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April 19, 2010

Ms. LaDonna Castañuela
Chief Clerk, MC-105
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, TX 78711-3087
Fax: (512) 239-3311

Via Electronic Submission

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

Dear Ms. Castañuela:

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

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

Sincerely,



Ilan Levin

Enclosure

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

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of Sierra Club's Exceptions to the Proposal for Decision on this 19th day of April, 2010.



Ilan Levin
Attorney for Sierra Club

For SOAH

Via Electronic Mail & U.S. Mail

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

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

SIERRA CLUB’S EXCEPTIONS TO THE PROPOSAL FOR DECISION

TO THE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

On March 29, 2010, Administrative Law Judges Tommy Broyles and Craig Bennett issued a Proposal for Decision recommending that “the permits be denied or remanded back to the ED for additional actions to be taken.” PFD p. 2 (emphasis added). The ALJs specifically listed four deficiencies that they believe warrant denial or remand. Furthermore, the ALJs concluded that several other changes would have to be made before the permits could issue.

If ever there was a permit worth denying, LBEC’s application for a 1,200 megawatt petroleum coke-fired power plant in Corpus Christi would be it.

Corpus Christi residents, including Sierra Club members, who live near the proposed plant already face a daunting array of air quality issues. Corpus is currently designated near nonattainment and will soon be in nonattainment for ozone under EPA’s imminent new stricter national ambient air quality standards. In addition, Corpus Christi has been designated as a TCEQ Air Pollutant Watch List area (APWL 1402) for benzene, due to emissions from an existing cluster of refineries and chemical plants.

Knowing full well that Corpus Christi residents currently face these and other well known environmental justice and public health concerns due to existing air pollution sources, LBEC could have stepped up to the plate and insisted that TCEQ impose the most stringent maximum achievable control technology (MACT) standards to reduce toxic emissions. LBEC also could have stepped up and performed conservative modeling, taking into account all the expected new emissions, instead of hiding the ball and completely ignoring significant particulate matter sources, leaving these sources out of the application. LBEC chose to do none of this. For these reasons alone, the Commission ought to deny the application and Draft Permits.

However, by law the Commission has two options in this matter: (1) Deny outright or (2) remand to the Executive Director.

One reason that denial or remand are the *only* options as a matter of law is that the TCEQ's regulations, which adopt the federal Clean Air Act requirements, clearly require technical review and public notice of a MACT determination for the LBEC's main boilers.

Consistent with the requirements of 40 Code of Federal Regulations §63.43 (concerning maximum achievable control technology determinations for constructed and reconstructed major sources), the owner or operator of a proposed affected source...shall submit a permit application as described in §116.110 of this title (relating to Applicability).

30 Tex. Admin. Code § 116.404. In adopting these rules,¹ TCEQ stated that federal MACT requirements are implemented through the preconstruction air permitting program.

¹ 30 TAC 116.400 *et. seq.* was renumbered in 2006 to allow for code reorganization. 31 Tex. Reg. 516, 521. (2006). Prior to the reorganization these rules were at 30 TAC 116.180-183, adopted and effective July 8, 1998. 23 Tex. Reg. 6973. 6973(1998).

40 CFR Part 63, Subpart B, requires the commission to make case-by-case MACT determinations for affected sources (as defined in §116.15(1), concerning Section 112(g) Definitions) that become subject to §112(g) prior to the EPA promulgating a MACT that would apply to the affected source. 40 CFR 63, §63.42, allows states to rely on existing NSR permitting programs to implement the requirements of §112(g) if the NSR program meets the requirements of that subpart. The commission believes that the adopted revisions to Chapter 116 concerning §112(g) will successfully implement the requirements of §112(g) and 40 CFR Part 63, Subpart B

23 Tex. Reg. 6973, 6976 (1998).

This situation is analogous to the NRG Limestone Unit 3 air permit matter (TCEQ Dockets 2007-1820-AIR and 2008-1210-AIR). In the Order, issued December 11, 2009, TCEQ affirmed that, after it was determined that federal Clean Air Act Section 112 case-by-case MACT applied, the applicant, NRG, was required to file a new application subject to technical review and public notice.² Similarly, because LBEC's main boilers are subject to federal Clean Air Act Section 112 and case-by-case MACT applies, a new application subject to technical review and public notice is required in order for LBEC to begin construction.

As a practical common sense matter, given the numerous and significant additional deficiencies in the Application and Draft Permits that the ALJs note in their proposal for decision, including failing to include secondary emissions and material handling in air dispersion modeling, the only appropriate course of action in this case is a denial or remand. Denial or remand are the only two options that would allow the necessary technical review and careful re-drafting of the permits by the Executive Director to take place. Sierra Club disagrees with the ALJs that the many additional changes that would have to be made before the permits could issue, including adjusting the emissions limits for total particulate matter (PM and PM₁₀),

² 2007-1820-AIR (NRG Limestone 3) TCEQ Order, Findings of Fact Nos. 13-19, 32-33, Conclusions of Law Nos. 38-43, and ordering provision No. 3.

mercury, carbon monoxide, and sulfuric acid mist, pursuant to best available control technology (BACT) requirements, could be done adequately without, at least, a remand back to the ED. In addition, due to the common practice of relying on “surrogates” for MACT limits (for example, in the NRG Limestone case-by-case MACT permit, TCEQ relied on PM and CO as “surrogates” for heavy metals and volatile toxics, respectively), it is highly likely that LBEC’s particulate matter and CO, or more appropriately VOC, limits will come down as a result of the MACT process. In addition, we remind the Commission that emissions monitoring requirements, to make sure the plant is meeting the limits in the permit, are part and parcel of BACT (and MACT), and need to be subject to the adjustments and additional technical review by the ED. These changes are not simply minor corrections that should be made on the fly; these changes involve significant new technical and engineering review, and should also result in changes to the proposed facility. These practical considerations make it all the more obvious why nothing short of a remand or denial of the application (which would allow LBEC an opportunity to file a new application) is the appropriate course of action for the Commission.

If the Commission denies the application and permits, then Las Brisas could submit a new permit application that addresses the deficiencies noted in the PFD. If the Commission remands the permits, then the ED would undertake the additional technical review as well as issue the public notice of a new draft permit containing, among other corrections, a case-by-case MACT determination for the main boilers.

A. Texas Health and Safety Code § 382.0518 Clearly Allows Permit Denial, and Should Be Interpreted Consistent with Federal and State Law

The ALJs correctly note that Texas Health and Safety Code § 382.0518 applies to this air permitting case. The ALJs have asked for briefing on the different possible methods for

handling this case. Specifically, the ALJs seek clarity on whether § 382.0518(d) and (e) apply to this case and, if so, what they require.³

These statutory provisions apply in this case, and they require a new application to be submitted in order to cure any deficiencies noted by the Commission in their denial of an application. The provisions describe a process whereby the Commission issues a report setting forth its objections and gives the applicant the opportunity to correct those problems. If the Applicant “makes the alterations in the person’s plans and specifications to meet the commission’s specific objections, the commission shall grant the permit.” § 382.0518(d). Applicants have recently argued that the TCEQ lacks authority to deny a preconstruction permit because the statute says that the TCEQ “shall” grant the permit. Such an interpretation is contrary to the plain language of the statute, TCEQ’s longstanding interpretation of the statute, and the federally-approved state implementation plan (SIP).

The plain language of the statute itself simply requires an applicant who has been denied a permit to *submit a new application*, one that addresses and corrects all of the Commission’s concerns. “The commission may refuse to accept a person’s new application until the commission’s objections ... are satisfied.” § 382.0518(e).

These statutory provisions were in the original Texas Clean Air Act, and have always been read as giving the State the broad plenary authority to grant or deny a permit application. Since at least 1973, the Texas Air Control Board has interpreted these provisions, formerly Section 3.27 of the Texas Clean Air Act, as providing the legal authority to prevent construction

³ See, PFD Transmittal Letter, from ALJs Bennett and Broyles to Les Trobman, General Counsel, TCEQ (March 29, 2010).

of a new source. *See*, Attachment A.⁴ The Texas Air Control Board has explained its authority to under these statutory provisions as follows:

“If the decision of the board is to deny the permit, the Board will not accept any new applications from the applicant until all objections of the Board to the previously submitted application are rectified.”⁵

Thus, the long-held interpretation of the statute is that TCEQ may deny a permit, set forth its reasons in a report, and allow the application to correct those problems in a new application.

Finally, in order to maintain SIP approval, the federal Clean Air Act requires state permitting authorities to retain broad authority, including the authority to deny a preconstruction permit if an applicant fails to satisfy preconstruction permit requirements. Texas has already committed, in order to retain authority to implement federal Clean Air Act programs, that the TCEQ has the authority to deny a preconstruction permit. Moreover, a state is never *required* to issue a federal PSD permit, even if the applicant meets all requirements.

Thus, if the Commission accepts the ALJs’ findings, then the Commission should deny the application – the ALJs’ 120-page PFD would no doubt fit the bill for the statute’s required “report” listing the specific objections. Consistent with the plain statutory language and the Commission’s longstanding interpretation, LBEC may, if it chooses, submit a new application that addresses the deficiencies in the report.

⁴ *See*, *Revision to the State Implementation Plan* adopted on April 15, 1973, Section V, Legal Authority, page V-3 (“The legal authority to prevent construction, modification, or operation... is contained in Sections 3.27 and 3.28 of the Texas Clean Air Act.”), available at <http://www.tceq.state.tx.us/implementation/air/sip/1973SIP.html>.

⁵ *Id* at Section X, The Permit System, page X-4.

Alternatively, the Commission may simply decide to remand the application to the ED for further review. Upon completion of any additional technical review, including a MACT analysis, the ED would then issue a revised Draft Permit subject to public notice.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Ilan M. Levin", is written above a horizontal line.

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ATTORNEY FOR SIERRA CLUB

Attachment A



Site Navigation

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» Questions or Comments:
siprules@tceq.state.tx.us

SIP Revision: Texas, April 15, 1973

Revision to the State Implementation Plan adopted on April 15, 1973.

This page contains the complete text of the Texas State Implementation Plan (SIP). This SIP contains revisions adopted on February 15, 1973 and April 15, 1973. These documents are available for download as PDF files only.

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— Print this —



Stimulus
Funding

SECTION V

LEGAL AUTHORITY

V - LEGAL AUTHORITY

A. GENERAL

The format of this section is designed to show that the State agency, the Texas Air Control Board, has legal authority to implement a plan for enforcement of national air quality standards.

The first air pollution control act, known as the Clean Air Act of Texas, was passed by the Texas Legislature in 1965. In 1967, the Clean Air Act of Texas was superseded by a more comprehensive statute, the Texas Clean Air Act (Attachment 1). The Legislature amended the Texas Clean Air Act (Article 4477-5, Vernon's Texas Civil Statutes) in 1969 and 1971.

Section 1.05 states that the Texas Air Control Board is the state air pollution control agency and is the principal authority in the state on matters relating to the quality of air resources and for setting standards, criteria levels, and emission limits for air content and pollution control. The powers and duties of the Board are summarized in Subchapter C, Sections 3.01 to 3.28, in which the Board is authorized to develop a state air control plan; to require emission inventories; to conduct research and investigations; to enter property and examine records and to prescribe monitoring requirements; to institute enforcement proceedings; to enter into contracts and execute instruments; to formulate rules and regulations; to issue orders taking into consideration factors bearing upon health, welfare, social and economic factors, and practicability and reasonableness; to implement action when emergency conditions arise; to conduct hearings; to establish air quality control regions; to encourage cooperation with citizens' groups and other agencies and political subdivisions of the state as well as with industries and the Federal Government; to grant variances; and to establish and operate a system of permits for construction or modification of facilities.

The authority of local governments is delineated in Subchapter E in Section 5.01 through 5.05. Local governments have the same power as the Board to enter property and make inspections. They also may make recommendations to the Board concerning any action of the Board that affects their territorial jurisdiction, may bring enforcement actions, and may execute cooperative agreements with the Board or other local governments. In addition, a city or town may enact and enforce ordinances for the control and abatement of air pollution not inconsistent with the provisions of the Act or the rules, regulations or orders of the Board.

B. APPLICABLE LAWS

The following statutes and regulations provide necessary authority and are submitted with the plan:

1. Texas Clean Air Act
(Article 4477-5, Vernon's Texas Civil Statutes, as amended) September 1, 1967
(Amended effective September 1, 1969, and August 30, 1971)
2. Article 698d Air Pollution,
Penal Code of Texas, 1925,
as amended. (Attachment 2) September 1, 1969
3. General Rules of the Texas
Air Control Board March 5, 1972
amended August 31, 1972
amended May 12, 1973
4. Ambient Air Quality Standards
of the Texas Air Control Board March 5, 1972
5. Regulation I - Control of Air
Pollution From Smoke, Visible
Emissions, and Particulate Matter March 5, 1972
6. Regulation II - Control of Air
Pollution From Sulfur Compounds March 5, 1972
7. Regulation IV - Control of Air
Pollution From Motor Vehicles March 5, 1972
amended May 12, 1973
8. Regulation V - Control of Air
Pollution From Volatile Organic
Compounds and Carbon Monoxide May 12, 1973
9. Regulation VI - Control of Air
Pollution by Source Registration
or Permits for New Construction
or Modification August 31, 1972
10. Regulation VII - Control of Air
Pollution From Oxides of Nitrogen August 31, 1972
11. Regulation VIII - Control of Air
Pollution Emergency Episodes March 5, 1972

C. FURTHER DESCRIPTION OF LEGAL AUTHORITY

1. The legal authority to adopt emission standards and limitations is contained in Sections 3.02, 3.09, 3.10, and 3.18 of the Texas Clean Air Act, Article 4477-5, Vernon's Texas Civil Statutes; and in Regulations I through VIII of the Texas Air Control Board.
2. The legal authority to enforce applicable laws, regulations, and standards, and to seek injunctive relief is contained in Sections 3.07, 4.01-4.05, 5.01-5.05 of the Texas Clean Air Act, Article 4477-5, Vernon's Texas Civil Statutes; and in Article 698d, Vernon's Annotated Penal Code.
3. The legal authority to abate pollutant emissions on an emergency basis is contained in Sections 3.14 (a) and (b) of the Texas Clean Air Act, Article 4477-5, Vernon's Civil Statutes and in Regulation VIII of the Texas Air Control Board.
4. The legal authority to prevent construction, modification, or operation of any stationary source at any location where emissions will prevent the attainment or maintenance of a national standard is contained in Sections 3.27 and 3.28 of the Texas Clean Air Act, Article 4477-5, Vernon's Texas Civil Statutes; and in the registration and permit requirements of Regulations VI of the Texas Air Control Board.
5. The legal authority to obtain information, including authority to require record keeping necessary to determine whether air pollution sources are in compliance, is contained in Sections 3.04, 3.05, 3.06, and 3.20 (a) of the Texas Clean Air Act, Article 4477-5, Vernon's Texas Civil Statutes and Rules 9 and 11.
6. The legal authority to require owners or operators of stationary sources to install, maintain, and use emissions monitoring devices and to make periodic reports to the State is contained in Sections 3.03, 3.06, and 2.13 of the Texas Clean Air Act, Article 4477-5, Vernon's Texas Civil Statutes and Rule 9.
7. Motor Vehicle Authority

The legal authority to prescribe requirements for the control of motor vehicle emissions is contained in Section 3.10 (d) of the Texas Clean Air Act, Article 4477-5, Vernon's Texas Civil Statutes; and in Regulation IV of the Texas Air Control Board. However, this legal authority does not lend itself to easy enforcement, as a civil suit would have to be brought in district court, as is done with industrial polluters.

SECTION X

Review of New Sources
and Modifications

THE PERMIT SYSTEM

2. The review will answer the following questions:
 - a. Will the new facility or modification comply with all Rules and Regulations of the Texas Air Control Board and with the intent of the Texas Clean Air Act?
 - b. Will the new facility or modification prevent the maintenance or attainment of any ambient air quality standard?
 - c. Will the new facility or modification cause significant deterioration of existing ambient air quality in an area?
 - d. Will the new facility or modification have provisions for measuring the emission of significant air contaminants?
 - e. Will the new facility or modification be located in accordance with proper land use planning?
 - f. Will the new facility or modification utilize the best available control technology with consideration to the technical practicability and economic reasonableness of reducing or eliminating the emissions resulting from the facility?
 - g. Will the design criteria for the new facility or modification achieve the performance specified in the application?
3. Upon completion of the review, the Permits Program will make a recommendation to the Executive Secretary of the Texas Air Control Board to either grant or deny the permit. The Executive Secretary of the Texas Air Control Board was authorized by the Board at their meeting on June 23, 1971, to grant or deny permits to construct or operate.

C. Granting or Denying a Permit to Construct

1. If the decision of the Executive Secretary is to deny the permit, he will report his objection in a written notice of denial to the applicant.
2. The applicant may appeal the denial of the permit to the Texas Air Control Board. If a written appeal is made, a public hearing may be held in the area of the proposed construction. The hearing report will be given to the Board for their consideration.
3. After a review of the pertinent facts, the Board will notify the applicant in writing of their decision.

4. If the decision of the Board is to deny the permit, the Board will not accept any new applications from the applicant until all objections of the Board to the previously submitted application are rectified.

5. If a permit to construct is issued, a copy of the permit will be sent to the local air pollution control agency and the regional office of the State Air Pollution Control Services.

D. The Permit to Construct

1. A permit to construct will specify certain provisions as follows:

- a. The permit is non-transferable from person to person or from place to place.
- b. The permit is automatically void if construction is not begun within one year of the date of issuance.
- c. The permit is automatically void when an operating permit is issued or denied.
- d. The facility will be constructed as specified in the application for permit to construct.
- e. Progress reports may be required.
- f. The permit holder may be required to monitor the emissions of the source upon beginning operation.
- g. The Texas Air Pollution Control Services must be notified in writing at least thirty (30) days prior to the start-up of the facility.
- h. The Texas Air Pollution Control Services must be notified in writing at least thirty (30) days prior to the start of any required monitoring.
- i. The permit is not a guarantee that the facility will receive an operating permit at the end of the construction period.
- j. The permit does not absolve a person from the responsibility for the consequences of non-compliance at the end of the construction period.