

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

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

**SIERRA CLUB’S REPLY TO EXCEPTIONS  
TO THE PROPOSAL FOR DECISION ON REMAND**

**TO THE HONORABLE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:**

**COMES NOW** Protestant Sierra Club and files this Reply to Exceptions to the Proposal for Decision on Remand (“PFD on Remand”) submitted by the Administrative Law Judges (“ALJs” or the “Judges”) in the above referenced dockets.

**I. INTRODUCTION**

As summarized by the ALJs in the PFD on Remand, Las Brisas Energy Center, LLC’s (“Applicant” or “LBEC”) Application<sup>1</sup> is fatally deficient and should be denied by the Texas Commission on Environmental Quality (“TCEQ” or the “Commission”). Despite ample opportunity, the Applicant failed to meet its burden to demonstrate that LBEC’s proposed facility will not cause or contribute to air pollution in violation of the federal standards, specifically to a violation of the PM<sub>10</sub> Prevention of Significant Deterioration (“PSD”) increment.

In response to the ALJs’ refusal to recommend permit issuance, LBEC presents a number of factually distorted and confusing arguments to distract from the glaring deficiencies in both the Application and LBEC’s evidence in this case. LBEC misrepresents testimony of Executive

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<sup>1</sup> These Exceptions collectively refer to Applicant’s PSD permit application (PSD-TX-1138), its hazardous air pollutant application (HAP 48), its plant-wide applicability limit (PAL 41) and state air quality permit (85013) as the “Application.”

Director (“ED”) witnesses, resuscitates issues well-settled during the original November 2009 hearing, and rather than directly address the ALJs’ and Protestants’ concerns, engages in finger pointing and blame shifting. LBEC has had more than sufficient opportunity, including two contested case hearings, to demonstrate that the power plant will comply with all applicable state and federal requirements. Yet, despite this extraordinary opportunity, in terms of both time and resources of the TCEQ, ALJs, and Protestants, the ALJs correctly concluded that LBEC has not demonstrated that emissions from the power plant will not violate the PSD increment for PM<sub>10</sub>. No amount of theatrics by LBEC can alter this fact.

Furthermore, Sierra Club contends that the Application suffers from a host of other fatal defects, including: (1) a failure to treat emissions from material handling operations as part of the same “stationary source” as the power plant; (2) a failure to apply Best Available Control Technology (“BACT”) to material handling operations; (3) a failure to conduct a case-by-case Maximum Achievable Control Technology (“MACT”) analysis for the main boilers; (4) a failure to complete a BACT analysis to determine whether selective catalytic reduction (“SCR”) is BACT for nitrogen oxides (“NO<sub>x</sub>”) control; (5) improper BACT limits for at a minimum, total PM (PM/PM<sub>10</sub>), mercury, carbon monoxide (“CO”), and sulfuric acid mist (“H<sub>2</sub>SO<sub>4</sub>”); (6) a failure to consider carbon dioxide (“CO<sub>2</sub>”) emissions; (7) a failure to demonstrate compliance with the new nitrogen dioxide (“NO<sub>2</sub>”) and sulfur dioxide (“SO<sub>2</sub>”) National Ambient Air Quality Standards (“NAAQS”); (8) failure to utilize a PM continuous emissions monitoring system; and (9) improper reliance on the PM<sub>2.5</sub> surrogacy policy, among other problems.

Therefore, Sierra Club respectfully urges the Commissioners to either deny the permit or, in the alternative, remand the Application pursuant to Texas Health and Safety Code

§ 382.0291(d), so that LBEC can amend its Application to properly address the many deficiencies identified by the ALJs and Protestants.

**II. THE ED'S MODELING CANNOT BE CONSIDERED BY THE COMMISSION, BECAUSE THE ED IMPROPERLY ASSISTED LBEC IN MEETING ITS BURDEN OF PROOF IN VIOLATION OF TEXAS WATER CODE § 5.5228(e)**

In the PFD on Remand, the ALJs correctly conclude that Texas Water Code § 5.5228(e) precludes the ED from assisting LBEC in meeting its burden of proof in a contested case hearing before the State Office of Administrative Hearings (“SOAH”).<sup>2</sup> Thus, LBEC is not entitled to rely on air dispersion modeling performed by the ED’s air modeling expert, Daniel Jamieson of the Air Dispersion Modeling Team (“ADMT”), which corrects significant errors in LBEC’s modeling. The ALJs concluded that without the ED’s modeling, LBEC cannot demonstrate that LBEC’s proposed facility will not cause or contribute to air pollution in violation of the federal standards, specifically to a violation of the PM<sub>10</sub> Prevention of Significant Deterioration (“PSD”) increment, and hence cannot satisfy the burden of proof required for permit issuance.

In its Exceptions to the PFD, LBEC contends that the ALJs are “mistaken” and offers a host of factually contorted and legally flawed arguments to support its ability to rely on Mr. Jamieson’s modeling to satisfy its burden of proof.<sup>3</sup> LBEC’s analysis fails for a number of reasons. First, LBEC completely eviscerates the meaning of Texas Water Code § 5.228(e), a result plainly disfavored under the fundamental principles of statutory interpretation. Second, contrary to LBEC’s assertions, the ALJs correctly determined that the ED was not legally required to perform additional modeling for SIP purposes in this permit proceeding. Third, LBEC improperly concludes that Mr. Jamieson’s modeling took place outside of the contested

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<sup>2</sup> PFD on Remand at 14.

<sup>3</sup> LBEC’s Exceptions to the PFD on Remand at 5-6.

case process, ignoring TCEQ precedent and rules. And finally, LBEC unjustly attempts to blame the ALJs for the position it now finds itself in, a distracting and meaningless attempt to shift the Commission's attention from the Application's fundamental deficiencies.

**A. Allowing LBEC to Rely on the ED's Modeling Would Eviscerate the Meaning of Texas Water Code § 5.228(e).**

In 2001, in an effort to address the concern that the TCEQ Executive Director appeared in contested cases as an advocate for the permit, the legislature limited the role of the ED in contested permit hearings. The 2001 Sunset Review had revealed widespread concern that in many contested permit cases, the ED was seen as bolstering the applicant or carrying the applicant's burden of proof. In its recommendations to the full legislature, the Sunset Commission noted that "[a]s permit writer and advocate for the permit in contested cases, the staff gives the impression of working against the interests of permit protestants and swaying permitting decisions in favor of the applicants."<sup>4</sup> In response, the legislature added the statutory provision specifying that the Executive Director's sole and limited role in a contested case is to provide information necessary to complete the administrative record.<sup>5</sup> Furthermore, the ED "may not assist a permit applicant in meeting its burden of proof."<sup>6</sup> As the ALJs correctly concluded, to allow the ED to assist LBEC in meeting its burden to demonstrate that emissions from LBEC will not violate the PM<sub>10</sub> PSD increment, would run afoul of this statutory mandate.

Rather than address the meaning and plain language of Texas Water Code § 5.228, LBEC argues that TCEQ rules permit LBEC to rely on Mr. Jamieson's extensive modeling work to demonstrate that its Application meets the applicable requirements. Specifically, LBEC asserts

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<sup>4</sup> 2001 Sunset Commission Report to the 77<sup>th</sup> Legislature, at p.186, available at <http://www.sunset.state.tx.us/77threports/tnrcc/tnrcc.pdf> at p 73.

<sup>5</sup> TEX. WATER CODE § 5.228(c).

<sup>6</sup> TEX. WATER CODE § 5.228(c)-(e).

that Mr. Jamieson’s modeling audit was necessary to reflect the technical review of the application under 30 Tex. Admin. Code § 80.118(a). LBEC’s “analysis” renders Texas Water Code § 5.228(e) virtually meaningless. 30 TAC § 80.118(a)—which provides that “[i]n all permit hearings, the record in a contested case includes at a minimum the following certified copies of documents: . . . any agency document determined by the executive director to be necessary to reflect the administrative and technical review of the application”—does not grant the ED free reign to bear the burden of proof for the applicant. If the Commission reads this provision so expansively, such that the ED can perform hundreds of hours of modeling for an applicant to meet the applicant’s burden of proof at a contested case hearing, then Texas Water Code § 5.228(e) has no meaning and the legislative intent is thwarted.<sup>7</sup>

If the Commission allows LBEC to rely on the ED’s modeling to meet its burden of proof, the Commission will not only violate the clear meaning of the statute, but will give the appearance of “working against the interests of permit protestants and swaying permitting decisions in favor of the applicants,” the very problem that Texas Water Code § 5.228(e) was intended to prevent. Thus, the Commission should adopt the ALJs’ recommendation and decline to issue the permit in this case.

**B. The ALJs Properly Concluded that the ED Was Not Legally Required to Perform Additional Modeling for SIP Purposes.**

1. *The ED’s Modeling Was Not a Review that the ED Was Required By Statute or Rule to Perform Under Texas Administrative Code § 80.127(h).*

Tex. Admin. Code § 80.127(h) provides that: “any analysis, study, or review that the executive director is required by statute or rule to perform shall not constitute assistance to the

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<sup>7</sup> *Texas Mut. Ins. Co. v. Vista Community Medical Center, LLP*, 275 S.W.3d 538, 557 (Tex. App.)—Austin 2008, pet denied; *National Plan Administrators, Inc. v. Nat’l Health Ins. Co.*, 235 S.W.3d 695, 701 (Tex. 2007) (holding that courts should not interpret statutes in a manner that leads to absurd results).

permit applicant in meeting its burden of proof.” According to LBEC, pursuant to this TCEQ rule, the ED’s “review” of LBEC’s modeling (*i.e.*, 200-300 hours correcting deficiencies and re-running the modeling to demonstrate compliance for LBEC) was permissible. Yet, LBEC never specifies exactly what statute or rule required the ED’s “review” during the contested case hearing process. However, in the ED’s Exceptions to the PFD on Remand, the ED asserts that EPA’s 1990 Draft New Source Review (“NSR”) Workshop Manual (“Draft NSR Manual”) required Mr. Jamieson to perform his additional “review.”<sup>8</sup>

The Draft NSR Manual is not a rule or statute, but instead an agency guidance document.

The Preface to the manual states:

This document was developed for use in conjunction with new source review workshops and training, and to guide permitting officials in the implementation of the new source review (NSR) program. It 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 plans. Rather, the manual is designed to (1) describe in general terms and examples the requirements of the new source regulations and pre-existing policy; and (2) provide *suggested* methods of meeting these requirements, which are illustrated by examples. **Should there be any apparent inconsistency between this manual and the regulations (including any policy decisions made pursuant to those regulations), such regulations and policy shall govern.** This document can be used to assist those people who may be unfamiliar with the NSR program (and its implementation) to gain a working understanding of the program.<sup>9</sup>

Thus, the manual establishes no “binding regulatory requirements” and did not require Mr. Jamieson to perform his additional “review” during the contested case process.

Moreover, if the ED is required to perform any additional modeling to substantiate and address a PSD increment issue, then that modeling should be done outside the scope of this

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<sup>8</sup> The ED never directly states that the EPA 1990 Draft NSR Workshop Manual is a statute or rule under Tex. Admin. Code § 88.127(h).

<sup>9</sup> ED Ex. No. 4 at 1 (Bates p. 97).

contested case proceeding.<sup>10</sup> In a prior contested case hearing, the ED made this very claim. Specifically, in the NRG Limestone Unit 3 hearing, the ED argued that the requirement for the State to substantiate and to mitigate a predicted PSD increment violation is “not applicable” within the permit hearing context.<sup>11</sup> On June 23, 2009, ALJs Bennett and Broyles issued a proposal for decision in the same contested case, finding, among other things, that: “[Sierra Club’s modeler] Ms. Sears found impacts above the 24-hour average PM<sub>10</sub> PSD increment of 30 µg/m<sup>3</sup>.”<sup>12</sup> Based on this, the ALJs recommended that the ED takes steps to substantiate the violation and to correct it through the SIP.<sup>13</sup> Thus, as previously recognized by the ED, the ED is not required to perform SIP modeling take place during the contested case process, and hence Texas Administrative Code § 80.127(h) does not trump Texas Water Code § 5.228(e).

2. *The ED Never Found LBEC’s **Remand Modeling** to Be Acceptable.*

In the PFD, the ALJs concluded that: “if Mr. Jamieson had found LBEC’s modeling to be acceptable and demonstrative of at least one valid predicted violation occurring at a time and place other than those when LBEC source emissions were significant, then he would have had the duty to proceed and to address the state’s SIP concerns. But Mr. Jamieson did not make such a finding.” According to LBEC, its timeline “clearly demonstrates that the ALJs are incorrect.”<sup>14</sup>

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<sup>10</sup> While we do not agree that the Clean Air Act allows PSD permits to be issued when modeling shows that there is no available increment, we acknowledge that EPA guidance allows, and applicants routinely conduct, culpability analyses in order to show that the proposed new emissions do not cause or contribute significantly to the predicted violation at the exact time and place of the predicted increment violation. EPA’s guidance clearly states that, in such situations, the preconstruction permit may not issue unless the State takes action to mitigate the violation through the SIP. *See* Sierra Club Ex. No. 240 (USEPA Memo, from Gerald Emison to Thomas Maslany, re Air Quality Analysis for PSD (July 5, 1988)). However, EPA guidance does not require TCEQ to perform such modeling during the contested case process.

<sup>11</sup> Executive Director’s Exceptions to the ALJs’ PFD and Order, TCEQ Docket No. 2007-1820-AIR, at p. 8, July 13, 2009 (“Therefore, the second part of the EPA guidance that the ED undertake some action is not applicable.”)

<sup>12</sup> Finding of Fact No. 130, Proposal for Decision re Application of NRG Texas Power LLC for State Air Quality Permit 79188, Prevention of Significant Deterioration Air Quality Permit PSD-TX-1072, and MACT HAP-14 Permit, at p. 18, June 23, 2009, available at: <http://www.soah.state.tx.us/pfdsearch/pfds/582/08/582-08-0861-pfd1.pdf>

<sup>13</sup> *Id.* at p. 69.

<sup>14</sup> LBEC’s Exceptions at 12.

Yet, LBEC's entire analysis blatantly misconstrues the series of events during the remand hearing, insinuating that the ED found LBEC's modeling **both** acceptable and demonstrative of at least one predictive violation occurring at a time and place other than those when LBEC source emissions were significant. LBEC's statement is misleading at best. Contrary to LBEC's repeated claims, the ED's ADMT never found LBEC's *remand modeling* (in contrast to modeling submitted prior to the original November 2009 hearing) to be acceptable.

The record clearly establishes that the ADMT did not find LBEC's remand modeling acceptable prior to performing the additional modeling for state implementation plan ("SIP") purposes. Prior to the original November 2009 hearing, the ED found Applicant's original modeling to be acceptable.<sup>15</sup> However, whether or not the ADMT approved LBEC's original modeling is irrelevant. The original modeling failed to include material handling operations, a glaring deficiency that necessitated remand of this case after the first contested case hearing. ADMT *never* approved LBEC's remand modeling, submitted by LBEC "as part of [LBEC's] pre-filed direct testimony for an upcoming case hearing" on July 15, 2010, along with a modeling discussion and other supporting documentation on July 21, 2010, updated modeling files and a revised modeling discussion on July 28, 2010, and additional documentation to support the representations made in the modeling analyses on August 20, 2010.<sup>16</sup> In the August 25, 2010 "Second Modeling Audit," Mr. Jamieson cited multiple deficiencies in the Applicant's pre-filed testimony modeling, including: (1) sources were not consistent with their permit representations, and (2) there was insufficient data for the worst case operating scenario relied on

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<sup>15</sup> However, after Protestant pointed out numerous deficiencies in LBEC's initial modeling submission, the ED altered its position. See ED's Closing Arguments ("[T]he Applicant provided additional modeling to correct some of the *source locations that were not properly sited.*")

<sup>16</sup> ED. Ex. 51 at 1.

in the modeling analysis.<sup>17</sup> Mr. Jamieson concluded that “given the deficiencies listed below, the applicant has not sufficiently demonstrated that a 24-hour PM10 increment violation would not occur at a significant receptor when considering both time and space.”<sup>18</sup> Thus, contrary to LBEC’s claim, Mr. Jamieson and the ED did not find the Applicant’s remand modeling to be acceptable before proceeding to perform the modeling for SIP purposes.

**C. The ALJs Properly Concluded that Mr. Jamieson’s Verification of LBEC’s Modeling Took Place During the Contested Case Hearing.**

Next, LBEC attacks the ALJs’ finding on the flimsy theory that Mr. Jamieson’s work was done outside of the contested case hearing process. However, first, LBEC incorrectly restricts the meaning of contested case hearing to only the evidentiary hearing itself, rather than the entire contested case hearing process. Assuming LBEC’s instructive “timeline” is correct, and Mr. Jamieson’s modeling took place “prior to June 30, 2010” and between July 15 and August 25, 2010, the modeling nonetheless occurred during the contested case process. The ED has “long considered the reference to a ‘public hearing’ in Tex. Health & Safety Code section 382.0291(d) to mean the entire hearing process beginning with the preliminary hearing where the ALJs take jurisdiction over the application, **and not the evidentiary hearing alone.**”<sup>19</sup> Here, the contested case hearing process began well before 2009 and Mr. Jamieson had been designated as a witness for the ED in the contested case for this entire period. Therefore, LBEC’s attempt to artificially limit the contested case hearing to the evidentiary record is incorrect and unsupported.

Second, LBEC suggests that even if Mr. Jamieson performed the work for his Second Modeling Audit memo between July 15 and August 25, 2010, after the remand to SOAH,

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<sup>17</sup> ED Ex. 51 at 2.

<sup>18</sup> *Id.*

<sup>19</sup> Letter from Booker Harrison, Senior Attorney, Environmental Law Division, Texas Commission on Environmental Quality, to the Honorable Craig Bennett and the Honorable Tommy Broyles, Administrative Law Judges, State Office of Administrative Hearings, April 30, 2008 (Attachment A).

because he used his “post-close-of the evidentiary record, pre-remand modeling as a starting point” that somehow the modeling is “permissible.” Sierra Club fails to recognize the significance of this distinction. Mr. Jamieson ran the modeling during the remand hearing, even according to LBEC’s unsupported, shortened understanding of the hearing period. This modeling was conducted between July 15 and August 25, 2010, the results of which were presented in the Second Modeling Audit.<sup>20</sup> As confirmed by ED’s witnesses, Mr. Jamieson and Randy Hamilton, the ED’s modeling was necessary for the ED to recommend approval of the permit in this case, because according to the ED and the ALJs, it was the *only* modeling that demonstrated that the proposed LBEC does not cause or significantly contribute to the predicted exceedances of the 24-hour PM<sub>10</sub> PSD increment.<sup>21</sup> When asked whether the Applicant had sufficiently shown that there would be no violations of the 24-hour PM<sub>10</sub> PSD increment, Mr. Jamieson testified: “[w]ithout making any of the updates that I made and with the inconsistencies and deficiencies that I saw, I would say, no, that it was not a sufficient demonstration.”<sup>22</sup> Likewise, Mr. Hamilton testified that Mr. Jamieson’s modeling “was a necessary part of getting the executive director’s approval of the proposed permit.”<sup>23</sup> Thus, whether or not Mr. Jamieson relied on work done prior to the remand hearing is irrelevant. Without Mr. Jamieson’s modeling performed between July 15 and August 25 and the August 25,

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<sup>20</sup> See ED Ex. 51.

<sup>21</sup> 12 Tr. 2882-2883 (Jamieson) (when asked whether the Applicant had sufficiently shown that there would be no violations of the 24-hour PM<sub>10</sub> PSD increment, answering: “Without making any of the updates that I made and with the inconsistencies and deficiencies that I saw, I would say, no, that it was not a sufficient demonstration”); 13 Tr. 3099 (Hamilton) (“testifying that Mr. Jamieson’s modeling “was a necessary part of getting the executive director’s approval of the proposed permit.”).

<sup>22</sup> 12 Tr. 2882-2883.

<sup>23</sup> 13 Tr. 3099.

2010 Second Modeling Audit, LBEC could not prove that emissions from LBEC will not violate the PM<sub>10</sub> PSD increment,<sup>24</sup> and the ED could not recommend granting the permit.

Therefore, the ALJs correctly concluded that the ED's modeling took place during the contested case hearing, and was a violation of Texas Water Code § 5.228(e). The Commission should disregard LBEC's strained and manufactured arguments to the contrary.

**D. If the Entire Remand Exercise Is Indeed a “Perfect Catch 22,” Only the Applicant Is to Blame.**

LBEC wraps up its confused argument regarding the ED's modeling, by suggesting that even if the ED did assist LBEC in meeting its burden of proof, the ALJs, rather than LBEC, are to blame. Only because the ALJs insisted that LBEC fulfill the statutory requirement to demonstrate that LBEC will not violate the 24-hour PM<sub>10</sub> PSD increment, was Mr. Jamieson's modeling conducted during the contested case hearing (and hence in violation of Texas Water Code § 5.228(e)). Once again, LBEC appears to forget that it has the burden of proof in this hearing, and that the ALJs role is to “call balls and strikes”<sup>25</sup> rather than assist the applicant in meeting its burden. LBEC is solely to blame for this deficiency in the evidentiary record.

During the original hearing, Applicant's air dispersion modeling suffered from a host of deficiencies, such that the ALJs recommended that the Application be denied or remanded on this basis alone:

The recommendation for a remand or denial is not made lightly, but is made considering the combined weight of concerns regarding material handling at secondary sources, the lack of planning or consideration of material handling onsite, the improper adjustment to the moisture content of the material handled by

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<sup>24</sup> Sierra Club maintains that even with the ED's remand modeling, LBEC cannot demonstrate that it will not violate the 24-hour PM<sub>10</sub> PSD increment. EDF expert witness Dr. Gasparini demonstrated that emissions from the entire stationary source—LBEC and the POCCA Bulk Docks—exceed the 24-hour PM<sub>10</sub> PSD increment on numerous occasions. See EDF Ex. Nos. 405 & 411.

<sup>25</sup> Cover Letter to PFD on Remand at 2.

POCCA, and the several mistakes in locating nearby facilities for modeling purposes.<sup>26</sup>

Then, when given a second chance to correct these numerous deficiencies, LBEC instead persuaded the Commission to remand the Application to SOAH rather than to the ED. If LBEC had re-submitted its Application, as urged by Protestants, LBEC could have resubmitted corrected air dispersion modeling. And, more importantly, any work that was done by the ED and his staff would have been part of their technical review (and would have been subject to public notice), and would not have been undertaken during a contested case hearing. Sierra Club agrees with the ALJs that “[h]ad this matter been remanded to the ED for proper technical review, as was requested by Protestants, the ED would have been better situated to perform his regulatory duties in the ordinary course of action.”<sup>27</sup> Thus, LBEC itself, not the ALJs, is solely to blame for the situation it now finds itself in.

### **III. MATERIAL HANDLING**

#### **A. The Applicant Has Not Demonstrated That It Will Not Exercise Control Over Material Handling Operations.**

In Applicant’s Exceptions to the PFD on Remand, LBEC demonstrates, yet again, that it has failed to meet its burden of proof regarding emissions from material handling operations. LBEC repeatedly refers to the “hypothetical off-site material handling options”<sup>28</sup> and “hypothetical scenarios” developed and modeled “strictly for demonstration purposes,”<sup>29</sup> backpedalling from prior statements in order to avoid properly accounting for emissions from these sources. While repeatedly stressing the “hypothetical” nature of the material handling

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<sup>26</sup> Original PFD at 51.

<sup>27</sup> *Id.* at 28.

<sup>28</sup> LBEC’s Exceptions to the PFD on Remand at 26.

<sup>29</sup> *Id.* at 27.

operations, LBEC simultaneously claims that it cannot exercise control over these significant sources of emissions.

If these scenarios are only “hypothetical,” LBEC cannot possibly demonstrate that it has delegated control over material handling operations to another entity, such as the Port of Corpus Christi Authority (“POCCA”), and consequently, retains control over material handling itself. In fact, if the Commission grants LBEC’s permit as-is, LBEC retains complete control over these sources of emissions. Even with a permit condition binding LBEC to the POCCA Bulk Dock “options” or options that have emissions impacts that are no worse than the modeled options, LBEC could exercise complete control over the sources via ownership of the POCCA Bulk Docks property, via a contractual agreement with POCCA granting LBEC operational control, by satisfying EPA’s case-by-case common control analysis, or via some entirely new arrangement, not involving POCCA, and not presented by LBEC during the course of the contested case hearing.<sup>30</sup>

Regardless of LBEC’s tactical decision to refer to the POCCA Bulk Dock options as “hypothetical,” abundant evidence presented at the remand hearing shows that LBEC and the POCCA Bulk Docks constitute a single “major stationary source” under the federal Clean Air Act for purposes of PSD review. LBEC and the material handling operations are located on one or more contiguous or adjacent properties; the material handling operations are a support facility

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<sup>30</sup> Key factors to the control analysis, as reflected in EPA guidance, include: interrelatedness/operational support; sharing of equipment, including pollution control equipment; general contractual arrangements; and financial arrangements. *See* Letter from William A. Spratlin, Director, Air, RCRA, and Toxics Division, EPA Region VII, to Peter R. Hamlin, Chief, Air Quality Bureau, Iowa Department of Natural Resources (Sept. 18, 1995); Memorandum from John S. Seitz, Director, Office of Air Quality Planning and Standards, regarding Major Source Determinations for Military Installations under the Air Toxics, New Source Review, and Title V Operating Permit Programs of the Clean Air Act, at 10 (Aug. 2, 1996).

to the power plant;<sup>31</sup> and they are under common control,<sup>32</sup> thereby satisfying EPA's three prong "single source" test.<sup>33</sup> As such, LBEC has failed to adequately consider emissions from the material handling facilities in both its modeling analysis and BACT analysis, and the Application should be denied.

**B. Material Handling Operations Are Part of the Same Stationary Source as LBEC, and at the Very Least Must Be Accounted for as Secondary Emissions.**

Not only does LBEC insist that the material handling operations that it modeled in order to satisfy its burden of proof are "hypothetical," the Applicant suddenly urges the Commission that emissions from material handling operations are not secondary emissions (let alone emissions from the same stationary source as the power plant). The record decisively establishes that emissions from LBEC's material handling operations are *at the very least* secondary emissions. The federal and state regulations define secondary emissions in substantially the same way:

*Secondary emissions* means 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 major stationary source or major modification itself. Secondary emissions include emissions from any offsite 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, such as emissions from the tailpipe of a motor vehicle, from a train, or from a vessel.<sup>34</sup>

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<sup>31</sup> EPA has longstanding policy that facilities may be aggregated, even if they have different Standard Industrial Classification ("SIC") codes, if they are "support facilities" that are integrally related to the primary activity at the site. EDF Ex. 326 (45 Fed. Reg. 52,695 (Aug. 7, 1980)). Under EPA's longstanding "support facility" test, the Bulk Docks would support the primary activity of LBEC, power generation, by supplying the necessary fuel and other materials the plant needs in order to run. Therefore, LBEC and the Bulk Docks have the functional relationship necessary for classification as a single source for PSD purposes.

<sup>32</sup> See Sierra Club's Closing Arguments on Remand and Reply to Closing Arguments on Remand for a detailed discussion of the common control prong of the analysis.

<sup>33</sup> 40 C.F.R. §§ 52.21(b)(5) & (b)(6).

<sup>34</sup> 40 C.F.R. § 52.21(b)(18).

Rather than describe the ample evidence demonstrating that LBEC's material handling emissions are *at the very least* secondary emissions, Sierra Club reiterates the Judges discussion in the their March 29, 2010 PFD ("Original PFD"):

If the four criteria for secondary emissions are met—they must be specific, well-defined, quantifiable, and impact the same general area . . . the rules appear to indicate that the secondary emissions should be considered as if they were emissions from the major stationary source itself. The evidence in this case establishes that the four criteria are met: the actual increases in emissions are specific, well-defined, quantifiable, and impact the same general area. They are from off-site support facilities that would not be constructed or experience an increase in emissions, except for the operations of the stationary source. The ALJs **do not believe that any party disagrees on this limited point**, particularly given that the POCCA dock emissions are remarkably similar to the quarry example in the NSR Manual, as discussed above.<sup>35</sup>

Apparently recognizing the weakness of its argument, LBEC attempts to confuse the meaning of secondary emissions with the test for a single stationary source. LBEC claims that: "off-site material handling emissions are out of its control and, consequently, are not specific, well-defined, and quantifiable."<sup>36</sup> However, control does not factor in to whether or not emissions constitute secondary emissions. Neither the federal regulatory definition cited above, nor EPA guidance described by the ALJs require control over secondary emissions. Therefore, LBEC's blatantly incorrect argument should be disregarded.

**C. LBEC Must Be Legally Bound to a Material Handling Operations Scenario or the Permit Should Not Be Issued.**

The Application lacks the required BACT analysis and modeling analysis for material handling operations. For this reason alone, Sierra Club contends that the Application is deficient and should be denied. Furthermore, the ALJs proposal to allow LBEC to overcome this flaw by allowing LBEC to "treat the two material handling options as included in the Application" would

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<sup>35</sup> Original PFD at 43.

<sup>36</sup> LBEC's Exceptions to the PFD on Remand at 27.

circumvent the requirement that “the *application must include*” “information which demonstrates that emissions from the facility” satisfy all PSD permitting requirements.”<sup>37</sup> As Protestant Environmental Defense Fund (“EDF”) pointed out in its Exceptions to the PFD on Remand, absent evidence that the Application has committed to a specific material handling plan in its Application, the Applicant has failed to demonstrate compliance with applicable requirements, such as the PSD increments, and cannot be granted without an amendment.<sup>38</sup> Nevertheless, if the Commission declines to order LBEC to re-file and re-notice its application with the requisite material handling operations information, in compliance with Texas statutory requirements, then LBEC will, at the very least, be bound by its representations concerning material handling during the remand hearing.<sup>39</sup>

Without a clear commitment for material handling operations, the permit should not be issued.<sup>40</sup> Federal and state rules require LBEC to demonstrate that emissions from the power plant, including secondary emissions, will not cause or contribute to air pollution in violation of any NAAQS or PSD increments.<sup>41</sup> Unless LBEC commits to a material handling operations plan, LBEC cannot meet this burden. As the ALJs noted, “[o]therwise, LBEC’s modeling shows

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<sup>37</sup> PFD on Remand at 39.

<sup>38</sup> See TEXAS HEALTH & SAFETY CODE § 382.0291(d) (“An applicant for a license, permit, registration, or similar form of permission required by law to be obtained from the commission may not amend the application after the 31<sup>st</sup> day before the date on which a public hearing on the application is scheduled to begin. If any 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.”)

<sup>39</sup> 30 TEX. ADMIN. CODE § 116.116(a).

<sup>40</sup> Sierra Club further contends that the permit cannot issue even if LBEC is bound to the POCCA Bulk Dock options, because the material handling operations remain part of the same stationary source. And, as described above, EDF expert witness Dr. Roberto Gasparini’s modeling demonstrates that emissions from the stationary source will repeatedly violate the 24-hour PM<sub>10</sub> PSD increment. Furthermore, LBEC has not conducted the requisite BACT analysis for emissions from material handling operations.

<sup>41</sup> 30 TEX. ADMIN. CODE § 116.160; 40 C.F.R. §52.21(k).

only that it is *possible to comply* with applicable air quality standards,” not that the facility actually will comply.<sup>42</sup>

LBEC cannot avoid any commitment on material handling operations by alleging that the POCCA Bulk Dock “scenarios” are “extremely conservative” and “unrealistic.” First, if the “scenarios” are as conservative as LBEC suggests, then LBEC should have no problem committing to either one of the modeled POCCA Bulk Dock options or an option with emissions impacts that are no worse than the modeled options. Furthermore, if the scenarios are indeed unrealistic, LBEC cannot rely on the POCCA Bulk Dock options to satisfy its burden of proof. The Applicant created farfetched options for its material handling operations—a mile long conveyer to deliver the over seven million tons per year of petroleum coke and limestone necessary to operate the power plant every year—and insisted that the emissions generated by these operations should not be considered part of the same stationary source. As Protestants have pointed out, LBEC appears to have concocted this material handling scheme solely to avoid modeling violations of the 24-hour PM<sub>10</sub> PSD increment. Yet, when presented with a finding by the ALJs that LBEC must be *bound* by its own plans, the Applicant argues that the options are too unrealistic and farfetched for compliance. LBEC cannot utilize its own “unrealistic” scheme to circumvent PSD permitting requirement, and then refuse to be bound by the scheme. To allow so would render the entire permitting process utterly meaningless.<sup>43</sup>

#### **IV. AIR QUALITY IMPACTS MODELING**

As Sierra Club explained in its Closing Brief on Remand, LBEC’s Application lacks the requisite demonstrations of compliance with the new NO<sub>2</sub> and SO<sub>2</sub> NAAQS, and therefore must

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<sup>42</sup> PFD on Remand at 37.

<sup>43</sup> Furthermore, whether LBEC likes it or not, they are bound by representations in their Application. 30 TAC 116.116(a).

be denied. In addition to the clear statutory language and applicable federal and state regulations and guidance indicating that a new NAAQS takes immediate effect,<sup>44</sup> recent briefing by EPA makes the point even clearer:

The new hourly NO<sub>2</sub> NAAQS became effective on April 12, 2010. . . Prior to this date, EPA issued a memorandum explaining that applicable statutes and regulations preclude the Agency from issuing a PSD permit without a demonstration that the source will not cause or contribute to a violation of the new hourly NO<sub>2</sub> standard. . . In two previous instances, EPA has established by rule exemptions for permit applications that were determined complete prior to the revision of a National Ambient Air Quality Standard for particulate matter. . . However, since EPA did not promulgate such an exemption applicable to the hourly NO<sub>2</sub> standard, existing regulations require *permits issued after April 12, 2010 to be supported by a demonstration that the proposed source will not violate the hourly NO<sub>2</sub> NAAQS*.<sup>45</sup>

Likewise, EPA did not promulgate an exemption applicable to the new one-hour primary SO<sub>2</sub> NAAQS.<sup>46</sup> LBEC's permit has not yet issued and thus, will issue (if at all) after April 12, 2010 and August 23, 2010, the effective dates for the NO<sub>2</sub> and SO<sub>2</sub> NAAQS, respectively.<sup>47</sup> Therefore, the Commission must either deny LBEC's Application or require the Applicant to re-notice and re-file an amended application that includes the necessary demonstrations showing compliance with the new national health-based ambient standards.

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<sup>44</sup> The federal Clean Air Act and applicable regulations require a PSD permit applicant to demonstrate that its facility will not cause or contribute to a violation of "any" NAAQS. See 42 U.S.C. § 7475(a)(3); 40 C.F.R. § 52.21(k).

<sup>45</sup>Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Judgment on the Pleadings and in Support of Defendant's Cross-Motion for Summary Judgment at 8-9, *Avenal Power Center, LLC v. U.S. Environmental Protection Agency*, Case No.: 1:10-cv-00383-RJL (D.C.C. filed on Sept. 17, 2010) (citations omitted) (emphasis added) (Attachment B).

<sup>46</sup> 75 Fed. Reg. 35,520 (June 22, 2010).

<sup>47</sup> 75 Fed. Reg. 6,474 (Feb. 9, 2010); 75 Fed. Reg. 35,520.

**V. COMMENTS ON LBEC’S PROPOSED CHANGES (REDLINE VERSION) OF THE PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

In addition to Sierra Club’s objections to the ALJs’ Proposed Order, discussed in Sierra Club’s Exceptions to the PFD on Remand, Sierra Club also calls attention to the following errors in LBEC’s redline of the Judges’ Proposed Order.

The Commission should reject LBEC’s edits to Finding of Fact (“FOF”) Nos. 21 and 25, which obscure the essentially undisputed fact that the Application did not address emissions from material handling operations.<sup>48</sup> Furthermore, the FOF improperly refers to “potential sources of secondary emission.” Emissions from material handling operations are part of the same stationary source as the power plant.

The ALJs and the ED found LBEC’s modeling to be deficient due to numerous failures identified by ED expert witness Daniel Jamieson.<sup>49</sup> Therefore, LBEC’s revisions to FOF 28 and deletion of FOF Nos. 29 and 37 are contrary to the PFD on Remand and unsupported by the record in this case. Likewise, Mr. Jamieson found LBEC’s initial modeling deficient after the original November 2009 hearing, and thus the ALJs’ FOF No. 36 should not be deleted.

LBEC’s new FOF Nos. 36-39 should not be adopted as they misrepresent the ALJs’ findings. Rather than find LBEC’s modeling to be overly conservative, the ALJs found that the modeling was deficient and incorrect in numerous respects.<sup>50</sup>

The Commission should reject LBEC’s proposed FOF No. 52 and edits to FOF Nos. 53 and 61, which are legally irrelevant. As discussed above, the federal Clean Air Act, and EPA

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<sup>48</sup> Original PFD at 46.

<sup>49</sup> PFD on Remand at 6-7, 14, 16-17.

<sup>50</sup> *Id.* at 28-29 (“LBEC urges that its remand modeling is more conservative than the ED’s and, as such, forms an acceptable basis for a finding that the Application will not cause or contribute to a PSD Increment violation. The ALJs do not find that a greater weight of evidence supports LBEC’s contention.”)

and TCEQ rules and guidance dictate that new NAAQS apply to permits issued after the effective date of the NAAQS.<sup>51</sup> Whether or not the permit was in technical review is immaterial to this determination.

Likewise, LBEC's additional FOFs regarding its modeling in the original November 2009 hearing are irrelevant, as both the ED and the ALJs found LBEC's initial modeling deficient in many respects.<sup>52</sup> Accordingly, the Commission should reject LBEC's proposed FOF Nos. 105, 106, 108, 111, 112.

The Protestants, the ALJs, and even ED expert witness Randy Hamilton, all agreed that the material handling operations are support facilities for the power plant, thereby satisfying the source code prong of the single source analysis.<sup>53</sup> Therefore, LBEC's alteration of FOF No. 113 is inaccurate and should be rejected.

At the very least, emissions from the POCCA Bulk Dock scenarios are secondary emissions,<sup>54</sup> and thus LBEC's revisions to FOF No. 114 are inaccurate. Furthermore, FOF Nos. 114(c) & (d), 278 and 279 are clearly inaccurate, as not only the Protestants, but also the ALJs and the ED have repeatedly found LBEC's modeling analyses to be defective.<sup>55</sup>

LBEC's proposed FOF Nos. 115, 116, 130, the edits to FOF No. 275, and the deletion of FOF No. 111 are incorrect. EDF expert witness Dr. Gasparini demonstrated that LBEC's PM<sub>10</sub> emissions will cause or contribute to an exceedance of the 24-hour average PM<sub>10</sub> PSD increment

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<sup>51</sup> 42 U.S.C. § 7475(a)(3); 40 C.F.R. § 52.21(k); Attachment B.

<sup>52</sup> See Original PFD at pp. 55-66.

<sup>53</sup> PFD on Remand at 10; 13 Tr. 3029:3-13.

<sup>54</sup> Original PFD at 43.

<sup>55</sup> PFD on Remand at 6-7, 14, 16-17.

of 30  $\mu\text{g}/\text{m}^3$  on numerous occasions.<sup>56</sup> Likewise, the ALJs held that LBEC has not demonstrated that it will not violate the  $\text{PM}_{10}$  PSD increment.<sup>57</sup>

LBEC's proposed FOF Nos. 119 – 128 and Conclusion of Law ("COL") No. 38 are incorrect, inaccurate, and should be rejected. The FOFs conveniently omit the fact that the ED's staff (the ADMT) found Applicant's original modeling and rebuttal modeling to be deficient.<sup>58</sup> Therefore, as the ALJs found in their PFD, the ED had no responsibility to further evaluate LBEC's deficient modeling for SIP purposes.<sup>59</sup>

The Commission should reject LBEC's proposed revision to FOF No. 251, because  $0.86 \times 10^{-6}$  lb/MMBtu does not represent BACT for mercury emissions from the boilers.<sup>60</sup>

LBEC's proposed FOF Nos. 292 through 295 are contrary to law. In the Original PFD, the ALJs concluded that LBEC's main pet coke-fired boilers are subject to the federal Clean Air Act's hazardous air pollutant ("HAP") standards and therefore must undergo the stringent case-by-case MACT analysis.<sup>61</sup>

LBEC's new FOF Nos. 304 and 305, COL No. 51, Ordering Provision No. 4, and deletion of FOF Nos. 275-278 are misplaced. The ALJs determined that LBEC should be required to pay for all transcript costs and the ALJs' analysis was reasonable and persuasive.<sup>62</sup>

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<sup>56</sup> See EDF's Exs. 405 & 411.

<sup>57</sup> PFD on Remand at 31-32.

<sup>58</sup> PFD on Remand at 6-7, 14, 16-17.

<sup>59</sup> *Id.* at 25.

<sup>60</sup> The ALJs recommend a BACT limit of  $5.7 \times 10^{-7}$  lb/MMBtu. PFD on Remand at 47.

<sup>61</sup> The ALJs devoted no less than 17 pages in their Original PFD to their factual and legal analysis, ultimately concluding that "there is no justification for not requiring a MACT analysis for the pet coke-fired CFB boilers in issue." Original PFD at 23.

<sup>62</sup> PFD on Remand at 49-51.

As held by the ALJs in the PFD on Remand, LBEC failed to demonstrate that emissions from the proposed plant will comply with all applicable requirements, including the Texas Clean Air Act.<sup>63</sup> Therefore, LBEC failed to demonstrate that emissions from the proposed power plant will not cause or contribute to air pollution or cause adverse public health or welfare effects and LBEC's proposed COL Nos. 7, 13, 14, 23, 36, 46, and 49 should be rejected.

Carbon dioxide ("CO<sub>2</sub>") is currently regulated under both the Texas Clean Air Act<sup>64</sup> and the federal Clean Air Act,<sup>65</sup> and hence LBEC must perform a BACT analysis for its CO<sub>2</sub> emissions. Thus, LBEC's new COL No. 28 is incorrect.

In accordance with the ALJs' PFD and Protestants' briefing in this contested case, the Commission should not grant LBEC's Application. The Application must either be denied outright, or alternatively, LBEC must re-file its Application pursuant to Texas Health and Safety Code § 382.0291(d). Thus, proposed COL No. 50 and Ordering Provision No. 1 should be rejected.

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<sup>63</sup> PFD on Remand at 3.

<sup>64</sup> Under Texas law, carbon dioxide is (1) an emission; (2) an air contaminant; and (3) an air pollutant. TEX. HEALTH AND SAFETY CODE § 382.003(2) ("Air contaminant" means particulate matter, radioactive material, dust, fumes, gas, mist, smoke, vapor, or odor, including any combination of those items, produced by processes other than natural."). CO<sub>2</sub> emitted by a power plant is a gas that, in these circumstances, does not arise from a natural process. It thus is an "air contaminant" under the Texas Clean Air Act's plain language. TEX. HEALTH AND SAFETY CODE § 382.003(3) ("Air pollution" means the presence in the atmosphere of one or more air contaminants or combination of air contaminants in such concentration and of such duration that: (A) are or may tend to be injurious to or to adversely affect human health or welfare, animal life, vegetation, or property; or (B) interfere with the normal use or enjoyment of animal life, vegetation, or property.")

<sup>65</sup> Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg. 17,004, 17,007 (Apr. 2, 2010) ("Regarding GHGs, EPA has concluded that PSD program requirements will apply to GHGs upon the date that the anticipated tailpipe standards for light-duty vehicles (known as the 'LDV Rule') take effect. Based on the proposed LDV Rule, those standards will take effect when the 2012 model year begins, which is no earlier than January 2, 2011.") (Attachment C); Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Final Rule, 75 Fed. Reg. 31,514, 31,522 (June 3, 2010) ("On April 1, 2010, we finalized the LDVR as anticipated, confirming that manufacturer certification can occur no earlier than January 2, 2011. Thus, under the terms of the final notice for the Interpretative Memo, GHGs become subject to regulation on that date, and PSD and title V program requirements will also begin to apply upon that date.") (Attachment D).

LBEC's proposed modification to COL No. 47 must be rejected, because the LBEC facilities will not utilize BACT for a number of pollutants, including NO<sub>x</sub>, CO<sub>2</sub>, and PM.

Ordering Provision No. 5 should not be deleted. The ALJs found that if LBEC is not bound to its material handling options, the Application fails to demonstrate that LBEC will comply with all PSD permitting requirements.<sup>66</sup> Sierra Club further contends that binding LBEC to the POCCA Bulk Dock options does not remedy the Application's fundamental failure to properly account for material handling emissions, both in its modeling and its BACT analysis. For example, simply binding LBEC to the most recent Bulk Dock options does not remedy the complete failure to consider BACT (such as covered enclosures for pet coke piles) for material handling sources.

Finally, Sierra Club updates its objection to the ALJs' FOFs and COLs regarding CO<sub>2</sub>. On January 2, 2010, greenhouse gases, including CO<sub>2</sub> emissions became subject to regulation under the federal Clean Air Act, and hence subject to PSD permitting requirements.<sup>67</sup> Thus, all FOFs and COLs to the contrary should be rejected by the Commission. Furthermore, the Application must be denied, because it does not contain the required CO<sub>2</sub> BACT determination and impacts analysis.

## **VI. CONCLUSION**

As the ALJs recommended in both the Original PFD and yet again in the PFD on Remand, LBEC has failed to meet its burden of proof and the Application and Permit should not be granted. In accordance with the PFD on Remand, the Original PFD, and for each of the additional reasons described above and in Sierra Club's Exceptions to the PFD on Remand,

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<sup>66</sup> PFD on Remand at 37.

<sup>67</sup> See 75 Fed. Reg. at 17,007 (Attachment C); 75 Fed. Reg. at 31,522 (Attachment D).

Closing Brief, and Brief in Reply to Closing Arguments on Remand, and in Sierra Club's closing briefs previously filed in the original hearing, Sierra Club respectfully requests that the Application be denied. In the alternative, if the Commission determines that remand is appropriate, then Sierra Club (again) requests that the Applicant be required to re-file and re-notice its Application, in order to cure the deficiencies in the Application and remedy the procedural irregularities that have resulted from a remand to SOAH. In addition, Sierra Club respectfully requests that the Commission grant such other and further relief for which Sierra Club and other Protestants show themselves justly entitled.

Respectfully submitted,

**ENVIRONMENTAL INTEGRITY PROJECT**



By: \_\_\_\_\_

Ilan Levin  
Texas Bar No. 00798328  
Erin Fonken  
Texas Bar No. 24059112  
Gabriel Clark-Leach  
Texas Bar No. 24069516  
1303 San Antonio Street, Suite 200  
Austin, Texas 78701  
Tel: (512) 637-9477  
Fax: (512) 584-8019

**ATTORNEYS FOR SIERRA CLUB**

# **ATTACHMENT A**

Buddy Garcia, *Chairman*  
Larry R. Soward, *Commissioner*  
Bryan W. Shaw, Ph.D., *Commissioner*  
Glenn Shankle, *Executive Director*



## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

April 30, 2008

Hon. Craig Bennett  
Hon. Tommy Broyles  
Administrative Law Judges  
State Office of Administrative Hearings  
300 West 15<sup>th</sup> Street, Suite 400  
Austin, Texas 78701

RE: Sierra Club's Motion for Clarification and Applicant's Response; *Application of NRG Texas Power LLC for State Air Quality Permit 79188 and Prevention of Significant Deterioration Air Quality Permit PSD-TX-1072*; SOAH Docket No. 582-08-0861; TCEQ Docket No. 2007-1820-AIR.

Dear Judges Bennett and Broyles:

The Executive Director (ED) has reviewed the Sierra Club's Motion for Clarification and the Applicant NRG's Response, and being mindful of the ED's role in this administrative proceeding, offers the following information for the Judges' consideration.

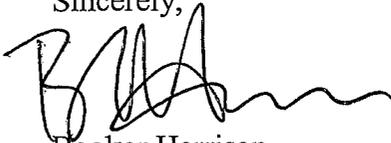
First, the ED has long considered the reference to a "public hearing" in Tex. Health & Safety Code section 382.0291(d) to mean the entire hearing process beginning with the preliminary hearing where the ALJs take jurisdiction over the application, and not the evidentiary hearing alone. *See 30 TEX. ADMIN. CODE § 80.25, and Application of Odell Geer Construction Co., Inc. for Air Quality Permit No. 31490; SOAH Docket No. 582-97-1897; TCEQ Docket No. 1997-0793-AIR; Orders No. 5 (03/16/1998) and 7 (03/26/1998); Proposal for Decision (07/10/1998); and TNRCC Order (11/06/1998)(See Attachments). See also TEX. GOV'T CODE § 2001.052(a)(2)(Preliminary hearing is the only hearing that goes to public notice).*

Second, as the ALJs stated during the April 10, 2008 hearing, the ED concurs that the Agency is entitled to deference in interpreting the statutes it is charged with administering, which includes implementing the permitting scheme articulated in the Texas Clean Air Act. *Chevron, U.S.A., Inc. v. Nat. Resources Def. Council*, 467 U.S. 837 (1984)("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations." *footnote omitted*, at 844).

Hon. Craig Bennett  
Hon. Tommy Broyles  
April 30, 2008  
Page 2

I appreciate the opportunity to provide this information. Should anyone have any questions, please do not hesitate to contact me at 512/239-4113.

Sincerely,

A handwritten signature in black ink, appearing to read 'Booker Harrison', with a stylized, cursive script.

Booker Harrison  
Senior Attorney  
Environmental Law Division

Enclosures

Cc: Service List

# **ATTACHMENT B**

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

AVENAL POWER CENTER, LLC	)
	)
Plaintiff,	)
	)
v.	)
	)
U.S. ENVIRONMENTAL PROTECTION	)
AGENCY and LISA P. JACKSON, in her	)
capacity as Administrator of the	)
U.S. Environmental Protection Agency	)
	)
Defendants.	)
_____	)

Case No.: 1:10-cv-00383-RJL  
(Hon. Richard J. Leon)

**MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO  
PLAINTIFF’S MOTION FOR JUDGMENT ON THE PLEADINGS AND IN SUPPORT  
OF DEFENDANTS’ CROSS-MOTION FOR SUMMARY JUDGMENT**

Plaintiff Avenal Power Center, LLC (“Plaintiff” or “Avenal”) brought this action pursuant to the citizen suit provision of the Clean Air Act (“CAA” or “Act”), 42 U.S.C. § 7604(a)(2), to compel Defendants, U.S. Environmental Protection Agency and Lisa P. Jackson, Administrator (“EPA”), to grant or deny its permit application pursuant to CAA section 165(c), 42 U.S.C. § 7475(c), which requires the Agency to do so within one year of the filing of a complete application. EPA does not dispute that it has failed to act on Plaintiff’s permit application within one year of declaring the application complete. Accordingly, the only issue to be resolved in this suit is the question of remedy – *i.e.*, the appropriate deadline by which EPA must grant or deny Plaintiff’s permit application. Because EPA cannot conclude review of Plaintiff’s permit application on any schedule more expedited than that proposed herein, EPA requests that its motion for summary judgment on remedy be granted, and that the Court enter an

primary NAAQS alone is not requisite to protect public health with an adequate margin of safety” and that “the NO<sub>2</sub> primary standard should be revised in order to provide increased public health protection against respiratory effects associated with short-term exposures, particularly for susceptible populations such as asthmatics, children, and older adults.”<sup>2</sup> 75 Fed. Reg. at 6490.

The new hourly NO<sub>2</sub> NAAQS became effective on April 12, 2010. *See* 75 Fed. Reg. at 6474. Prior to this date, EPA issued a memorandum explaining that applicable statutes and regulations preclude the Agency from issuing a PSD permit without a demonstration that the source will not cause or contribute to a violation of the new hourly NO<sub>2</sub> standard. *See* Jordan Decl., Ex. 5 (Memorandum from Stephen D. Page, EPA Office of Air Quality Planning and Standards, Applicability of the Federal Prevention of Significant Deterioration Permit Requirements to New and Revised National Ambient Air Quality Standards (Apr. 1, 2010) (“Page Memorandum”). In two previous instances, EPA has established by rule exemptions for permit applications that were determined complete prior to the revision of a National Ambient Air Quality Standard for particulate matter. *See* 40 C.F.R. 52.21(i)(1)(x)-(xi).<sup>3</sup> However, since EPA did not promulgate such an exemption applicable to the hourly NO<sub>2</sub> standard, existing

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<sup>2</sup> The CAA requires that not later than August 7, 1978, EPA “promulgate a national primary ambient air quality standard for NO<sub>2</sub> concentrations over a period of not more than 3 hours unless ... [the Administrator] finds that there is no significant evidence that such a standard for such a period is requisite to protect public health.” 42 U.S.C. § 7409(c). EPA had previously addressed the issue of short-term exposures to NO<sub>2</sub> and the appropriateness of a short term standard in both the 1985 and 1996 NAAQS reviews. *See* 50 Fed. Reg. 25,532 (June 19, 1985); 61 Fed. Reg. 52,852 (Oct. 8, 1996).

<sup>3</sup> In response to a petition for reconsideration, EPA has recently proposed to repeal section 52.21(i)(1)(xi), in part because EPA adopted this provision without an opportunity for public comment. 75 Fed. Reg. 6827, 6833 (Feb. 11, 2010). EPA previously stayed this provision until June 22, 2010. 74 Fed. Reg. 48,153 (Sept. 22, 2009).

regulations require permits issued after April 12, 2010 to be supported by a demonstration that the proposed source will not violate the hourly NO<sub>2</sub> NAAQS. *See* Jordan Decl., Ex. 5, Page Memorandum at 3. Thus, EPA has determined, and notified Avenal on May 5, 2010, that Avenal must show compliance with the hourly NO<sub>2</sub> standard in order to obtain a PSD permit. Jordan Decl., ¶¶ 14-15, 17; Joint Stip. at ¶ 10. As discussed more fully *infra*, EPA is currently evaluating, pursuant to section 165(a)(3) of the CAA, whether Plaintiff has demonstrated that emissions from the Project will not cause or contribute to air pollution in excess of the revised NO<sub>2</sub> standard. Jordan Decl., ¶¶ 15, 17. Since the promulgation of the revised NO<sub>2</sub> standard, EPA has been working with Avenal through a number of letter exchanges and discussions to determine whether the proposed facility will comply with the revised NO<sub>2</sub> standard. *See* Pls. Exs. H, J, K, M. On August 17, 2010, Avenal confirmed its intent to provide EPA with additional information and justification concerning its hourly NO<sub>2</sub> NAAQS analysis by September 13, 2010 as requested by EPA. Jordan Decl. Ex. 6. On September 13, 2010, EPA received Avenal's submission and is currently reviewing it. Jordan Decl. ¶ 17 and Ex. 7.

On June 22, 2010, EPA published a final rule establishing a primary NAAQS for sulfur dioxide ("SO<sub>2</sub>") based on a 1-hour averaging time. That rule became effective on August 23, 2010. 75 Fed. Reg. 35,520 (Jun. 22, 2010). EPA has already informed Avenal that it believes that the Project would be in compliance with the hourly SO<sub>2</sub> NAAQS. EPA further informed Avenal that it has determined that additional analysis is not required from Avenal to address this standard, given that the Project's SO<sub>2</sub> emissions are estimated to be 16.7 tons per year, which is below the significant emissions rate for SO<sub>2</sub>. *See* 40 C.F.R. §§ 52.21(m)(1) and 52.21(b)(23)(i); Jordan Decl., ¶ 16.

# **ATTACHMENT C**



# Federal Register

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**Friday,  
April 2, 2010**

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**Part V**

## **Environmental Protection Agency**

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**40 CFR Parts 50, 51, 70, and 71  
Reconsideration of Interpretation of  
Regulations That Determine Pollutants  
Covered by Clean Air Act Permitting  
Programs; Final Rule**

at the time the first control requirements applicable to a pollutant take effect. Public comments raised several questions regarding the application of the PSD program and Title V permits to GHGs that EPA did not specifically raise in the October 7, 2009 proposed notice of reconsideration. Some of these comments raised significant issues that the Agency recognizes the need to address at this time to ensure the orderly transition to the regulation of GHGs under these permitting programs. Thus, this notice reflects additional interpretations and EPA statements of policy on topics not discussed in the October 7, 2009 notice. These interpretations and policies have been developed after careful consideration of the public comments submitted to EPA on this action and related matters. In subsequent actions, EPA may address additional topics raised in public comments on this action that the Agency did not consider necessary to address at this time.

Regarding GHGs, EPA has concluded that PSD program requirements will apply to GHGs upon the date that the anticipated tailpipe standards for light-duty vehicles (known as the "LDV Rule") take effect. Based on the proposed LDV Rule, those standards will take effect when the 2012 model year begins, which is no earlier than January 2, 2011. While the LDV Rule will become "effective" for the purposes of planning for the upcoming model years as of 60 days following publication of the rule, the emissions control requirements in the rule do not "take effect"—*i.e.*, requiring compliance through vehicular certification before introducing any Model Year 2012 into commerce—until Jan. 2, 2011, or approximately 9 months after the planned promulgation of the LDV Rule. Furthermore, as EPA intends to explain soon in detail in the final action on the PSD and Title V GHG Tailoring Rule (known as the "Tailoring Rule"),<sup>7</sup> in light of the significant administrative challenges presented by the application of the PSD and Title V requirements for GHGs (and considering the legislative intent of the PSD and Title V statutory provisions), it is necessary to defer applying the PSD and Title V provisions for sources that are major based only on emissions of GHGs until a date that extends beyond January 2, 2011.

<sup>7</sup> The proposed "Tailoring Rule" can be found at 74 FR 55291 (Oct. 27, 2009).

## B. Analysis of Proposed and Alternative Interpretations for Subject to Regulation

### 1. Actual Control Interpretation

EPA has concluded that the "actual control" interpretation (as articulated in the PSD Interpretive Memo) is permissible under the CAA and is preferred on policy grounds. Thus, EPA will continue to interpret the definition of "regulated NSR pollutant" in 40 CFR 52.21(b)(50) to exclude pollutants for which EPA regulations only require monitoring or reporting but to include each pollutant subject to either a provision in the CAA or regulation promulgated by EPA under the CAA that requires actual control of emissions of that pollutant. As discussed further below, EPA will also interpret section 51.166(b)(49) of its regulations in this manner. This interpretation is supported by the language and structure of the regulations and is consistent with past practice in the PSD program and prior EPA statements regarding pollutants subject to the PSD program. The CAA is most effectively implemented by making PSD emissions limitations applicable to pollutants after a considered judgment by EPA (or Congress) that particular pollutants should be subject to control or limitation. The actual control interpretation promotes the orderly administration of the permitting program by allowing the Agency to first assess whether there is a justification for controlling emissions of a particular pollutant under relevant criteria in the Act before applying the requirements of the PSD permitting program to a pollutant.

Because the term "regulation" is susceptible to more than one meaning, there is ambiguity in the phrase "each pollutant subject to regulation under the Act"<sup>8</sup> that is used in both sections 165(a)(4) and 169(3) of the CAA. As discussed in the Memo, the term "regulation" can be used to describe a rule contained in a legal code, such as the Code of Federal Regulations, or the act or process of controlling or restricting an activity. The primary meaning of the term "regulation" in Black's Law Dictionary (8th Ed.) is "the act or process of controlling by rule or restriction." However, an alternative meaning in this same dictionary defines

<sup>8</sup> The CAA requires BACT for "each pollutant subject to regulation under this Act." See CAA 165(a)(4), 169(3). The United States Code refers to "each pollutant regulated under this chapter," which is a reference to Chapter 85 of Title 42 of the Code, where the CAA is codified. See 42 U.S.C. 7475(a)(4), 7479(3). For simplicity, this notice generally uses "the Act" and the CAA section numbers rather than the U.S. Code citation.

the term as "a rule or order, having legal force, usu. issued by an administrative agency or local government." The primary meaning in Webster's dictionary for the term "regulation" is "the act of regulating; The state of being regulated." Merriam-Webster's Collegiate Dictionary 983 (10th Ed. 2001). Webster's secondary meaning is "an authoritative rule dealing with details of procedure" or "a rule or order issued by an executive authority or regulatory agency of a government and having the force of law." Webster's also defines the term "regulate" and the inflected forms "regulated" and "regulating" (both of which are used in Webster's definition of "regulation") as meaning "to govern or direct according to rule" or "to bring under the control of law or constituted authority." *Id.*

The PSD Interpretive Memo reasonably applies a common meaning of the term "regulation" to support a permissible interpretation that the phrase "pollutant subject to regulation" means a pollutant subject to a provision in the CAA or a regulation issued by EPA under the Act that requires actual control of emissions of that pollutant. Public comments have not demonstrated the dictionary meanings of the term "regulation" described in the Memo are no longer accepted meanings of this term. In light of the different meanings of the term "regulation," EPA has not been persuaded by public comments that the CAA plainly and unambiguously requires that EPA apply any of the other interpretations described in the October 7, 2009 notice. Moreover, the Memo carefully explains how the actual control interpretation is consistent with the overall context of the CAA in which sections 165(a)(4) and 169(3) are found. After consideration of public comment, EPA continues to find this discussion persuasive. The "subject to regulation" language appears in the BACT provisions of the Act, which themselves require actual controls on emissions. The BACT provisions reference the New Source Performance Standards (NSPS) and other control requirements under the Act, which establish a floor for the BACT requirement. See 42 U.S.C. 7479(3). Other provisions in the CAA that authorize EPA to establish emissions limitations or controls on emissions provide criteria for the exercise of EPA's judgment to determine which pollutants or source categories to regulate. Thus, it follows that Congress expected that pollutants would only be regulated for purposes of the PSD program after: (1) The EPA promulgated regulations requiring control of a particular

# **ATTACHMENT D**



# Federal Register

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**Thursday,  
June 3, 2010**

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**Part II**

## **Environmental Protection Agency**

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**40 CFR Parts 51, 52, 70, et al.  
Prevention of Significant Deterioration  
and Title V Greenhouse Gas Tailoring  
Rule; Final Rule**

vehicle rule would take effect on January 2, 2011.

On April 1, 2010, we finalized the LDVR as anticipated, confirming that manufacturer certification can occur no earlier than January 2, 2011. Thus, under the terms of the final notice for the Interpretive Memo, GHGs become subject to regulation on that date, and PSD and title V program requirements will also begin to apply upon that date.

#### IV. Summary of Final Actions

This section describes the specific actions we are taking in this final rule. It describes the overall tailoring approach for NSR and title V applicability, the steps we are taking to put it into place, and future actions that we commit to take. The next section, V, provides the legal and policy rationale for these actions. In that section, we provide a description of our rationale and response to comments for each action, presented in the same order as we describe the actions here.

##### A. How do you define the GHG pollutant for PSD and title V purposes?

###### 1. GHG Pollutant Defined as the Sum-of-Six Well-Mixed GHGs

We are identifying the air pollutant for purposes of PSD and title V applicability to be the pollutant subject to regulation, which is the air pollutant for GHGs identified in EPA's LDVR, as well as EPA's endangerment and contribution findings.<sup>8</sup> In the LDVR, EPA set emissions standards under section 202(a) that were "applicable to emission" of a single air pollutant defined as the aggregate sum of six GHGs. The six GHGs, which are well-mixed gases in the atmosphere, are CO<sub>2</sub>, CH<sub>4</sub>, N<sub>2</sub>O, HFCs, PFCs, and SF<sub>6</sub>. Earlier, EPA made the contribution finding for this single air pollutant.

Furthermore, as proposed, we are using an emissions threshold that allows all six constituent gases to be evaluated using a common metric—CO<sub>2</sub>e. Thus, to determine applicability, a source's GHG emissions are calculated on a CO<sub>2</sub>e basis by multiplying the mass emissions of any of the six GHGs that the source emits by that gas's GWP and then summing the CO<sub>2</sub>e for each GHG emitted by the source. This sum, expressed in terms of tpy CO<sub>2</sub>e, is then compared to the applicable CO<sub>2</sub>e-based permitting threshold to determine whether the source is subject to PSD and title V requirements.

In addition, because we are implementing this phase-in through the term "subject to regulation," the

regulatory language is structured such that the statutory mass-based thresholds (*i.e.*, for PSD, 100/250 tpy for new construction and zero tpy for modifications at a major stationary source, and for title V, 100 tpy) continue to apply. As a result, stationary source apply and stationary sources or modifications that do not meet these thresholds are not subject to permitting requirements. While technically evaluation of the mass-based thresholds is the second step in the applicability analysis, from a practical standpoint most sources are likely to treat this as an initial screen, so that if they would not trigger PSD or title V on a mass basis, they would not proceed to evaluate emissions on a CO<sub>2</sub>e basis. We have treated evaluation of mass-based thresholds as the initial step in our descriptions. As applicable, a source would evaluate these mass-based thresholds by summing each of the six GHGs it emits on a mass basis (*i.e.*, before applying GWP). We expect that it will be very rare for a new stationary source or modification to trigger permitting based on CO<sub>2</sub>e and not also trigger based on mass alone.

Determining permit program applicability for the GHG "air pollutant" by using the sum-of-six GHGs is based on EPA's interpretation that the PSD and title V requirements apply to each "air pollutant" that is "subject to regulation" under another provision of the CAA. As discussed previously, the final LDVR for GHGs makes it clear that the emissions standards EPA adopted are standards applicable to emission of the single air pollutant defined as the aggregate mix of these six well-mixed GHGs. *See* LDVR, May 7, 2010, 75 FR 25398–99, section III.A.2.c, and 40 CFR 86.1818–12.<sup>9</sup> For reasons explained in more detail in section V, we have determined it is legally required, and preferable from a policy standpoint, for EPA to use the same definition of the air pollutant for permitting purposes as that used in the rule that establishes the control requirements for the pollutant. We also believe there are implementation advantages for applying PSD and title V in this way. Thus, this rule establishes that a stationary source will use the group of six constituent gases for permitting applicability, rather than treating each gas individually. Similarly, you will include all six constituent gases because that is how the air pollutant is defined, even though motor vehicles only emit four of the six.

##### 2. What GWP values should be used for calculating CO<sub>2</sub>e?

We are requiring that wherever you perform an emissions calculations involving CO<sub>2</sub>e for the purposes of determining the applicability of PSD or title V requirements, you use the GWP values codified in the EPA's mandatory GHG reporting rule.<sup>10</sup> This approach will assure consistency between the values required for calculations under the reporting rule and for PSD or title V. In addition, because any changes to Table A–1 of the mandatory GHG reporting rule regulatory text must go through a rulemaking, this approach will assure that the values used for the permitting programs will reflect the latest values adopted for usage by EPA after notice and comment.

##### B. When will PSD and title V applicability begin for GHGs and emission sources?

###### Overview

In this action, we establish the first two phases of our phase-in approach, which we refer to as Steps 1 and 2. We also commit to a subsequent rulemaking in which we will propose or solicit comment on establishing a further phase-in, that is, a Step 3, that would apply PSD and title V to additional sources, effective July 1, 2013, and on which we commit to take final action, as supported by the record,<sup>11</sup> by no later than July 1, 2012.

We also commit to undertaking an assessment of sources' and permitting authorities' progress in implementing PSD and title V for GHG sources, and to complete this assessment by 2015. We further commit to completing another round of rulemaking addressing smaller sources by April 30, 2016. Our action in that rulemaking would address permitting requirements for smaller sources, taking into account the remaining problems concerning costs to sources and burdens to permitting authorities. Finally, we determine in this action that we will apply PSD or title V requirements to sources that emit GHGs, or that conduct modifications that result in increases in emissions of GHGs, in amounts of less than 50,000 tpy CO<sub>2</sub>e any earlier than when we take the required further action to address smaller sources by April 30, 2016.

<sup>10</sup> Table A–1 to subpart A of 40 CFR part 98—Global Warming Potentials, 74 FR 56395.

<sup>11</sup> Although we commit to propose or solicit comment on lower thresholds and to take final action on that proposal by July 1, 2012, we cannot, at present, commit to promulgate lower thresholds. It will not be until the Step 3 rulemaking itself that we will gather and analyze data and receive comments that determine whether we have basis for promulgating lower thresholds.

<sup>8</sup> *See* 74 FR 66496, 66499, 66536–7, December 15, 2009.

<sup>9</sup> 40 CFR 86.1818–12(a).