

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

APPLICATION OF	§	BEFORE THE STATE OFFICE
LAS BRISAS ENERGY	§	
CENTER, LLC FOR STATE	§	OF
AIR QUALITY PERMIT NOS.	§	
85013, PSD-TX-1138, HAP 48,	§	ADMINISTRATIVE HEARINGS
AND PAL 41		

ENVIRONMENTAL DEFENSE FUND, INC.'S
REPLY TO EXCEPTIONS TO PROPOSAL FOR DECISION

April 29, 2010

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ENVIRONMENTAL DEFENSE FUND, INC.'S
REPLY TO EXCEPTIONS TO PROPOSAL FOR DECISION

TO THE COMMISSIONERS OF THE TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY:

COMES NOW Protestant Environmental Defense Fund, Inc. (“EDF”) and files this Reply to the Exceptions to the Administrative Law Judges’ Proposal for Decision in the referenced docket, and would respectfully show as follows:

I. SUMMARY

As summarized in the Administrative Law Judges’ (“ALJs”) Proposal for Decision (the “PFD”), Applicant Las Brisas Energy Center, LLC’s (“Applicant” or “Las Brisas”) Application in this matter is fatally deficient in numerous respects and completely fails to make numerous showings that are expressly required under the federal Clean Air Act, the Texas SIP, and TCEQ’s rules. Having failed to make the required showings in its Application and the contested case hearing in this matter, the Applicant again substitutes invective and specious legal argument for the evidence that it failed to supply with its Application and at hearing. In addition, Las Brisas attempts to supplement its Exceptions with nearly 200 pages of additional untimely “evidence” – an

admission that the record in this case does not and cannot support issuance of the requested permit.

This matter must be decided upon the Application and the evidence the Applicant submitted in the hearing before SOAH, not upon some imaginary case that the Applicant wishes it had presented but did not. No amount of mental gymnastics, name calling or finger pointing can supply that evidence. Nor can the Applicant change the applicable law, which requires, among other matters, that the Applicant: (1) apply maximum achievable control technology (“MACT”) to control the over 60 tons of hazardous air pollutants that the proposed Las Brisas Energy Center (“LBEC”) circulating fluidized bed (“CFB”) boilers would emit each year; and (2) account for emissions resulting from bulk material handling operations that Applicant concedes are required for operation of the proposed source.

In the PFD, the ALJs carefully review and summarize the Application and record and correctly determine that the Applicant: (i) improperly sought to avoid MACT review, which is required under EPA and TCEQ rules for the LBEC CFB boilers which are major sources of hazardous air pollutants; (ii) wholly failed to account for how the required 7.2 million tons per year of petroleum coke and bulk materials will be handled, thereby failing to demonstrate that such materials will be handled without an increase in secondary emissions; and (iii) relied upon fundamentally defective air dispersion modeling – modeling which was revealed to be erroneous *for a second time* after Applicant’s expert attempted to make corrections and resubmitted the modeling with his rebuttal testimony.

The Application and evidence submitted by the Applicant at hearing blatantly fail to meet the minimum requirements for permit issuance under the federal Clean Air Act, Texas SIP, and TCEQ’s rules. The Applicant has only itself to blame for the defective state of the

record it created. The Applicant cannot remedy that fundamentally defective record in its Exceptions. The Application must be denied.

II. THE APPLICANT'S ATTEMPT TO IMPROPERLY SUBMIT NEW EVIDENCE AFTER HEARING IS AN ADMISSION THAT ITS APPLICATION IS FATALLY DEFECTIVE.

With its Exceptions, Applicant submits nearly 200 pages of additional "evidence" in an attempt to bolster its Application. Except for a copy of Applicant's Consolidated Response to Protestants' Motions for Summary Disposition previously filed in this matter, it appears that the attachments are entirely new.¹ The Applicant's actions in themselves constitute an admission that the Application is incomplete and defective. The TCEQ's rules require that an Applicant demonstrate in its Application that the proposed source will comply with all applicable requirements. 30 TAC § 116.111. As such, these actions alone establish that the Application should be denied. To the extent the Applicant wishes to amend its Application, it must resubmit and re-notice its Application in accordance with Texas Health & Safety Code §382.0291(d).

In addition, EDF objects to this improper submission of untimely evidence. The record in this matter is closed, and Applicant's attempt to supplement the record with 200 pages of additional documents at this late juncture is procedurally improper. Additionally, the Applicant's actions are fundamentally unfair as none of the other parties have had the opportunity to cross-examine witnesses concerning the additional documents, or otherwise prepare any appropriate evidence or testimony in response. Accordingly, EDF objects to the Attachments to Applicant's Exceptions to the extent such attachments contain items that

¹ Among other matters, in Attachment D the Applicant attempts to submit a new application for permit amendment seeking to reduce the permitted moisture content for a Port of Corpus Christi air permit, thereby seeking to correct one of multiple issues that the ALJs found fatal to the Applicant's case. See PFD at 59-66.

are not already admitted into evidence in this matter or otherwise comprise part of the record in accordance with TCEQ rules, and moves that such improper supplements to Applicant's Exceptions be stricken from the record.

III. THE ALJs CORRECTLY CONCLUDED THAT MACT REVIEW OF HAZARDOUS AIR POLLUTANTS IS REQUIRED

It is undisputed that the LBEC CFB boilers are a major source of hazardous air pollutants ("HAPs") and will emit numerous HAPs including arsenic, beryllium, cadmium, chromium, hydrogen chloride, hydrogen fluoride, lead, manganese, mercury and nickel. Tr. 2 at 319:15—17, 320:18—322:5; Tr. 8 at 1794:6-10. The CFBs would emit over 60 tons of HAPs per year. LBEC Ex. 6 at 00080. There is no question that coal-fired CFBs are subject to the regulation of HAPs under federal Clean Air Act §112. Although it is undisputed that the CFB boilers emit essentially the same set of HAPs as boilers that burn coal, the Applicant continues to insist that a special loophole exists for CFBs that burn *only* petroleum coke.²

After exhaustively reviewing the parties' arguments and applicable authority concerning the alleged loophole, the ALJs properly concluded that: (1) under a common sense or technical approach, petroleum coke-fired boilers must be treated like coal- and oil-fired boilers and subjected to a MACT analysis in accordance with the rationale of EPA's 2000 "Listing Decision" for certain "electric utility steam generating units" ("EUSGUs"); and (2) if one applies the "strict constructionist" approach utilized by the Applicant, pet-coke fired CFB boilers are not "EUSGUs" as defined under applicable

² Notably, even under the Applicant's rationale this wholesale exception would not apply if the proposed plant burned any amount of coal — even as little as 1% — in addition to pet coke, further highlighting the absurdity of the Applicant's claims.

rules at all,³ with the consequence that the LBEC CFBs are nevertheless subject to MACT review as Industrial Boilers. PFD at 14, 22-23.

In spite of the ALJs' conclusion, and in spite of close proximity of the proposed plant to neighborhoods, schools and churches, the Applicant persists in its efforts to invent a loophole that would somehow allow it to skirt MACT review of the massive volumes of hazardous air pollutants that LBEC would emit. Specifically, the Applicant claims: (1) the EPA's rules requiring MACT for Industrial, Commercial and Institutional Boilers ("Boiler MACT") do not apply to the LBEC CFBs as determined by the ALJs; (2) the "technical engineering approach" applied by ALJs is misplaced because petroleum coke is not a "coal"; (3) the 2000 Listing Decision covering EUSGUs does not apply to pet-coke fired electric generating units; and finally (4) even if the LBEC CFBs are otherwise subject to MACT, TCEQ has the authority to depart from federal rules governing the application of MACT to hazardous air pollutants and make its own independent determination as to whether case-by-case MACT applies. None of the Applicant's claims hold water.

A. Vacated Rules Provide No Justification for the Applicant's Failure to Comply with MACT.

Applicant first claims that petroleum coke-fired CFBs are exempt from regulation as "industrial boilers" as a result of the EPA's Boiler MACT rule, citing 40 CFR § 63.7491, a provision in the Boiler MACT Rule which enacted an exemption for certain "electric utility steam generating units." However, a careful reading of the Applicant's

³ In this connection, the ALJs correctly observe that, if one takes the "strict legal interpretation" approach that the undefined terms "coal" does not include pet coke (although many EPA definitions of such terms do include petroleum coke), then one must also strictly apply the definition of "fossil fuel", with the result that the LBEC CFBs are not EUSGUs. PFD at 23. Because EUSGUs are limited to units that burn fossil fuel, and pet coke does not fall within the strict legal definition of "fossil fuel" historically utilized by EPA, pet-coke fired boilers do not fall within the general MACT exemption for EUSGUs set forth in federal Clean Air Act § 112(n). See 42 U.S.C. §7412(n).

argument discloses that the Boiler MACT rule that Applicant relies upon for this alleged “exclusion” was in fact *vacated in its entirety* by the United States Court of Appeals for the District of Columbia Circuit. See LBEC Exceptions at 4-5, n. 1 (citing *NRDC v. EPA*, 489 F.3d 1250 (D.C. Cir. 2007)). Applicant further *admits* that, because the Boiler MACT rule has been vacated, industrial boilers are subject to case-by-case MACT. See LBEC Exceptions at 4 n.1.

In other words, the Applicant contends that, although the LBEC CFBs would otherwise be subject to MACT review as industrial boilers, they are exempted from regulation because EUSGUs were (temporarily) exempted from the (now vacated) Boiler MACT rule. This argument is a complete non-sequitur. The exemption on which Applicant relies: (a) no longer exists; and (b) operated only to exclude certain EUSGUs from the encompassing Boiler MACT rule, which also no longer exists. Absent the now-invalid rule, there is no rule or authority exempting large pet-coke fired boilers such as the LBEC CFBs from case-by-case MACT, which Applicant now concedes applies to industrial boilers.

As the ALJs observe in the PFD, it would be an absurd result to conclude the EPA intended to subject smaller pet-coke fired industrial boilers to a MACT analysis but not larger ones like the massive HAP-emitting LBEC CFBs. PFD at 23. Far from providing any valid basis to depart from the ALJs’ conclusions, the Applicant’s argument further confirms that, even if one counter-factually assumes the LBEC CFBs are somehow excluded from regulation under the EPA’s 2000 Listing Decision, they are nevertheless subject to case-by-case MACT as Industrial Boilers.

As with its improper reliance on proposed but rejected rules (discussed in Section II.C.2 below), the Applicant's reliance on a vacated rule to excuse its failure to comply with MACT is both unavailing and irresponsible. And just as the Applicant cannot justify its case on the basis of non-existent evidence that the Applicant did not present with its Application or at hearing, likewise the Applicant cannot justify its failure to perform MACT on invalid rules. The Applicant's Exceptions fail as a matter of law to justify the Applicant's attempt to avoid MACT review of the over 60 tons per year of hazardous air pollutants that the proposed plant would emit.

B. Applicant's "Petroleum Is Not a Coal" Argument Fundamentally Misconstrues the Basis for the ALJs' Proposal for Decision.

As noted above, in the PFD the ALJs conclude that, applying a technical or common sense view, pet-coke fired boilers "may be considered coal-fired or oil-fired for purposes of [MACT analysis] . . . because pet coke is a major source of HAPS, just like coal and oil, and has been included within the definition of coal and petroleum at different times in EPA's rules." PFD at 23. The Applicant seeks to attack this conclusion on the basis that from a technical perspective coke is not a coal, attaching an American Society of Testing and Materials ("ASTM") document discussing various categories of coal.⁴ LBEC Exceptions at 8. This argument is irrelevant and mischaracterizes the stated basis for the ALJs' decision.

The problem is that the basis for the ALJs' conclusion is *not* whether or not it is possible to differentiate petroleum coke as a substance from "coal," but instead whether there is any difference that would justify not regulating pet coke-fired boilers while regulating coal-fired and oil-fired boilers. See PFD at 21-23. The evidence in this case

⁴ As noted in Section II above, this document is improper late-filed evidence and as such should be stricken from the record.

uniformly and overwhelmingly demonstrates that the answer to this question is “no.” As the ALJs observe, the ED’s expert Randy Hamilton testified there is no valid reason why pet coke-fired boilers should be excluded. PFD at 23; see also Tr. 8 at 2078: 14-19. Even the Applicant’s own expert Shanon DiSorbo admitted that the proposed LBEC will be a major source of the *exact same HAPs* cited by the EPA in its decision to list coal- and oil-fired EUSGUs. Tr. 2 at 319:9-322:11.

Applicant’s tactic is a classic straw-man argument. The Applicant seizes upon the word “technical” in the PFD and uses it in an entirely different sense than the ALJs. As the PFD makes clear, the “technical understanding” cited by the ALJs is used interchangeably with “common sense understanding” and expressly references a line of testimony by the ED’s witness Randy Hamilton as to whether there is a valid “common sense” or technical basis for treating pet coke-fired EUSGU differently than coal-fired EUSGUs for purposes of regulating HAPs. See PFD at 23; see also Tr. 8 at 2076-2078. Tr. 8 at 2076:23—2078:19. The ALJs’ use of the word “technical” therefore refers to whether a *relevant* technical distinction can be made between coal and pet coke, not whether *any* technical distinction can be made.

The Applicant instead attempts to use the word “technical” in the latter manner, contending the ALJs’ argument is invalid *if there is any technical basis at all* for distinguishing between coal and pet coke, regardless of whether it is relevant to the issue of HAP emissions. In other words, in responding to the ALJs common-sense argument that it is nonsensical to exclude pet coke-fired EUSGUs from MACT, the Applicant once more attempts to craft a hyper-technical argument in response, completely ignoring the

context in which the word “technical” was used and misconstruing the entire point of the ALJs’ discussion.

In the referenced discussion, the ALJs were not addressing whether any distinction could be made between pet coke and coal. Instead, the ALJs’ point is that it is absurd to not regulate pet coke-fired EUSGUs that emit many tons of certain HAPs when coal-fired EUSGUs that are regulated for the very reason that they emit those same HAPs. And as the ALJs observe in the other tier of their analysis, applying a hyper-technical view, pet coke-fired boilers are already regulated as industrial boilers regardless of whether they are covered or not by the 2000 Listing Decision. See PFD at 23.

The Applicant’s “pet coke is not coal” argument misrepresents the basis for the ALJs’ decision and wholly fails to address the merits of that decision. This argument merely presents yet another example of the Applicant attempting to fashion a highly technical legal loophole to justify its insistence on ignoring the massive quantities of hazardous air pollutants that the proposed LBEC would emit in close proximity to neighborhoods, schools, and churches. As shown by the PFD, no such loophole exists.

C. The 2000 Listing Decision Covers Petroleum Coke-Fired EUSGUs.

1. The Utility RTC Further Confirms That MACT Applies to Pet Coke-Fired Boilers.

The Applicant next contends that “it is indisputable” that the EPA’s 2000 Listing Decision only applies to coal- and oil-fired EUSGUs. In this connection, the Applicant carefully avoids mention of the facts that: (1) the 2000 Listing Decision is silent as to the definition of “coal” and “oil”; and (2) at the time of the 2000 Listing Decision, multiple EPA definitions of “coal” expressly included petroleum coke. In light of these facts, it is far from “indisputable” that the Listing Decision does not cover petroleum coke. In fact,

given the term “coal” as used by EPA in 2000 commonly encompassed “petroleum coke” and the fact that petroleum coke emits the exact same HAPs cited as the basis for the Listing Decision, as the ALJs correctly note, it is quite easy to conclude the 2000 Listing Decision in fact covers pet coke-fired units. PFD at 21.

Nevertheless, in support of its claims the Applicant focuses on the EPA’s February 1998, *Study of Hazardous Air Pollutant Emissions from Electric Steam Generating Units – Final Report to Congress* (“Utility RTC”)⁵ cited by the 2000 Listing Decision, claiming the Utility RTC supports its position because: (1) emissions testing data in the Utility RTC “was clearly limited to data from bituminous, subbituminous, and lignite coal-fired units”; and (2) the Utility RTC “was not focused on petroleum coke-fired EUSGUs.” LBEC Exceptions at 12-13. The Utility RTC fails to justify Applicant’s position.

The Applicant’s first claim with regard to the Utility RTC is simply inaccurate. In fact, the Utility RTC noted that at least one of the units studied burned a mixture of coal and petroleum coke. See 1 Utility RTC at 3-16. In fact, with respect to this unit, the EPA found that concentrations of nickel (a HAP) in petroleum coke burned by that plant may have been more than 100 times higher than the coal assumed to be burned by that plant, and consequently the study “likely . . . underestimated” nickel emissions from plants burning coal / pet coke mixtures. *Id.* Thus, the Utility RTC found that utilizing pet coke as a fuel may result in emissions of some HAPs that are *even higher* than emissions from coal.

As to the Applicant’s second claim, there is no question that the Utility RTC expressly notes that it focused on coal-fired, oil-fired, and natural gas-fired units; it expressly did so because “units using these fuels make up an overwhelming majority of the

⁵ <http://www.epa.gov/ttn/atw/combust/utiltox/eurtc1.pdf>

fossil-fuel-fired electric utility units with a capacity of >25 MWe.” 1 Utility RTC at 3-8. But this statement does not, as the Applicant claims, mean that it is illogical to conclude that EPA intended the 2000 Listing Decision to cover other types of units. Notably, Applicant focuses upon the fact that the RTC created separate categories for only “bituminous, subbituminous, and lignite coal-fired units” and argues that this fact necessarily excludes pet coke from the scope of the 2000 Listing Decision. See Utility RTC at 3-8. Yet the Utility RTC also fails to include anthracite coal as a separate category. *Id.* According to the Applicant’s incorrect logic, since anthracite is not listed among the fuel sources in Table B-2 of Volume 2 of the Utility RTC,⁶ the EPA would also not have intended to include anthracite coal-burning utilities in its 2000 Listing Decision – an absurd conclusion. Applicant’s focus on the main “categories” set forth in the Utility RTC proves nothing.

And as noted above in the Utility RTC, the EPA acknowledged that some plants burned petroleum coke in addition to coal and as a result were likely to have *even higher* emissions of certain HAPs like nickel. Given the rationale of the 2000 Listing Decision, which makes clear that EPA was choosing to regulate certain EUSGUs with significant emissions of HAPs, and not regulate other units that do not have significant emissions of HAPs, the discussion of pet coke in the Utility RTC merely further confirms that the 2000 Listing Decision was intended to cover units that burned petroleum coke. In fact, the 2000 Listing Decision expressly noted in the course of listing oil-fired EUSGUs that such units

⁶ See 2 Utility RTC at Table B-2 (<http://www.epa.gov/ttn/atw/combust/utiltox/eurtc2.pdf>).

are likely to emit increased concentrations of nickel relative to coal-fired units. See EDF Ex. 311 at 79828.⁷

As the ALJs correctly note in the PFD, Congress stated in the federal CAA that the “Administrator *shall regulate electric steam generating units* under this section, *if the Administrator finds such regulation is appropriate and necessary after considering the results of the study required by this subparagraph.*” 42 U.S.C. § 7412(n)(1)(a) (emphasis added). Having found that coal- and oil-fired boilers are significant emitters of HAPs, and in light of the undisputed fact that pet coke-fired boiler emit significant amounts of the exact same HAPs, the EPA is compelled to require a MACT analysis for pet coke-fired boilers. See PFD at 22. And, indeed, the evidence presented at hearing in this case shows that the EPA specifically takes the position that MACT applies to LBEC, having provided the TCEQ a comment letter in February, 2009 setting forth a list of detailed considerations “*for you to consider as you develop the case-by-case section 112(g) MACT standard for the LBEC.*” See EDF Ex. 30 at p. 1 (emphasis added).

2. Proposed but Rejected EPA Rules Provide No Support for Applicant’s Position.

Next the Applicant proceeds to cite a set of rules that EPA proposed in 2004, but ultimately rejected, as evidence of EPA’s alleged intent to exclude petroleum coke in the 2000 Listing Decision four years earlier. See 69 Fed. Reg. 4652 (January 30, 2004) (the “Rejected MACT Rule”). See LBEC Exceptions at 15-16. The Applicant previously cited this same rule in its Closing Statement, but the ALJs correctly noted that, as a proposed

⁷ Nor does the fact that petroleum coke-burning EUSGUs represent a relatively small percentage of HAP emissions *nationwide* justify the Applicant’s position that it is acceptable for LBEC to subject the residents of the Corpus Christi area to over 60 tons of hazardous air pollutants per year from petroleum coke without applying MACT, as Applicant suggests in footnote 37 of its Exceptions. See LBEC Exceptions at 14 n.37.

rule, under federal case law⁸ the Rejected MACT Rule is entitled to no deference. PFD at 22-23. The Applicant criticizes the ALJs' finding, claiming instead that under *Kraft Foods North America, Inc. v. United States*, 58 Fed. Cl. 507, 512 (Fed. Cl. 2003), "[p]roposed regulations qualify as pre-existing guidance . . . even if they [a]re not final." See LBEC Exceptions at 16.

Even the most superficial reading of *Kraft* proves that it does not support Applicant's position. *Kraft* involved a set of rules that were ultimately *adopted*, not *rejected* like the proposed rule on which Applicant relies. *Kraft*, 58 Fed. Cl. at 511 (noting "[t]he 1996 Proposed Regulations and the Final 1999 Treasury Regulations are substantially the same"). Furthermore, a more detailed reading of *Kraft* reveals that it is not even remotely applicable here. *Kraft* did not involve any question of whether proposed rules are entitled to deference as a general matter. Instead, it involved whether, under a specific Treasury regulation subjecting taxpayers to a "reasonable, good faith" reliance standard based on "pre-existing guidance," a taxpayer could claim its interpretation of tax laws was reasonable in light of a proposed Treasury regulation (ultimately adopted) that was contrary to the taxpayer's position.⁹

⁸ *Clay v. Johnson*, 264 F.3d 744, 750 (7th Cir. 2001)(concluding that "a proposed regulation does not represent an agency's considered interpretation of its statute . . . and therefore is not entitled to deference.")(citing *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 845, 106 S.Ct. 3245, 92 L.Ed.2d 675 (1986)).

⁹ In that case, the plaintiffs filed amended returns for tax years 1994, 1995 and 1996 in an attempt to re-classify severance pay as deferred compensation in order to reduce their employment tax burden. *Id.* at 508. The plaintiffs sought refunds of previously-paid FICA taxes. *Id.* The IRS determined the severance pay was not properly classified as deferred compensation, and rejected the plaintiffs' claims. *Id.* at 509. The plaintiffs argued they were nevertheless entitled to refunds under a specific Treasury regulation providing that an "an employer may rely on a reasonable, good faith interpretation" of the relevant regulation "taking into account pre-existing guidance." *Id.* at 511. The Federal Claims Court rejected the plaintiffs' claims, finding proposed Treasury rules were contrary to the plaintiffs' interpretation, and thus their interpretation was not "reasonable" under the regulation. It was in this context that the Claims Court made the statement cited by Applicant – *i.e.*, "[t]he Regulations qualified as pre-existing guidance, however, even if they were not final." *Id.* at 512.

Kraft is simply inapplicable here, as it does not even purport to address the issue for which it is cited by Applicant, which is whether, as a general proposition of administrative law, proposed regulations are accorded any deference. And, as the applicable authority (including a decision of the United States Supreme Court) relied upon by the ALJs¹⁰ makes absolutely clear, proposed regulations are entitled to *no* deference. The Applicant's reliance on *Kraft* is utterly misplaced. Rejected EPA rules provide no justification for the Applicant's interpretation of the 2000 Listing Decision. Once more, the Applicant attempts to create justification for its position where none exists. The Applicant's additional specious MACT arguments should be rejected.

D. The TCEQ Cannot Unilaterally Exempt Pet Coke-Fired CFBs from MACT.

Finally, the Applicant suggests that the EPA interprets Section 112(g) of the federal Clean Air Act as wholly assigning responsibility to the TCEQ for determining whether categories of sources are subject to case-by-case MACT determinations. See LBEC Exceptions at 17-18. Accordingly, Applicant apparently contends that in this case the ED has the unfettered discretion to exempt the Applicant from MACT review¹¹, and that the ED's decision in this regard cannot be challenged. For this proposition, the Applicant cites a 1996 EPA Final Rule governing implementation of MACT requirements. See 61. Fed. Reg. 68384 (the "1996 MACT Rule"). Specifically, the

¹⁰ See *Clay*, 264 F.3d at 750 (citing *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 845, 106 S.Ct. 3245, 92 L.Ed.2d 675 (1986)). In the *Commodity Futures* case, the Supreme Court stated: "It goes without saying that a proposed regulation does not represent an agency's considered interpretation of its statute and that an agency is entitled to consider alternative interpretations before settling on the view it considers most sound." 478 U.S. at 845; 106 S.Ct. at 3253.

¹¹ Notably, the record in this case reveals that the ED's decision not to subject the LBEC CFB boilers to MACT review was not independently made by the ED, but rather was actively procured by the Applicant after one or more meetings between the TCEQ's Executive Director and his managers and lawyers for the Applicant. Tr. 8 at 1794:23-25, 1795:7—19.

Applicant cites language in that rule providing that “[t]he EPA interprets [federal CAA] §112(g) as assigning to the permitting authority of each State . . . the responsibility for making 112(g) determinations.” LBEC Exceptions at 17 (citing 61 Fed. Reg. 68,382, 68,390 (Dec. 27, 1996)). Thus, the Applicant construes the word “determination” as including the unilateral and sole authority to decide whether a particular type of source is subject to MACT.

First, it is worth noting that CAA §112(g) itself expressly refers to a “determination”:

[N]o person may construct or reconstruct any major source of hazardous air pollutants, unless the Administrator (or the State) *determines* that the maximum achievable control technology emission limitation under this section for existing sources will be met. . . [s]uch *determination* shall be made on a case-by-case basis where no applicable emissions limitations have been established.

42 U.S.C. § 7412(g)(2)(B)(emphasis added). In other words, the “determination” cited by the Applicant is merely the *MACT determination itself*, and not some broader determination as to which categories and classes of sources may be excluded from MACT. Consistent with this language, the 1996 MACT Rule upon which the Applicant relies repeatedly refers to “case-by-case MACT determinations.” 61 Fed. Reg. at 68390.

This language merely provides that states have responsibility for performing case-by-case MACT determinations, and does not evidence any intent to delegate listing decisions or other issues of MACT applicability to the States. Indeed, the numerous federal rules and guidance concerning MACT applicability cited by the parties in this case (*e.g.*, the 2000 Listing Decision and the various MACT rules cited by Applicant) establish that the EPA has retained authority over MACT applicability issues and has exercised extensive regulatory oversight over the subject. The Applicant’s apparent

proposition that the States enjoy unfettered discretion to exempt classes of sources from MACT requirements is unsupportable.¹² There is no question that CAA §112 and EPA's listing decisions pursuant to that statute govern MACT requirements, and no permitting authority is free to act contrary to the requirements of CAA §112. To suggest otherwise is absurd. The ED is still bound by the law. For the reasons set forth in the PFD, the ALJs correctly found that under CAA §112 pet coke-fired boilers like the proposed LBEC CFBs are subject to case-by-case MACT. The Applicant and ED improperly failed to comply with the requirement to perform a case-by-case MACT determination.

IV. THE ALJS CORRECTLY DETERMINED THAT APPLICANT IMPROPERLY FAILED TO ACCOUNT FOR IMPACTS FROM ITS REQUIRED MATERIAL HANDLING OPERATIONS.

A. The Application's Wholesale Failure to Account for Required Material Handling.

The ALJs conclude that, by failing to account for emissions resulting from material handling required by the proposed LBEC, the Applicant failed to meet its burden of showing that emissions from the proposed LBEC, will not "cause or contribute" to any violation of the national ambient air quality standards ("NAAQS") or PSD increment as required by 30 TAC § 116.160 and 40 CFR § 52.21(k).¹³ On this point, the Application

¹² The Applicant further relies upon language in the 1996 MACT Rule providing that questions regarding the applicability criteria of the Rule (implementing portions of CAA § 112(g)) could be addressed to the "state or local air permitting authority." LBEC Exceptions at 17 (citing 61 Fed. Reg. at 68,358-59). By its plain terms, this language merely provides for permitting authorities (which notably may include the EPA in some instances) to provide information to regulated entities. Nothing in this language suggests that it constitutes any delegation of unilateral authority to alter the scope of CAA § 112. Nor does this rule even concern CAA § 112(n), which contains the special provisions governing EUSGUs.

¹³ The latter rule, which is incorporated by reference in TCEQ's rules by 30 TAC § 116.160, provides as follows: (k) Source impact analysis. The owner or operator of the proposed source or modification shall demonstrate that allowable emission increases from the proposed source or modification, in conjunction with all other applicable emissions increases or reductions (*including secondary emissions*), would not cause or contribute to air pollution in violation of: (1) Any national ambient air quality standard in any air quality control region; or (2) Any applicable maximum increase over the baseline concentration in any area. 40 CFR §52.21(k) (emphasis added).

states that the material handling operations required for operation of LBEC would be handled by a different entity called LBTC, and thereby omits any analysis of these operations:

Material handling facilities *will be required* for pet coke, limestone, lime, soda ash, sand, and combustion by products (fly ash and bottom ash). *The materials will transported to the adjacent site operated by Las Brisas Terminal Company, LLC (LBTC).* The material from the LBTC stockpiles will be delivered to the LBEC material handling systems by conveyors, equipped with hoods to reduce the particulate emissions . . .

[t]he material handling activities located within the LBEC property boundary are included in this permit application *while the material handling activities occurring prior to the custody transfer (i.e., active storage pile, inactive storage pile, conveyors, and etc.) will be authorized under a separate NSR authorization by LBTC.*

LBEC Ex. 6 at 00021-22 (emphasis added). No information concerning any such “separate NSR authorization” by LBTC was ever presented by Applicant. Instead, the Applicant took the position that material handling activities required for LBEC could be ignored in the Application.

But as noted by the ALJs, 40 CFR § 52.21(k) expressly requires consideration of “secondary emissions.” The definition of “secondary emissions” in the Texas SIP¹⁴ provides as follows:

(17) Secondary emissions -- Emissions which would occur as a result of the construction or operation of a major stationary source or major modification, but do not come from the source or modification itself. Secondary emissions must be specific, well-defined, quantifiable, and impact the same general area as the stationary source or modification which causes the secondary emissions. *Secondary emissions include emissions from any off-site support facility which would not be constructed or increase its emissions, except as a result of the construction or operation of the major stationary source or major modification.* Secondary emissions do not include any emissions which come directly from a mobile source

¹⁴ Although the Applicant and ALJs cite definitions of “secondary emissions” contained in different portions of TCEQ’s rules and EPA’s rules, all of the cited definitions are substantially identical.

such as emissions from the tail pipe of a motor vehicle, from a train, or from a vessel.

30 TAC § 116.12(17)(effective November 1, 2001); approved by EPA July 22, 2004 (69 FR 43752) effective September 20, 2004 (emphasis added). As the ALJs observe in the PFD, the definition of “secondary emissions” covers emissions “which would occur as the result of the construction or operation of the major source *but that do not come from the applicant’s facility itself.*” PFD at 39. The purpose of the definition is therefore “to make sure that the cumulative impacts of the permitted facility itself – along with emissions from any facilities not subject to the requested permit – will not exceed an applicable standard or increment.” PFD at 39.

Applicant’s own expert witness Shanon DiSorbo testified at hearing that the volume of bulk materials required to be handled would be 7.2 million tons per year for pet coke and limestone alone – 4 million tons of petroleum coke and 3.2 million tons of limestone annually. Tr. 1 at 109:19-22; 110:19-111:1. In spite of the vast amount of material handling required for these quantities of materials, the Applicant made no attempt to evaluate emissions from the required offsite material handling. As noted by the ALJs, the Applicant failed to quantify specific emissions for stockpiles of pet coke and limestone, or the other material handling storage processes, in the LBEC Application. See PFD at 41. The Application contains no emissions factors for storage piles of pet coke and limestone, no emissions factors from the crushers used to prepare the pet coke and limestone, no emissions factors for the conveyors or trucks used to transport the pet coke or limestone, and no emissions factors for the anticipated drop points. *Id.*; Tr. I at 112:7-113:12.¹⁵ At no time in

¹⁵ By contrast, Mr. DiSorbo, who also prepared the White Stallion application, included all of this information in the White Stallion application. PFD at 41; see also EDF Ex. 306.

this case has the Applicant ever shown the TCEQ the locations where the required storage piles, crushers, drop points and conveyors for pet coke and limestone will actually¹⁶ be located. Nor has Applicant quantified or modeled emissions from such material handling facilities that it concedes will be required.

Therefore, although the Applicant apparently contends that material handling emissions will not cause an exceedance of the NAAQS or exceed any PSD increment, it is undisputed that the Applicant has never made any showing of what those emissions actually will be, nor has the Applicant located such emissions and performed air dispersion modeling. This failure is even more critical because, even using the Applicant's own air dispersion modeling that was shown to be error-ridden, the proposed LBEC is within 1 $\mu\text{g}/\text{m}^3$ of violating the applicable 24 hour PM_{10} PSD increment. PFD at 46.

B. The ALJs' Conclusions.

Shortly before hearing, the Applicant jettisoned its planned reliance on "LBTC" and instead stated that it planned to rely for purposes of its material handling needs on existing Port of Corpus Christi ("POCCA") air permits covering two bulk docks. Yet the Applicant failed to amend its Application to otherwise address the required material handling and reflect its changed position. The ALJs consequently found the Applicant failed to meet its burden of proof. While the PFD addresses the material handling issues correctly and thoroughly, in light of the Applicant's claims in its Exceptions a summary of a few of the ALJs' salient points is appropriate here.

First, the ALJs found the Applicant's failure to meet its burden of proof largely arose from its failure to perform any specific quantification or accounting for secondary emissions

¹⁶ Although Figure 3-2 to the Application depicts a conveyor going from the LBEC property to a blank area to the east, Mr. DiSorbo testified that the type of conveyor was undecided, and did not even know if it would be one conveyor or two. Tr. I at 327.

resulting from the required material handling. The ALJs note that the record fails to show “how LBEC materials would be processed at POCCA nor how the materials would be transported from POCCA to the LBEC material transfer tower,” nor “how the POCCA docks, under their current permits, could legally process the more than 7 million tons per year of pet coke and limestone necessary for [LBEC].” PFD at 42.¹⁷ In addition, the ALJs correctly note that on their face the POCCA permits are inconsistent with the handling of 7.2 million tons per year, as they contain a number of annual volume limitations that are far less than 7.2 million tons. See PFD at 44. In light of these failures, the ALJs correctly conclude that “[w]ithout any plans, process flow diagrams, or emission calculations, LBEC failed to meet its burden of proof in this regard.” PFD at 41.

Second, the ALJs reject the Applicant’s claims that it is permissible to ignore material handling emissions altogether. In its Closing Arguments, the Applicant suggested that its failure to address emissions from the required material handling was justified on the basis that the Application does not attempt to authorize material handling emissions from LBEC.¹⁸ The ALJs noted, however, that this claim is contrary to the definition of “secondary emissions” which expressly contemplates that increased emissions from offsite sources must be considered. PFD at 39. The ALJs also addressed the Applicant’s justification that “future changes to existing offsite support facilities must be authorized by TCEQ prior to construction,” noting:

¹⁷ In fact, the Application makes no attempt whatsoever to make such a showing. Although two of the POCCA permits were attached to the section of the Application regarding air dispersion modeling (because emissions from such permits were required to be modeled as part of LBEC’s background air dispersion modeling), the Application makes no statement that such permits were to be utilized by LBEC for material handling, much less any attempt to show how such permits could accommodate the required material handling of 7.2 million tons per year of bulk materials.

¹⁸ See LBEC Closing Arguments at 17.

Taken to the extreme, this specious argument could be made for the entire Application. It is tantamount to suggesting that, because LBEC may not operate a facility in violation of any permitted standard, the Application should automatically be granted. To the contrary, applicants seeking a permit from the state bear the burden of proving that proposed major stationary sources, including certain secondary emissions, will not emit contaminants that exceed the NAAQS and the increments *prior to construction*. Merely restating that the regulations will not be violated because it is illegal to do so is an insufficient and circular argument [footnote omitted]. LBEC's burden of proof applies equally, without regard to whether the . . . material handling operations will be handled by an existing (POCCA) or proposed (LBTC) entity.

PFD at 39-40 (emphasis in original). Accordingly, the ALJs rightly reject the Applicant's claims regarding material handling, concluding the Applicant failed to meet its burden of proof. PFD at 37, 46-47.

C. The Applicant's Claims.

Now faced with a total lack of evidence as to the secondary emissions from handling 7.2 million tons of material per year and applicable rules that require such emissions to be evaluated, in its Exceptions the Applicant resorts to obfuscation and finger pointing in an attempt to distract attention from the Application's fatal deficiencies. Specifically, the Applicant attempts to justify its failure to account for material handling by: (1) incorrectly claiming that no "material" change in its material handling plans ever occurred and blaming others for the Applicant's own failure to present evidence on the issue; (2) leveling unjustified and irrelevant personal attacks at EDF's air dispersion modeler Michael Hunt; (3) arguing that the required material handling emissions are not "secondary emissions" because the Applicant allegedly has ceded material handling operations to third parties; (4) misapplying EPA guidance; and (5) performing fruitless calculations in an attempt to show the POCCA permits can handle the LBEC material handling. Deficiencies in the Application and the case the Applicant presented at hearing are the Applicant's fault – not

the fault of the ALJs or the Protestants. Each of the Applicant's unavailing excuses is addressed in turn below.

1. The Applicant's Changing Position on Material Handling.

For ends that are not entirely clear, the Applicant accuses the ALJs of either misunderstanding or mischaracterizing the evidence regarding LBTC, and claims that the ALJs are under the "misimpression that plans materially changed . . . in the sense that any change would have altered the relevant modeling analysis." LBEC Exceptions at 19. In this connection, Applicant claims that it originally intended for POCCA's air permits to be transferred to LBTC. *Id.* at 21. Tellingly, as "proof" of this assertion, Applicant does not cite any statement or representation made by the Applicant, whether in its Application or otherwise. Rather, it cites *a hypothetical line of questioning of an EDF witness by Applicant's counsel* during the November, 2009 hearing. See LBEC Exceptions at 21 n. 59. And in fact, the Application makes no mention whatsoever of LBTC utilizing existing POCCA permits, but instead merely refers to a "separate NSR authorization." See LBEC Ex. 6 at 00021-22.

The Applicant's claims that its plans have not materially changed are directly contradicted by its own pleading filed September 18, 2009 in response to EDF's Motion for Summary Disposition:

When Las Brisas submitted its application to TCEQ, [its parent companies] Chase Power Development, LLC ("Chase Power") and Chase Terminal Company, LLC ("CTC") envisioned developing and operating a commercial bulk terminal facility, utilizing the LBTC name, which, in addition to other bulk materials, could accommodate petroleum coke and limestone for use at the LBEC; hence the discussion of a LBTC material handling and storage facility in Las Brisas's application. *The plans of Chase Power and CTC have since changed . . .*

. . . While facilities will be necessary for the storage and handling of bulk materials to be used at the LBEC, those facilities need not be controlled by LBTC or any other entity affiliated with Las Brisas. *The existing Port of Corpus Christi Authority (“POCCA”) bulk terminal operations can provide off-site handling and storage, as necessary, of the materials to be used at the LBEC, in addition to the myriad of other materials that the POCCA handles for the port’s other customers. . .*

See LBEC Response to EDF’s Motion for Summary Disposition at 2-3 (emphasis added)(courtesy copy attached as Attachment “A”). This detailed statement describes a “change” in plans and *makes no reference whatsoever to any prior plan by LBTC to utilize POCCA permits*. And further, as the ALJs note, in discovery the Applicant itself produced material handling plans dated February 2009 – many months after the Applicant filed its Application – that depict material handling operations separate and apart from the POCCA docks. PFD at 31. As the ALJs correctly recognize, the Applicant’s claims that its plans have not materially changed are “inexplicable” and totally contrary to the record. See PFD at 37 n.69.¹⁹

Although the import to the Applicant of its alleged “consistency” claim is not entirely clear, it appears that the Applicant believes that, if LBTC utilized POCCA permits, this would result in moving property boundaries that EDF’s modeler Michael Hunt utilized in air dispersion modeling based upon the February 2009 material handling plans for LBTC produced in discovery (but not submitted to TCEQ) by the Applicant. See Exceptions at 25-26, 22 n. 65 (noting Mr. Hunt’s testimony was prepared based upon schematics produced by the Applicant). Applicant alleges that moving the boundaries would impact Mr. Hunt’s

¹⁹ Further, the Applicant’s attempts (at pages 19-20 of its Exceptions) to blame EDF for its inconsistency on this point – and apparently also for the Applicant’s failure to meet its burden of proof –are ludicrous. The record plainly reflects that as early as May 2009, EDF served discovery responses on Applicant noting that the Application improperly failed to account for emissions associated with LBTC. Tr. I at 24:23-25:7. Once more in August 2009, more than two months before the hearing on the merits, EDF filed a Motion for Summary Disposition again raising the material handling issues. The Applicant had early notice and ample opportunity to timely correct the deficiencies, and merely elected not to do so.

modeling of LBTC impacts. However, this evidence is not even essential to the ALJs' conclusion. Although Mr. Hunt's modeling based upon the Applicant's "LBTC" plans remains the only evidence in the record showing impacts once the storage piles and other required material handling infrastructure located and modeled (and shows in such a case PSD increments are exceeded), for purposes of the PFD the ALJs assumed the Applicant had abandoned its LBTC plans and in fact intended to utilize POCCA permits. See PFD at 38. The Applicant's critique of Mr. Hunt's work is irrelevant and does not excuse the Applicant's failure to meet its burden of proof.

Not only is Applicant's "consistency" argument completely untrue, it is equally unavailing. As the ALJs recognize, in the absence of any representation whatsoever that LBTC intended to utilize existing POCCA permits, one necessarily must calculate and model LBTC emissions apart from and in addition to the existing POCCA permits. See PFD at 37-38. But even assuming (as the ALJs explicitly do) that the Applicant will in fact use existing POCCA permits, Applicant's arguments fail to supply the missing evidence necessary to prove that it can successfully utilize those permits for the 7.2 million tons of bulk materials necessary for LBEC.

Finally, in a desperate attempt to draw attention away from its own failures, at pages 19-20 of its Exceptions the Applicant attempts to blame EDF for the inconsistency in the Applicant's representations, and apparently also for the Applicant's failure to meet its burden of proof. On this point, Applicant apparently contends that it was somehow prejudiced by the timing of EDF's discovery *requests* to the Applicant. This claim is ludicrous. The Applicant does not contest that EDF's discovery requests were timely served within the specified discovery period set out in the scheduling order in this case.

Further, the record reflects that EDF's discovery *responses* and pleadings notified the Applicant early and often that the Application was deficient as to material handling:

- In Rule 194 disclosures served on the Applicant in May 2009, *more than five months before hearing*, EDF notified the Applicant that the Application improperly failed to account for emissions associated with LBTC. Tr. I at 24:23-25:7;
- In EDF's pre-filed testimony served on the Applicant on August 21, 2009, *more than two months before hearing*, EDF again raised in detail the defects in the Application concerning failure to account for material handling; see EDF Ex. 100 at 8-28;
- On August 28 2009, *again more than two months before the hearing on the merits*, EDF filed a Motion for Summary Disposition once again raising the material handling issues.

The Applicant had early notice and ample opportunity to timely correct the deficiencies in its Application. But the Applicant elected to make no effort whatsoever to do so.²⁰ The Applicant has only itself to blame.

2. Applicant's Personal Attacks on Michael Hunt Are Irrelevant and Unavailing.

In its discussion of material handling the Applicant repeatedly levels unsupported personal attacks²¹ on EDF's air dispersion modeler Michael Hunt, P.E., apparently for purposes of casting aspersions on the air dispersion modeling Mr. Hunt performed based on the "LBTC" material handling plans produced by the Applicant in discovery. See LBEC Exceptions at 25-28. In the course of these attacks, the Applicant criticizes Mr. Hunt for (a)

²⁰ The Applicant did not present any testimony on the off-site material handling issues in its pre-filed testimony, and in fact failed to disclose any testimony on the subject at all until the Friday afternoon before the hearing on the merits, at which time the Applicant attempted to designate a completely new expert witness, Kevin C. Ellis, to testify on the subject. The ALJs properly excluded Mr. Ellis's testimony on the basis that the Applicant had prior notice of the issue and untimely designated the witness. Tr. I at 51:1-9.

²¹ To give just a few examples, Applicant falsely claims Mr. Hunt: (1) "does not rely on any particular guidance"; (2) "dismisses [guidance] any time he disagrees with it"; (3) takes the position "he is the best and sole arbiter of emission rates." LBEC Exceptions at 27. Notably, the only basis the Applicant cites for these false claims are two lines of hearing testimony in which Mr. Hunt merely stated that with regard to particular details of modeling road emissions and storage pile emissions, he utilized EPA guidance rather than conflicting TCEQ guidance. LBEC Exceptions at 27 n.91-93; Tr. 4 at 794-95; 805; 907-916.

“neglect[ing] the proper property boundaries” by representing LBTC as a different permit authorization than POCCA; (b) modeling emissions rates that allegedly do not reflect BACT; and (c) allegedly “following no guidance other than his own.” *Id.* at 26.

First, as noted above, each of these claims is fruitless for purposes of attacking the ALJs’ decision. The modeling of which the Applicant complains involves the apparently discarded “LBTC” scenario. The ALJs accept for purposes of their PFD that this plan has in fact been abandoned by the Applicant and instead focus on the Applicant’s new story involving POCCA permits. See PFD at 38. Therefore, while Mr. Hunt’s modeling does show that exceedances of PSD increments will occur under the LBTC scenario or similar material handling scenarios once one accounts for handling of the required 7.2 million tons of bulk materials per year, this modeling is not essential in any way to the ALJs’ basis for recommending denial based on deficiencies in the Application regarding material handling.

In addition to being irrelevant, each of Applicant’s criticisms is unfounded. As to the claim that Mr. Hunt improperly depicted a boundary between LBTC and POCCA, how could he do otherwise? The undisputed evidence shows the Applicant *failed to make any representation whatsoever that LBTC would utilize existing POCCA permits*. As the ALJs recognize, in the absence of such a representation, LBTC necessarily must be evaluated as a separate facility from POCCA. See PFD at 37-38. To the extent Mr. Hunt made any assumption that is no longer correct, he did so solely due to deficiencies in the Application and the Applicant’s subsequent change in plans.

As to the BACT issue, the Applicant takes issue with Mr. Hunt on the basis that Mr. Hunt’s determination of BACT for material handling does not comport with testimony of Sierra Club witness Phyllis Fox, who stated that BACT requires controls including enclosed

barns or domes for pet coke storage piles. See LBEC Exceptions at 27. Although EDF is somewhat puzzled by the Applicant's apparent concurrence with Ms. Fox's views regarding BACT,²² regardless it is important to note that Mr. Hunt's pre-filed testimony reveals that the plans he relied upon (and the "schematic" referenced by the Applicant on page 27 of its Exceptions) were in fact a set of proposed plans prepared by or for the Applicant itself, which make no reference to enclosed storage piles. See EDF Ex. 100 at 16-21; EDF Ex. 103 at 0000047145-46 (showing stockpiles); 0000047150. Accordingly, to the extent the Applicant would claim that Mr. Hunt's modeling does not reflect BACT, the Applicant – not Mr. Hunt – is at fault.

Finally, the Applicant's gratuitous claim that Mr. Hunt follows "no guidance other than his own" is simply a false and irrelevant *ad hominem* attack. This claim is directly refuted by Mr. Hunt's testimony, which reveals that he diligently seeks to follow applicable guidance and accurately predict emissions, and that the few cases where he disagrees with TCEQ guidance (*i.e.*, modeling of roads and storage pile emissions) involve instances where EPA and TCEQ guidance are not consistent. Tr. 8 at 805:4-11; 911:10-12.²³ The Applicant's personal attacks should be viewed as what they are: desperate attempts to distract the TCEQ's attention from the actual, relevant issues in this case. As noted by the ALJs, the PFD assesses the Applicant's case independent of the "LBTC" scenario that is addressed by Mr. Hunt's modeling. The Applicant cannot supply missing evidence and meet its burden of proof by these unwarranted personal attacks on Mr. Hunt, particularly given

²² In this connection, the Applicant's own expert Shanon DiSorbo's does not believe BACT requires domes or similar enclosures for storage piles, as his application in the White Stallion matter makes no reference to such enclosures for stockpiles but rather proposes "use of water and/or dust suppression, where technically practical, at . . . stockpiles" as BACT. See EDF Ex. 306 at para. 6.2.1.

²³ Although Applicant's counsel criticized Mr. Hunt for recommending modeling of road emissions in accordance with EPA guidance, Mr. Hunt testified that he represents both permit applicants and protestants and in each case he advises that roads should be modeled. Tr. 4 at 936-37.

the attacks are made in relation to evidence that is inessential to the ALJs' conclusion.

3. The Applicant Cannot Shield the Required Material Handling Emissions from the "Secondary Emissions" Inquiry by Merely Refusing to Disclose or Quantify Such Emissions.

Repeatedly throughout its discussion of material handling, the Applicant takes the position that, because it apparently plans to allow material handling operations to be performed under the POCCA permits, those emissions are not "specific, well-defined, [and] quantifiable" and therefore are not "secondary emissions" at all. See PFD at 29-35. In particular, the Applicant contends that "[i]f the specificity, definition, or quantity of the emissions are unknown by the applicant, then these emissions are not and cannot be 'secondary emissions.'" LBEC Exceptions at 30. Further advancing this position, the Applicant claims that the ALJs unfairly require it "to speculate as to the design and siting of material handling equipment." *Id.* Then, suggesting (contrary to other assertions elsewhere in its Exceptions) that its plan might require a modification of the POCCA permits and application of BACT, the Applicant additionally claims it "cannot ensure that POCCA would ever apply for the facilities described by Las Brisas," apparently suggesting that the Applicant is somehow hostage to POCCA. LBEC Exceptions at 30-31.

The Applicant's arguments are at once completely specious and completely disingenuous. These arguments are specious because they would render compliance with the secondary emissions inquiry required by 40 CFR § 52.21(k) and TCEQ's rules totally optional. In fact, the ALJs have already noted the absurdity of this contention in the PFD, stating "it is not [our] understanding that an applicant may avoid secondary emissions simply by failing to quantify or specify emissions that may [readily] be defined." PFD at 57. Such a reading is unsupported by either 40 CFR § 52.21(k) or the definition of

“secondary emissions.”²⁴ Indeed, such an interpretation would allow applicants to make compliance entirely optional by merely refusing to quantify emissions, thereby rendering the “secondary emissions” requirement completely illusory.

There is no question that emissions from storage piles, conveyors, crushers, and other material handling facilities may be readily quantified. In fact, Mr. DiSorbo quantified those emissions in the White Stallion application, and Michael Hunt likewise performed such a quantification based upon Applicant’s now-abandoned LBTC plans. The Applicant’s interpretation is absurd and unsupported by the applicable rules. The Applicant cannot magically make discrete and quantifiable emissions otherwise by playing “hide the ball.”

Furthermore, the Applicant’s claims that it must rely upon POCCA are disingenuous and unavailing. Even if the definition of “secondary emissions” somehow did not apply emissions controlled by third parties, the Applicant nevertheless has failed to state any specific facts supporting (much less provide evidence of) its insinuation that it lacks control of material handling and is held hostage by third parties. In fact, the evidence directly contradicts this position, showing that as of late September 2009 LBEC in fact possessed an option allowing it to perform the material handling on adjacent property.²⁵ The Applicant cannot avoid the requirement of assessing secondary emissions by merely refusing to

²⁴ Notably, the definition of “secondary emissions” contains no exclusion for increases in emissions that are contractually assigned to third parties. To the exact contrary, as the ALJs note the definition in fact *presupposes* that it will require consideration of emissions originating *apart from* the proposed facility. PFD at 39.

²⁵ A September 18, 2009 affidavit by Kathleen Smith, the Applicant’s President, (submitted in support of the Applicant’s Response to EDF’s Motion for Summary Disposition) states that LBEC’s parent company acquired an option to lease additional land from POCCA for purposes of material handling. See Attachment “B” hereto at Paras. 7-9. Although the affidavit states that Applicant’s parents have elected not to exercise that option, the affidavit clearly states that the option “remains in effect.” *Id.* Nor are the statements in such affidavit surprising, as it is simply not credible that the Applicant would proceed to incur the massive expenditure involved in building the proposed LBEC without any assurance of available facilities for the massive material handling operations that LBEC concedes in its Application are required. LBEC Ex. 6 at 00021.

quantify such emissions or feigning a lack of control over them.

Finally, the Applicant once more attempts to justify its attempts to shield material handling activities from review by claiming any changes to POCCA permits would be subject to TCEQ review. This claim ignores the fundamental problem, recognized by the ALJs, that doing so may result in exceedances of PSD increments. As the ALJs note, absent review of secondary emissions, an increase in emissions at an off-site source due to a new primary source *would never be considered for PSD increment analysis* so long as the change to the off-site source results in emissions impacts of less than 5 $\mu\text{g}/\text{m}^3$ in AOI modeling. See PFD at 45. Yet here, even the Applicant's own 24-hour PM_{10} modeling shows the Applicant is within 1 $\mu\text{g}/\text{m}^3$ of exceeding the applicable PSD increment. PFD at 46. As the ALJs identify, this scenario highlights the importance of the "secondary emissions" requirement and why it cannot be ignored. The Applicant has no credible excuse for ignoring material handling emissions.

4. The Applicant Misapplies EPA Guidance.

In its discussion of material handling, the Applicant cites a hypothetical scenario discussed in the EPA's 1990 Draft NSR Manual ("Draft NSR Manual") as somehow supporting its position. LBEC Exceptions at 31-34. This example fails to advance the Applicant's cause. The hypothetical scenario is described at pages A.29-A.31 in the Draft NSR Manual, and discusses an increase in emissions from a mine that serves a new power plant. LBEC Exceptions at 31-32. The cited guidance notes that "the increase in fugitive emissions from the mine . . . will be classified as secondary emissions with respect to the power plant and therefore must be considered . . . if the power plant is subject to PSD review." *Id.* at 32 (citing Draft NSR Manual at A.31).

Far from supporting the Applicant's emission, this guidance directly supports the ALJs' position that any increases in emissions from offsite material handling in this case are in fact treated as "secondary emissions." It simply confirms that, because this case involves a PSD permit application for LBEC and the Applicant intends to utilize POCCA for the handling of 7.2 million tons of pet coke and limestone needed for LBEC, the Applicant must establish that secondary emissions will not cause or contribute to an exceedance of the NAAQS or PSD increments.²⁶

5. The Record Fails to Support the Applicant's Efforts to Show Sufficiency of the POCCA Permits.

Finally, the Applicant attempts once more to perform "back of the envelope" calculations based upon the POCCA permits in an attempt to show that those permits can handle the 7.2 million tons of materials required annually for LBEC. These attempts fail for myriad reasons.

As the ALJs correctly observed, the POCCA permits contain multiple annual limitations that are far less than the 7.2 million tons per year that LBEC will require. See PFD at 43-44; see also LBEC Ex. 7 at 00156 (maximum annual limitation of 2.8 million tons); LBEC Ex. 7 at 00180 (annual limitation of 578, 471 for fuels and aggregates). The Applicant pretends that the POCCA permits' annual volume limitations do not matter on the

²⁶ The Applicant further attempts to confuse the issues by constructing an inapt hypothetical whereby a concrete plant chooses to "play the spot market" and acquire materials from one of two competitor quarries. LBEC Exceptions at 33-34. Notably, this hypothetical does not refer to any guidance, whether EPA, TCEQ, or otherwise. Nevertheless, the Applicant apparently wishes to insinuate, without support, that in such a situation it would not be required to model increased emissions from either quarry. To the contrary, to the extent the plant intended to receive product from one or both, it stands to reason it should be required to account for multiple scenarios. But regardless, in addition to being utterly unsupported, this hypothetical is completely inapposite here, where the record demonstrates LBEC will necessarily need to have a set of material handling facilities including piles of pet coke and limestone, crushers, conveyors, and drop points to feed bulk materials to a single facility – LBEC. Indeed, the Application itself specifies that these facilities are "required" and not contingent or hypothetical in any way. LBEC Ex. 6 at 00021.

basis that 24-hour PSD increment exceedances are a chief concern for purposes of PSD increment analysis. See LBEC Exceptions at 37. This argument reveals the Applicant has no answer to this issue other than to pretend that the annual volume constraints in the POCCA permits do not exist. See LBEC Exceptions at 37. But the evidence proves such annual limitations *do* exist, and as a result the record definitively shows that the POCCA permits cannot handle the volume of materials required for LBEC.²⁷

Second, the POCCA permits are limited insofar as they only authorize certain quantities of emissions at certain specified emissions points. See LBEC Ex. 7 at 00152-156; 00179-180. Because the Applicant has failed to make any showing as to the specific equipment and flow path to be used for the LBEC bulk materials, or to quantify and calculate the emissions resulting from such handling, there is nothing to compare to the existing POCCA permits. The Applicant has failed to show that the material handling required for LBEC can be accommodated under the current terms of the POCCA permits without requiring additional emissions points.

Third, even assuming these prior showings had been made, as the ALJs correctly observe there is no evidence whatsoever as to what, if any, capacity remains for processing additional materials at the POCCA facilities after accounting for pre-existing commitments. See PFD at 44. As the ALJs noted, it is possible that the POCCA permits are already operating at or near their permitted capacity. The Applicant utterly failed to show that any capacity is available.

Fourth and finally, not only has the Applicant failed to quantify material handling emissions, but it also failed to perform air dispersion modeling to evaluate impacts from

²⁷ The Applicant admits as much at page 30 of its Exceptions, where it refers to POCCA amending its permit to accommodate the material handling facilities necessary for LBEC.

such emissions. Under 40 CFR § 52.21(k) and TCEQ's rules, the Applicant is required to demonstrate that that "allowable emission increases from the proposed source or modification, in conjunction with all other applicable emissions increases or reductions (including secondary emissions), would not cause or contribute to air pollution in violation of" any NAAQS or PSD increment. This language takes into account both emissions *and reductions*, and provides that a showing must be made with regard to both NAAQS and PSD increments. Such language requires that the Applicant account for its proposed material handling activities in its air dispersion modeling. Given that the Applicant totally failed to locate or quantify emissions from the required material handling, the record is likewise devoid²⁸ of the air dispersion modeling required to prove that the material handling activities required for LBEC do not violate NAAQS or PSD increments.

In conclusion, despite the Applicant's complaints, personal attacks and attempts to manufacture evidence, the record reveals a total lack of proof as to how and where bulk materials will be handled, and what emissions will result from such handling. The Applicant must accept responsibility for its own defective case. Because as a matter of law the Applicant bears the burden of showing that emissions from the proposed facility (including secondary emissions) will not violate NAAQS or PSD increments, the ALJs correctly determined that the Applicant failed to meet its burden of proof on this issue. The Application should be denied.

²⁸ Aside from the air dispersion modeling performed by Michael Hunt using the Applicant's now-disavowed LBTC plans, which predicted PSD exceedances. See EDF Ex. 109.

V. THE ALJs CORRECTLY CONCLUDE THAT APPLICANT'S AIR DISPERSION MODELING IS FUNDAMENTALLY DEFECTIVE

In the PFD, the ALJs conclude that the Applicant's air dispersion modeling is defective in multiple respects. Specifically the ALJs found the following major errors: (1) the Applicant's air dispersion modeling incorrectly located multiple sources, resulting a potential for 24 hour PM₁₀ exceedances; (2) the Applicant improperly failed to model emissions from material handling facilities and/or to provide sufficient justification for why emissions were assumed to be zero; and (3) the Applicant improperly adjusted the moisture content for POCCA permit No. 9498 from 2% to 4.8%. PFD at 55-66. Noting that the ED contended in its Reply to Closing Arguments that it has not had an opportunity to review modeling mistakes that came to light during hearing and that consequently remand would be appropriate, the ALJs recommend that the Application be either denied or remanded for further consideration. PFD at 51.

In its Exceptions, the Applicant responds by: (1) claiming the ED has had sufficient time to review the Applicant's revised modeling and consequently, no remand is necessary; (2) repeating its claim regarding material handling that emissions from material handling can be ignored because they are "uncertain" and therefore not "secondary emissions"; and (3) with regard to improperly adjusting moisture content, contending this issue is moot because POCCA has "altered" its permit "based upon a moisture content of 4.8%" and made other changes to its permit. Each of these claims is ill-founded.

A. The Evidence Definitively Establishes Applicant's Air Dispersion Modeling Is Erroneous and Unreliable.

The Applicant first claims it is appropriate to simply ignore the ED's request for remand, reasoning in part on the basis that time has passed since the hearing and presumably

the ED can make any concerns known. LBEC Exceptions at 40. This ignores the fact that the ED is requesting remand on the basis that “federal guidance requires the ED to verify the Applicant’s modeling prior to issuance of the permit.” See ED’s Exceptions at 11. Further, the ED’s Exceptions filed April 19, 2010 make clear that the ED still believes remand on this issue is appropriate. ED’s Exceptions at 11.

More fundamentally, the Applicant’s contention that further modeling review is unnecessary is completely unsupported given that multiple, substantial errors in Applicant’s modeling that were proven at hearing. Although Applicant claims that the errors in emission point locations were corrected on rebuttal, see LBEC Exceptions at 39, the evidence in fact proves that even on rebuttal Applicant’s air dispersion modeler Joseph Kupper failed to properly locate at least three emissions points, mislocating these points by a few hundred meters. Tr. 9 at 2275:2-17. Furthermore, as the ALJs observe, by comparing the differences between the Applicant’s initial modeling and its revised modeling, it is clear that the mislocation of emissions points may have a significant effect on modeling results. PFD at 55. These fundamental errors cannot simply be ignored.

Left with these clear errors, the Applicant’s only recourse is to claim that its modeling was “conservative.” LBEC Exceptions at 42. But post-hearing, qualitative claims of “conservatism” do not provide the necessary demonstration required by 40 CFR § 52.21(k). There is no evidence quantifying the effect of this alleged “conservatism,” much less showing that it was sufficient to counterbalance the numerous errors noted by the ALJs, including pervasive mislocation of sources, pervasive failure to quantify and model emissions from material handling, and improper adjustment of moisture content. See PFD

at 54-56, 57, 63-66.²⁹ Moreover, many of the factors cited by the Applicant in support of its “conservatism” argument relate to allegedly “conservative” assumptions as to hours of operations – i.e., assuming certain equipment would run all of the time rather than intermittently. *See, e.g.* Tr. 9 at 2318:7:14 (stating auxiliary boilers “would not operate all year long.”). Such assumptions have no “conservative” impact on Applicant’s compliance demonstration as to short term emissions limits. Critically, the 24-hour PM₁₀ PSD increment, which the record shows the Applicant will exceed, is a short-term limit.

The Applicant cannot change the numerous, significant and proven modeling errors demonstrated at hearing and acknowledged in the PFD. There is simply no room for dispute that the Applicant’s modeling contains substantial errors. In fact, the record shows that such modeling was proven erroneous a second time even after Applicant attempted to correct and resubmit it on rebuttal. There is no evidence whatsoever proving that any alleged “conservatism” is sufficient to offset these errors. For these reasons, the Application is

²⁹ Specifically, the Application is not “conservative” as Applicant contends because: (1) the Applicant failed to specify any details of the required offsite material handling or model emissions associated with these operations, with the result that the Applicant cannot possibly ensure that any “conservatism” offsets the incremental emissions that will result from these “required” material handling operations ignored by the Applicant; (2) the Applicant failed to model the permit allowable and instead increased the moisture content of the petroleum coke handled at the Port of Corpus Christi under POC 9498 in direct violation of EPA and TCEQ modeling guidance, including TCEQ’s RG-25, see PFD at 59-66, and as a result, the modeled emissions are vastly lower than the permitted allowable; (2) the Applicant repeatedly failed to properly locate emissions sources in conducting its air dispersion modeling, under-predicting emissions impacts by locating sources farther away from the proposed LBEC; (3) the Applicant failed to model sources below the significance level when conducting its PSD increment modeling in direct violation of applicable EPA and TCEQ modeling guidance; (4) the Applicant failed to calculate emission rates and model PM₁₀ emissions associated with the conveyor system depicted on Figure 3-2. Tr. 1 at 112:7-16; Tr. 2 at 460:7-15; (5) the Applicant failed to model emissions from rock crushing operations required to crush the limestone and/or pet coke prior feeding into the boilers; Tr. 1 at 113:6-12; and (6) the Applicant failed to calculate emissions rates and model PM₁₀ emissions impacts related to fugitive emissions from the loading of fly ash and bottom ash into trucks—emissions which the Applicant’s consultants accounted for in preparing and filing the White Stallion air quality permit application for four petroleum coke-fired circulating fluidized bed boilers and which proposes to use almost identical air quality control measures. Tr. 1 at 86:6-93:7.

fundamentally defective and should be denied.

B. The Applicant Is Not Free to Ignore Material Handling Emissions.

The Applicant next claims once again that “there are no secondary emissions unless they are specific and quantifiable” and feigns inability to comply with applicable rules on the basis that “Applicant cannot design and authorize a system on another entity’s property.” Of course, this is merely a re-iteration of the Applicant’s spurious argument, addressed at length above, that it can elect to ignore required emissions merely by arbitrarily assigning them to a third party. Indeed, such an interpretation would render the “secondary emissions” requirement illusory.

There is absolutely no basis in 40 CFR § 52.21(k) allowing an Applicant to ignore required and otherwise discreet and quantifiable emissions by merely failing to specify their location. And, as noted above, there is furthermore no evidence whatsoever that Applicant is somehow unable to design the required material handling operations and obtain the approval of POCCA (or other applicable third party) to those plans. For the reasons discussed in Section III.C.3, above, this argument is utterly specious and should be rejected.

C. The Applicant’s Claims Regarding Moisture Content.

The ALJs concluded that the Applicant made an additional error in its air dispersion modeling by improperly adjusting the permitted moisture content under POCCA permit 9498 from 2% (the permitted limit) to 4.8%. PFD at 59-66. The ALJs concluded doing so had a dramatic effect on modeled emissions, as utilizing the permitted 2% moisture content causes large exceedances of the applicable 24-hour PM₁₀ increment. PFD at 61.

In response, the Applicant attempts to submit a recent application for permit amendment by POCCA, claiming that this Amendment addresses the ALJs’ concerns

regarding moisture content. As noted above, the record in this matter is closed and such an attempt to submit additional evidence after the fact is untimely and improper. As such, EDF re-iterates its objection to and moves to strike Attachment D to Applicant's Exceptions.

EDF additionally notes that Attachment D does not appear to reflect any TCEQ concurrence in the amendment sought by POCCA. As of the date of submittal of this Reply, the TCEQ's website reflects that the proposed amendment is still pending.³⁰ As such, even assuming it were permissible to submit additional evidence at this juncture, the attachment does not provide any basis for changing the analysis. And, even assuming Attachment D were final and admissible, it addresses at best one concern out of a number of fundamental errors in Applicant's modeling. Accordingly, it fails to support issuance of the requested permit.

For all of the reasons described above, the Applicant cannot create the pervasive and substantial errors in its air dispersion modeling at this late hour. Accordingly, the Application should be denied. To the extent the Applicant wishes to correct the numerous deficiencies identified in the PFD, it should be required to re-file its Application.

VI. REPLY TO APPLICANT'S EXCEPTIONS TO BACT.

The Applicant furthermore stridently objects to the ALJs' finding that the proposed mercury emissions in the Draft Permit do not represent BACT. The Applicant also contends that the ALJs improperly identified BACT for total PM and CO. All of these claims are misplaced and cannot be squared with the record.

³⁰ http://www5.tceq.state.tx.us/airperm/index.cfm?fuseaction=airpermits.project_report&proj_id=156256&addn_num_txt=9498

A. The Applicant Cannot Change Its Own Witness's Testimony Regarding Mercury BACT.

The Applicant complains that the proposed mercury BACT limit of 6.0×10^{-7} lb/MMBtu is improper in light of recently issued permits and complains that the ALJs deviate from TCEQ guidance. The Applicant's claims are doubly misplaced. First, the proposed mercury limit is in fact consistent with "emission reduction performance levels" accepted by the TCEQ in recent permit review, *and* consistent with the actual permitted limits for the Calhoun County Navigation District ("CCND") permit. Second and perhaps more importantly, the record reveals that the permitted limit *was determined based upon the testimony of the Applicant's own expert Shanon DiSorbo*. The Applicant cannot disavow the testimony of its own expert.

First, the Applicant claims the ALJs deviate from TCEQ guidance because the proposed mercury emission limit for LBEC is lower than the permitted limit for the Formosa Plastics Corporation permit and the initial CCND permitted limit (both 3.0×10^{-6} lb/MMBtu). LBEC Exception at 46-47. However, the Applicant then contradicts its own allegation by noting that under the Commission's Tier I BACT review, the metric for comparison is the "emission reduction performance level" accepted as BACT – not the mercury emission limit itself. LBEC Exceptions at 47-48. On this point, the Applicant notes that "there is no dispute" that the "emission reduction *performance level*" is 90% -- two percentage points higher than the 88% proposed by LBEC. LBEC Exceptions at 48-49. Thus, the Applicant's own arguments demonstrate that: (1) its criticism of the ALJs for endorsing a mercury emission limit lower than Formosa or the initial CCND limit is misplaced; and (2) the "emission reduction performance level" proposed by Applicant in fact fails to meet BACT.

The Applicant correctly notes that the reason for the differing proposed mercury emission limits between LBEC, White Stallion and various other plants arises from different assumptions regarding inlet fuel mercury concentration, and goes on to claim “there is no evidence in the record to support the ALJs’ critique of the petroleum coke mercury content data used by Las Brisas.” *Id.* at 48-49. But at this juncture the Applicant’s argument again breaks down. Not only does such evidence exist, *but furthermore it was provided by the Applicant’s own expert.*

As noted in the PFD and Applicant’s Exceptions, Mr. DiSorbo prepared the permit applications in both this proceeding and the White Stallion proceeding. However, the proposed mercury BACT limits in White Stallion, which proposes a CFB boiler using the exact same control technology as LBEC, are far lower – 8.6×10^{-7} lb/MMBtu – than the limits proposed by the Applicant in this case. See PFD at 90. Mr. DiSorbo submitted a permit application in White Stallion which endorsed this limit under his signature and professional engineer’s seal. See EDF Ex. 306; EDF. Ex. 307 at 59; EDF Ex. 308 at 171. Further, Mr. DiSorbo testified that, in light of the fact that White Stallion proposes to burn both coal and pet coke, when one adjusts the emission limit calculations to account for burning pet coke only, the number is even *lower*: 5.7×10^{-7} lb/MMBtu. PFD at 90; *see also* Tr. 2 at 305:16-306:20.

In determining the mercury emissions limits for White Stallion and Las Brisas, the same set of pet coke data was used. Mr. DiSorbo’s testimony reveals that in White Stallion, two unusually high samples were excluded as outliers, whereas in Las Brisas the two samples were not excluded.³¹ However, Mr. DiSorbo’s testimony reveals that he did

³¹ As the ALJS note, of 11 data points, 8 reflect mercury content of 0.05 ppmw or less. PFD at 92 (citing LBEC Ex. 33). The two excluded data points were 0.53 and 0.84 ppmw. PFD at 92.

not even make the decision to include or exclude the data; instead, in each case the decision was made based upon guarantees provided by design engineers:

The [proposed LBEC mercury BACT limit] is the performance standard that being backed up by our engineering contractors and design firm right now. That's the lowest number that we have guaranteed. So there's a commercial component to that. The number above in White Stallion is based on a different set of design engineers and owner engineers that are going to stand behind that number. *So it's just a difference in the guarantees that are being provided by the two different engineering firms charged with designing these facilities.*

Tr. 2 at 261:16-262:2 (emphasis added).³²

This testimony establishes that the alleged “BACT” numbers testified to by Mr. DiSorbo are dictated by the Applicant and the Applicant’s design engineers and do not even reflect Mr. DiSorbo’s own opinion. *He endorses completely different numbers as “BACT” in the LBEC and White Stallion proceedings.* And even more damaging to the Applicant’s case, Mr. DiSorbo’s testimony discloses that the design firm in White Stallion has in fact *guaranteed* a far lower number than that proposed by the Applicant here. The fact that an Applicant chooses to use one design engineer over another does not supply an excuse to avoid BACT. As the ALJs correctly conclude:

If one set of design engineers or contractors are willing to guarantee a certain level of performance, then that level of performance should be able to be achieved by others who are using the same control technologies, same boiler types, and same fuel types. If not, then other facilities need to utilize those same design engineers or contractors to get to that level of performance.

PFD at 94.³³

³² Far from justifying its actions, the two pages of Mr. DiSorbo’s testimony excerpted by Applicant at pages 54 and 55 of its Exceptions simply further confirm that the mercury emissions limits sought by Applicant – aka the “output value” – were unilaterally dictated to Mr. DiSorbo by the Applicant and its design engineers. See LBEC Exceptions at 54-56.

The Applicant repeatedly criticizes the ALJs for their conclusion, claiming that the ALJs “step[ped] out of their appropriate role of triers of fact and into the role of fuel analysis ‘experts.’” LBEC Exceptions at 51. This criticism is completely misplaced, however, because *the Applicant never presented any evidence whatsoever justifying why it was necessary to treat the fuel data differently than in White Stallion*. The Applicant did not present an expert to testify as to “fuel analysis” or as to why the Applicant in this case was justified in treating the fuel data differently than the applicant in White Stallion.

Instead, the Applicant relied upon Mr. DiSorbo, who is not a fuel analysis expert or design engineer,³⁴ and who testified that he simply utilized numbers that were dictated to him by the Applicant and its design engineers. Because there is no evidence justifying Mr. DiSorbo’s endorsement of a “BACT” limit here that is far higher than BACT limit he endorsed in White Stallion, the ALJs properly concluded that the evidence fails to support a higher limit.³⁵

The Applicant also complains that “the ALJs’ basis for proposing a mercury limit of 6.0×10^{-7} lb/MMBtu . . . appears to be their mistaken belief that the White Stallion draft permit includes a mercury limit of 5.7×10^{-7} lb/MMBtu and the CCND permit contains a mercury limit of 6.0×10^{-7} lb/MMBtu.” LBEC Exceptions at 59-60. In this connection,

³³ The ALJs also conclude that it was improper for the Applicant to apply an additional 25% “safety factor” on top of its failure to exclude outlying data.

³⁴ Ironically, the Applicant concedes in its Exceptions that Mr. DiSorbo “was never held out as a design engineer,” see LBEC Exceptions at 57, yet attacks the ALJs for questioning Mr. DiSorbo’s decision to set a BACT limit based upon the dictates of (non-testifying) design engineers.

³⁵ The Applicant also complains that other parties did not provide evidence regarding whether the sampling data was accurate. LBEC Exceptions at 51. This is simply another example of improper burden-shifting. As with its material handling arguments, the Applicant has the burden of proving its direct case, and cannot shift the burden to Protestants. It was the Applicant’s burden to prove it correctly determined BACT.

the Applicant argues that, although the CCND permit has been amended to limit annual mercury emissions to 14 pounds per year, the 6.0×10^{-7} limit was not deleted. LBEC Exceptions at 60-61.

These claims are mistaken and misplaced on multiple counts. First, the ALJs' basis for proposing the mercury limit was plainly not any "mistaken belief" as to the White Stallion permit limits but rather *Mr. DiSorbo's own testimony*. As noted above, Mr. DiSorbo clearly testified that if one adjusts the 8.6×10^{-7} lb/MMBtu proposed permit limit in White Stallion to account for burning only pet coke, the resulting number is 5.7×10^{-7} lb/MMBtu. See Tr. 2 at 265:7-14; 305:21-306:20.³⁶ Again, the Applicant cannot hide from its own expert's testimony.

With regard to the CCND permit, the Applicant's claim is a distinction without a difference. As the Executive Director conceded in its Response to Comments in this case, the 14 lb. per year limit in CCND "calculates to 0.60 lb. Hg/TBtu", or 6.0×10^{-7} lb./MMBtu. Indeed, the absurdity of this alleged distinction is revealed by merely consulting the draft LBEC permit, which would allow for annual mercury emissions of over 216 lbs.³⁷, or over *15 times* the annual mercury emissions permitted for CCND. As the PFD indicates, the CCND limit further shows that mercury emissions far lower than the Draft Permit are achievable. See PFD at 94.

Finally, the Applicant also suggests that the requirement to continuously monitor mercury emissions along with the proposed "optimization" provision in Special Condition 50 ("SC50") of the LBEC Draft Permit will account for any deficiencies in the

³⁶Therefore, although the proposed White Stallion permit limit itself is slightly higher (8.6×10^{-7} lb/MMBtu) because it proposes to burn pet coke and coal, the testimony is clear that, on an "apples-to-apples" basis, the White Stallion application determined 5.7×10^{-7} is *achievable* for a plant that burns pet coke only.

³⁷ See LBEC Ex. 27 at 00030-32 (providing CFB boilers may emit up to 0.027 tons (54 lbs.) Hg per year).

BACT limits. The ED likewise objects to the ALJs' conclusions regarding mercury BACT, arguing that the limit identified by the ALJs is artificially low and that the Commission should instead rely upon the "optimization" provision to adjust the mercury BACT limits. ED's Exceptions at 13. The problem with these claims is that the optimization clause cannot be used as an excuse for failure to require a numerical BACT limit consistent with the evidence *in this case*. For the reasons shown above, Shanon DiSorbo's testimony and application in White Stallion establishes that a BACT limit of 6.0×10^{-7} lb/MMBtu is achievable for a pet coke-fired CFB. Furthermore, although the ED cites a number of EPA Environmental Appeals Board ("EAB") cases for the proposition that such optimization clauses may be permissible where there is substantial uncertainty as to what limit is achievable,³⁸ there is no such uncertainty here where both an existing permitted limit (CCND) and the Applicant's own witness (DiSorbo) establish that the BACT limit identified by the ALJs is achievable. To the exact contrary, the Applicant concedes that there is no dispute about the level of emission control regarding mercury BACT. See LBEC Exceptions at 47-48.

For all of the reasons described above, the ALJs correctly set mercury BACT in accordance with the evidence presented at hearing and in accordance with emission limits that Shanon DiSorbo's own testimony demonstrated are achievable. The Applicant's complaints regarding those limits are unjustified and should be rejected.

³⁸ *In re Prairie State Generating Co.*, PSD Appeal 05-05, 2006 WL 2847225 (EAB 2006); *In re AES Puerto Rico, L.P.*, 8 E.A.D. 324, 348-50 (EAB 1999); *In re: Hadson Power 14 – Buena Vista*, 4 E.A.D. 258 (EAB 1992). Notably, it appears that in each of these cases cited by the ED, the emissions reduction directly correlated to actual test results, as opposed to the arbitrary 50% cutoff in SC50 which only comes into effect if test results are at least 50% or less than the permitted value. See LBEC Ex. 27 at 00028. As a result, the ED's witness Randy Hamilton conceded that in some cases SC50 will fail to adjust limits even though testing establishes BACT is actually much lower than the limit set in the permit. Tr. 7 at 1807:20—1810:19. Further, by its terms the optimization clause in this case is not applied until the first annual test, see LBEC Ex. 27 at 00028, thereby guaranteeing that, even in cases where the provision actually adjusts permit limits, emissions from the source will exceed BACT for at least one year.

B. The Applicant's Complaints Regarding Total PM BACT Are Misplaced.

As with a number of other pollutants, the Applicant and ED rely on alleged uncertainty regarding the emissions of total PM to justify a high permit limit. As the ALJs noted: "basically the ED and [Applicant] are saying 'we don't know yet what sort of results the new test method will demonstrate, so we are building a margin of error in.'" PFD at 88. The ED's own Response to Comments indicates that the ED believes the emissions limit for total PM will "probably" be lowered under the optimization provisions of SC50. Given that by its terms SC50 does not apply unless actual emissions are 50% or less than the permitted limit, this response indicates the ED believes that actual emissions will likely be more than 50% less than the 0.033 lb/MMBtu identified in the draft permit. See LBEC Ex. 31 at 37.

As the ALJs correctly identify, it is improper to set an artificially high BACT limit on the basis of mere uncertainty. PFD at 88-89. Further, to the extent the Applicant and ED justify their actions based on SC50, the evidence shows SC50 is an improper method of adjusting BACT as (1) its arbitrary 50% cutoff will fail to adjust permits in many cases even though test results prove the permitted limit is not BACT; (2) testing is not performed until one year after operation commences, and thus even when it is effective SC50 guarantees one year of emissions at levels exceeding BACT; and (3) as the ED's witness Randy Hamilton conceded, the 50% cutoff in SC50 may create a perverse incentive for the permit-holder to achieve artificially high emissions in order to avoid permit reductions. Tr. 7 at 1807:20—1810:19; LBEC Ex. 27 at 00028; Tr. 8 at 2056:9-13.

The ED and Applicant fail to raise any valid basis for setting an artificially high BACT limit. Their complaints regarding the total PM limits should be rejected.

C. Applicant's Complaints Regarding CO BACT Are Unsupported.

The ALJs found that Applicant failed to justify its proposed CO BACT limit of 0.11 lb/MMBtu (12 month average). The ALJs note that, while the Applicant attempts to distinguish two plants with lower (0.10 lbs/MMBtu) permitted limits³⁹ by pointing out these plants have higher limits for periods of lower-capacity operation, there is no evidence that LBEC would operate at lower capacity. PFD at 96. And in fact, the undisputed evidence in the record shows that LBEC is a base-load plant burning a relatively cheap fuel. Tr. 6 at 1488:19—1489:23.

Faced with this evidence, the Applicant once more attempts to shift the burden of proof to Protestants, claiming “the presumption that base load units only operate at full load has no basis in reality.” LBEC Exceptions at 66. But curiously, the Applicant cites no evidence in support of this claim. The undisputed evidence in the record shows that LBEC is a base-load plant, and there is absolutely no indication that it will operate at a lower capacity for any significant periods. LBEC's exceptions to the BACT CO limit are baseless and amount to nothing more than an invitation to ignore the undisputed evidence in the record.

VII. PLANT-WIDE APPLICABILITY LIMIT.

Although the Applicant contends that there is “no issue at this time that prevents” the Commission from issuing a Plant-Wide Applicability Limit (“PAL”), at present the Commission's PAL rules have not been incorporated into the Texas SIP, and in fact the

³⁹ These plants are the CLECO Rodemacher 3 and the Entergy Little Gypsy 3 units in Louisiana. See EDF Ex. 1 at 38:1-4.

EPA currently proposes disapproval of the proposed SIP amendment including such rules. See 74 Fed. Reg. 48467, 48469-71, 48474. Moreover, one of the bases upon which the EPA proposes to disapprove the rule as a SIP amendment is that it “lacks a provision which limits applicability of a PAL only to an existing major stationary source, and which precludes applicability of a PAL to a new major stationary source, as required under 40 CFR 51.165(f)(1)(i) and 40 CFR 51.166(w)(1)(i).” 74 Fed. Reg. 48467, 48474. The Applicant’s request for a PAL in this case presents the exact scenario that has invoked this objection from EPA, as the Applicant seeks a PAL for a new major stationary source. In light of the established case law providing that a state cannot administer the federal Clean Air Act in a manner contrary to its SIP unless and until such changes are approved as SIP amendments,⁴⁰ EDF submits it is inappropriate for the Commission to issue a PAL as requested by the Applicant unless and until the EPA approves the Commission’s PAL rules.

VIII. REPLY TO THE EXECUTIVE DIRECTOR’S DISCUSSION OF PROCEDURAL ISSUES.

In its Exceptions, the Applicant fails to address the procedural issues that were specifically requested to be briefed by the ALJs. However, the Executive Director addresses these issues in his Exception. Specifically, the ED takes the position that: (1) utilizing the “report” approach referenced in Texas Health & Safety Code §382.0518(d) to an application for a new air permit would be a case of first impression, and is not recommended because (i) “this process would eliminate any further hearing (and probable notice) before the ALJs” and (ii) there is another viable alternative; and (2)

⁴⁰*Sierra Club v. Tennessee Valley Auth.*, 430 F.3d 1337, 1346-50 (11th Cir. 2005)(holding state’s employment of 2% *de minimis* exception rule to opacity limitation incorporated in SIP was improper in absence of acceptance of exception rule by EPA as SIP revision); *Sweat v. Hull*, 200 F.Supp.2d 1162, 1169-72 (D. Ariz. 2001)

remand to the ALJs pursuant to 30 TAC § 80.265 is the preferred option. See ED Exceptions at 4-6.

For the reasons set forth in its EDF's Exceptions, EDF concurs in the ED's conclusion that the "report" described in Texas Health & Safety Code §382.0518(d) is not a proper or appropriate remedy. However, EDF disagrees with the ED's arguments concerning remand insofar as the ED does not appear to address the requirements set forth in Texas Health & Safety Code § 382.0291(d). This portion of the Texas Clean Air Act stipulates that an Applicant:

[M]ay not amend [its] application after the 31st day before the date on which a public hearing on the application is scheduled to begin. If an amendment of an application would be necessary within that period, the applicant shall resubmit the application to the commission and must again comply with notice requirements and any other requirements of law or commission rule as though the application were originally submitted to the commission on that date.

Tex. Health & Safety Code §382.0291(d).

According to TCEQ's rules, the Applicant must provide in its Application information which demonstrates that emissions from the facility meet, among other things, PSD review requirements and applicable requirements for hazardous air pollutants such as MACT. See 30 TAC §116.111(a)(2)(I),(K). For the reasons discussed at length in the PFD and herein, the Applicant has failed to provide information in its Application (or otherwise) making the requisite showing as to either requirement.

Therefore, the Applicant must amend its Application in order to comply with 30 TAC § 116.111 and thereby be entitled to receive a permit. In accordance with the plain terms of Texas Health & Safety Code §382.0291(d), Applicant therefore must "resubmit the application to the commission" and must again "comply with notice requirements and

any other requirements of law or commission rule as though the application were originally submitted to the commission on that date.” Accordingly, EDF respectfully disagrees with the ED to the extent, if any, the ED suggests that a remand may be accomplished without compliance with Texas Health & Safety Code §382.0291(d).

IX. CONCLUSION

The Applicant cannot fix the multitudes of fatal deficiencies in its Application at this late hour. The Application and evidence presented at hearing demonstrate that the proposed permit cannot be granted without violations of multiple requirements of the federal Clean Air Act, Texas SIP, and other applicable laws. Therefore, the Application should be denied. In the alternative, to the extent the Commission determines remand is appropriate for any reason, EDF submits that such remand must be required to conform with the terms of the Texas Health & Safety Code including Section 382.0291, and the Applicant required to resubmit its Application and issue notice in accordance with the terms of that statute.

For each of the reasons described above and in EDF’s Closing Brief and Reply Brief, EDF respectfully requests that the Application be denied, that in the alternative the Applicant be required to re-submit and re-notice its Application in accordance with Texas Health and Safety Code 382.0291, and that the Commission grant such other and further relief to which EDF and the other Protestants show themselves justly entitled.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on April 29, 2009 a true and correct copy of the following has been sent to the representatives of parties on the official service list by hand delivery, fax or by mail, if no fax number is listed below. Additionally, electronic copies have been served by email upon those parties or counsel of record for whom the undersigned has email addresses.



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SERVICE LIST

AGENCY: TEXAS COMMISSION ON ENVIRONMENTAL QUALITY (TCEQ)

STYLE/CASE: APPLICATION OF LAS BRISAS ENERGY CENTER, LLC FOR STATE AIR QUALITY PERMIT; NOS. 85013, HAP48, PAL41, AND PSD-TX-1138

SOAH DOCKET NUMBER: 582-09-2005

TCEQ DOCKET NUMBER: 2009-0033-AIR

STATE OFFICE OF ADMINISTRATIVE HEARINGS	CRAIG R. BENNETT TOMMY L. BROYLES ADMINISTRATIVE LAW JUDGES
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SOAH DOCKET NO. 589-09-2005
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

APPLICANT LAS BRISAS ENERGY CENTER, LLC'S CONSOLIDATED
RESPONSE TO PROTESTANTS' MOTIONS FOR SUMMARY DISPOSITION

The fundamental purpose of this contested case hearing is to determine whether the application submitted by Las Brisas Energy Center, LLC ("*Applicant*" or "*Las Brisas*") "complies with all applicable statutory and regulatory requirements."¹ Instead of a full evidentiary hearing on the matter, Protestants Environmental Defense Fund, Inc. ("*EDF*") and Sierra Club (collectively, "*Protestants*") would have the Administrative Law Judges ("*ALJs*") make their recommendation to the Commissioners of the Texas Commission on Environmental Quality ("*TCEQ*") in the context of a motion for summary disposition absent due consideration to witness testimony and other evidence, and without a complete administrative record. Whether the application complies with applicable Texas statutory and regulatory requirements is properly determined after a full evidentiary hearing, not at this preliminary stage of the proceeding.

Furthermore, summary disposition may be rendered only if "there is no genuine issue as to any material fact and the moving party is entitled to summary disposition as a matter of law."² Per this standard, Protestants' motions should be summarily denied without reaching Protestants' legal claims because material facts underlying their arguments are in dispute, despite Protestants' representations to the contrary. Moreover, even if the ALJs were to somehow move past the

¹ 30 TEX. ADMIN. CODE § 55.210(b).

² *Id.* § 80.137(c).

disputed material facts to Protestants' legal claims, the ALJs will find that Protestants' motions are legally flawed and should be denied. As demonstrated below, contrary to Protestant's assertions, Las Brisas's application complies with the applicable statutory and regulatory requirements. Accordingly, neither the facts nor the law support Protestants' attempt to derail this proceeding.

I. ARGUMENT

A. FACTS MATERIAL TO PROTESTANTS' MOTION ARE IN DISPUTE.

Protestants' motions rest on the existence and use of a site operated by Las Brisas Terminal Company, LLC ("*LBTC*") and located adjacent to the Las Brisas Energy Center ("*LBEC*") for the handling and storage of bulk materials to be used at the LBEC. There is no LBTC site. There are currently no active plans to develop or use a site operated by LBTC.³ Las Brisas does not plan to utilize LBTC for any material handling or storage.⁴ In fact, LBTC has never been formed as a corporation.⁵

When Las Brisas submitted its application to TCEQ, Chase Power Development, LLC ("*Chase Power*") and Chase Terminal Company, LLC ("*CTC*") envisioned developing and operating a commercial bulk terminal facility, utilizing the LBTC name, which, in addition to other bulk materials, could accommodate petroleum coke and limestone for use at the LBEC;⁶ hence the discussion of a LBTC material handling and storage facility in Las Brisas's application. The plans of Chase Power and CTC have since changed. Neither Chase Power, CTC, nor any related entity, as LBTC or under any other name, foresees developing or operating

³ See Ex. A, Affidavit of Kathleen Smith, ¶¶ 9-11.

⁴ See *id.*, ¶ 6, 9-11.

⁵ See *id.*, ¶ 4.

⁶ See *id.*, ¶ 8.

a commercial bulk terminal facility adjacent to the LBEC site or at any other location to serve the LBEC.⁷

Contrary to Protestants' claims, developing and using a site operated by LBTC for bulk material handling and storage is neither necessary nor required. While facilities will be necessary for the storage and handling of bulk materials to be used at the LBEC, those facilities need not be controlled by LBTC or any other entity affiliated with Las Brisas. The existing Port of Corpus Christi Authority ("*POCCA*") bulk terminal operations can provide off-site handling and storage, as necessary, of the materials to be used at the LBEC, in addition to the myriad of other materials that the *POCCA* handles for the port's other customers.⁸ Las Brisas's application accounts for the material handling and storage emissions from the *POCCA*'s existing bulk terminal operations.⁹

Protestant EDF claims – *but has not proven* – that there will be an increase in off-site material handling and storage emissions as a result of the future off-site handling and storage of materials to be used at the LBEC. Las Brisas maintains that the off-site handling and storage of materials to be used at the facility will not result in an increase in emissions from the *POCCA*'s existing bulk terminal operations.¹⁰ Accordingly, whether there will be an increase in off-site material handling and storage emissions is one of the many facts in dispute – a genuine issue of material fact that should only be resolved after consideration of the parties' evidence.

⁷ See *id.* ¶¶ 9-11.

⁸ See *id.* ¶ 6.

⁹ See Ex. B, Affidavit of Joseph M. Kupper, P.E., ¶ 7; Protestant EDF's Motion for Summary Disposition at 4 n.1.

¹⁰ See Ex. B, Affidavit of Joseph M. Kupper, P.E., ¶ 10.

B. PROTESTANTS' ARE NOT ENTITLED TO SUMMARY DISPOSITION AS A MATTER OF LAW.

Protestants acknowledged that in order to prevail on their motions for summary disposition they must prove, as a matter of law, that the bulk material handling facilities that will be required for the LBEC (1) will be part of the same "stationary source" as the LBEC or, in the alternative, (2) will result in "secondary emissions." As explained below, Protestants have not proved either of these required elements. Accordingly, their motions for summary disposition must be denied

1. The LBEC and the Bulk Material Handling Facilities Will Not Be Part of the Same "Stationary Source,"

Under TCEQ regulations, prevention of significant deterioration ("PSD") permitting requirements apply to "[e]ach proposed new *major source* or major modification in an attainment or unclassifiable area."¹¹ TCEQ's PSD regulations define a "major stationary source" as "[a]ny *stationary source* that emits, or has the potential to emit, a threshold quantity of emissions of any air contaminant . . . for which a national ambient air quality standard has been issued."¹² Therefore, key to determining the scope of PSD permitting requirements is determining what constitutes a "stationary source."

TCEQ's PSD regulations define a "stationary source" as "[a]ny building, structure, facility, or installation" that emits a regulated air pollutant.¹³ The term "[b]uilding, structure, facility, or installation" is defined as "[a]ll of the pollutant-emitting activities that belong to the same industrial grouping, are located in one or more contiguous or adjacent properties, *and* are under the control of the same person (or persons under common control)."¹⁴ Accordingly, to be part of the same stationary source, pollutant-emitting activities must (1) belong to the same industrial grouping, (2) be located in one or more contiguous or adjacent properties, and (3) be

¹¹ 30 TEX. ADMIN. CODE § 116.160(a) (emphasis added).

¹² *Id.* § 116.12(17) (emphasis added).

¹³ *Id.* § 116.12(35).

¹⁴ *Id.* § 116.12(6) (emphasis added).

under common control. As set forth below, Protestants have failed to prove that the pollutant-emitting activities associated with the LBEC and the bulk material handling operations meet these three criteria.

a. **Protestants Have Failed to Prove, As a Matter of Law, that the LBEC and the Bulk Material Handling Operations Belong to the Same Industrial Grouping.**

According to TCEQ regulations, “[p]ollutant emitting activities are considered to belong to the same industrial grouping if they belong to the same ‘major group’ (i.e., that have the same two-digit code) as described in the Standard Industrial Classification Manual, 1972, as amended by the 1977 supplement.”¹⁵ Protestants do not argue that steam electric generating facilities and the bulk material handling operations have the same two-digit SIC code. That is because they do not.

As Protestants recognize, and as reflected in Section III.C of Las Brisas’s TCEQ Form PI-1,¹⁶ the pollutant emitting activities associated with the LBEC fall under SIC Code 4911 which covers electric power generation facilities. Thus the LBEC falls under Major Group 49: Electric, Gas, and Sanitary Services.¹⁷ The bulk material handling operations will fall under a separate and distinct major group. As evidenced by Section III.C of the POCCA’s TCEQ Form PI-1,¹⁸ bulk material handling operations fall under SIC Code 4491 or Major Group 44: Water Transportation.¹⁹ Accordingly, the pollutant emitting activities associated with the LBEC and the bulk material handling operations will *not* belong to the same industrial grouping and thus, according to TCEQ regulations, will *not* be part of the same “stationary source.”

¹⁵ *Id.*

¹⁶ See Las Brisas Pre-Filed Exhibit 3, Permit Application, p. 12.

¹⁷ See Protestant BDF’s Motion for Summary Disposition, Exhibit I.

¹⁸ See Ex. C, POCCA TCEQ Form PI-1.

¹⁹ See Ex. D, Standard Industrial Classification Manual, 1972.

Protestants attempt to overcome this clear difference in industrial groupings by relying on preamble language from Environmental Protection Agency ("EPA") rulemakings and BPA guidance relating to "support facilities." However, the preamble language and the guidance relied upon by Protestants do not constitute law²⁰ and, furthermore, are not binding on TCEQ.²¹ Accordingly, neither serves as proper support for summary disposition. Instead, pursuant to TCEQ regulations, which are controlling, the LBEC and the bulk material handling operations will not constitute a single "stationary source" because they will not belong to the same industrial grouping.

b. Protestants Have Failed to Prove, As a Matter of Law, that the LBEC and the Bulk Material Handling Operations Will Be Under Common Control.

Although the fact that the LBEC and the bulk material handling operations fall under different industrial groupings is enough, on its own, to defeat Protestants' claim that the two operations must be considered a single "stationary source," the required element of common control also is lacking.

²⁰ The guidance cited by both EDF and Sierra Club clearly states that such guidance is not legally binding. For example, the Preface of EPA's Draft 1990 NSR Manual cited by EDF includes the following statement: "[This document] is not intended to be an official statement of policy and standards and *does not establish binding regulatory requirements*; such requirements are contained in the regulations and approved state implementation plan." Ex. E, Draft, October 1990, EPA New Source Review Workshop Manual, Preface (emphasis added). Additionally, the December 6, 2004 letter from EPA Region 7 referenced by Sierra Club includes the following disclaimer: "As a final note, even though we encourage SIP-approved PSD states . . . to follow EPA guidance to ensure consistency in implementation of the program, *such guidance is not legally binding and does not substitute for controlling regulations.*" Protestant Sierra Club's Motion for Summary Disposition, Exhibit C (emphasis added).

²¹ When approving TCEQ's PSD permitting regulations as part of the Texas State Implementation Plan in 1992, EPA, in response to comments, directly addressed the relevance of its interpretations and guidance regarding PSD regulations. EPA stated that it "did not intend to suggest that Texas is required to follow EPA's interpretations and guidance issued under the Act in the sense that those pronouncements have independent status as enforceable provisions of the Texas PSD SIP, such that mere failure to follow such pronouncements, standing alone, would constitute a violation of the Act." Ex. F, 57 Fed. Reg. 28,095 (June 24, 1992).

As explained above, when Las Brisas submitted its application to TCEQ, Chase Power envisioned developing and operating a commercial bulk terminal facility, which, in addition to other bulk materials, could accommodate the petroleum coke and limestone to be used by the LBEC.²² In furtherance of this pursuit, Chase Power formed CTC in February 2008 and later reserved the LBTC name with the Texas Secretary of State.²³ Accordingly, when Las Brisas filed the application it referenced a LBTC material handling and storage facility. Protestants, relying on the reference to LBTC, claim that both the LBEC and the material handling operations are under the common control of Chase Power. This simply is not the case, as neither Chase Power nor CTC foresee developing or operating a commercial bulk terminal facility adjacent to the LBEC site or at any other location to serve the LBEC.²⁴ Furthermore, contrary to Protestants' claims, developing and using a site operated by LBTC for bulk material handling and storage is neither necessary nor required. While facilities will be necessary for the storage and handling of bulk materials to be used at the LBEC, those facilities need not be controlled by LBTC or any other entity affiliated with Las Brisas. The existing POCCA bulk terminal operations can provide off-site handling and storage, as necessary, of the materials to be used at the LBEC, in addition to the myriad of other materials that the POCCA handles for the port's other customers.²⁵ Therefore, the LBEC and the material handling operations will not be under common control and thus cannot be considered a single "stationary source."

2. The LBEC Will Not Result in Secondary Emissions.

Protestant BDF argues that, even if the LBEC and the bulk material handling operations are not considered to be part of the same "stationary source," the material handling operations

²² See Ex. A, Affidavit of Kathleen Smith, ¶ 8.

²³ See *id.* ¶¶ 3-4.

²⁴ See *id.* ¶¶ 9-12.

²⁵ See *id.* ¶ 6.

will necessarily result in secondary emissions that have not been considered in the Application. EDF's argument, however, is based on the unproven claim that there will be an increase in off-site material handling and storage emissions as a result of the future off-site handling and storage of materials to be used at the LBEC. In fact, there will be no such increase in emissions.

TCEQ's PSD permitting regulations incorporate by reference 40 C.F.R. § 52.21(k) concerning source impacts analyses, which provides that "the owner or operator of the proposed source or modification shall demonstrate that allowable emissions increases from the proposed source or modification, *in conjunction with all other applicable emissions increases or reductions (including secondary emissions)*, would not cause or contribute to air pollution in violation" of any national ambient air quality standard ("NAAQS") or PSD increment.²⁶ TCEQ's PSD permitting regulations also define "secondary emissions" as follows:

Emissions that would occur as a result of the construction or operation of a major source or major modification, but do not come from the source or modification itself. Secondary emissions must be specific, well-defined, quantifiable, and impact the same general area as the stationary source or modification that causes the secondary emissions. Secondary emissions include emissions from any off-site support facility that would not be *constructed or increase its emissions*, except as a result of the construction or operation of the major stationary source or major modification. Secondary emissions do not include any emissions that come directly from a mobile source such as emissions from the tail pipe of a motor vehicle, from a train, or from a vessel.²⁷

As EDF recognizes and as TCEQ's PSD source impacts analysis requirements and definition of "secondary emissions" both make clear, consideration of secondary emissions is only relevant when there will be an increase in off-site emissions, a fact that EDF has failed to prove. Contrary to EDF's claims, developing and using a site operated by LBTC for bulk material handling and storage is neither necessary nor required. Rather, the existing POCCA bulk terminal operations will provide off-site handling and storage, as necessary, of the materials

²⁶ Incorporated by reference at 30 TEX. ADMIN. CODE § 116.160(o)(2)(B).

²⁷ 30 TEX. ADMIN. CODE § 116.12(32).

to be used at the LBEC,²⁸ Furthermore, the future off-site handling and storage of materials to be used at the LBEC can be accommodated without an increase in the currently authorized emissions, emissions that were considered by Las Brisas in both its NAAQS and PSD increment analyses.²⁹ Accordingly, EDF has failed to prove that the off-site material handling operations will result in emissions that have not been considered in the Application.³⁰

II.
EVIDENCE FILED IN SUPPORT OF CONSOLIDATED RESPONSE TO
PROTESTANTS MOTION FOR SUMMARY DISPOSITION

Protestants have submitted several exhibits in support of their motions for summary disposition, none of which establish their entitlement to summary disposition. In addition to relying on certain of Protestants' exhibits as set forth in this Consolidate Response, Applicant submits the following exhibits in support of this Consolidated Response, true and correct copies of which are attached hereto and incorporated herein. This evidence includes:

- Exhibit A: Affidavit of Kathleen Smith.
- Exhibit B: Affidavit of Joseph M. Kupper, P.E.
- Exhibit C: Certified copy of TCEQ Form PI-1, Air Preconstruction Permit and Amendments, filed by Port of Corpus Christi Authority for amendment of TCEQ Permit No. 47881.
- Exhibit D: Excerpt from Standard Industrial Classification Manual, 1972; Major Group 44 -- Water Transportation.

²⁸ See Ex. A, Affidavit of Kathleen Smith, ¶ 6.

²⁹ See Ex. B, Affidavit of Joseph M. Kupper, P.E., ¶¶ 7-10.

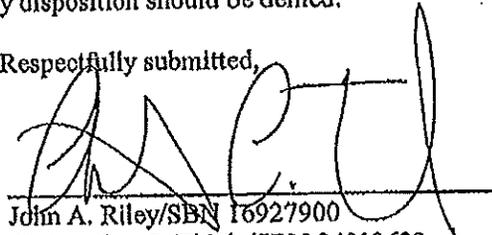
³⁰ Although Sierra Club's motion does not request summary disposition based on the contention that the material handling operations will necessarily result in secondary emissions that have not been considered in the Application, it does cite a Proposal for Decision ("PFD") in the Matter of the Application of ASARCO, Inc. for the renewal of Air Permit No. 20345 (SOAH Docket No. 582-05-0593) as "instructive" on the issue of whether emissions from an "interconnected facility" should be considered in the "primary facility's" application. Contrary to Sierra Club's claim, the cited PFD is not "instructive" at all to a request for summary disposition because it does not reflect governing law or regulation or, in this case, even TCEQ policy. In fact, the portions of the PFD cited by Sierra Club were never adopted by the Commission. Rather, the Commission adopted an Interim Order including only those findings of fact from the PFD "which concern jurisdictional matters, designation and withdrawal of parties, and general background with regard to the El Paso Plant." See Ex. G, TCEQ Interim Order.

- Exhibit E: Preface of Draft, October 1990, EPA New Source Review Workshop Manual.
- Exhibit F: 57 Fed. Reg. 28,095 (June 24, 1992).
- Exhibit G: Certified copy TCEQ Interim Order concerning Application of ASARCO, Incorporated to renew Air Quality Permit No. 20345; TCEQ Docket No. 2004-0049-AIR, SOAH Docket No. 582-05-0593.

III.
CONCLUSION

For the foregoing reasons, Applicant respectfully submits that Protestants' motions for summary disposition are factually and legally insupportable. There are genuine issues as to a number of material facts and Protestants are not entitled to summary disposition as a matter of law. Accordingly, Protestants' motions for summary disposition should be denied.

Respectfully submitted,

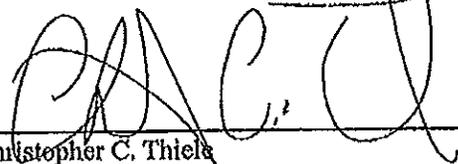


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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the forgoing response has been served by hand-delivery, email, facsimile or U.S. Mail to the parties listed on the attached service list on this the 18th day of September, 2009.



Christopher C. Thiels

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SOAH DOCKET NUMBER: 582-09-2005

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SOAH DOCKET NO. 582-09-2005
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AFFIDAVIT OF KATHLEEN SMITH IN SUPPORT OF
LAS BRISAS ENERGY CENTER, LLC'S CONSOLIDATED RESPONSE
TO PROTESTANTS' MOTION FOR SUMMARY DISPOSITION

STATE OF TEXAS §
§
COUNTY OF HARRIS §

BEFORE ME, the undersigned notary, personally appeared Kathleen Smith, a person whose identity is known to me. After I administered an oath to her, upon her oath, she said:

1. "My name is Kathleen Smith. I am over the age of 21, am competent to make this affidavit, have personal knowledge of the facts herein, and affirm that those facts are true and correct."
2. "I am the President and Chief Operating Officer of Chase Power Development, LLC ("Chase Power") and have held that position since the company was formed in 2007 for the purpose of developing a power generation company in Texas."
3. "I am the President of Chase Terminal Company, LLC ("CTC") and have held that position since the company was formed in February 2008 for the purpose of developing a commercial bulk terminal facility at the Port of Corpus Christi Authority ("POCCA")."
4. "The name 'Las Brisas Terminal Company, LLC' ("LBTC") was reserved with the Texas Secretary of State for potential use (see, e.g., EDF Motion for Summary Disposition Exhibit O) by Chase Power through counsel but the LBTC has never been formed as a corporation."
5. "I am the President and Chief Operating Officer of Las Brisas Energy Center, LLC ("Las Brisas"), and have held that position since the company was formed in 2007. Las Brisas was formed by Chase Power to pursue the development of the Las Brisas Energy Center ("LBEC"), a solid fuel-fired steam electric generating facility to be located in Corpus Christi, Texas. After exploring a number of fuel options, Las Brisas elected to use petroleum coke as the LBEC fuel source and applied for the air authorizations that are the

EXHIBIT A

1

Attachment B

subject of the above-captioned proceeding, which is currently pending before the Texas State Office of Administrative Hearings."

6. "POCCA currently operates a bulk terminal located to the east of the proposed site of the LBEC. The POCCA bulk terminal operations consist of the storage, handling, and loading of dry bulk commodities including, but not limited to, petroleum coke. The existing POCCA bulk terminal operations can accommodate the petroleum coke and limestone to be used at the LBEC."
7. "On November 13, 2007, Chase Power and the POCCA entered into an option agreement ("Option Agreement," EDF Motion for Summary Disposition Exhibit K) whereby the POCCA granted Chase Power an option to lease approximately 170.21 acres of property ("Option Property") owned by the POCCA. Approximately 82.48 acres of the Option Property make up the proposed site of the LBEC. Chase Power was, at one time, contemplating leasing the remainder of the Option Property for the CTC's development of bulk terminal facilities for handling petroleum coke and limestone to be used at the LBEC."
8. "CTC was formed to explore the potential privatization and upgrade of the existing POCCA bulk terminal operations. When Las Brisas submitted the air permit application for the LBEC to TCEQ, Chase Power and CTC envisioned developing and operating a commercial bulk terminal facility, utilizing the LBTC name, which, in addition to other bulk materials, could accommodate petroleum coke and limestone for use at the LBEC."
9. "Although the Option Agreement remains in effect, there are no active negotiations to enter into a lease agreement between the POCCA and Chase Power, CTC, or any related entity as LBTC or under any other name, involving any property other than the approximately 82.48 acres that constitute the proposed site for the LBEC and are depicted in Exhibit A to this affidavit. Instead, Chase Power intends to exercise the Option Agreement within the next few months only with respect to the approximately 82.48 acres that constitute the proposed site for the LBEC. Chase Power currently anticipates that, prior to commencement of the evidentiary hearing in this matter on November 2, 2009, it will have entered into a term sheet or lease agreement with the POCCA for only the approximately 82.48 acres that constitute the proposed site for the LBEC."
10. "No agreement to develop or operate a commercial bulk terminal facility adjacent to the LBEC site exists between or among POCCA and Chase Power, CTC, or any related entity as LBTC or under any other name."
11. "Neither Chase Power, CTC, nor any related entity as LBTC or under any other name foresees using the Bulk Handling Equipment and Layout Conceptual Design prepared in May 2008 (EDF Motion for Summary Disposition Exhibit N) in planning for the construction and operation of the LBEC. EDF's Motion for Summary Disposition Exhibit N, dated May 8, 2008, represents one of many a commercial bulk terminal facility conceptual design drafts that Chase Power or CTC commissioned or has considered."

12. "Chase Power terminated its relationship with the author of BDF's Motion for Summary Disposition Exhibit N shortly after the conceptual design was delivered on May 14, 2008."

Further affiant sayeth not."


Kathleen Smith, Affiant

Subscribed and sworn to before me on this 18 day of September, 2009, to certify of which witness my hand and seal of office.


Notary Public - State of Texas

My Commission Expires: 12-9-2012

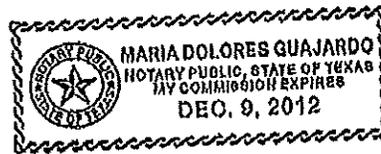


EXHIBIT A

