TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

2010 APR 29 PM 2:13

CHIEF CLERKS OFFICE

CLEAN ECONOMY COALITION

April 28, 2010

Ms. LaDonna Castanuela
Chief Clerk, MC105
Texas Commission on Environmental Quality.
P. O.Box 13087
Austin, Texas 78711-3087
Fax: (512) 239-3311

Via: U.S. Mail

Re: TCEQ Docket No. 2009-0033-AIR and SOAH Docket No. 582-09-2005; Application of Las Brisas Energy Company, LLC. For State Air Quality Permits Nos. 85013, HAP 48, Pal 41 and PSD-TX-1138.

Dear Mrs. Castanuela:

Enclosed for filing in the above referenced cause, is the original and seven copies of Clean Economy Coalition (CEC) Response to the Applicant's Exceptions to the Administrative Law Judges' (ALJs') Proposal for Decision (PFD), and CEC's Response to the Executive Director's Exceptions to the PFD filed on behalf of the Clean Economy Coalition and Parties Aligned with Clean Economy Coalition, copies of which have been forwarded to the Administrative Law Judges in the above contested case.

Please call me at (361) 855-7051 if there any questions about this filing. Copies of the Responses have been served as indicated on the attached service list

Yours Very Truly,

Gerald Sansing

Gerald Sansing, Designated Representative
Clean Economy Coalition,
5426 Chevy Chase
Corpus Christi, Texas 78412
Fax: 361/854-5859

Enclosures: 1. CEC's Response to Applicant's Exceptions to ALJs' PFD
2. CEC's Response to ED's Exceptions to ALJs PFD
3. Service List

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

APPLICATION OF LAS BRISAS	*	BEFORE THE STATE OFFICE
ENERGY CENTER, LLC	*	
FOR STATE AIR QUALITY PERMIT:	*	OF
NOS. 85013, HAP48, PAL41,	*	
AND PSD-TX-1138	*	ADMINISTRATIVE HEARINGS

CLEAN ECONOMY COALITION'S RESPONSE TO EXECUTIVE DIRECCTOR'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGES' PROPOSAL FOR DECISION

TO: The Commissioners of the TCEQ.

NOW COMES Protestant, Clean Economy coalition (CEC), and responds to the Executive Director's (ED's) Exceptions to the decision of Administrative Law Judges' findings and Proposal for Decision (PFD) in the above numbered and styled contested case; and, subject to the qualifications hereinafter stated, respectfully requests the Commissioners to accept the Judges' Proposal for Decision, and deny the Applicant, LAS BRISAS ENERGY CENTER, LLC (LBEC) the requested air quality permits.

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Introduction/Background.

Omitted from the ED's description of the background of the case is the fact that out of some approximate 400 protestants and interested parties at the preliminary hearing held in Corpus Christi, over 50 parties and organizations were granted standing as Party Protestants against the proposed LBEC air quality permits. Among these were (by later grouping re SOAH Order No. 2) Sierra Club, Medical Societies of Nueces, Aransas, San Patricio and Refugio Counties, medical doctors, the Texas Clean Air Cities Coalition, Sierra Club, Environmental Defense Fund, teachers, business men and women, residents of adjacent neighborhoods close to the proposed site, geologists, sportsmen, landowners bordering Nueces Bay, Engineers, college professors, pharmacists, students, and a host of citizens whose health and welfare would be adversely effected by the proposed LBEC facility. The Clean Economy Coalition (CEC), under whose umbrella, many of the individuals and groups were grouped by the Administrative Law Judges (ALJs), participated with various individuals and organizations at every stage of the Contested Case. The ages of the protestants ranged from the 80's to college students. All of the individuals who the ALJ's found to have standing as persons affected by the facility, live and work, or retired, in the area affected by the facility. On the other hand, Las Brisas Energy Center, LLC (LBEC), and its alleged parent, Chase Power Development, LLC, were formed in 2007, with offices in Houston, by Kathleen Smith and John Upchurch, both of the Houston area, solely for the purpose of obtaining permits for an electric generating facility. CEC's goal and purpose is to promote a vibrant, clean and healthy economy for the benefit of the citizens of the Coastal Bend. To that end, LBEC was asked to use an alternate and less polluting technology referred to as integrated gasification combined cycle (IGCC), or commonly known as simply "gasification", to reduce the harmful pollutants burning petroleum coke(pet coke)would produce. LBEC chose not to use IGCC, or natural gas for its primary fuel, but instead chose a circulating fluidized bed (CFB) technology that would each year spew into the atmosphere over Corpus Christi, Nueces Bay, Corpus Christi Bay, San Patricio County, and as far as the winds would take: 1664 tons of particulate matter (PM_{10}), 8096 tons of sulfur dioxide, 3824 tons of nitrogen oxides, 5977 tons of carbon monoxide, 283 tons of volatile organic chemicals, and 220 pounds of mercury, if allowed by the TCEQ.

PROPOSAL FOR DECISION (PFD)

A. **MACT, Secondary Emissions, Modeling and PAL**. The ED did not except to the ALJ's findings on secondary emissions, incorrect modeling, or PAL, and CEC will not further comment on these findings, having addressed the issues in the CEC Response to Applicant's Exceptions. As to MACT, however, the ED incorrectly buys into the LBEC argument that petroleum coke (pet coke) fired electric generating units are not subject EPA requirements in section 112 of the Clean Air Act, and therefore no MACT determination is required. This argument, that pet coke is neither coal nor oil, and is therefore not regulated as such fuels,(even though it has all the characteristics of coal, including the emission of similar hazardous pollutants, i.e. looks like coal, burns like coal, pollutes like coal), defies all logic and reason. The ALJ's are correct in their analysis of the MACT requirement. The ED seems to acknowledge the possibility that the ALJs are correct, and even recommends a procedure for correcting the failure to conduct a MACT analysis. (ED's exceptions pp. 8-9)

B. **PM CEMS and PM_{10}/$PM_{2.5}$ Surrogacy Policy**. Although the ALJ's did not specifically require that LBEC comply with the $PM_{2.5}$ National Ambient Air Quality Standards (NAAQS); it is clear that the surrogacy policy allowing PM_{10} as a surrogate for $PM_{2.5}$ is not the current law, and the "grandfathering provision" is stayed pending its repeal. (see Federal Register/Vol. 75, No. 28 pl 6827, February 11, 2010). Since the ALJ's left the decision to implement the $PM_{2.5}$ standards to the Commission, CEC urges the Commission to abandon the surrogacy policy, and implement the current NAAQS.

C. **BACT.** The ALJ's found that the limits in the draft permit for Total PM/PM_{10}, CO, and H_2SO_4 were not BACT, and recommended lower specific limits. Without explanation, the ED simply states that he believes that evidence supports the BACT limits in the draft permit. (ED's Exceptions, p.13). CEC would point out that the ALJs' decision on BACT for the stated pollutants was made after detailed analysis of all the evidence, and should be adopted by the Commission.

The 9 day hearing referred to in the ED's introduction/background section, was a culmination of eight months of preparation and discovery. The two Administrative Law Judges, the Honorable Tommy Broyles and the Honorable Craig Bennett, heard the testimony, observed the witnesses, examined the evidence, considered the arguments, and have concluded that LBEC failed to meet its burden to prove that the emissions from its proposed facility would not harm the public health and welfare. This was no off-the-cuff finding. It came after arguments and briefs, rebuttal arguments and rebuttal briefs filed by all parties. The finding is solid and irrefutable.

The ED's introduction and background, relying on the Application, describes the proposed LBEC site to be at 6059 Joe Fulton Corridor, Corpus Christi. This tells us nothing, because there is no such address locatable on the ground. From the testimony, exhibits, and inspection of the area of the proposed site, it lays partly in the Corpus Christi ship Channel, and a roadway's distance from the shoreline of Nueces Bay, a public fishing area. (See testimony and photographs of Wilson Wakefield, Individual Protestant). ED does not mention that the Corpus Christi/ San Patricio County area is classified in TCEQ documents as a "near non-attainment area", and Nueces Bay is already heavily polluted. Although this is an air quality permit proceeding, Mr. Wakefield's photographs show the plumes of pollutant from existing piles of pet coke near the LBEC site drifting over and falling into the bay.

PROCEDURAL ISSUES

As to procedure from this point on, the ED refers to Section 382.0518 (d) of the Texas Health and Safety Code (THSC) which provides the procedure for denial of the Permit. This statute, on its face seems to be the mandated procedure. Instead, The ED recommends that the Commission proceed as provided in TCEQ Rule 80.265, which provides that the Commission, either on its own motion, or the motion of any party, may order the ALJs to reopen the record for further proceedings on specific issues in dispute. All this does is give LBEC another bite of the apple, akin to a new trial on limited issues. LBEC was unable to meet its burden of proof after a nine day trial in November, and there is no reason to believe that a new trial will change the facts. It has been the practice of LBEC, when faced with an unacceptable quantity of emitted pollutants in its Application, to simply erase one number and put in another, without any change of technology. (See testimony of Mr. Hamilton in this regard).

D. **BACT for Mercury**. The ED rejects the findings by the ALJs that the Mercury [1]BACT limits for the proposed LBEC facility should be equivalent to the limits recently set by TCEQ for the Calhoun County Navigation District (CCND) permit. The ED reasons that because the limits in the CCND were based on a "settlement agreement and not on a BACT analysis", they can be disregarded. The ED's argument contradicts the commission's own position with regard to the mercury limits in the CCND permit. On April 29, 2009, the TCEQ wrote Mr. Charles Hausmann, Port Director, Calhoun Port Authority regarding Permit Numbers45586 and PSD-TX-1055, ES Joslin Power Station, Point Comfort, Calhoun County a letter which reads in pertinent part as follows: "Dear Mr. Hausmann: *This is in response to your letter received August 28, 2007, requesting revision of the conditions and maximum allowable emission rates table of the above-referenced permit. We understand you asked for the following four changes to the permit: 1) Decrease the mercury rate to 0.007 ton per year. 2) Add mercury to the optimization study identified in Special Condition No. 43."*

The letter continues: "As indicated in Title 30 Texas Administrative Code sec. 116.116(c) [30 TAX sec. 116.116(c)], and based on our review, the first two changes identified above are hereby approved and Permit Numbers 455;86 and PSD-TX-OSD-TX-1055 are altered.". (italics supplied). The letter concluded: "This action is taken under authority delegated by the Executive Director of the TCEQ." and is signed by and unidentifiable signature, "for Richard A, Hyde, P.E. Director Air Permits Division Office of Permitting Registration Texas Commission on Environmental Quality". [2] The letter clearly shows that the mercury limit decrease was requested by the Applicant; and **the TCEQ reviewed and approved it.** Significantly, the other two requested changes were not approved by the TCEQ, presumably after review. It is more probable than not that the "settlement" limits more accurately reflected BACT for mercury than the guess work by Mr. Hamilton. The ALJs' determination is correct.

[1] ED's exceptions p. 13
[2] The referenced letter is the first document in an attachment "E"to LBEC's Exceptions to the ALJs' PFD

CONCLUSION

CEC, the parties aligned with CEC, Individual Protestants, and organizations that protest issuance of the requested air quality permits sought by LBEC, believe that the mandate in section 382.002 of the Texas Health and Safety Code, cited as the Texas Clean Air Act, and the Federal Clean Air Act, require the TCEQ to consider protection of the public health and welfare as its primary goal. To that end, the parties most affected by the pollution from the proposed LBEC facility have waded and struggled through the various statutes, rules and procedures for hearing issues regarding air quality and pollution determination. The arduous process has culminated in a proposal for decision (PFD) by the two administrative law judges (ALJs) who have found from the evidence presented in the contested case that LBEC has failed to show that the emissions from its proposed facility would be protective of the health and welfare of the public. The Executive Director, while not completely agreeing with the PFD, likewise recognizes that the LBEC Application is deficient in several respects.

The Protestants understand that under current statutes, the Commissioners of the TCEQ will make a final determination whether or not to issue LBEC an air quality permit. CEC and the Individual Protestants and organizations aligned with CEC ask the Commissioners to accept the PFD as the decision of the Commission and deny the requested permit.

Respectfully Submitted,

Gerald Sansing

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CERTIFICATE OF SERVICE

I certify that true copies of the foregoing Response to the Executive Director's Exceptions to the Rulings of the ALJs was served in accord with the attached service list on April 28 2010.

Gerald Sansing

SOAH Docket No. 582-09-2005
TCEQ Docket No. 2009-0033-AIR
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FAX COVER SHEET

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From: Gerald A. Sansing, Chairman, Clean Economy Coalition
Client/Matter: Docket Number 2009-0033-AIR
Date: April 29, 2010

DOCUMENTS	NUMBER OF PAGES*
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COMMENTS:

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