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CHIEF CLERKS OFFICE

2010 APR 30 AM 8:09

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

Hon. Tommy L. Broyles
Hon. Craig R. Bennett
Administrative Law Judges
P.O. Box 13025
William P. Clements Bldg., Ste. 502
300 West 15th Street
Capitol Station, Texas 78711-3025

April 29, 2010

Regarding: *Application of Las Brisas Energy Center, LLC, for State Air Quality Permit; Nos. 85013, HAP48, PAL41, and PSD-TX-1138.*

Reply to Suggestions on the § 382.0518(d)&(e) question

Dear Judges Broyles and Bennett:

The ED, EDF and Sierra Club addressed your inquiry about § 382.05281(d)&(e), Health & Safety Code. The Medical Group believes the Sierra Club and EDF likely have the more workable and, yet, legally-supportable, suggestions.

The language at issue was adopted via House Bill 322 in 1971. Section 2 of that bill added a sec. 3.27 ("Construction Permit") to the Texas Clean Air Act. That bill, as displayed on the TCEQ web site,¹ is attached to the note. This is the language that was initially adopted to the Texas SIP by EPA in 1972.²

The Air Control Board, the agency entrusted to interpret the 1971 (and earlier) Clean Air Act law, explained the process envisioned by that language to EPA as follows:

C. Granting or Denying a Permit to Construct

¹ http://www.tceq.state.tx.us/assets/public/implementation/air/sip/sipdocs/1972-SIP/1972_sip_section_x.pdf, pp. X-1 through X-3.

² 40 CFR § 52.2270(e), first entry in the table.

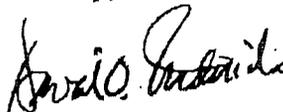
1. If the decision of the Executive Secretary is to deny the permit, he will report his objection in a written notice of denial to the applicant.
2. The applicant may appeal the denial of the permit to the Texas Air Control Board. If a written appeal is made, a public hearing will be held in the area of the proposed construction. The hearings report will be given to the Board for their consideration.
3. After a review of the pertinent facts, the Board will notify the applicant in writing of their decision.
4. If the decision of the Board is to deny the permit, the Board will not accept any new application from the applicant until all objections of the Board to the previously submitted application are rectified.
5. If a permit to construct is issued, a copy of the permit will be sent to the local air pollution control agency and the regional office of the State Air Control Program.

Texas SIP Revision, January 26, 1972, p. X-5, as reflected on the TCEQ web site, URL set out at note 1, below.

The Medical Group's view is that this interpretation of the language is authoritative and leads to a workable process. The Commissioners consider your PFD and direct the preparation of findings of fact and conclusions of law consistent with their decisions on your PFD. The findings and conclusions go to the Commissioners at some later date, and they approve them or modify them and, as modified, approve them. The Commissioners issue an order denying the permit application for the reasons set forth the findings and conclusions and any ordering paragraphs the Commissioners may author. The LBEC acts on that "report" as it sees fit. (So, for example, it might appeal the Commission's decision, or it might notice and conduct the MACT analysis, deal with the secondary emissions issues, and correct the modeling errors and submit and notice a new application that reflects these changes.)

The Medical Group believes the ED's recommendation for remand to the ED, thus short-circuiting the "report" process, invites too much opportunity for procedural errors (e.g., notice errors) and would add unnecessary expense for all parties. That is, on this last point, an application as deficient in as many respects as is this one will require a good deal of time to correct, and having all parties and you and, potentially, the TCEQ periodically involved in decisions/controversies that arise over that time just seems a degree of overhead that should be avoided.

Sincerely,



David Frederick

CHIEF CLERKS OFFICE

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CERTIFICATE OF SERVICE

By my signature above, I hereby certify that on the 29th of April, 2010, the forgoing document was served upon the Chief Clerk of the TCEQ via electronic filing, and true and correct copies were sent to the following via Facsimile, Electronic mail and/or U.S. First Class Mail.

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For the Sierra Club

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**For Susie Luna-Saldana and the
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Section X

Review of New Sources
and Modifications

THE PERMIT SYSTEM

NOTE: The documents contained in this Section are self explanatory, thus, no narrative description is provided.

H. B. 322

An Act relating to permits issued by the Texas Air Control Board for construction of new facilities or modifications of existing facilities by any person in this state and to permits issued by the Texas Air Control Board for initial operation of new facilities or modifications of existing facilities in this state; relating to appeal under this Act; amending Subchapter C, Texas Clean Air Act, as amended (Article 4477 - 5, Vernon's Texas Civil Statutes), to add new Sections 3.27 and 3.28 and amending Section 1.03, Subchapter A, Texas Clean Air Act, as amended (Article 4477 - 5, Vernon's Texas Civil Statutes), to add new Subsections (8) and (9); and declaring an emergency.

Be it enacted by the Legislature of the State of Texas:

Section 1. Section 1.03, Subchapter A, Texas Clean Air Act, as amended (Article 4477-5, Vernon's Texas Civil Statutes), is amended to add new Subsections (8) and (9) to read as follows:

Definitions

"Section 1.03. As used in this Act, unless the context requires a different definition:

"(1)'air contaminant' means particulate matter, dust, fumes, gas, mist, smoke, vapor or odor, or any combination thereof produced by processes other than natural;

"(2)'source' means a point of origin of air contaminants, whether privately or publicly owned or operated;

"(3)'air pollution' means the presence in the atmosphere of one or more air contaminants or combinations thereof, in such concentration and of such duration as are or may tend to be injurious to or to adversely affect human health or welfare, animal life, vegetation or property, or as to interfere with the normal use and enjoyment of animal life, vegetation or property;

"(4)'board' means the Texas Air Control Board;

"(5)'executive director' means the executive director of the Texas Air Control Board;

"(6)'person' means individual, corporation, organization, government or governmental subdivision or agency, business trust, partnership, association, or any other legal entity; and

"(7)'local government' means a county, an incorporated city or town; or a health district established under authority of Chapter 63, Acts of the 51st Legislature, 1949, as amended by Chapter 239, Acts of the 56th Legislature, 1959 (Article 4447a, Vernon's Texas Civil Statutes);

"(8)'new source' means any stationary source, the construction or modification of which is commenced after the effective date of this statute;

"(9)'modification' means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source into the atmosphere or which results in the emission of any air pollutant not previously emitted. Insignificant increases in the amount of any air pollutant emitted are not intended to be included, nor is maintenance or replacement of equipment components which do not increase or tend to increase the amount or change the characteristics of the air contaminants emitted to the atmosphere."

Section 2. Subchapter C, Texas Clean Air Act, as amended (Article 4477 - 5, Vernon's Texas Civil Statutes), is amended to add a new Section 3.27 to read as follows:

Construction Permit

Section 3.27. (a) Any person who plans to construct any new facility or to engage in the modification of any existing facility which may emit air contaminants into the air of this State shall apply for and obtain a construction permit from the board before any actual work is begun on the facility. The board may exempt certain facilities or types of facilities from the requirements of Section 3.27 and Section 3.28 if it is found upon investigation that such facilities or types of facilities will not make a significant contribution of air contaminants to the atmosphere.

"(b) Along with the application for the permit, the person shall submit copies of all plans and specifications necessary for determining whether the proposed construction will comply with applicable air control standards and the intent of the Texas Clean Air Act, together with any other information which the board considers necessary.

"(c) If, from the information submitted under subsection (b) of this section, the board finds no indication that the proposed facility will contravene the intent of the Texas Clean Air Act, including proper consideration of land use, the board shall grant within a reasonable time a permit to construct or modify the facility. If the board finds that the emissions from the proposed facility will contravene these standards or will contravene the intent of the Texas Clean Air Act, it shall not grant the permit and shall set out in a report to the applicant its specific objections to the submitted plans of the proposed facility.

"(d) If the person applying for a permit makes the alterations in his plans and specifications to meet the specific objections of the board, the board shall grant the permit, but the board may refuse to accept new applications by a person until all previous objections of the board to the previously submitted plans of that person are rectified. If the person fails or refuses to alter the plans and specifications, the board shall refuse to grant the permit.

"(e) A permit granted under this section may be revoked by the board if the board later determines that any of the terms of the permit are being violated or that emissions from the proposed facility will contravene air pollution control standards set by the board or will contravene the intent of the Texas Clean Air Act.

"(f) The board or the executive director may seek an injunction in a court of competent jurisdiction to halt work on a facility which is being done without a permit issued under this section or is in violation of the terms of a permit issued under this section.

"(g) The powers and duties set out in Section 3.27 and Section 3.28 may be delegated by the board to the executive director. The applicant may appeal to the board any decision made by the executive director under these sections.

"(h) Provided, however, that at the time this Act becomes effective no provision of this Act shall apply where any person, firm, partnership or corporation has let any contract, or begun any construction for any addition, alteration or modification to any new or existing facility. Any contracts under this subsection shall have a beginning construction date no later than six months after the effective date of this Act to qualify for this exemption."

Section 3. Subchapter C, Texas Clean Air Act, as amended (Article 4477- 5, Vernon's Texas Civil Statutes), is amended to add a new Section 3.28 to read as follows:

Operating Permit

Section 3.28. (a) If a permit to construct is issued, then within sixty days after the facility has begun operation, the person in charge of the facility shall apply for an operating permit. The board may require the submission of monitoring data to demonstrate compliance with applicable rules and regulations and with the Texas Clean Air Act in support of the application for an operating permit. If start-up or testing requires more than sixty days, this period may be extended by the board.

"(b) When all stipulations of the construction permit are met and the operation of the facility will not contravene air pollution control standards set by the board or will not contravene the intent of the Texas Clean Air Act, the board shall issue within a reasonable time the operating permit

"(c) If the board determines that the operation of such a facility will contravene the air pollution control standards set by the board or will contravene the intent of the Texas Clean Air Act

it shall set out in a report to the applicant the specific objections which it finds to the facility and shall not grant the permit.

"(d) The board shall refuse to accept new applications by a person for an operating permit until all the previous objections to that facility submitted by the board are rectified.

"(e) A permit issued under this section may be revoked by the board if the board later determines that any of the terms of the permit are being violated or that emissions from the facility contravene air pollution control standards set by the board or contravene the intent of the Texas Clean Air Act.

"(f) The board or the executive director may seek an injunction in a court of competent jurisdiction to halt the operation of any facility which is operating without a permit issued under this section or which is operating in violation of the terms of a permit issued under this section."

Section 4. Upon the failure of the board to take action within 120 days after receipt in proper form of an application for a permit under Sections 3.27 or 3.28, the petitioner shall be entitled to assume that his petition has been denied, and he may perfect an appeal on this basis in the manner provided in Section 6.01 of this Act. However, until such time as the petitioner files his appeal in the manner provided in Section 6.01 of this Act, the board shall continue to have jurisdiction to act on the petition.

Section 5. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the Constitutional Rule requiring bills to be read on three several days in each house be suspended, and this Rule is hereby suspended, and that this Act take effect and be in force from and after its passage, and it is so enacted.

/s/ Ben Barnes
Lieutenant Governor
President of the Senate

/s/ Gus Mutscher
Speaker of the House

I hereby certify that H.B. No. 322 was passed by the House on April 19, 1971, by the following vote: Yeas 144, Nays 0; and that the House concurred in Senate amendments to H. B. No. 322 on May 30, 1971, by a non-record vote.

/s/ Dorothy Hallman
Chief Clerk of the House

I hereby certify that H.B. No. 322 was passed by the Senate, as amended, on May 26, 1971, by a viva voce vote.

/s/ Charles Schnabel
Secretary of the Senate

Approved:

June 4, 1971
Date

Filed in the Office of the Secretary of State,
1:15p.m. o'clock, June 4, 1971

/s/ Preston Smith
Governor

/s/ Martin Dies, Jr.
Secretary of State