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January 3, 2011

*Via Electronic Filing*

Ms. LaDonna Castañuela  
Chief Clerk, MC-105  
Texas Commission on Environmental Quality  
12100 Park 35 Circle  
Austin TX 78753

Re: SOAH DOCKET NO. 582-09-2005; TCEQ DOCKET NO. 2009-0033-AIR  
Application of Las Brisas Energy Center, LLC for State Air Quality Permit  
Nos. 85013, PSD-TX-1138, HAP48, and PAL41

Dear Ms. Castañuela:

Attached for filing in the above matter is Environmental Defense Fund, Inc.'s Reply to Exceptions to Proposal for Decision on Remand. The original and seven copies are being hand delivered your office.

Sincerely,



Thomas M. Weber

TMW/jam  
5043-09  
Enclosure

cc: Mr. Les Trobman (via hand delivery)  
Honorable Tommy R. Broyles (via hand delivery)  
Honorable Craig R. Bennett (via hand delivery)  
Service List

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

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

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

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**January 3, 2011**

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

**TO THE HONORABLE COMMISSIONERS, GENERAL COUNSEL TROBMAN,  
AND ADMINISTRATIVE LAW JUDGES:**

COMES NOW Protestant Environmental Defense Fund, Inc. ("EDF") and files this Reply to Exceptions to the Proposal for Decision on Remand ("PFD") submitted by the Administrative Law Judges ("ALJs") in the referenced dockets.

**I.**

**INTRODUCTION**

In its Exceptions to the Proposal for Decision on Remand, Applicant Las Brisas Energy Center, LLC ("Applicant") admits that the material handling plans that it submitted as evidence in this matter are mere "hypothetical scenarios strictly for demonstrative purposes" and takes the position that it cannot be bound to any specific material handling plan.<sup>1</sup> These statements explicitly confirm that the Applicant is seeking to obtain a permit by using sham material handling plans that it has no intention of ever actually implementing. The Applicant cannot demonstrate that emissions from the proposed LBEC will comply with applicable NAAQS and PSD increments while

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<sup>1</sup> See LBEC Exceptions at 27-28.

simultaneously refusing to disclose the actual material plans that the Applicant admits are required to operate LBEC. EDF, the Protestants, the ED, the ALJs, the Commissioners, and the public are entitled to see and review plans for the facilities that are required to operate LBEC, and to analyze the ambient impacts of those sources of air pollution.

Stripped to its essence, the Applicant is asking the Commission to gut the fact-based, science-based demonstrations that are at the core of the air permitting processes under both the federal Clean Air Act and Texas Clean Air Act. If the Commission were to allow applicants to demonstrate “compliance” using mere hypotheticals, then permitting demonstrations would become exercises in fantasy, as applicants could create fictional scenarios for the purposes of obtaining permits and then construct something totally different. Fortunately, the TCEQ’s rules and federal laws do not permit applicants to make such a mockery of the permitting process, but instead require the Applicant to demonstrate in its application that emission increases from the proposed source, 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.<sup>2</sup> The Applicant’s concession that its material handling evidence does not represent how material handling will actually be performed is a legal admission that it has failed to make the demonstration required under 30 TAC § 116.160 and 40 CFR § 52.21(k). The Commission should reject the Applicant’s attempt to obtain a permit based upon “plans” that the Applicant’s own statements reveal are mere pretenses.

Furthermore, neither the Applicant nor the TCEQ Executive Director (“ED”) offers any credible justification regarding why the Applicant is legally allowed to rely on

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<sup>2</sup> See 30 TAC §§116.111, 116.160 (incorporating by reference 40 CFR § 52.21(k)).

the ED's air dispersion modeling as a substitute for the Applicant's error-riddled and defective modeling. The Administrative Law Judges ("ALJs") correctly determined that such reliance is illegal and violates Texas Water Code § 5.228(e). The Applicant's claims that the ED's modeling is admissible on the basis that the ED "found the Applicant's modeling acceptable" and the ED was merely "addressing . . . SIP concerns" are thoroughly false and once again misrepresent the record.<sup>3</sup> The undisputed evidence and the sworn testimony of the ED's witnesses establishes that the Applicant's modeling on remand was "deficient" and that the ED's modeling correcting the Applicant's modeling was "necessary" for any permit to issue. The Applicant cannot change this testimony and evidence and its attempts to do so in briefing amount to a blatant misrepresentation of the record. Nor is there, as is claimed by the ED, any statute or rule that requires the ED to perform modeling assisting the Applicant in meeting its burden of proof. To the exact contrary, Texas Water Code § 5.228(e) expressly prohibits the ED from assisting the Applicant in meeting its burden of proof.

For these reasons and the other reasons discussed in the PFD and in Protestants' Exceptions, as a matter of law the evidence presented by the Applicant fails to support issuance of the requested permits. The Commissioners should deny the Application or, at a bare minimum, require the Applicant to re-file and re-notice its Application pursuant to Texas Health & Safety Code § 382.0291(d).<sup>4</sup>

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<sup>3</sup> As the ALJs have previously observed on multiple occasions, the Applicant has repeatedly mischaracterized the record in this case. See June 2, 2010 Letter from Judges Broyles and Bennett to General Counsel Trobman, p. 1 (wherein the Judges state that "many" of Applicant's exceptions to the PFD "misrepresent and mischaracterize our analysis and conclusions"); Order No. 22, p. 4 (wherein the Judges raise "concerns" about the "Applicant's repeated misrepresentations when presenting arguments"); March 29, 2010 Proposal for Decision, p. 39 (wherein the Judges characterize Applicant's argument as "specious").

<sup>4</sup> EDF incorporates by reference the Replies to Exceptions filed by all other Protestants in these dockets.

**II. THE APPLICATION MUST BE DENIED IN LIGHT OF THE APPLICANT'S ADMISSION THAT THE "OPTION 1" AND "OPTION 2" MATERIAL HANDLING FACILITIES WERE FICTIONAL EXERCISES.**

**A. The Applicant's Own Statements Confirm That the Material Handling Plans It Submitted Are a Sham.**

The Applicant's failure to ever identify or commit to a specific material handling plan is one of the most critical failures in the Application. In the original PFD issued March 29, 2010 ("Original PFD") after the first hearing in this case, the ALJs noted:

Without any plans, process flow diagrams, or emission calculations, LBEC failed to meet its burden of proof in this regard. As noted above, simply stating that the emissions cannot legally exceed the POCCA docks' permit limits is insufficient. While the underlying point made is accurate—i.e., emissions from the POCCA may not legally exceed the permitted limits—the conclusion or inference that the Application may then be approved does not necessarily follow. The main purpose of the application process is to ascertain whether the Facility (including secondary sources) may be constructed and *fully operated as proposed* without causing or contributing to a condition of air pollution

Original PFD at 41 (emphasis added).

On remand, the Applicant presented two hypothetical "Option 1" and "Option 2" material handling plans, presumably in an attempt to correct this fatal defect in its Application. As EDF has previously noted, the Applicant's hypothetical "Option 1" and "Option 2" material handling scenarios are improbable in the extreme, calling for nearly mile-long enclosed conveyors (moving the huge sources of particulate emissions caused by the required material handling far away from LBEC and the receptor grid at which LBEC sources are "significant") and construction of a "bubble" or dome over the massive limestone pile required for LBEC to operate. See LBEC Exs. 702, 703. And as

EDF also has repeatedly noted in this matter, the Applicant has never once made any representation that it *actually intends to use* either Option 1 or Option 2.

Recognizing that “an Applicant has to be bound to the operations it has modeled” or else “any showing is merely illusory,” the Judges conclude in their PFD on remand that LBEC must be bound to actually utilize Options 1 or 2. See Remand PFD at 37. Faced with the Judges’ finding, the Applicant is forced to disclose that it has no intention whatsoever of utilizing Option 1 or 2, objecting to any requirement to be bound and admitting that “Applicant developed and modeled two *hypothetical scenarios* [i.e., Options 1 and 2] *strictly for demonstrative purposes.*” LBEC Exceptions at 27. This statement confirms once and for all that the Applicant has simply concocted the two hypothetical material handling scenarios for purposes of obtaining a permit without any intention whatsoever that either one actually be used.

It is not EDF’s, the ED’s, or the TCEQ’s problem that the Applicant’s business plan does not allow it to design or contract for material handling at the time when it is required to quantify and model impacts from the material handling activities required to operate LBEC and demonstrate that its proposed actions comply with the federal Clean Air Act, the Texas Clean Air Act, and TCEQ’s rules. This is a problem of the Applicant’s own making and it must suffer the consequences. In the meantime, neither the other parties in this case nor the people or environment of Corpus Christi should be made to suffer. If the Applicant cannot or will not attempt to nail down its plan for material handling in a manner sufficiently definite make the required demonstrations, then LBEC is not entitled to a permit and should re-file its Application if and when its business plan allows it to make the required demonstrations.

The TCEQ's rules, the Texas Clean Air Act and the federal Clean Air Act do not permit applicants to obtain permits by fictional pretenses. To the exact contrary, TCEQ's rules provide that, to obtain a PSD permit, "the application must include. . . (2) information which demonstrates that emissions from the facility, including any associated dockside vessel emissions, meet all of the following . . . (I) Prevention of Significant Deterioration (PSD) review." 30 TAC § 116.111(a)(2)(I) (emphasis added). In turn, TCEQ rule 30 TAC § 116.160 incorporates by reference 40 CFR § 52.21(k), which requires that: "[t]he 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" any NAAQS or PSD increment. 30 TAC § 116.160(c)(2)(A); 40 CFR § 52.21(k)(emphasis added).

As confirmed by the testimony of ED witness Randy Hamilton at hearing, the purpose of this inquiry is to make sure the TCEQ can verify that emissions rates and impacts are accurate and thereby assure that the source will not violate applicable regulations:

Q: [By Mr. Baab] [W]hen an applicant builds some source of air emissions, the actual infrastructure, whatever they build and the design of that, is going to dictate what the emissions are. Right? That can be calculated.

A: [By Mr. Hamilton] Yeah. That's right.

Q: And, in fact, what your job is in the air permits division, one of your jobs, is to look at those, make sure that the emissions calculations are correct, and that, in fact, if something's built as represented that you'll know what the emissions will be. Correct?

A: Correct.

Q: And then based upon how you quantify those emissions, those become inputs into the air dispersion modeling. Right?

A: Right.

Tr. 13:3083:25-3084:15.

As Mr. Hamilton's testimony reveals, in ascertaining whether emissions increases and decreases resulting from a proposed source – including secondary emissions – will comply with the NAAQS and PSD Increments, the TCEQ relies upon the Applicant's representations as to the location and emissions rates of the structures and emissions sources required to operate the facility. Then, the TCEQ reviews computer air dispersion modeling to assess emissions impacts from those facilities. Obviously, this scientific inquiry is of no utility if the structures and emissions points that are built are completely different from what is represented in the Application. Yet what the Applicant is attempting to do in this case is to obtain a permit based upon material handling scenarios that are "hypothetical," "strictly for demonstrative purposes," and that the Applicant has no intention of actually performing – in short, mere fantasy.

As the Judges recognize, the Applicant's actions here, if allowed, would render the showings required for permit issuance completely illusory. See PFD at 37. The Commission's charge would no longer be to assure that proposed sources in fact comply with applicable standards, but rather to merely assure that the Applicant is sufficiently creative that it can invent a hypothetical scenario – regardless of any intention or commitment to actually use such a scenario – whereby compliance would be possible. But the Commission must be guided by facts and by science, and not by fantasy. In the Applicant's fantasy world, "compliance" could always be reached through sufficiently

creative permitting. The Applicant's attempt to demonstrate compliance based upon a mere hypothetical scenario that the Applicant admits it has no intention of using proves nothing.

B. The Applicant's Claims That It Cannot Determine the Emissions That Will Result From the "Required" Material Handling for LBEC Are False.

The Applicant once more attempts to justify its failure to specify any actual material handling plans by claiming that emissions from the material handling activities are not "specific, well-defined and quantifiable" and that it cannot make any demonstration because it lacks control over off-site sources. Neither claim has any merit whatsoever. In fact, the Judges previously rejected each of these claims.

First, as the Judges noted in the original March 2010 PFD, "it is not [our] understanding that an applicant may avoid secondary emissions simply by failing to quantify or specify emissions that may readably be defined . . . [LBEC] may not then simply evade consideration of its necessary and obvious secondary sources and declare its emissions inventory complete." Initial PFD at 57. In fact, the Applicant's own actions in quantifying and modeling emissions from its Option 1 and Option 2 material handling scenarios in its pre-filed testimony proves that the material handling emissions required for LBEC will be "specific, well-defined and quantifiable." The Applicant cannot render such emissions otherwise – and thereby avoid analysis of material handling emissions required under applicable rules and statutes – merely by refusing to disclose how material handling will be performed.

Likewise, the Applicant cannot avoid analysis of the required material handling activities by claiming that such activities may be performed by someone else, or by feigning an inability to ascertain how the activities will be performed. As the Judges concluded in

the Initial PFD, “LBEC's burden of proof to show compliance with the regulations is not lessened if it chooses to have its material handling managed by POCCA, and its existing facilities, rather than the proposed facilities at LBTC.” *Id.* at 40. The Applicant admits in the Application that the additional material handling facilities are “required.” See LBEC Ex. 6 at 00021, LBEC Ex. 7 at 00009. The Applicant obviously has the power to determine, either by itself or by agreement with a third party such as POCCA, the actual material handling plans to be used. Indeed, it is absurd for the Applicant to contend otherwise, as the Applicant must do so in order to be able to operate the LBEC power plant.

What the Applicant really seeks to do is avoid disclosing its actual material handling plans because it knows (as EDF’s modeling demonstrates) that it cannot comply with applicable 24-hour PM<sub>10</sub> standards using any realistic plans. Regardless, as a matter of law, the Applicant cannot demonstrate compliance with the NAAQS or PSD increments without showing the actual material handling plans to be used. The Applicant’s failure to determine (or refusal to disclose) its material handling plans is not the fault of the TCEQ, the Judges, or the Protestants. It is the Applicant’s fault that it has failed (or refused) to meet its burden of proof.<sup>5</sup> For over a year and a half the Applicant

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<sup>5</sup> The Applicant also attempts to excuse its failure to commit to a material handling scenario by arguing that the hypothetical material handling scenarios “were designed to be extremely conservative.” This claim is false. In fact, although the Applicant purports to locate the required material handling facilities fully *one mile away* from the LBEC site using enclosed, “emission-less” conveyors, see LBEC Exs 702 and 703, the Applicant refuses to commit to actually use these plans. It is not in any way “conservative” to assume that the material handling facilities and particulate emissions resulting from those facilities will in fact be located *one mile away* from the LBEC property line and therefore at a considerable distance from the emissions impacts caused by LBEC itself. Nor is it in any way “conservative” to assume that the seven million tons per year of bulk material needed for LBEC will all be carried over this one mile distance in emission-less conveyors. Given the Applicant’s claimed lack of control over material handling, had the Applicant truly intended to be “conservative” in modeling the material handling facilities, it would have located them on the POCCA property directly adjacent to the LBEC site, not a mile away (notably, the Applicant’s initial “LBTC” plans called for material handling to occur on vacant POCCA property directly adjacent to the LBEC site. See EDF Ex. 103 at LB000047147-150). Moreover, the Applicant cannot

has played hide the ball and refused to commit to how the seven million tons per year of bulk materials required for LBEC will be handled, despite being on notice that it was its burden to demonstrate that emissions from such activities, in conjunction with the other LBEC sources, would not violate applicable NAAQS or PSD increments.<sup>6</sup> And now, the Applicant finally discloses what EDF has long claimed – that Las Brisas is seeking a permit based upon fictional material handling plans that make a mockery of the core inquiry of the TCEQ’s air permitting process. The Applicant has now wasted the time and resources of the Commission, SOAH, and the other parties to this proceeding through two contested case hearings without disclosing any of its actual (but required) material handling plans. Enough is enough. The Application should be denied.

**III. THE APPLICANT’S ATTEMPTS TO JUSTIFY ADMISSION OF THE ED’S MODELING ARE UNAVAILING AND MISREPRESENT THE RECORD.**

The testimony and evidence at the remanded hearing clearly and overwhelming demonstrate that the ED’s air dispersion modeling assisted the Applicant in meeting its burden of proof in contravention of Texas Water Code §5.228(e). The evidence establishes the following:

- Due to multiple “deficiencies” in its air dispersion modeling, the Applicant “[did] not sufficiently demonstrate that a 24-hr PM<sub>10</sub> Increment violation would not occur at a significant receptor when considering both time and space.” LBEC Ex. 910 at 2;
- After making “updates” to the Applicant’s air dispersion modeling and performing modeling of his own, the ED’s modeler Daniel Jamieson testified

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justify its failure to accurately locate and model required sources of air pollutants by mere claims of “conservatism.” Absent modeling showing predicted concentrations of pollutants once accurate input data is used, one cannot prove that so-called “conservatism” actually results in compliance with NAAQS or PSD increments. See Section III.C. below.

<sup>6</sup> EDF notified the Applicant by discovery responses in May 2009 that the Application was deficient due to its failure to account for material handling emissions. Tr. 1 at 24:23-25:7.

that his modeling [i.e., the ED's] "would sufficiently demonstrate that a 24-hr PM<sub>10</sub> Increment violation would not occur at a significant receptor when considering both time and space," Tr. at 2819, 2882-83.

- Mr. Jamieson further testified that, "without making any of the updates that I made and with the inconsistencies and deficiencies that I saw, I would say no, [the Applicant's modeling] was not a sufficient demonstration," Tr. at 2882-83;
- Mr. Jamieson, via his work, "corrected the problems" in the Applicant's air dispersion modeling," Tr. at 3099 (testimony of Randy Hamilton); and
- Mr. Jamieson's modeling correcting the Applicant's modeling "was a necessary part of getting the executive director's approval of the proposed permit," Tr. at 3099 (testimony of R. Hamilton).

The Applicant devotes twenty rambling pages of its Reply in an unavailing attempt to explain away the voluminous, clear and direct evidence proving that admission of the ED's modeling constitutes improper assistance to the Applicant in meeting its burden of proof in violation of Texas Water Code § 5.228(e).<sup>7</sup> But faced with this overwhelming and irrefutable evidence that the ED's modeling bridged an essential gap in the Applicant's burden of proof, the Applicant once again resorts to mischaracterizing the record.

A. "Deficient" ≠ "Acceptable."

As the basis for admission of the ED's modeling, the Applicant claims that the work performed by Mr. Jamieson was conducted "pursuant to a regulatory duty." LBEC Exceptions at 7. Specifically, seizing upon language in the Remand PFD, the Applicant claims Mr. Jamieson's modeling may be admitted because the ED "found LBEC's modeling to be acceptable" and Mr. Jamieson's modeling was in fact conducted pursuant

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<sup>7</sup> This statute provides, in relevant part: "[t]he executive director or the executive director's designated representative may not assist a permit applicant in meeting its burden of proof in a hearing before the commission or the State Office of Administrative Hearings."

to “the duty to . . . address the state’s SIP concerns.” LBEC Exceptions at 15. But this claim is an unconscionable misrepresentation of the record. The ED did not find the Applicant’s modeling “acceptable.” Rather, the TCEQ found the Applicant’s modeling “deficient” and “not a sufficient demonstration.” LBEC Ex. 910 at p. 2; Tr. at 2882-83.

As the sole basis for its claim that the ED found the Applicant’s modeling to be “acceptable,” the Applicant points to the initial modeling audit memorandum issued by TCEQ’s air dispersion modeling team, (“ADMT”) on December 16, 2008 which discussed the initial air dispersion modeling submitted by the Applicant. See LBEC Exceptions at 7, 12. This is a specious argument, as the first modeling audit was performed before the November 2009 hearing in this matter, at which the Applicant’s then-current modeling was proven to contain numerous errors.<sup>8</sup> Indeed, the multiple defects in this modeling in large part occasioned the remand in this case.

The record is clear: on remand, the ED found the Applicant’s modeling was “deficient” and “not a sufficient demonstration.” LBEC Ex. 910 at 2; Tr. at 2882-83. As the Judges state, “it is only after a verified compliance demonstration that the permitting agency has a duty to address the potential SIP demonstration.” Remand PFD at 24 (emphasis added). And as the ALJs further note, here “Mr. Jamieson did not verify

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<sup>8</sup> The Applicant’s initial modeling and the Applicant’s rebuttal modeling were proven to contain multiple errors at the original November, 2009 hearing. Tr. 2 at 414:25 – 440:12; Tr. 9 at 2273:6 – 2276:15; EDF Ex. 313A. In fact, even after attempting to correct these errors on rebuttal, the Applicant’s original air dispersion modeling Joe Kupper testified on cross examination that this new modeling did not correct multiple errors, and admitted that he could not “say with certainty that any of the modeling that you have testified about in connection with this proceeding is 100 percent accurate.” Tr. 9 at 2284:4-2285:17; 2331:18-13. In response to the new modeling submitted by the Applicant on rebuttal, the ED noted that it “did not have an opportunity to audit that modeling” and consequently suggested a remand – thus clearly acknowledging that the prior modeling audit cited by the Applicant was no longer sufficient. See ED’s Reply to Closing Arguments filed January 20, 2010 at 4. And then, in its pre-filed testimony on remand, the Applicant submitted two additional, different sets of modeling incorporating its “Option 1” and “Option 2” material handling scenarios. It is these sets of modeling which are the subject of the remand proceeding – not the prior and superseded (but also erroneous) modeling submitted in the original hearing. And it is these, current sets of modeling that the ED found “deficient.” See LBEC Ex. 910 at 2.

LBEC's compliance demonstration but rather found that LBEC's modeling was deficient." *Id.*(emphasis added). The Applicant's suggestion that TCEQ has "accepted" its modeling is simply false. Absent this false premise – which is the linchpin of the Applicant's argument that Mr. Jamieson was under a duty to perform a "SIP demonstration" – the Applicant's claims necessarily fail. The Commission should reject the Applicant's blatant mischaracterization of the record in this case.

B. Mr. Jamieson Did Not Merely "Verify" the Applicant's Modeling.

The Applicant additionally contends that much of Mr. Jamieson's work in this case was done in the time period between the November 2009 hearing and the June 30, 2010 Agenda and that Mr. Jamieson was performing his work under a regulatory duty to "verify" the Applicant's modeling. See LBEC Exceptions at 17-22. These arguments are unavailing because at all times, Mr. Jamieson was an expert witness for the ED in an ongoing contested case proceeding and, more importantly, the record proves Mr. Jamieson did far more than simply "verify" the Applicant's modeling. Again, the Applicant mischaracterizes the record.

First, the Applicant attempts to claim that, to the extent Mr. Jamieson performed work between February 1, 2010 and June 30, 2010, his work was not done "in a contested case hearing" because the record in the initial hearing had closed. This claim is unavailing. Texas Water Code § 5.228(e) provides that the ED "may not assist a permit applicant in meeting its burden of proof in a hearing *before the commission or the State Office of Administrative Hearings.*" Tex. Water Code § 5.228(e) (emphasis added). There is no dispute that, at all relevant times since prior to the initial hearing, Mr. Jamieson has been a designated testifying expert for the ED, this matter has been before

SOAH and/or the Commission, and the Commission has not entered any final order in this matter. See Tr. 2810:22-2811:1. The ED's own witnesses admitted at the remand hearing that they were limited in their communications by the fact that they were in a contested case proceeding. Tr. at 2909-10; Remand PFD at 27-28. Accordingly, at all times, this has been a contested case hearing "before the Commission or SOAH." Moreover, even if one could read the statute as LBEC does, the record is clear that the modeling Mr. Jamieson ultimately found deficient, and that he then addressed with his own modeling, is the modeling *that the Applicant submitted in its pre-filed testimony on remand*. Tr. 2816:10-2917:19. Therefore, the specific actions which violate Texas Water Code §5.228(e) – *i.e.*, performing modeling to correct the "deficiencies" in the Applicant's pre-filed testimony modeling and then submitting that modeling as evidence in this case – unquestionably occurred after remand, in the context of the hearing before SOAH.

Second, Mr. Jamieson's work went far beyond "verifying" the Applicant's modeling. In Mr. Jamieson's own words, the Applicant's modeling contained multiple "deficiencies." See LBEC Ex. 910 at 2. Mr. Jamieson further testified under oath that, "without making any of the updates that I made and with the inconsistencies and deficiencies that I saw . . . [the Applicant's modeling] was not a sufficient demonstration." Tr. at 2882-83. Mr. Jamieson's testimony shows that it was his own modeling work, not the Applicant's, which "sufficiently demonstrate[d] that a 24-hr PM<sub>10</sub> Increment violation would not occur at a significant receptor when considering both time and space." Tr. at 2819, 2882-83. Mr. Jamieson's own words demonstrate that he made the Applicant's required showings. Tr. at 2819. Indeed, as the Judges note in the PFD,

Mr. Jamieson attempted to “verify” the Applicant’s modeling, “but found he could not, because LBEC’s modeling is deficient.” PFD at 31. Mr. Jamieson did not “verify” the Applicant’s modeling; rather he filled gaps in the Applicant’s burden of proof that were disclosed when he was unable to verify the modeling. The Applicant’s claim that Mr. Jamieson was merely “verifying” Mr. Jamieson’s work contradicts the record and defies common sense.

C. The Applicant’s Attempts to Rely on Its Own Erroneous Modeling Fail.

Next, the Applicant attempts to argue that its own modeling was nevertheless acceptable, claiming once more that its modeling was “conservative.” But as the ALJs, Mr. Jamieson and Mr. Hamilton all concluded, the Applicant’s modeling was deficient and does not suffice to meet the Applicant’s burden of proof. See Remand PFD at 28-32; Tr. at 2882-83, 3099. In fact, the ALJs already addressed the Applicant’s misplaced “conservatism” claims in the PFD on remand:

The number of problems found by Mr. Jamieson are significant, including incorrectly locating emission sources, mischaracterizing emission sources, improperly grouping emissions sources, and failing to apply wind scalars. Although the parties dispute how to correctly quantify Mr. Jamieson’s changes / corrections, it is clear that, in number, there were more than 20 made by him . . . LBEC only addressed a few of the changes and did not refute the vast majority of his modifications . . .

[T]he ALJs note that the mere fact that LBEC’s modeling may be “more conservative” (in some of its assumptions) than the ED’s does not prove it is either accurate or acceptable for the compliance demonstration. Conservatism in the methodology is not sufficient if the modeling is based upon incorrect data . . . [the ALJs] cannot agree that more conservative – but deficient – modeling proves anything, and is somehow better than less conservative modeling without deficiencies.

Remand PFD at 30-31 (emphasis added).

The evidence is undisputed that the Applicant's modeling contains dozens of errors and as such is simply wrong. The Applicant cannot fix its error-ridden modeling by simply claiming that the modeling was somehow "conservative." As the ED and the ALJs conclude, the Applicant's modeling contains numerous errors which cannot be fixed absent modeling that *corrects those errors* and verifies that the resulting emissions impacts using correct data do not exceed applicable NAAQS or PSD increments.<sup>9</sup> Consequently, the Application must be denied.

D. The Applicant Cannot Rely Upon Its Own Attempt to Introduce Mr. Jamieson's Modeling.

Finally, the Applicant claims that it has met its burden of proof by its own attempt to submit into evidence the Applicant's "post-processing" of Mr. Jamieson's modeling. See LBEC Exceptions at 25-26. Specifically, the Applicant took Mr. Jamieson's modeling, then removed those locations and times at which LBEC did not exceed the significance threshold of  $5\mu\text{g}/\text{m}^3$  in order to determine the "high second-high value when the proposed LBEC sources are predicted to be significant." *Id.* However, the Applicant's attempt to submit Mr. Jamieson's modeling as its own work likewise violates Texas Water Code § 5.228(e) because it necessarily relies upon Mr. Jamieson's work as an essential step in meeting the Applicant's burden of proof.

The Applicant admits in its Exceptions that its "post-processing" started with Mr. Jamieson's own modeling, and as such that post-processing reflects and incorporates

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<sup>9</sup> As noted in EDF's Closing Brief on Remand, Daniel Jamieson testified that sources with lower emissions rates may nevertheless have greater emissions impacts than sources with higher rates due to the number of factors that come into play in modeling emissions impacts. See Tr. 2825:21-2826:25. In this case, the Applicant has failed to even attempt to quantify the effects of its claimed "conservatism" on emissions rates. But even if it had done so, the Applicant still cannot demonstrate compliance with NAAQS and PSD increments simply by pointing to so-called "conservative" assumptions in its emission calculations –air dispersion modeling analyzing predicted impacts on ambient air must be used to prove compliance, and not emissions rate calculations themselves.

Mr. Jamieson's impermissible work. *Id.* As the Judges ruled, "it would violate the law to consider the ED's modeling" to overcome the deficiencies in LBEC's modeling. Remand PFD at 32. The Applicant cannot avoid the prohibitions of Texas Water Code §5.228(e) by simply incorporating Mr. Jamieson's modeling in its own work – otherwise, in any case the statute could be readily circumvented by the applicant's mere re-submission of the ED's evidence on rebuttal.<sup>10</sup> Accordingly, the Applicant's attempt to rely on Mr. Jamieson's modeling by performing "post-processing" fail as a matter of law.

**IV. THE EXECUTIVE DIRECTOR FAILS TO IDENTIFY ANY STATUTE OR RULE ALLOWING THE ED TO ASSIST AN APPLICANT IN MEETING ITS BURDEN OF PROOF.**

The ED also filed Exceptions to the PFD, contending that Mr. Jamieson's modeling is admissible pursuant to 30 TAC § 80.127(h), which provides that "[t]estimony or evidence given in a contested case permit hearing by agency staff regardless of which party called the staff witness or introduced the evidence relating to the documents listed in §80.118 of this title (relating to Administrative Record) or any analysis, study, or review that the executive director is required by statute or rule to perform shall not constitute assistance to the permit applicant in meeting its burden of proof." Specifically, the ED contends that Mr. Jamieson's modeling is admissible under 30 TAC §80.127(h) as "analysis ... study, or review that the [ED] is required by statute or rule to perform."

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<sup>10</sup> In its Motion to Exclude Evidence, EDF objected to *any* evidence based on the ED's modeling. See EDF Motion to Exclude Evidence at 11. In addition, EDF objected to any attempt by Applicant to itself introduce Mr. Jamieson's modeling, and was granted a running objection to such evidence. See Tr. 2710:2-10.

This claim fails as a matter of law because the ED fails to identify any “statute or rule” requiring Mr. Jamieson to perform his modeling meeting the Applicant’s burden of proof. Instead, as the specific source of the alleged “requirement” that led to the performance of Mr. Jamieson’s own modeling, the ED cites the EPA’s 1990 New Source Review Manual. See ED’s Exceptions at 4. Obviously, the 1990 NSR Manual is not a statute or a rule, and as such does not fall within the ambit of 30 TAC §80.127(h).

Furthermore, the 1990 NSR Manual does not require Mr. Jamieson to perform his own modeling fixing the errors in the Applicant’s modeling. The portion of the NSR manual on which the ED relies states as follows:

[T]he source will not be considered to cause or contribute to the violation if its own impact is not significant at any violating receptor at the time of each predicted violation. In such a case, the permitting agency, upon verification of the demonstration, may approve the permit. However, the agency must also take remedial action through applicable provisions of the state implementation plan to address the predicted violations.

See ED’s Exceptions at 4-5 (citing EPA 1990 NSR Manual at C-52) (emphasis added). As described above, here there was no “verification” of the demonstration because the Applicant failed to make a legally adequate demonstration.<sup>11</sup> Rather, Mr. Jamieson found that the Applicant’s modeling on remand was “deficient,” “not a sufficient demonstration,” and that the Applicant’s modeling “[did] not sufficiently demonstrate that a 24-hr PM<sub>10</sub> Increment violation would not occur at a significant receptor when considering both time and space.” LBEC Ex. 910 at 2; Tr. at 2882-83. Nothing in the

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<sup>11</sup> Although the ED claims that Mr. Jamieson “testified that he was able to reach the conclusion that the Applicant demonstrated that their sources would not cause or contribute to the predicted exceedances shown in the model,” the ED discloses in a footnote that there is an important qualification to this claim: namely, that this “conclusion” by Mr. Jamieson was made *prior to the remand* and with respect to the Applicant’s now-superseded rebuttal modeling. See ED’s Exceptions at 5 n.11. As discussed above, Mr. Jamieson found the Applicant’s modeling on remand “deficient.”

NSR Manual requires the ED to affirmative perform modeling *correcting* the Applicant's modeling when it cannot be verified.<sup>12</sup>

Finally, the ED contends that the modeling audit memo discussing Mr. Jamieson's modeling correcting the Applicant's modeling may be admitted as "information developed by the commission" in the course of its technical review under Texas Water Code § 5.228(a) and as "necessary parts of the administrative record" under 30 TAC § 80.118. This claim is an untenable construction of Water Code §5.228(a) and 30 TAC § 80.118. It would enable the ED to wholly avoid application of the specific, express prohibition in Texas Water Code § 5.228(e) barring the ED from assisting the Applicant in meeting its burden of proof by simply performing work assisting the Applicant and then deeming such work "information developed by the commission" or a "necessary part of the administrative record." Such a construction would render Texas Water Code §5.228(e) completely meaningless. Indeed, the ALJs have already rejected the ED's absurd construction, noting that the ED's discretion to investigate air quality does not grant the ED an exception from the prohibitions of Water Code § 5.228(e), as "[t]o do so would render the statute meaningless and would contradict the rules of statutory construction." Remand PFD at 25 n. 45.

There is no statute or rule requiring the ED to perform modeling to correct the Applicant's failure to meet its burden of proof. The ED was not in any manner required

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<sup>12</sup> In contrast to this lack of any provision in the NSR Manual requiring the ED to help the Applicant demonstrate compliance, TCEQ's own rules require *the Applicant* to submit air dispersion modeling with its Application if such modeling is required by the TCEQ. See 30 TAC § 116.111 (a)(2)(J). Furthermore, TCEQ's own modeling guidance makes clear that it is the Applicant's responsibility to perform refined modeling, not the ED's. See TCEQ Air Quality Modeling Guidelines, RG-25 at 9. These rules do not require the *ED* to perform correct air dispersion modeling; instead, they require the *Applicant* to do so.

to fix the Applicant's modeling in this case. The ED's position is unsupportable and should be rejected.

**V. THE APPLICANT'S ATTEMPT TO RELY ON EMISSIONS RATES TO AVOID A DEMONSTRATION OF COMPLIANCE IS COMICAL AND VIOLATES THE TCEQ'S RULES AND FEDERAL CLEAN AIR ACT.**

Finally, in its Exceptions, the Applicant argues that it can "meet its burden" under the Commission's Interim Order without relying on air dispersion modeling. See LBEC Exceptions at 2-5. The Applicant contends that it has complied with the first ordering provision in the Commission's July 1, 2010 Interim Order which remanded this matter to SOAH for the taking of additional evidence on "[w]hether there will be any increase in particulate matter (PM) from off-site material handling sources above what was modeled, or if the ultimate conclusions from the impacts analysis would be unchanged by secondary sources." In a blatant attempt to twist the words of the ALJs and the Commission to avoid making legally-required demonstrations, the Applicant contends that it has shown that there will be no increase in PM emissions over the total amount of emissions modeled by Joseph Kupper in the initial hearing, and that consequently no impacts analysis – i.e., air dispersion modeling – is necessary. The Applicant is wrong on both counts.

First, as discussed above, one cannot simply compare emissions rates to determine compliance with the NAAQS or PSD increments, which require an analysis of emissions impacts expressed in concentrations of contaminants per cubic meter. One must model emissions impacts because emissions rates are just one factor in determining impacts. See Tr. 2825:21-2826:25. TCEQ's own rules expressly require that the estimates of ambient concentrations of pollutants "shall be based on . . . applicable air

quality models.” See 30 TAC § 116.160(d).

In light of these requirements, the Applicant cannot avoid the legal requirement of demonstrating compliance with the NAAQS and PSD increments merely by citing to emissions rates. On remand, the Applicant has relied upon the “Option 1” and “Option 2” material handling scenarios which it now refuses to be bound to actually use. Given the Applicant’s admission that these Options do not represent actual material handling plans and that in fact other plans will be utilized for material handling, the Applicant has not proven that quantitative emissions resulting from operations of LBEC will be lower than what Mr. Kupper modeled. But even if the Applicant had made such a demonstration, nevertheless, Options 1 and 2 would need to be modeled in order to demonstrate compliance with the NAAQS and PSD. Options 1 or 2 would result in new emissions points that are not now reflected, and have never been reflected, in Mr. Kupper’s work. In addition, numerous other changes have been made to emissions points since Mr. Kupper’s modeling, including the changes resulting from amendments to POCCA permits made since the initial hearing. Worse still, as proven at the prior hearing, Mr. Kupper’s modeling contained errors even after he attempted to correct it on rebuttal. Tr. 2284:4-2285:17; 2331:8-13.

Second, the language in the Interim Order does not purport to obviate compliance with the TCEQ’s rules and 40 CFR § 52.21(k). And in fact, the ED’s own actions demonstrate that a showing of compliance by air dispersion modeling is necessary – otherwise, why would Mr. Jamieson have spent hundreds of hours reviewing the Applicant’s air dispersion modeling and then performing the ED’s own modeling? Like the Applicant’s other arguments, the Applicant’s specious claim that it can show

compliance based upon merely quantifying emissions has no basis in law or fact and must be rejected. The Applicant's disingenuous game-playing highlights once again its disdain for the applicable law and its repeated attempts to cut corners in this case.

**VI. THE APPLICANT FAILS TO PROVIDE ANY JUSTIFICATION FOR A MERCURY EMISSIONS LIMIT HIGHER THAN THE LIMIT RECOMMENDED BY THE ALJS.**

In the PFD on remand, the Judges found that there is "clear evidence . . . [f]rom LBEC's own witness and data" showing that, when pet coke alone is used as the fuel source, the proper BACT limit for mercury would be  $5.7 \times 10^{-7}$  lb/MMBTU. See Remand PFD at 48. In its Exceptions, LBEC has absolutely no response to this argument other than to claim, without explanation or justification, that the higher permitted limit for the White Stallion plant of  $8.6 \times 10^{-7}$  lb/MMBTU is appropriate. See LBEC Exceptions at 29. The record is undisputed that this higher limit results because White Stallion proposes to burn both pet coke *and coal*, and that burning coal results in higher mercury emissions. See Tr. at 97, 222-223; Remand PFD at 46-48.

It is ironic in the extreme that the Applicant, who has repeatedly insisted that it is inappropriate to consider plants which burn fuels other than pet coke in conducting BACT analyses due to the differing potentials of various fuels to produce air contaminants, now attempts to rely on the coal-based White Stallion mercury BACT limits as a justification.<sup>13</sup> The Applicant's attempt to rely on the White Stallion limit is even more ironic given that the testimony in the White Stallion case and this case establishing  $5.7 \times 10^{-7}$  lb/MMBTU represents BACT for a pet-coke fired CFB *comes*

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<sup>13</sup> See, e.g., Applicant's Closing Arguments at 50 (arguing that "comparison of BACT limits for total PM/PM<sub>10</sub> should be limited to CFB boilers firing petroleum coke because the combustion of petroleum coke has a higher potential to produce H<sub>2</sub>SO<sub>4</sub> than coal"); Applicant's Response to Closing Arguments at 62 (same).

*from the Applicant's own experts.* See Tr. 222:20-223:7 (testimony of LBEC expert Shanon DiSorbo). The undisputed technical evidence in the record establishes that mercury BACT for a proposed source burning only pet coke is  $5.7 \times 10^{-7}$  lb/MMBTU. The Commission should reject the Applicant's unjustifiable request that the Commission ignore this undisputed evidence.

**VII. THE APPLICATION CANNOT BE GRANTED DUE TO THE APPLICANT'S FAILURE TO DEMONSTRATE COMPLIANCE WITH PSD REQUIREMENTS FOR GREENHOUSE GASES.**

As noted in a letter to the Commission dated December 21, 2010, the United States Environmental Protection Agency ("EPA") has promulgated a partial disapproval of the Texas PSD program and issued a interim final rule whereby EPA has assumed permitting authority for certain greenhouse gas ("GHG") emitting sources in Texas effective January 2, 2011. See 75 FR 82430 (December 30, 2010).

There is no dispute that the Applicant has failed to make any demonstration in this case related to GHGs. Likewise, there is no dispute that at present the Applicant has failed to submit to the EPA any information or demonstrations regarding GHG emissions or obtain any permitting approvals from the EPA with respect to GHGs. Accordingly, as a matter of law the requested permits cannot issue in this case for the additional reason that the Applicant has failed to demonstrate compliance with applicable GHG PSD requirements.

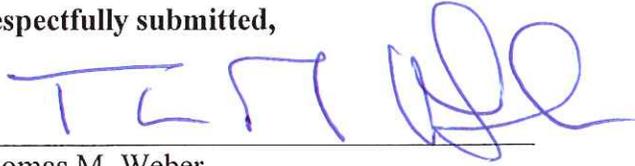
## VIII. CONCLUSION

For nearly two years, the Applicant has played hide the ball and refused to disclose how the seven million tons per year of petroleum coke and limestone required for the proposed LBEC will be handled – a critical issue because LBEC will be located in an area that already has high levels of PM emissions. Now, the Applicant admits that the material handling plans it introduced at the remanded hearing do not reflect its actual plans, revealing that such fictional plans were submitted merely as a ruse to obtain a permit.

The Applicant's actions prove once and for all that LBEC's Application is a farce and that the Applicant has no intention of ever demonstrating how it will comply with applicable NAAQS and PSD increments. The Commission must issue permits based upon facts, sound science, and the binding representations of applicants – not based upon fictional exercises. The Applicant should not be permitted to continue wasting the Commission's and the Parties' time in its attempt to obtain an Application based on purely hypothetical material handling plans that it has no intention of using and that it admits were concocted "strictly for demonstrative purposes." For these reasons and the other reasons identified by the Protestants and in the Judges' PFD on remand – including the ED's violations of Texas Water Code § 5.228(e) – the Application should be denied.

**WHEREFORE, PREMISES CONSIDERED**, EDF respectfully requests that the Application be denied, or, additionally and/or in the alternative, that the Applicant be required to re-file its Application pursuant to Texas Health & Safety Code §382.0291(d), comply with all requirements of such statute, prior to any further consideration of such Application. Further, EDF requests that the Judges and TCEQ grant such other and further relief to which EDF and the other Protestants show themselves entitled.

**Respectfully submitted,**



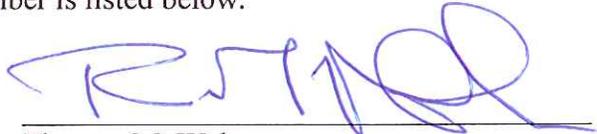
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**CERTIFICATE OF SERVICE**

I certify that on January 3, 2011 a true and correct copy of the foregoing document 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.



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Thomas M. Weber

## 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

<b>STATE OFFICE OF ADMINISTRATIVE HEARINGS</b>	<b>CRAIG R. BENNETT TOMMY L. BROYLES ADMINISTRATIVE LAW JUDGES</b>
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