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

December 21, 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: 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 Proposal for Decision on Remand for the above-referenced matter. **This version replaces the prior version that contained a typographical error.**

Sincerely,

Erin Selvera
Staff Attorney
Environmental Law Division

Enclosures

cc. Service List

SOAH DOCKET NO. 582-09-2005
TCEQ DOCKET NO. 2009-0033-AIR

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

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

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' (ALJs) Proposal for Decision (PFD) on Remand, 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]

Upon completing the technical review, the Executive Director issued the Notice of Application and Preliminary Decision which was published on January 14, 2009. The

[1] Las Brisas Ex. 31 at bates page 1.

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 PFD to the Commission. In their PFD, the ALJs recommend remand or denial of the application based on several issues.[2] On June 30, 2010, the Commission considered the Las Brisas application and determined to remand the matter to SOAH solely for the purpose of reopening the record, pursuant to 30 Texas Administrative Code § 80.265 and Texas Government Code § 2003.047(m), to take additional evidence on the following seven issues: 1) whether there will be any increase in particulate matter (PM) above what was modeled, or if the ultimate conclusions from the impacts analysis would be unchanged by secondary sources; 2) review of additional modeling performed by the applicant in support of the application; 3) the ability of the applicant to design and install a conveyor system that will not be a source of emissions; 4) the ability of the applicant to design and install a system for ash loading into trucks that will not be a source of emissions; 5) whether modeling inputs, with respect to moisture content, for the Port of Corpus Christi Authority facilities are proper; 6) the proper BACT emission limits for total particulate matter (PM/PM_{10}) and mercury; and 7) the proper revisions to Special Condition 44 to address any changes in

[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.

BACT limits.[3] The remand hearing was held October 18, 2010 through October 21, 2010. Parties filed Closing Arguments and Replies to Closing Arguments on November 1, 2010, and November 8, 2010, respectively.

On December 1, 2010, the ALJs issued their PFD on Remand which addressed each of the issues listed above. Many of these issues were resolved by agreement of the parties, or the Applicant's agreement to prior ALJ recommendations. With the exception of the mercury BACT limit, the case comes down to the issue of the modeling analysis conducted by ADMT, and whether that information constitutes assistance to the Applicant in meeting their burden of proof under Texas Water Code (TWC) § 5.228.[4] The ED's Exceptions address the issue of the modeling analysis.

II. CONSIDERATION OF THE ED'S EVIDENCE DOES NOT VIOLATE TEXAS WATER CODE § 5.228

The ED excepts to the ALJ's conclusion that consideration of the ED's evidence violates TWC § 5.228(e).[5] The ALJ's appropriately recognize that "there is sparse legal guidance on the meaning of Texas Water Code§ 5.228, and the interpretation of that statute is a legal issue that the Commission has the authority to decide."[6] However, TCEQ rules do shed some light on this issue, explaining when ED action does not

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[3] Exhibit ED-48, the Commission's Interim Order dated July 1, 2010.
[4] The ALJ's state that "if the Commission disagrees with the ALJs and find that it may rely on the ED's modeling to find that the NAAQS and PSD increment will not be violated, then the ALJs find no other deficiencies on remand with the application." PFD at 4.
[5] PFD at 21. TWC § 5.228(e) states: " The executive director or the executive director's designated representative may not assist a permit applicant in meeting its burden of proof in a hearing before the commission or the State Office of Administrative Hearings unless the permit applicant fits a category of permit applicant that the commission by rule has designated as eligible to receive assistance. The commission shall adopt rules establishing categories of permit applicants eligible to receive assistance."
[6] *Id.* at 4.

constitute assistance to the Applicant. Specifically, TCEQ rule 30 TAC § 80.127(h) states "testimony or evidence given in a contested case permit hearing by agency staff regardless of which party called the staff witness or introduced the evidence relating to the documents listed in § 80.118 of this title (relating to Administrative Record) **or** any analysis, study, or review that the executive director is required by statute or rule to perform shall not constitute assistance to the permit applicant in meeting its burden of proof."[7]

The ALJ's identify the seminal question in this inquiry to be whether Mr. Jamieson was required to perform the PM_{10} modeling that ultimately is necessary for LBEC to meet its burden of proof.[8] As explained in the ED's Closing and Reply to Closing Arguments, the ED followed applicable guidance, namely, the 1990 New Source Review Workshop Manual, which states: "the source will not be considered to cause or contribute to the violation if its own impact is not significant at any violating receptor at the time of each predicted violation. In such a case, the permitting agency, upon verification of the demonstration, may approve the permit. However, the agency must also take remedial action through applicable provisions of the state implementation plan

[7] 30 TAC § 80.127(h). (emphasis added). 30 TAC § 80.118 lists the components of the administrative record stating: "In all permit hearings, the record in a contested case includes at a *minimum* the following certified copies of documents: (1) the final draft permit, including any special provisions or conditions; (2) the executive director's preliminary decision, or the executive director's decision on the permit application, if applicable; (3) the summary of the technical review of the permit application; (4) the compliance summary of the applicant; (5) copies of the public notices relating to the permit application, as well as affidavits of public notices; and (6) *any agency document determined by the executive director to be necessary to reflect the administrative and technical review of the application.(Emphasis Added)*
[8] PFD at 22.

to address the predicted violations."[9] The ED disagrees with the ALJ's interpretation that this requirement "would only be triggered once the ED had satisfied itself that LBEC's modeling was sufficient **and** demonstrated that any predicted exceedance(s) occurred at times and places where the proposed source emissions were not significant."[10] The ALJ's interpretation combines two distinct components of the ED's overall modeling review, only one of which triggers the portion of the federal guidance in question. The guidance states the permit may be approved "upon verification of the demonstration." EPA does not further elaborate on the demonstration element in its guidance. The ED has historically interpreted the requirement to "verify the demonstration" to mean the demonstration that impact from the Applicant's sources is not significant at any violating receptor at the time of each predicted violation. Mr. Jamieson testified that he was able to reach the conclusion that the Applicant demonstrated that their sources would not cause or contribute to the predicted exceedances shown in the model. Mr. Jamieson also explained that it was this demonstration that triggered the state's responsibility to conduct the further analysis of predicted exceedances caused by other sources.[11]

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[9] Exhibit ED-4, p. C-52 (bates page 284).
[10] PFD at 24.
[11] *See* Tr. Vol. 12, p. 2776:8-16 where, in the context of his preparation for the June 30, 2010 Agenda, Mr. Jamieson testifies that "...when looking at that [the Applicant's] output of the rebuttal modeling to determine the time periods in which the modeled predictions were greater than 30, and to determine whether or not the proposed sources were significant, that evaluation showed me that there were no time periods in which the proposed sources were significant with those modeled predictions. And so at that stage, the State has a responsibility to evaluate and substantiate those modeled predictions." Mr. Jamieson goes on to state definitively that "The time stamps for which those modeled predictions were greater than 30, the proposed project sources were not significant for those same time periods." Mr. Jamieson also testifies, "for the updated modeling and the potential scenario modeling, the output

Mr. Jamieson also testified that he found some deficiencies in the Applicant's modeling overall. However, as discussed in his testimony and the modeling audit, none of the deficiencies involved placement or characterization of the proposed LBEC sources.[12] As the modeling audit explains, the issues about which Mr. Jamieson was concerned centered on the characterization and placement of surrounding sources other than the Applicant's.

Finally, as expressed in the ED's Closing and Reply to Closing Arguments on Remand, consideration of the ED's testimony and evidence does not violate Texas Water Code § 5.228, but is supported by this statute. Specifically, TWC § 5.228 (a) states: "The position of and information developed by the commission shall be presented by the executive director or his designated representative at hearings of the commission and the hearings held by federal, state, and local agencies on matters affecting the public's

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associated with those modeling files had maximum high-second-high predictions greater than 30. As part of my review, I evaluated where those receptors were and at what time periods those predictions took place similar to the discussion with the pre-agenda modeling. With the time stamps noted for those predicted high-second-highs greater than 30, I looked to see if the proposed project sources were significant or greater than five for those same time periods. There was – with those time periods, predictions were not greater than five, and so there was the responsibility of the State to further substantiate those model predictions and to conduct an evaluation into those." *See* Tr. Vol. 12, p. 2790:4-18. *See* also Exhibit ED-51, page 2 that states: "Given that the model output submitted by the applicant reflects predicted violations of the 24-hr PM_{10} Increment, and that the predicted concentrations associated with the proposed project emissions are not significantly contributing to the predicted 24-hr PM_{10} Increment violations, the ADMT conducted evaluations to further examine the predicted 24-hr PM_{10} Increment violations."

[12] *See* Exhibit ED-51, page 2 where the Second Modeling Audit Report states: "The Applicant subsequently provided an analysis to show that the proposed project sources were not significantly contributing to the predicted violations at the same time as the predicted violations. The approach followed by the applicant to pair significant receptors, considering both time and space, with receptors from the 24-hr PM_{10} Increment modeling analyses to show predictions less than the 24-hr PM_{10} Increment is an acceptable approach." Immediately following this statement, the modeling audit lays out in two bullets, the issues Mr. Jamieson had with the Applicant's modeling demonstration. The first bullet focuses on the sources associated with the tenant leasing pad sites for the Port of Corpus Christi Authority and the Port's Dock 1 permit. The second bullet focuses on the Port's Dock 2 sources.

interest in the state's environment and natural resources, including matters that have been determined to be policies of the state." The modeling audit memorandum containing Mr. Jamieson's evaluation falls squarely within the confines of this statutory provision, as it reflects the ED's technical review of the modeling.[13] Because the information presented by the ED constitutes necessary parts of the administrative record under 30 TAC § 80.118, the hearing record under Texas Government Code § 2001.060, and comports with the requirements of Texas Water Code § 5.228 and Texas Clean Air Act § 382.056, the information must be considered in the record.[14]

III. CONCLUSION

For the foregoing reasons, based on the totality of the evidence in the record, the ED stands by the conclusions expressed in the remand hearing that the permit may be issued.

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[13] *See* TEX. HEALTH AND SAFETY CODE § 382.002(a). See also HEALTH AND SAFETY CODE § 382.056(f) which states: "the executive director shall conduct a technical review of and issue a preliminary decision on the application."

[14] TEX. GOVT. CODE § 2001.060 defines the record in a contested case to include:(1)each pleading, motion, and intermediate ruling;(2)evidence received or considered;(3) a statement of matters officially noticed;(4)questions and offers of proof, objections, and rulings on them;(5)proposed findings and exceptions;(6)each decision, opinion, or report by the officer presiding at the hearing; and(7)*all staff memoranda or data submitted to or considered by the hearing officer or members of the agency who are involved in making the decision.*(emphasis added).

Respectfully submitted,
Texas Commission on Environmental Quality
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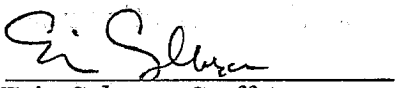
Environmental Law Division



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REPRESENTING THE EXECUTIVE DIRECTOR
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CERTIFICATE OF SERVICE

I certify that true and correct copies of the foregoing Executive Director's Exceptions to the ALJs' Proposal for Decision on Remand have been served on the following in the manner indicated below on this 21st day of December, 2010.

Erin Selvera
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SOAH DOCKET NO. 582-09-2005
TCEQ DOCKET NO. 2009-0033-AIR

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