TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

January 3, 2011

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 Reply to Exceptions to the Proposal for Decision on Remand for the above-referenced matter.

Sincerely,

Erin Selvera

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 REPLY TO EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGES' PROPOSAL FOR DECISION ON REMAND

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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' (ALJs) Proposal for Decision (PFD) on Remand, and in support thereof shows the following:

I. INTRODUCTION

On December 21, 2010 the Environmental Defense Fund (EDF), Sierra Club (SC), Clean Economy Coalition (CEC), and Wilson Wakefield; collectively referred to as the Protestants, the ED, and Las Brisas Energy Center (Applicant or LBEC), filed exceptions to the ALJs' PFD. On December 23, 2010, the TCEQ General Counsel issued a letter moving the deadline to file reply briefs from December 31, 2010 to January 3, 2011. In their exceptions to the PFD, the Protestants and Applicant raised the following issues: ED's modeling review; material handling; moisture content; BACT for PM/PM10 and mercury; and seven other issues not referred in the Commission's remand of this matter to SOAH for additional evidence.

II. ED MODELING

In its Exceptions to the Proposal for Decision on Remand, EDF argues that the ED's modeling cannot be substituted to meet the Applicant's burden of proof in a hypothetical remand hearing. However, the modeling performed by the ED was not done, nor is it being offered, as a substitute for the Applicant's modeling. Moreover, the ED's modeling need not be considered in a hypothetical remand hearing, but should be considered by the Commission as a necessary part of the ED's technical review and as part of the administrative record. As explained in the ED's Closing Argument, Replies to Closing Arguments, and Exceptions to the Proposal for Decision on Remand, the ED performed a modeling analysis to comply with applicable federal guidance, namely, the 1990 New Source Review Workshop Manual.[1] The modeling analysis performed by Mr. Jamieson is a necessary part of both the administrative record under 30 TAC § 80.118 and the hearing record under Texas Government Code § 2001.060. Furthermore, the modeling analysis is a part of the ED's technical review which must be considered by the Commission under Texas Water Code § 5.228(a) and Texas Health and Safety Code § 382.056(f).

[1] ED's Closing Argument pp. 4-6 (filed November 1, 2010); ED's Reply to Closing Arguments pp. 4-5 (filed November 8, 2010); ED's Exceptions to the PFD on Remand pp. 4-7.

III. MATERIAL HANDLING

A. Off-site material handling

Applicant argues that the Commission's Interim Ordering Provision 2(a) – "Whether there will be any increase in particulate matter (PM) from material handling source above what was modeled, or if the ultimate conclusions from the impacts analysis would be unchanged by secondary sources" – was based on the Applicant's theory and thus, its meaning must be gleaned from the Applicant's own "underlying rationale."[2] While the ED would agree that the permit could be issued if there had not been an increase in particulate matter emissions from off-site material handling sources above what was modeled, the ED does not interpret this phrase in the same manner as the Applicant.

The Applicant's interpretation is that the cumulative allowable emissions modeled for the existing off-site material handling operations are sufficient to accommodate LBEC's off-site material handling needs.[3] Under this interpretation, the Applicant's burden would be met through a mathematical demonstration showing that the current allowable emissions of POCCA's Bulk Dock 2 permit are greater than the sum of the actual emissions of Bulk Dock 2 and the actual emissions of either of the proposed material handling scenarios, BD-1 or BD-3.

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[2] Las Brisas' Exceptions to PFD on Remand at 3.
[3] *Id.* at 3-4.

The ED has addressed how it interprets Interim Ordering Provision 2(a) in its Closing Argument.[4] Both Mr. Jamieson and Mr. Hamilton testified that due to the additional sources that will need to exist off site for material handling purposes, which were not included in the initial modeling runs submitted with the application, there would be an increase in particulate matter above what was initially modeled.[5] At the same time, Mr. Jamieson also testified that the more important factor to consider is whether the ultimate conclusions from the impacts analysis would be unchanged by secondary sources.[6] Mr. Jamieson testified that even though there would be an increase in particulate matter emission above what was modeled, the impacts analysis would remain unchanged by those secondary sources.[7] Based on this conclusion, along with the information contained in Mr. Jamieson's Second Modeling Audit, Mr. Hamilton testified that it was the ED's position that TCEQ may issue the permit.[8]

B. Hypothetical Material Handling Operations

EDF argues that because the Applicant fails to specify or commit to any actual material handling plan, the Applicant cannot adequately demonstrate compliance with the NAAQS and PSD increments.[9] EDF further argues that the ALJs' solution to this failure –treating the material handling facilities "as if they were included in the

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[4] ED's Closing Argument at 4.
[5] *See* Tr. Vol. 12, p. 2785:7-13; Tr. Vol. 13, p. 3024:19-24.
[6] Tr. Vol. 12, p. 2797:7-11.
[7] *Id.* at 2797:3-6.
[8] Tr. Vol. 13, pp. 3034:6-11, 3093:22-25.
[9] EDF's Exceptions to PFD on Remand at 5-6, 13-15.

Application" – fails to comply with the Texas Health and Safety Code.[10] However, as noted previously, based on the findings of Mr. Jamieson, the ED is satisfied that the conclusions from impacts analysis will remain unchanged from the Applicant's original modeling submitted as part of its application and therefore, the permit may be issued.

During the hearing on the merits in November 2009, the ED concluded that the impacts analysis of the modeling submitted with the Application adequately demonstrated compliance with the NAAQS and PSD increments. However, when it became apparent that the Applicant had mislocated three off-site emission sources and submitted revised rebuttal modeling, the ED was required to review this new modeling to determine whether it met applicable rules and regulations. This is the reasoning behind the position taken by the ED in its Exceptions to the ALJs' March 29, 2010 PFD, where it stated, "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." The ED understood Ordering Provision 2(a) of the Commission's Interim Order to request further evidence as to whether the impacts from revised modeling submitted by the Applicant would be equivalent to or less than that which was originally modeled and approved by the ED as part of the original hearing. Based on the review of Applicant's modeling and the analyses performed by Mr.

[10] *Id.* at 5, 14.

Jamieson, it is the ED's position that the Applicant has met its burden of proof on this issue and the permit may be issued.

C. Separate Stationary Source

Several Protestants argue that the ALJs' conclusion that the material handling sources should be considered secondary sources because the material handling operations would be conducted by Port of Corpus Christi Authority (POCCA) is not supported by the evidence.[11] EDF and Wilson Wakefield both note that Applicant's own witness, Frank Brogan, admitted POCCA has made no determination as to whether or not it will, in fact, perform the material handling for LBEC. CEC and Sierra Club argue that EDF's modeler provided uncontroverted testimony that for LBEC to operate properly, the material supply, storage, and handling of raw materials would necessarily be under LBEC control and that the Bulk Dock operations and LBEC should be considered the same source.

As explained in the ED's Reply to Closing Arguments, the emissions associated with the proposed material handling operations, BD-1 and BD-3, are secondary emissions and thus, are not analyzed as part of the proposed source.[12] To be considered the same stationary source, the pollutant emitting activities must belong to the same industrial grouping, be located on contiguous or adjacent properties, and be under common control.[13] When asked to describe his analysis of this issue, Mr. Hamilton

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[11] EDF's Exceptions to PFD on Remand at 9-13.
[12] Tr. Vol. 13, p. 3031:21-22.
[13] 30 TAC §§ 116.12(6), 116.12(35); *see also* ED's Reply to Closing Arguments at 11-12.

explained, "it looks clearly to be a different set of controls . . . I can see that the purposes of these two entities are really clearly different, and I would be – in my opinion, the board of directors or whatever they call it for the board are different from Las Brisas'."[14] Summarizing his testimony, Mr. Hamilton stated, "[s]o, yes, those emissions from the BD-1 and BD-3 scenarios constitute secondary emissions."[15]

The purpose of evaluating the BD-1 and BD-3 scenarios was not to determine the exact method in which materials will be handled, but rather to examine whether or not the ultimate conclusions from the impacts analysis would be changed by secondary sources. Based on the ED's evaluation of proposed scenarios and the modeling analysis performed by Mr. Jamieson, the ED is satisfied that the ultimate conclusions from the impact analysis would not be changed by secondary sources and therefore, the permit may be issued.

D. Permit Requirements for Conveyor Belt and Ash Loading System

CEC argues that to ensure there are no emissions from the conveyor belt or the ash loading spouts, the permit should require emission free systems for the conveyor belt and the ash loading spouts as represented in LBEC exhibits 603 and 605. As noted during the cross-examination of Applicant's witness, Mr. Kevin Ellis, "all representations regarding construction plans and operation procedures contained in the permit application shall be conditions upon which the permit is issued."[16] The

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[14] Tr. Vol. 13, p. 3031:4-10.
[15] *Id.* at 3031:21-22.
[16] Tr. Vol. 13, pp. 3229:17-3232:7; *see also* 116.116(a).

Applicant represented in its application that the conveyor belt and ash loading spout would not be a source of emissions. The ED staff confirmed that the Applicant could, in fact, design a conveyor belt that did not produce any emissions along its length and an ash loading spout that would not produce any emissions. Thus, if issued, these representations made by the Applicant will be binding conditions upon which the permit is issued.

IV. MOISTURE CONTENT

Clean Economy Coalition (CEC) argues that the ALJs' conclusion that the moisture content of the pet coke to be used in the proposed LBEC plant will be 4.8 percent rather than 2 percent is not based on sufficient evidence. As noted in the PFD on Remand, POCCA has amended its Bulk Dock 2 permit so that all materials are required to have a minimum moisture content of 4.8 percent.[17] The ALJs' conclusion is further supported by the expert testimony of TCEQ engineer, Randy Hamilton, who not only reviewed the testimony of Frank Brogan, but also spoke to Alex Berksan, another TCEQ permit engineer, who processed the alteration to the Port's permit, about the moisture content of the materials handled by POCCA.[18] Mr. Hamilton concluded that the moisture content had been properly adjusted in accordance with TCEQ guidance and practice.[19] The ALJs' conclusion is supported by the testimony of the TCEQ expert witness, the Applicant's witness, and a binding permit issued by TCEQ.

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[17] PFD on Remand at 43.
[18] Tr. Vol. 13, pp. 3039:22-3040:24.
[19] *Id.* at 3039:17-19.

V. BACT

A. Total PM/PM_{10}

Sierra Club and CEC both argue that the BACT limit for PM/PM_{10} should be lowered from the 0.025 lb/MMBtu, recommended by the ALJs. Sierra Club states that the limit should be within the range of 0.012-0.018 lb/MMBtu. CEC believes the BACT limit should be set at 0.016 lb/MMBtu, based on the recommendation of the ALJs in the White Stallion contested case hearing.

The evidence in the record supports the ALJs recommendation of a BACT limit for PM/PM_{10} of 0.025 lb/MMBtu. At the time the Response to Comments was drafted the appropriate BACT limit for PM/PM_{10} was set at 0.033lb/MMBtu. Since that time, the Commission has issued three solid fuel-fired power plant permits with the PM/PM_{10} BACT limit of 0.025 lb. MMBtu. In order to be consistent with TCEQ's BACT guidance, the appropriate PM/PM_{10} BACT limit for the proposed LBEC is 0.025 lb/MMBtu. Furthermore, in reaching its decision to apply the 0.025 lb/MMBtu BACT limit in the White Stallion case, the Commission specifically rejected the 0.016 lb/MMBtu limit recommended by the ALJs in the that matter.

B. Mercury

At the remand hearing, Mr. Hamilton concluded that, the ED would consider $0.86(10^{-6})$ lb/MMBtu as the proper BACT limit for mercury.[20] Mr. Hamilton testified that based on his evaluation of the ED's original BACT determination as described in the

[20] *Id.* at 3046:2-4.

RTC, the prefiled testimony of the Applicant's witness, Mr. Cabe, and the testimony of EDF's witness, Dr. Sahu, that the mercury BACT limit of 2.0(10^{-6}) lb/MMBtu in the draft permit reflects the appropriate BACT limit at the time the RTC was drafted.[21] Mr. Hamilton also testified that since the original hearing in November 2009, the Commission has approved a permit for the White Stallion Energy Center with the lower mercury BACT limit of 0.86(10^{-6}) lb/MMBtu.[22] Mr. Hamilton concluded that based on the BACT limit approved in the White Stallion permit, the ED would also support that lower limit for the Las Brisas plant.

In its closing arguments, the Applicant specifically stated that "LBEC does not object to the lowering of the mercury limit for the LBEC CFB boilers from 2.0(10^{-6}) lb/MMBtu to 0.86(10^{-6}) lb/MMBtu."[23] The ALJs recommended that the BACT limit for mercury be reduced even further to 0.57(10^{-6}) lb/MMBtu. The ED maintains that the appropriate BACT limit is 0.86(10^{-6}) lb/MMBtu.[24]

As Mr. Hamilton testified, the first step in his BACT analysis is to look at recently permitted similar facilities – the most recent being White Stallion.[25] In his prefiled testimony for the original hearing, Mr. Hamilton noted the vast difference in the mercury content of different petroleum coke sources.[26] Furthermore, none of the

[21] *Id.* at 3044:19-3045:25.
[22] *Id.*
[23] Las Brisas' Closing Argument at 22.
[24] Tr. Vol. 13, p. 3045:10-3047:11.
[25] Ex. ED-1, p. 12:25-26.
[26] *Id.* at 25:19- 23.

RBLC-listed CFB projects with mercury limits fired 100 percent petroleum coke.[27] The wide range of mercury content in petroleum coke, combined with the lack of test data and RBLC-listed CFB projects firing 100 percent pet coke, leads the ED to the conclusion that the 0.86(10^{-6}) lb/MMBtu limit is the appropriate BACT limit. Furthermore, if the actual mercury emissions demonstrate that the petroleum coke sources used by Las Brisas have a relatively-low mercury content, the Optimization Clause, Special Condition 50, may trigger a downward adjustment of the mercury BACT limit to more accurately reflect the mercury content and the appropriate emissions. Based on this analysis, the ED recommends a BACT limit for mercury of .86(10^{-6}) lb/MMBtu.

VI. OTHER ISSUES NOT REFERRED TO SOAH FOR ADDITIONAL EVIDENCE

A. Procedural Irregularities

In its exceptions to the ALJ's PFD on remand, Sierra Club raises what it terms procedural irregularities, claiming that the Commission erred when it remanded this matter to SOAH instead of either denying the application or remanding the matter to the ED for additional review. Sierra Club argues that the Federal Clean Air Act requires a MACT analysis for LBEC's main boilers. However, not only is Sierra Club's complaint untimely, but is it not a decision that is directly addressed in the PFD on remand. First, Sierra Club's use of the MACT requirements as the basis for the need to remand the matter to the ED is moot because the Commission has already spoken on the issue of

[27] *Id.*

MACT for LBEC's main boilers. Specifically, the Commission found that the primary boilers for the proposed project are not subject to case-by-case MACT preconstruction permitting requirements.[28] Therefore, there is no remedy the Commission can provide for Sierra Club's complaint.

Second, Sierra Club also urges that the matter should have been remanded to the ED as a matter of equity. However, as noted in the ED's Exceptions to the PFD, there are no TCEQ rules that specifically address situations where an application may be remanded to the ED for additional technical review.[29] However, of the two available approaches, the ED recommended the most equitable approach – remand to SOAH – which allowed for the greatest opportunity for participation by the Protestants.[30] To have taken the only other viable option, the Commission would have eliminated the possibility for public participation. Again, the Commission has already remanded the matter to SOAH for consideration of additional evidence.

Finally, Sierra Club argues that the matter should have been remanded to the ED for additional technical review because it would allow for review of the new NO_2 and SO_2 NAAQS. However, the approach the Commission has taken does not obviate the Applicant's obligation to comply with all applicable state and federal requirements. All

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[28] Commission's Interim Order at 2 (July 1, 2010).
[29] Executive Director's Exceptions to the Administrative Law Judges' Proposal for Decision at 5 discusses how 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.
[30] In the Executive Director's Exceptions to the Administrative Law Judges' Proposal for Decision at 5, the ED specifically notes that it does not recommend the report approach under Texas Clean Air Act § 382.0518(d) because it would eliminate any further hearing before the ALJs.

owners and operators of new and modified facilities, including Las Brisas Energy Center, will be required to demonstrate that their emissions will not cause or contribute to a violation of the new SO_2 and NO_2 NAAQS.

B. BACT

1. Definition of BACT

EDF argues that when the ED reevaluated BACT for total particulate matter (PM/PM_{10}) the ED incorrectly applied the 30 TAC 116.10(3) definition of BACT, instead of the definition in 30 TAC 116.160(c)(1)(A), which became effective on June 24, 2010. Because the 116.160 definition follows the federal definition of BACT more closely, EDF argues the BACT definition applied in this case does not meet the federal definition and therefore there has been no demonstration that BACT has been achieved. Similarly, Sierra Club argues that the TCEQ is required to apply the federal definition of BACT instead of the state's own definition.

When the commission remanded this case to SOAH, the commission requested further evidence on several issues, including the proper BACT limits for total particulate matter and mercury.[31] The ED reevaluated the BACT limits for total PM and mercury in accordance with BACT guidance, specifically in light of other permits recently issued by TCEQ since the ED's BACT determination.

The record is clear that TCEQ has been conducting BACT reviews using the same process since EPA approved Texas' prevention of significant deterioration (PSD)

[31] Commission's Interim Order at 2 (Ordering Provision 2(f)).

permitting program into the SIP in 1992. Texas has a fully federally approved PSD program to issue and enforce PSD permits[32] subject to basic agreements between TCEQ and the EPA as specified in the proposed rule-making.[33] As part of that rule-making, the EPA also interpreted the Federal Clean Air Act (FCAA) BACT definition as possessing two fundamental concepts.[34] First, the most stringent available control technology (and associated emission limitation) must be evaluated.[35] Second, if BACT is proposed that is less than the most stringent available, there must be a case-specific demonstration why the most stringent control is not selected.[36] The TCEQ three-tiered approach captures these fundamental concepts. In the proposed rule-making, the EPA acknowledged: "[S]tates have the primary role in administering and enforcing the...PSD program ... and ... EPA's involvement in interpretive and enforcement issues is limited to only a small number of cases."[37] Consequently, EPA's continuing oversight role under the FCAA leaves Texas and other states with considerable discretion to implement the PSD program as they see fit.[38]

Mr. Randy Hamilton testified that the two primary guidance documents used by the TCEQ in conducting a BACT review are the TCEQ guidance document "Evaluating Best Available Control Technology (BACT) in Air Permit Applications" Draft RG-383, dated April 2001, and EPA's "New Source Review Workshop Manual: Prevention of

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[32] Ex. ED-7, p. 28096, at bates page 418; *see* Ex. ED-1, p. 10:26-11:7, at bates page 10-11.
[33] Ex. ED-6, p. 52825, at bates page 413.
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] Ex. ED-7, p. 28095, at bates page 417.
[38] *Id.*

Significant Deterioration and Non-Attainment Area Permitting" Draft, dated October 1990.[39] Mr. Hamilton also testified to the TCEQ's three-tiered process for conducting BACT analyses,[40] the differences between the three-tiered approach and EPA's Top-Down approach,[41] and that the two processes are equivalent.[42] Therefore, the record is clear that the TCEQ has been conducting BACT reviews for PSD permits consistent with the proposed rule-making and contemporaneous agreements approving delegation of the PSD permitting program. In this application, which involves a PSD permit, as the record reflects, the TCEQ required the applicant to evaluate all control technologies, by among other things, evaluating the EPA RACT/BACT/LAER Clearinghouse (RBLC) and recently issued permits, draft permits and applications for pet coke power projects.[43]

2. Consideration of Clean Fuels

Sierra Club further argues that Texas has committed through its SIP to consider clean fuels a part of the BACT process.[44] As previously noted, this issue was not one that was remanded to SOAH in the Commission's Interim Order for consideration. Furthermore, the letter was not admitted into evidence as an exhibit, nor was it the subject of any direct or cross examination. Therefore, the matter is not properly before the Commission for review.

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[39] Ex. ED-1, pp. 10:26-11:7, at bates pages 14-15; Ex. ED-3; Ex. ED-4.
[40] Ex. ED-1, pp. 12:25 – 32, at bates page 16.
[41] Ex. ED-1, p. 12:42-13:20, at bates pages 16-17.
[42] Ex. ED-1 13:22-28, at bates page 17.
[43] *Id.* at 10:26-11:7, at bates pages 14-15; Ex. ED-14, p. 4, at bates page 522; Ex. ED-15, p. 5, at bates page 547.
[44] Sierra Club's Exceptions to PFD on Remand at 18.

C. CO and H_2SO_4

Sierra Club raises concern with certain findings of fact (FOF) and conclusions of law (COL) that it believes should be revised or deleted. Specifically, it claims that FOF No. 216 regarding CO is in error, and that FOF 222 regarding H_2SO_4 is also in error. Similar to the issues described above, the ALJs did not address the BACT limits for CO and H_2SO_4 in the remand hearing or PFD on Remand because these pollutants were not among those remanded to the ALJs for additional evidence. To this extent, as noted in the ED's Exceptions to the PFD, the record evidence supports the BACT limits in the draft permit and thus the findings of fact are accurate.[45]

D. SO_2 and NO_2

As noted above, the ED has consistently maintained that all owners and operators of new and modified facilities, including Las Brisas, will be required to demonstrate that their emissions will not cause or contribute to a violation of the new NAAQS.

E. CO_2

Sierra Club argues that CO_2 is either already subject to regulation under federal law or alternatively, will become subject to regulation under the federal Clean Air Act on January 2, 2011, citing to EPA's notice. Sierra Club goes further, stating, "even if CO_2 is not currently subject to regulation under federal law, all findings of fact and conclusions of law that reflect this point will no longer be accurate as of January 2, 2011 ... thus, FOF Nos. 187, 188, and 189 and COL Nos. 20 and 21 are in error."

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[45] *Id.* at 13.

The ED provides no additional argument on this issue beyond that stated in prior filings, except to note that on December 23, 2010, the EPA Administrator signed the "Determinations Concerning Need for Error Correction, Partial Approval and Partial Disapproval, and Federal Implementation Plan Regarding Texas Prevention of Significant Deterioration Program."[46] The Determination and FIP consist of two separate actions: proposal and interim final rule.[47] The FIP will allow EPA to issue PSD permits for greenhouse gas (GHG) sources in Texas at the thresholds established in the Tailoring Rule.[48] Texas will continue to issue PSD permits for other pollutants. At the time of this filing, the Determination and FIP are currently the subject of federal litigation and an administrative stay.[49]

F. $PM_{2.5}$ Surrogacy Policy and PM CEMS

Like CO and H_2SO_4, Sierra Club and CEC again raise the issue of application of the PM2.5 surrogacy policy and the use of PM CEMS claiming that some of the related findings of fact and conclusions of law are in error. Sierra Club cites to a portion of the transcript from the original hearing on the merits claiming that Mr. Hamilton indicated that PM CEMS is the "only way to enforce the Draft Permit's hourly PM limit..." This is a mischaracterization of Mr. Hamilton's testimony. Mr. Hamilton testified on cross that

[46] 75 Fed. Reg. 82430. Determinations Concerning Need for Error Correction, Partial Approval and Partial Disapproval, and Federal Implementation Plan Regarding Texas Prevention of Significant Deterioration Program (Dec. 30, 2010).
[47] *Id.*
[48] *Id. See* also 75 Fed. Reg. 31514 (June 3, 2010).
[49] *Texas v. EPA*, No.10-1425 (D.C. Cir. December 30, 2010).

PM CEMS would be appropriate,[50] but also testified on redirect that in Texas, the TCEQ has yet to require PM CEMS for direct compliance with the PM emission limits.[51] The Executive Director does not require PM CEMS for filterable PM because neither TCEQ nor EPA rules required it.

With regard to the $PM_{2.5}$ Surrogacy policy, Sierra Club and EDF re-raise the appropriateness of using the surrogacy policy and argue that the applicant was required to include a demonstration that LBEC's reliance on the surrogacy policy is appropriate. However, as noted in the ED's Reply to Closing Arguments, technical review of the application at issue was complete on December 31, 2008. This matter began the hearing process in February 2009, six months prior to the *Trimble* decision[52] and thus the ALJs' properly found that the use of the surrogacy policy appropriate.[53]

EDF and Sierra Club both raise the fact that in 1997, EPA revised the NAAQS for PM in 1997, to add new standards for fine particles, with $PM_{2.5}$ as the indicator, and established the surrogate policy that year.[54] However, EPA established the surrogate policy citing significant technical difficulties with respect to $PM_{2.5}$ monitoring, emissions estimation, and modeling, and allowing permit applicants to use compliance with the applicable PM_{10} requirements as a surrogate approach for meeting $PM_{2.5}$ New Source

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[50] Tr. Vol. 8, p. 1921:6-8.
[51] Tr. Vol. 8, p. 1967:10-20.
[52] Petition No. IV-2008-3, In Re: Louisville Gas and Electric Company, Trimble County, Kentucky Title V/PSD Air Quality Permit # V-02-043 Revision 2 and 3 (August 12, 2009).
[53] PFD at 50.
[54] 62 *Fed. Reg.* 38652. National Ambient Air Quality Standards for Particulate Matter (July 18, 1997).

Review (NSR) requirements until the technical difficulties were resolved.[55] EPA continues to allow SIP Approved states to use the policy during the transition to the new $PM_{2.5}$ requirements.[56] Moreover, up until October 2010, EPA had yet to adopt a final rule necessary for implementation of the $PM_{2.5}$ NAAQS, making it impracticable for LBEC to have applied the rule as EDF suggests.[57]

In summary, the record evidence supports the ALJs' finding that the application is sufficient without the showing under *Trimble*, and that PM CEMS is not required for this application.[58] Therefore, the findings of fact and conclusions of law related to each of these issues are not in error.

G. MACT

As noted above, Sierra Club, EDF and CEC raised the issue of MACT applicability to the Las Brisas main boilers. Because the ED has briefed his position on this issue in his Exceptions to the PFD, and the Commission has acted on the issue finding that that

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[55] 73 *Fed. Reg.* at 28324. Implementation of the New Source Review (NSR) Program for Particulate Matter Less Than 2.5 Micrometers ($PM_{2.5}$) (May 16, 2008).
[56] 75 Fed. Reg. 6831 at 6833. Implementation of the New Source Review (NSR) Program for Particulate Matter Less Than 2.5 Micrometers (PM2.5); Notice of Proposed Rulemaking To Repeal Grandfathering Provision and End the PM10 Surrogate Policy (February 11, 2010).
[57] In 2007, EPA proposed the third and final rule needed to implement the PM2.5 National Ambient Air Quality Standard (NAAQS). However, the rule was not adopted until October 20, 2010, and was not effective until December 20, 2010 for the SILs and SMC. The increment demonstration will not be applicable until October 20, 2011.
[58] PFD at 50 and 112. In their original PFD, the ALJ's conclude "that PM CEMS is not *required* for the LBEC facility. Thus, any determination to require it is up to the sound discretion of the Commission." In the absence of a prior court order requiring the analysis outlined in the Trimble Order, or a determination by the Commission that it intends to apply such requirements, the ALJs do not find that LBEC's application is deficient for failing to make the enhanced showing outlined in the Trimble Order.

the primary boilers for the proposed project are not subject to case-by-case MACT preconstruction permitting requirements, the ED will not repeat his arguments.[59]

With regard to CEC and EDF's concerns about the Commission's explanation of their decision, and Sierra Club's claims regarding Conclusions of Law 35 and36, the Commission discussed at length the issue of MACT applicability at the Agenda meeting on June 30, 2010. Furthermore, the Commission has yet to issue its final order in this matter and may choose to provide additional information discussing their decision at that time. [60] To this accord, Conclusions of Law 35 and36 are not in error.

H. Protectiveness Review

In his exceptions to the PFD, Wilson Wakefield argues that the draft permit will not be protective of public health and safety. Specifically, he argues that the proposed site is located near an important fishing and marine nursery area; just north of St. Theresa Church and School; and near a heavily populated residential area. He also notes that ships loaded with hydrocarbons passing by the LBEC site will create further danger from the proposed 4 CFB boilers that are operating 24 hours a day, 365 days a year. Finally, Mr. Wakefield argues that Bulk Dock 3 has no permit for material

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[59] See Executive Director's Exceptions to the Administrative Law Judges' Proposal for Decision at 7-9.
[60] In accordance with the Texas Administrative Procedure Act § 2001.058(e), "A state agency may change a finding of fact or conclusion of law made by the administrative law 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. The agency shall state in writing the specific reason and legal basis for a change made under this subsection." For TCEQ, this information is typically documented in the final order issued by the Commission.

handling and that Bulk Dock 1 is limited to handling a mere fraction of the LBEC material requirements. In summary, Mr. Wakefield argues that because of the proposed plant's proximity to urban areas and POCCA's inability to safely handle and supply the material handling needs of the Applicant, LBEC has failed to meets its burden of proof.

As noted in the RTC, the potential impacts to human health and welfare or the environment are determined by comparing air dispersion modeling predicted emission concentrations from the proposed facility to appropriate state and federal standards and effects screening levels. Based on potential concentrations reviewed by the ED's staff, it is not expected that existing health conditions will worsen, or that there will be adverse health effects in the general public, sensitive subgroups, or animal life as a result of exposure to the expected levels of emissions from this site. Mr. Jamieson's modeling analysis, as evidenced by his Second Modeling Audit Report, confirms that the ED's original impacts analysis would remain unchanged by secondary sources. Based on this analysis, the ED concludes that the permit may be issued.

VII. 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.

Respectfully submitted,
Texas Commission on Environmental Quality
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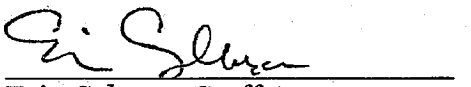

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CERTIFICATE OF SERVICE

I certify that true and correct copies of the foregoing Executive Director's Reply to Exceptions to the ALJs' Proposal for Decision on Remand have been served on the following in the manner indicated below on this 3rd day of January, 2011.

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