Nos. 2007-1820-AIR and 2008-1210-AIR; Consolidated SOAH Docket Nos.582-08-0861.

¹⁹ *Id.*

²⁰ PFD at 24-47.

²¹ The ALJs state "Relatively late in the process, and after public notice and comment, LBEC changed its intentions and now pursue the POCCA route for materials handling." PFD at 38.

²² PFD at 40-41. The ALJs admit that they did not fully comprehend this until after the hearing. PFD at 41, FN 77.

²³ *Id.* at 41.

²⁴ *Id.* at 46.

²⁵ *Id.* at 42.

The ED does not specifically except to these findings and, as the ALJs agree, if LBEC's underlying rationale that if there will be no increase in PM emissions from off-site material handling sources above what was modeled, or if the ultimate conclusions from the impacts analysis are unchanged by secondary sources, then LBEC would meet its burden of proof on this issue. However, also based on some of these same concerns expressed by the ALJs, coupled with the fact that the ED did not have the opportunity to review the sufficiency of the Port's Dock 1 and 2 authorizations in terms of throughput and allowables as the source of material handling operations for LBEC, the ED recommended that it was appropriate to remand this portion of the application to further address them.²⁶ The ED notes that, related to this issue, on March 11, and April 14, 2010, the POCCA submitted alteration requests for its Bulk Dock 2 air quality permit, the net result of which would be to significantly reduce the allowable emission rate of PM.

3. Air Dispersion Modeling

In Section IV D, the ALJs discuss the air dispersion modeling evidence presented in the Applicant's direct case and through rebuttal.²⁷ Similar to the issue of secondary emissions, the ALJs recommend remand or denial of the application based on the following evidentiary concerns: 1) failure to properly locate emissions sources, 2) failure to calculate and model impacts related to fugitive emissions, and 3) improper adjustment of the emissions associated with the Port's 9498 authorization.

²⁶ Executive Director's Reply to Closing Arguments at 3.

²⁷ PFD at 50-69.

Executive Director's Exceptions to the ALJs' Proposal for Decision
Application of Las Brisas Energy Center, LLC for Permit Nos. 85013, HAP48, PAL 41, and
PSD-TX-1138

The ED does not except to the ALJs' findings on this issue. As stated in his reply to closing arguments, the ED did not have the opportunity to audit the revised modeling submitted during rebuttal. Because federal guidance requires the ED to verify the Applicant's modeling prior to issuance of the permit, it is appropriate to remand this portion of the application to allow evidence of the modeling audit.

4. PAL

In Section IV F1, the ALJs discuss the evidence and arguments regarding the Applicant's Plant-wide Applicability Limit or PAL application, recommending remand of this issue in addition to, and in light of the other areas of remand suggested in the PFD.²⁸ The ALJs base their decision on the fact that EPA would likely issue its final decision regarding PALs in the Texas SIP before the application would be reconsidered. The ED does not except to the ALJs' conclusions. Additionally, the ALJs' recommended changes to the BACT limits in the draft permit would potentially necessitate changes to the PAL provisions.

B. PM CEMS and PM₁₀/PM_{2.5} Surrogacy Policy

Unlike some of the issues where the ALJs specifically recommend remand or denial of the application, for the issues of PM CEMS, and use/applicability of the PM₁₀ Surrogacy Policy to demonstrate compliance for PM_{2.5}, the ALJs suggest that the Commission may consider the applicability of these issues as a matter of policy.²⁹ The ED does not except to the ALJs'

²⁸ *Id* at 108-110.

²⁹ PFD at 50 and 112.

conclusions. The ED raises no exceptions to the policy recommendations raised by the ALJs but may provide comment in the reply based on the exceptions from the other parties.

On the specific issue of application of the surrogacy policy, the record supports the ALJs' finding that the application is sufficient without the enhanced showing outlined in the Trimble Order.³⁰ The ED agrees that the Administrative Procedure Act (APA) provides for Commission discretion in considering the ALJs' recommendations and making alterations to the findings where the Commission's interpretation differs.³¹

C. State Health Effects Review and BACT for Total PM/PM₁₀, CO, and H₂SO₄

In Section IV G, the ALJs conclude that, unlike the issues with the PSD modeling, no additional state health effects review is necessary.³² The ED does not except to the ALJs' analysis that the state health effects review is sufficient.

In section IV E(3), the ALJs recommend changes to the BACT limits for total PM/PM₁₀, CO, and H₂SO₄, noting that if the Applicant finds them unachievable, then the permit may either

³⁰ *Id.*

³¹ Specifically, Tex. Govt. Code § 2001.058(e), also known as the Administrative Procedure Act states: "A state agency may change a finding of fact or conclusion of law made by the administrative law judge, or may vacate or modify an order issued by the administrative judge, only if the agency determines: (1) that the administrative law judge did not properly apply or interpret applicable law, agency rules, written policies provided under Subsection (c), or prior administrative decisions; (2) that a prior administrative decision on which the administrative law judge relied is incorrect or should be changed; or (3) that a technical error in a finding of fact should be changed." While not in the record, the ED recognizes the regulatory changing landscape on this issue. For example, as recent as March 23, 2010, EPA has expressed that they continue to allow states to use the PM₁₀ surrogate policy during their transition to the new PM_{2.5} requirements; however, they have also required additional information when the surrogate policy is used. (Memorandum from Stephen D. Page to EPA Regional Modeling Contacts, et. al., entitled Modeling Procedures for Demonstrating Compliance with PM_{2.5} NAAQS March 23, 2010).

³² PFD at 117. However, they leave open the door to remand if the additional PSD modeling reveals any areas of concern.

be denied or remanded for further evidence on the BACT for that pollutant.³³ The ED believes that the record evidence supports the BACT limits in the draft permit.

D. BACT for Mercury

The ALJs recommend adoption of a different BACT limit for mercury without any recommendation regarding remand or denial. The ALJs agree with some of LBEC's contentions regarding mercury but ultimately find LBEC's proposed mercury limit is not BACT.³⁴ Instead, they recommend the permit be revised to include a mercury limit of 6.0×10^{-7} lb/MMBtu.³⁵ The ALJs expressed concern that the proposed mercury limit is artificially high.³⁶ However, setting the mercury limit at 6.0×10^{-7} lb/MMBtu, the number established in Calhoun County Navigation District (CCND), would set an artificially low limit for two reasons. First, the limit referenced in the ED's RTC for CCND was established based on a settlement agreement and not on a BACT analysis.³⁷ Second, using such a low limit that has not been established in practice would most likely preclude triggering the optimization clause, which in turn would preclude establishing a limit reflective of the true operational control capabilities of the facility.³⁸

³³ PFD at 87- 89, 92-94, 96-97, and 101.

³⁴ *Id* at 92.

³⁵ *Id* at 94. See also Exhibit ED-16 at 40. The ED's RTC shows that 6.0×10^{-7} lb/MMBtu is the revised BACT limit for mercury in the Calhoun County Navigation District established through a settlement agreement.

³⁶ The ALJs discuss how allowing the extremely high data points along with an additional safety factor to account for variability in the pet coke supply is unreasonable. PFD at 93.

³⁷ See Exhibit ED-16, at 40, bates 592, where it states that the TCEQ issued air permits for two coke-fired CFB projects, Formosa Plastics and Calhoun County Navigation District (CCND), both in Calhoun County, Texas with an emission limit of 3.0 lb Hg/ 10^{12} BTU (3.0 lb Hg/TBtu) limit (the EPA's proposed MACT standard for coal-fired industrial boilers).

³⁸ See Exhibit Ed-3 at bates page 56 describing how the process involves resolving questions such as: Has the proposal been demonstrated to work based on actual operation and can the proposal reasonably be expected to work based on technical analysis. Examples of this issue were presented through hypotheticals posed to Mr. Hamilton by EDF counsel Webber and Applicant counsel Riley. In Mr. Webber's scenario, no downward

Executive Director's Exceptions to the ALJs' Proposal for Decision
Application of Las Brisas Energy Center, LLC for Permit Nos. 85013, HAP48, PAL 41, and
PSD-TX-1138

Furthermore, use of optimization clauses to establish BACT limits has been accepted in prior cases reviewed by the USEPA's Environmental Appeals Board (EAB), and thus should be accepted in this case. For example, in the matter of *In re: Prairie State Generating Company*, PSD Permit No. 189808AAB, the EAB found no clear error in the Illinois Environmental Protection Agency's (IEPA's) permitting decision with respect to the permit's BACT limit for total filterable and condensable PM₁₀.³⁹ The EAB noted that on two prior occasions, it had sustained a permitting authority's decision to issue a permit containing BACT limits that were subject to adjustment based on post-construction performance data, referring to *AES Puerto Rico, LP* and *In re Hadson Power*.⁴⁰ The EAB explains that the permit in *Hadson Power* set a high limit for NO_x subject to downward adjustment after obtaining post-construction operating data.⁴¹ In both cases, the permitting authorities explained the adjustable permit limits were used because of uncertainty as to what emission limit would be achievable.⁴² In the *Prairie State* case, the EAB gave credence to the IEPA conclusion that there was scientific uncertainty regarding the achievable PM₁₀ emission limit.⁴³ Under these circumstances, the EAB concluded that, just as

adjustment would be required, but in Mr. Riley's hypothetical, the limit would be adjusted through the optimization clause to a level that reflects the true emissions. Tr. at 1807-1810 and 1969-1978. See Also EDF Exhibit 320 and Las Brisas Exhibit 57.

³⁹ IEPA accepted as BACT a limit of 0.035 lb/MMBtu for total PM when other facilities had lower limits at 0.018 lb/MMBtu. *In re: Prairie State Generating Co.*, Appeal No. 05-05, slip op. at 112 (EAB Aug 24, 2006).

⁴⁰ *Id.* at 111. (citing *In re AES Puerto Rico, L.P.*, 8 E.A.D. 324, 348-50 (EAB 1999); and *In re Hadson Power 14*, E.A.D. 258 (E.A.B 1992)).

⁴¹ *In re: Prairie State Generating Co.*, *supra*, slip op at 112. (Citing *Hadson Power*, 4 E.A.D at 191).

⁴² *Id.*

⁴³ *Id.*

Executive Director's Exceptions to the ALJs' Proposal for Decision
Application of Las Brisas Energy Center, LLC for Permit Nos. 85013, HAP48, PAL 41, and
PSD-TX-1138

they held in AES Puerto Rico, the use of an adjustable limit, constrained by certain parameters, and backed by worst case air quality analysis, is a reasonable approach.⁴⁴

Moreover, the EAB's decision in Prairie State was based on considerations made by the IPEA, similar to those made by the ED in this matter. Specifically, the EAB focused on the IEPA's demonstration that it considered other permits in its review, as documented in IEPA's RTC. The EAB gave weight to IEPA's finding that the limits for combined particulate matter set or proposed in other states were in a wide range and thus did not provide a reliable basis to set such a limit.⁴⁵ And finally, the EAB looked at IEPA's express statement that its determination was based, at least in part, on its conclusion that there was an uncertain current state of scientific knowledge about condensable particulate matter emissions, total PM₁₀ emissions and their control.⁴⁶

These three factors are present in the ED's evaluation of the Las Brisas Application. Specifically, for LBEC, the ED's RTC establishes that its permit engineer considered four other pet coke-fired CFB boilers prior to public comment and found LBEC's request in the mid range of those permits.⁴⁷ In addition, the RTC documents that in response to public comments, the permit engineer reviewed an additional nine permits that use other types of fuel noting that: "None of the RBLC-listed CFB projects with mercury limits used petroleum coke fuel and the reported emission limits range from 0.4 to 81, which equates to two orders of magnitude. This

⁴⁴ *Id.*

⁴⁵ *Id.* at 109-110.

⁴⁶ *Id.* at 110.

⁴⁷ Exhibit ED-16 at 40. *See also*, Exhibit ED-1 at 24:23-27.

wide range of emission limits demonstrates a lack of consensus among CFB boilers and therefore, little additional information was gained from this part of the review."⁴⁸ Furthermore, in his prefiled testimony, Mr. Hamilton explains that: "The complication in establishing BACT has been in setting the appropriate emission limit for petroleum coke fuel, because of the uncertainty in how much mercury is in petroleum coke."⁴⁹ Furthermore, he testified during the hearing that "...what we've seen with mercury testing, there is quite a bit of variability."⁵⁰ Therefore, Mr. Hamilton relies on the optimization clause (now in special condition 50) to require the permit limit to be adjusted downward based on the results of the first annual compliance sampling. For these reasons, the record evidence, including the ED's RTC, and Mr. Hamilton's testimony regarding Special Condition 50, support the ED's recommendation with respect to the draft permit.

IV. CONCLUSION

As outlined above, the ALJs have identified MACT, secondary emissions, modeling, and the PAL as issues that should be remanded. These are all issues within the Commission's discretion for consideration and ultimate determination. The ED has offered his exceptions to those conclusions. The ED respectfully requests that if the Commission orders remand in this matter, consistent with 30 TAC § 80.265, the order of remand be as specific as possible on matters such as which issues are remanded, the purpose of the remand (e.g., to take additional evidence), the duration of hearing, the anticipated outcome (e.g., new or revised PFD, findings of

⁴⁸ *Id.* at 41. *See also*, Exhibit ED-1 at 25:19-23.

⁴⁹ *See* Exhibit ED-1 at 24:19-21.

⁵⁰ Tr. at 1809.

Executive Director's Exceptions to the ALJs' Proposal for Decision
Application of Las Brisas Energy Center, LLC for Permit Nos. 85013, HAP48, PAL 41, and
PSD-TX-1138

fact, conclusions of law, and proposed order), and any other relevant procedural matters such as
notice.⁵¹

Respectfully submitted,

Texas Commission on Environmental Quality
Mark R. Vickery, P.G., Executive Director

Stephanie Bergeron Perdue, Deputy Director
Office of Legal Services

Robert Martinez, Director
Environmental Law Division



Erin Selvera, Staff Attorney
Environmental Law Division
State Bar No. 24043385
(512) 239-6033
eselvera@tceq.state.tx.us

Benjamin Rhem, Staff Attorney
Environmental Law Division
State Bar No. 24065967
brhem@tceq.state.tx.us
P.O. Box 13087, MC 173
Austin, Texas 78711-3087
(512) 239-6501

REPRESENTING THE EXECUTIVE DIRECTOR
OF THE TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

⁵¹ See, Tex. Govt. Code § 2001.058(e). See also, Tex. Govt. Code § 2001.060.

CERTIFICATE OF SERVICE

I certify that true and correct copies of the foregoing Executive Director's Exceptions to the ALJs' Proposal for Decision have been served on the following in the manner indicated below on this 19th day of April, 2010.



Erin Selvera
Staff Attorney
Environmental Law Division

SERVICE LIST
LAS BRISAS ENERGY CENTER, LLC
PERMIT NOS. 85013, HAP48, PAL41, AND PSD-TX-1138
SOAH DOCKET NO. 582-09-2005
TCEQ DOCKET NO. 2009-0033-AIR

FOR SOAH:

VIA: Facsimile
The Honorable Tommy L. Broyles
The Honorable Craig R. Bennett
Administrative Law Judges
State Office of Administrative Hearings
300 West 15th Street
Austin, TX 78701
Tel: (512) 475-4993
Fax: (512) 475-4994

VIA: Facsimile
State Office of Administrative Hearings
Attn: SOAH Docket Clerk
P.O. Box 13025
Austin, TX 78711-3025
Tel: (512) 475-4993
Fax: (512) 475-4994

FOR THE APPLICANT:

VIA: E-mail
John Riley
Christopher C. Thiele
Vinson & Elkins, LLP
2801 Via Fortuna
Suite 100
Austin, Texas 78746-7568
Tel: (512) 542-8520 Riley
Tel: (512) 542-8632 Thiele
Fax: (512) 236-3329 Riley
Fax: (512) 236-3283 Thiele
Email: cthiele@velaw.com
jriley@velaw.com

FOR ROGER LANDRESS:

VIA: E-mail
Michael J. Westergren
P.O. Box 3371
Corpus Christi, TX 78404
Tel: (361) 765-6828
Fax: (866) 882-3928
Email: mikewest@trip.net

FOR THE PUBLIC INTEREST COUNSEL:

VIA: E-mail
Mr. Scott Humphrey
Texas Commission on Environmental
Quality
Public Interest Counsel, MC103
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-0574
Fax: (512) 239-6377
Email: shumphre@tceq.state.tx.us

FOR INDIVIDUALS:

VIA: regular mail
Manuel J. Cavazos, III
3409 Fairmont Dr.
Corpus Christi, TX 78408

FOR MEDICAL GROUPS:

VIA: E-mail
Richard Lowerre, Counsel
David Frederick, Counsel
Nakisha Nathan, Legal Assistant
Lowerre, Frederick, Perales, Allmon &
Rockwell
707 Rio Grande, Suite 200
Austin, Texas 78701
Tel: (512) 469-6000
Fax: (512) 482-9346
Email: rl@lf-lawfirm.com
dof@lf-lawfirm.com
nakisha@lf-lawfirm.com

FOR SIERRA CLUB:

VIA: E-mail
Sierra Club
Ilan Levin
Environmental Integrity Project
1303 San Antonio St., Ste. 200
Austin, Texas 78701
Direct: 512.637.9479
Fax: 512.584.8019
Email: ilevin@environmentalintegrity.org

FOR CLEAN ECONOMY COALITION:

VIA: E-mail
Gerald Sansing, Chairperson
P.O.Box 537
Corpus Christi, TX 78403
Tel: 361-855-7051
Fax: 361-854-5859
jsansing@grandecom.net

**FOR LEAGUE OF UNITED LATIN
AMERICAN CITIZENS (LULAC):**

VIA: regular mail
Susie Luna-Saldana, Education Chair
League of United Latin American Citizens,
Council No. 1
4710 Hakel Dr.
Corpus Christi, TX 78415

**FOR ENVIRONMENTAL DEFENSE
FUND:**

VIA: E-mail
Tom Webber
Matt Baab
McElroy, Sullivan, & Miller, LLP
P.O.Box 12127
Austin, TX 78711
Tel: (512) 327-8111
Fax: (512) 327-6566
Email: tweber@msmtx.com
mbaab@msmtx.com

VIA: Fax
Jeffrey G. Wigington
Wigington Rumley Dunn, L.L.P.
800 North Shoreline
14th Floor South Tower
Corpus Christi, Texas 78401
Tel: (361) 885-7500
Fax: (361) 885-0487

**FOR TEXAS CLEAN AIR CITIES
COALITION:**

VIA: E-mail
Terrell W. Oxford
Susman Godfrey, LLP.
901 Main, Ste. 5100
Dallas, TX 75202
Tel: (214) 754-1902
Fax: (214) 665-0847
Email: toxford@susmangodfrey.com

FOR THE CHIEF CLERK

VIA: E-file and hand delivery
LaDonna Castañuela
Office of the Chief Clerk
Texas Commission on Environmental
Quality
Office of the Chief Clerk, MC-105
P.O. Box 13087
Austin, Texas 78711-3087