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April 29, 2010

Ms. LaDonna Castañuela
Chief Clerk, MC-105
Texas Commission on Environmental Quality
P.O. Box 13087
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Via Electronic Submission

Re: TCEQ Docket No. 2009-0033-AIR; SOAH Docket No. 582-09-2005; *Application of Las Brisas Energy Center, LLC for State Quality Permit; Nos. 85013, HAP 48, PAL 41 and PSD-TX 1138.*

Dear Ms. Castañuela:

Enclosed for filing in the above-referenced cause, please find Sierra Club's Reply to Exceptions to the Proposal for Decision.

Thank you for your attention to this matter. Please call me at (512) 637-9477 should you have any questions.

Sincerely,



Ilan Levin

Enclosure

cc: Service List (*Via Electronic Mail and U.S. Mail*)

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of Sierra Club's Reply to the Exceptions to the Proposal for Decision on this 29th day of April, 2010.



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Attorney for Sierra Club

For SOAH

Via Electronic Mail & U.S. Mail

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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; HAP-48, PAL-41,	§	
AND PSD-TX-1138	§	ADMINISTRATIVE HEARINGS

SIERRA CLUB’S REPLY TO EXCEPTIONS TO THE PROPOSAL FOR DECISION

TO THE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

No amount of additional legal briefing or exceptions by LBEC can plug the fatal holes in their Application and Draft Permit.

MACT for the Main Boilers

In September 2009, Sierra Club filed a motion for summary disposition, arguing that the LBEC Application and Draft Permit are deficient as a matter of law for failing to include a case-by-case MACT determination for the proposed four main boilers. Instead of simply agreeing to undergo a case-by-case MACT analysis subject to public notice (as was required of NRG in the Limestone Unit 3 air permit matter) in order to ensure that air toxics such as mercury, nickel, and other dangerous hazardous air pollutants (“HAP”) are controlled to the maximum level, LBEC continues to chant the same tired refrain: that the main boilers are not subject to this federal Clean Air Act requirement. My people call this “chutzpah.” Amazingly, LBEC’s entire argument continues to rest on two *vacated* federal rules, which LBEC calls “the most relevant EPA actions”¹ – (1) EPA’s MACT standard for industrial boilers and (2) EPA’s MACT standard for electric utility steam generating units. Because a federal court vacated, rather than simply

¹ LBEC Exceptions at 3.

remanded, both of these EPA rulemakings, they are essentially wiped off of the books and lack any legal significance.² Yet, LBEC parses these two vacated rules in its attempt to cobble together their weak argument.³

LBEC argues that the main boilers cannot be considered Industrial Boilers under federal CAA Section 112, because EPA's 2004 Industrial Boiler MACT rule, which was subsequently vacated, is inconsistent with such a finding.⁴ Yet, LBEC fails to provide any legal authority for this claim. Moreover, at the time that the Industrial Boiler MACT rule was promulgated, nothing in it would have precluded its application to LBEC. So, both the legal and factual predicates for Applicant's argument are without support.

As the ALJs note:

“...it appears that EPA has wrestled with the correct treatment of pet coke over the years. In numerous proposed revisions to 60.41Da (and as seen in other rules), the EPA has modified its proposed treatment of pet coke, explicitly 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. *At the times relevant to this hearing, pet coke was not explicitly included in either of those definitions.*”⁵

The ALJs then explain in a footnote their recognition that parsing EPA's “intent” is a challenge. The ALJs have applied sound and deliberative reasoning to this legal question and come to the same conclusion as Sierra Club: while the explanation and regulatory history on the

² See, *Environmental Defense v. EPA*, 489 F.3d 1 320, 1325 (D.C.Cir. 2007) (while remanded regulations remain in effect, vacated regulations do not); *Campanale & Sons, Inc. v. Evans*, 31 1 F.3d 109, 127 (1st Cir 2002) (option of vacating a regulation described as “overturning it in its entirety”).

³ LBEC Exceptions at pp. 3-6, 10, 16.

⁴ LBEC Exceptions at 4.

⁵ PFD at 20-21 (emphasis added).

question is tricky, the answer to the question is clear and obvious. Of course, LBEC's boilers are subject to case-by-case MACT!

LBEC's attempt to attack the ALJs' "strict constructionist" reading of the relevant authorities in this matter is without merit. The ALJs carefully considered the regulatory treatment of petroleum coke under various proposed, vacated, and finalized regulations, and came to the correct conclusion that if one narrowly construes EPA's 2000 listing decision (in the manner the Applicant suggests), then the evidence supports a conclusion that petroleum coke is neither coal nor oil, nor is it a fossil fuel. If LBEC is not fossil fuel-fired, then it is not an EUSGU at all, and accordingly the so-called Section 112(n) exemption for fossil fuel-fired EUSGUs does not apply. Thus, LBEC's boilers are subject to regulation under federal CAA Section 112 because they are classified as Industrial Boilers.

LBEC would also have the Commission believe that, by incorporating the federal MACT requirements by reference, the TCEQ is at liberty to decide when and if an "exemption" to Section 112 of the federal Clean Air Act applies.⁶ LBEC cites no legal authority for this absurd proposition.

Material Handling

LBEC argues that their plans did not materially change during the course of this proceeding, yet nothing could be further from the truth.

LBEC's Application references "Las Brisas Terminal Company," or "LBTC," no fewer than eight times, including the following statement:

⁶ LBEC Exceptions at p. 17 ("Unquestionably, TCEQ has the authority to ...decid[e] when this exemption applies.")

“4.2 Material Handling Facilities

“Material handling facilities will be required for pet coke, limestone, lime, sand and combustion byproducts (fly ash and bottom ash). A simplified process flow diagram for the materials handling facilities is included at the end of this section as Figure 4-2. The pet coke and limestone will be transported in trucks to the adjacent pet coke and limestone stockpile site operated by Las Brisas Terminal Company, LLC (LBTC).”

Based on the Applicant’s clear representations in their application, prefiled testimony, and testimony of Kathleen Smith, the Applicant’s corporate representative in this matter, Sierra Club filed a brief early in this proceeding, in September 2009, pointing out that both LBEC and LBTC are owned and controlled by Chase Power, and, furthermore, that the petroleum coke and other material stockpiles and the associated material handling emissions are a required and integral part of the Applicant’s plan to construct and operate the LBEC. As such, LBEC and LBTC constitute a “single source” for Clean Air Act permitting.⁷

In response to EDF and Sierra Club’s September 2009 motions, the Applicant changed its “story” and, departing from the Application, informed the ALJs and Parties that the company no longer “foresees developing or operating a commercial bulk terminal facility adjacent to the LBEC site...”⁸

Thus, based on the company’s own representations in their Application, Sierra Club concluded that the LBEC and LBTC sites are a “single source.” In response to Sierra Club’s and EDF’s arguments, the record shows that LBEC’s plans *did* materially change.

⁷ Sierra Club’s Response to EDF’s Motion for Summary Disposition Regarding the Las Brisas Terminal Company (filed September 4, 2009).

⁸ LBEC Resp. Br. To EDF’s motion for summary disposition regarding LBTC, at p. 2-3.

However, no matter how many times the Applicant's business plans may change from the representations in its initial Application, LBEC cannot escape the fact that, at a minimum, the Application must take into account secondary emissions associated with the power plant.

Counsel for Sierra Club is aware of no other similar power plant permit application – in Texas or elsewhere – that simply *excludes* all the largest sources of fuel storage and materials handling for the plant.

Applicant's gripe that "EDF, the Protestant that is primarily responsible for raising the issue of secondary emissions, elected to wait more than four months after commencement of discovery" to inquire into LBTC is irrelevant and misleading. LBEC conveniently neglects to mention that Sierra Club served initial discovery requests on May 18, 2009, the month after discovery commenced, specifically seeking information on the Applicant's air dispersion modeling, including plot plans, maps, and all the emission calculations relied upon by the Applicant. It was through this early discovery request that Sierra Club first attempted to get a clear understanding as to whether or not LBEC included all required emission sources in its Application. On July 2, 2009, Sierra Club propounded a second set of discovery, seeking information related to the supply of petroleum coke to the facility, and method of delivery of fuel to the facility.

LBEC's argument that the ALJs' decision on this subject is an "unexplained overemphasis on a change in business plans that makes no difference"⁹ is a ridiculous and unsupported assertion. The record clearly demonstrates that the issue of low-level fugitive particulate matter emissions is an Achilles' heel for this project, or as LBEC describes it, "the

⁹ LBEC Exceptions at p. 21.

metric of concern.”¹⁰ In fact, LBEC’s own modeling (without taking into account the massive pet coke and materials storage and handling) predicts the short-term PM increment at 29.7 micrograms per cubic meter, just barely under the regulatory limit of 30 $\mu\text{g}/\text{m}^3$. So, LBEC desperately *needs* to disregard and ignore these emissions in order to portray the project as meeting all regulatory requirements. Hence, in true form, LBEC had the gall to submit an Application in which the millions of tons per year of pet coke and limestone required for the main boilers magically appears at the power plant fence line.

Even accepting LBEC’s changing business plans, it is required to account for all emissions, including secondary emissions. LBEC knows how much material and fuel it will need to move in order to operate the plant, and it is required to account for these emissions. LBEC failed to do so.

LBEC’s contorted interpretation of Sierra Club’s witness Dr. Phyllis Fox’s testimony evidences only the fact that the Applicant itself failed to supply any testimony on this issue. LBEC cites two sentences in Dr. Fox’s 61 pages of testimony, fails to provide the context, and essentially attempts to put words in the mouth of a Sierra Club witness that were never said. Dr. Fox offered testimony on BACT and MACT.¹¹ Dr. Fox’s testimony was filed in August 2009, and was based on the Application.¹² This fact is important because, as explained above, Protestants took the Application at face value, and the Application clearly represented that the LBEC and LBTC sites were contiguous, part of the same project, and would be operated by the same entity. Based on her review of the Application, Dr. Fox responded to the question “Did

¹⁰ Id at p. 37.

¹¹ Sierra Club Ex. 300 (Prefiled Testimony of Dr. Fox) at p. 3.

¹² Id.

the Application include a BACT analysis for all emissions at LBEC?” Dr. Fox answers, “No,” and then goes on to explain that numerous sources that should be included in the Application were *left out*.¹³ Dr. Fox’s prescient critique of the LBEC application, as failing to include a BACT analysis (or any consideration at all, for that matter) of the associated material handling and storage should not be misconstrued. Dr. Fox neither reviewed nor provided any testimony on EDF’s modeling. LBEC’s reliance on these two sentences from Sierra Club’s BACT and MACT witness’ testimony is out of context, misconstrues the testimony, fails to mention that the testimony was based on the Applicant’s initial “story” (that Las Brisas would develop and operate the terminal), and was filed in this contested case *before* LBEC changed its tune about its plans for LBTC.

On page 37-38 of their Exceptions, LBEC’s counsel attempts to present a bit of additional expert testimony into the record, arguing that the existing Port of Corpus Christi permits can handle all the needed fuel and materials that LBEC would require. Such post-hearing “expert” testimony by LBEC’s counsel should be seen for what it is: a desperate last attempt to plug a hole in the record, and a lawyer’s plea to accept the argument as “not cobbled together” and just “simple math.”¹⁴ The Commission should reject this attempt. As any TCEQ permit engineer would hopefully confirm, the argument is not just simple math – it requires numerous assumptions involving, for example, the amount of fuel that a huge power plant would need on hand at any given time, transportation and delivery issues, and *other* permit terms and conditions that could constrain operations at the terminal. In other words, LBEC’s counsel oversimplifies by assuming that the pound per hour limit in the existing POCCA permits

¹³ Id at p. 49.

¹⁴ Id at p. 38.

maximum allowable emission rate table (MAERT) is the only constraint on operations at that facility.

Mercury

LBEC mis-states Sierra Club witness Dr. Fox's testimony regarding mercury. Dr. Fox testified that LBEC's BACT analysis for mercury was flawed, and that the proposed emission limit is not BACT.¹⁵ In fact, Dr. Fox testified that several permits have been issued with significantly lower mercury limits than proposed by LBEC.¹⁶ In addition, Dr. Fox testified that LBEC's proposed mercury limit is based on "an extraordinarily high uncontrolled mercury level" and that, therefore, even though mercury limits are "commonly based on a 90% mercury control" the proposed limit of 2×10^{-6} lb/MMBtu "is far below the standard."¹⁷

Conclusion

Although Sierra Club does not agree with all of the ALJs' 120-page PFD, for the reasons set forth in the PFD, Sierra Club urges the Commission to either (1) deny the Application and Draft Permit or (2) remand to the Executive Director for additional technical review and public notice.

¹⁵ Sierra Club Ex. 300 at p. 49.

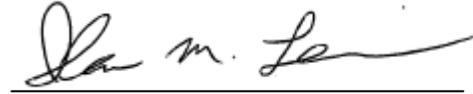
¹⁶ Id at 49-50.

¹⁷ Id.

Respectfully Submitted,

ENVIRONMENTAL INTEGRITY PROJECT

By:

A handwritten signature in black ink, appearing to read "Ilan M. Levin", written over a horizontal line.

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