

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 29, 2010

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Texas Commission on Environmental Quality
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Re: Executive Director's Reply to 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 Reply to 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 29, 2010

The Honorable Tommy Broyles
The Honorable Craig Bennett
Administrative Law Judges
State Office of Administrative Hearings
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Austin, Texas 78701

Re: Executive Director's Reply to 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 Reply to 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

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CORPUS CHRISTI, NUECES COUNTY	§	ADMINISTRATIVE HEARINGS

**EXECUTIVE DIRECTOR'S REPLY TO 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 Reply to Exceptions to the Administrative Law Judges' Proposal for Decision (PFD), and in support thereof shows the following:

I. INTRODUCTION/BACKGROUND

On April 19, 2010, the following parties filed Exceptions to the ALJs' PFD: the Applicant, Las Brisas Energy Center (LBEC); Environmental Defense Fund, Inc., (EDF); Sierra Club; the Medical Group; and the ED. The Protestant groups focus primarily on the procedural processes of which the ALJs requested briefing. The Applicant's brief covers a broader scope of issues in the PFD. The focus of the ED's reply is on the procedural aspects of issues raised in each of the parties' briefs.

II. PROCEDURAL ISSUES

Both the Sierra Club and EDF argue that Texas Clean Air Act (TCAA) § 382.0518 would require the applicant to submit a new application to cure any deficiencies in the draft permit

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before it could be issued.¹ As noted in the ED's Exceptions to the PFD, the ED acknowledges that application of § 382.0518 is an option for remedying issues regarding the LBEC application, but is not the best means of addressing these issues. However, because Sierra Club and EDF interpretations of § 382.0518 are inaccurate, the ED finds it necessary to clarify the manner in which §§382.0518 (d) and (e) operate and the process that would occur under that approach.²

The first step required in accordance with § 382.0518(d) is the Commission's consideration of the application. In this case, it would encompass all information in the administrative record, including the information in the Administrative Law Judges' proposal for decision, and the briefs filed subsequent. Considering that information and argument, if the Commission finds that the emissions from the proposed facility will contravene the standards under subsection § 382.0518(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. The statute does not allow the Commission to deny the permit at this stage. However, it mandates the next step in the process. This step requires the Commission to set out in a report to the applicant the Commission's specific objections to the submitted plans of the proposed facility, and to allow the Applicant an opportunity to make the alterations in the applicant's plans

¹ Tex. Health & Safety Code (THSC) § 382.0518(d), also known as the Texas Clean Air Act or TCAA. *See* Sierra Club Exceptions to the Proposal for Decision at 5. *See* Environmental Defense Fund's Exceptions to the Proposal for Decision at 3.

² As noted in the ED's Exceptions to the PFD, this is a case of first impression, and as acknowledged by the ALJs and EDF, there is little authority addressing this provision. *See* the ALJs' PFD transmittal letter to General Counsel Trobman dated March 29, 2010. *See also* EDF Exceptions to the PFD at 3. However, also noted in the ED's Exceptions to the PFD at 4, footnote 7, is a similar provision was applied in accordance with THSC § 382.055(f) and (g), in the matters of ASARCO, Inc. Air Quality Permit No. 20345, K&K Tank Cleaning, and Tex Art Stone. These cases involved permit renewals and the permit holders were allowed the opportunity to correct the deficiencies prior to denial of their applications.

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and specifications to meet the Commission's specific objections. If the Applicant successfully addresses the Commission's objections, the statute provides that the Commission shall then grant the permit.

Sierra Club's and EDF's assertion that the permit should be denied is only an option if, after being given the opportunity to make the necessary changes, the Applicant fails or refuses to do so.³ If such an event is the case, the Commission would also have the discretion to refuse to accept a new application from this Applicant until the Commission's objections to the plans previously submitted are satisfied.⁴

III. PFD

A. **Response to Medical Group's Concerns Regarding PM_{2.5}, and Application of the Surrogacy Policy.**

Unlike the other parties' exceptions to the PFD, the Medical Group focuses on the issue of PM_{2.5}, asking the ALJs to add a paragraph clarifying that there are two issues related to PM_{2.5}: whether the Applicant has demonstrated that its controls achieve BACT, and whether the Applicant has demonstrated that its emissions will not cause or contribute to a violation of the

³ In a similar instance, a 1993 rulemaking repealing old, and adopting new, Chapter 116 rules addressing permits for new construction or modification, included two comments that a permit application should not be modified after initial submittal. The ED responded stating: "The staff believes that interaction between an applicant and the permit engineer is a desirable and necessary part of the review process. Denial of permit applications with correctable deficiencies is not a reasonable approach. The applicant is entitled to be informed of deficiencies and allowed to correct them. The Texas Health and Safety Code has clearly provided for interaction in its requirement for an administrative completeness determination in §382.0517. Denial should only occur when the applicant does not meet standards and is unwilling to change the application to meet those standards. Denial prior to that time is a waste of resources in view of §.382.0518(d)." See 18 Tex. Reg. 5746, 5747 (August 27, 1993).

⁴ THSC § 382.0518(e) states: "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." (emphasis added)

NAAQS. To meet both of these demonstrations, the Medical Group acknowledges that the Applicant may rely on a surrogacy policy.⁵ To this extent, the Medical Group notes that the testimony on this issue is focused on EPA's surrogacy policy and not TCEQ's surrogacy policy asserting in some way that TCEQ must have its own policy. However, as evidenced by the ED's testimony, exhibits and written arguments on this matter, when appropriate, the ED relies on federal policy and guidance for PSD permitting issues.⁶ In this case, as stated in the Executive Director's Response to Comments, the TCEQ used EPA's surrogacy policy as its own.⁷

B. Response to Sierra Club's assertion that adjustment of specific emission limitations requires remand to the ED.

In Exceptions to the PFD, Sierra Club states that it disagrees with the ALJs that adjusting the emission limits for PM and PM10, mercury, carbon monoxide, and sulfuric acid mist could be done without remand to the ED. Although the ED generally agrees with the ALJs regarding adjustment of specific limits without the need for remand, as noted in the ED's Exceptions to the PFD, it is within the Commission's discretion to remand this matter to the ALJs to reopen the record and take additional evidence on issues specifically referred by the Commission.⁸

C. Response to Applicant's Assertions Regarding Rebuttal Modeling

In their Exceptions to the PFD, the Applicant addresses each of the issues regarding the air dispersion modeling noted by the ALJs. One of these issues is the ED's request that the matter be remanded to SOAH to take additional evidence on the Applicant's rebuttal modeling,

⁵ Medical Group's Exceptions to the PFD at 2.

⁶ See ED's Exhibits 4, 10, 26, 32, and 33.

⁷ Exhibit ED-16 at 17, bates page 569.

⁸ 30 TAC § 80.265

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specifically, evidence of the ED's audit of this modeling. In this regard, the Applicant asserts that the ED has no different rights from any other party, noting that he did not object at the time rebuttal modeling was offered into the record, and thus should not be allowed to object after the hearing has adjourned.⁹ However, this is a misstatement of the ED's Reply to Closing Arguments. The ED would like to clarify that he does not object to the submission of rebuttal modeling by the Applicant; however the record is not complete without the ED's review and approval of this modeling, if it is to be used as the basis for the Applicant's impacts analysis. As noted in the ED's Reply to Closing Arguments, the ED's counsel made it known to the ALJs as well as all of the parties at the hearing that the ED's modeling experts had not had the opportunity to review the modeling.¹⁰ Furthermore, applicable guidance and historical agency policy require ED verification of the applicant's modeling prior to approval and issuance of a PSD permit.¹¹

Additionally, the Applicant asserts that there has been sufficient time since the hearing, for the ED to make known any concerns he may have with regard to the inputs to the rebuttal

⁹ Applicant's Exceptions to the PFD at 40. The Applicant discounts the ED's role in the permitting process, omitting the concept that the ED is not only a party to the hearing, but is the arm of the TCEQ that is charged with review and initial approval of applications submitted for final Commission approval. Furthermore, it should be noted that the ED's role in hearings is to complete the administrative record; a task that has not been accomplished due to the lack of the ED's audit of the rebuttal modeling. See 30 TAC § 80.108(d).

¹⁰ ED's Reply to Closing Arguments page 4, footnote 13.

¹¹ Refer to ED exhibit ED-4 at C.52, bates 284. As the New Source Review Workshop Manual Prevention of Significant Deterioration and Nonattainment Area Permitting guidance document explains, "when a violation of any NAAQS or increment is predicted at one or more receptors in the impact area, the applicant can determine whether the net emissions increase from the proposed source will result in a significant ambient impact at the point (receptor) of each predicted violation, and at the time the violation is predicted to occur. 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 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 to address the predicted violation(s). *Emphasis added.*

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modeling or outputs reported.¹² However, as the Applicant acknowledges, the hearing has adjourned,¹³ thus, giving rise to the ED's request that the ALJs recommend the issue of air dispersion modeling be remanded to SOAH to take additional evidence on this matter. Simply stated, post-hearing briefings are not evidence upon which an ALJ can make findings of fact. In addition, because the ED has not had the opportunity to provide evidence regarding the audit of the rebuttal modeling, none of the other parties have had the opportunity to cross examine the ED's witness on this additional evidence. Finally, the Applicant would not have the opportunity to provide additional information to remedy any concerns raised by the modeling audit, so that such information could also admitted in to the record.¹⁴

With regard to the Applicant's suggestion that the ED could simply withdraw his concerns at any time, it would be inappropriate for the ED to do so in light of the ED's obligation to review the modeling that was provided to support the Applicant's impacts analysis.¹⁵ Without this evidence, the record on this issue would be incomplete. Therefore, the ED maintains his previous request that the ALJ's recommend the air dispersion modeling issue be remanded to SOAH for the admission of additional evidence.

¹² Applicant's Exceptions to the PFD at 40.

¹³ After the filing of Closing Arguments and Replies to Closing Arguments, the record closes and the ALJ may no longer take additional fact evidence unless the record is reopened, as the ED has suggested in accordance with 30 TAC § 80.265 in his Exceptions to the PFD.

¹⁴ The ED also notes that modeling audits often involve interaction with the Applicant's modeling consultant to refine modeling, for example, where the model predicts exceedances of any standard or increment, whether or not caused by the applicant, before the ED can approve that modeling and the permit.

¹⁵ The ED acknowledges that if the Applicant chooses to withdraw their rebuttal modeling from the record, or to not rely upon it as the basis for their impacts analysis, that the necessity for an audit of this modeling would no longer exist.

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IV. CONCLUSION

For the reasons stated above and as outlined in the ED's Exceptions to the PFD, 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 fact, conclusions of law, and proposed order), and any other relevant procedural matters such as notice.¹⁶

Respectfully submitted,

Texas Commission on Environmental Quality
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¹⁶ See, Tex. Govt. Code § 2001.058(e). See also, Tex. Govt. Code § 2001.060.

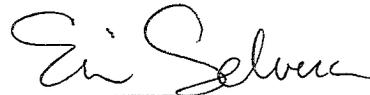
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REPRESENTING THE EXECUTIVE DIRECTOR
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CERTIFICATE OF SERVICE

I certify that true and correct copies of the foregoing Executive Director's Reply to Exceptions to the ALJs' Proposal for Decision have been served on the following in the manner indicated below on this 29th day of April, 2010.

A handwritten signature in cursive script, appearing to read "Erin Selvera", written over a horizontal line.

Erin Selvera
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SOAH DOCKET NO. 582-09-2005
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