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

APPLICATION OF LAS BRISAS ENERGY CENTER, LLC FOR STATE AIR QUALITY PERMIT; NOS. 85013, HAP48, PAL41, AND PSD-TX-1138.	**§ § § § § §**	**BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS**

Exceptions of the Medical Group

TO THE HONORABLE ALJs BROYLES AND BENNETT:

COME, NOW, the Coastal Cardiology Association, Dr. Gregg Silverman, the San Patricio Aransas Refugio Medical Society, and Nueces County Medical Society (hereinafter "the Medical Group" or "Group") and present these Exceptions to your PFD.

The Medical Group does not, here, address the question of § 382.0518(d and e), Tex. Health & Safety Code, inasmuch as the reasons presented in the PFD for recommending application denial require several additional demonstrations by the applicant, at least one of which (MACT) itself requires a new public notice, and the "approvability" of the next application will turn on both the results of the additional demonstrations and issues raised by any new parties who might come forward with the re-notice.

<u>PM_{10}-$PM_{2.5}$ Question</u>

The Medical Group argued in hearing and post-hearing that there are at least two distinct "surrogacy" issues: (1) has the Applicant demonstrated that its controls achieve BACT levels for $PM_{2.5}$, and (2) has the Applicant demonstrated that its emissions will not cause or contribute to a violation of the $PM_{2.5}$ NAAQS. The Medical Group understands

– disagrees with, but understands – your conclusion that the Applicant may rely on a "surrogacy" policy to meet both these demonstrations. However, only because the Medical Group is "deep into the weeds," I think, is it possible to know your PFD addressed both these (again) distinct demonstrations. The Commissioners will not understand, I think, from the PFD that there are two questions and that they might logically decide differently on each one. So, we recommend you add a paragraph that makes this clear.[1] Such a paragraph may be particularly helpful to the Commissioners, inasmuch as the alleged technical difficulties of consideration of $PM_{2.5}$ mostly arise in the NAAQS-demonstration context, not in the BACT-analysis context.

The Group also recommends you let the Commissioners know that Dr. Hunt's $PM_{2.5}$ NAAQS modeling, using the size speciation of PM from various sources presented in the White Stallion docket, demonstrated a very large number of $PM_{2.5}$ short-term NAAQS exceedances: 309 (1985 meteorology), 355 (1986), 842 (1988) and 138 (1991).[2] The fact of this modeling demonstration, even if one believed there were uncertainties associated with various judgments one must make to conduct the modeling, would both alert the Commissioners to the apparent gravity of the issue (i.e., there are apparently lots of violations of the NAAQS), and it would allow them a basis on which do distinguish

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[1] I will not further belabor the vagueness of the TCEQ's surrogacy policy, assuming it in fact has one. The Medical Group's initial closing argument demonstrated this lack of clarity at pages 10-16. Your PFD could benefit the Commissioners by pointing out that the testimony in this case focused almost completely on EPA's surrogacy policy, not TCEQ's policy, so the record is not very clear as to what the TCEQ policy is and where it is documented. The agency's historical lack of clarity, at least, has left the Commissioners with considerable discretion to act in ways not clearly in conflict with past state, as opposed to EPA, policy.

[2] Exh. EDF-118, "Eighth Highest" file.

this particular permit proceeding from all or at least most of the others they have or will address.

Finally, on this topic, the Medical Group directs your attention to EPA's February 11, 2010, EPA announcement that it is reconsidering its earlier-stated policy that SIP-approved states, like Texas, might have until May of 2011 to abandon their surrogacy policies. See, 75 Fed. Reg. 6827 (Feb. 11, 2010). There, at pages 6831-6832, EPA lays out the case law and regulatory history that suggest it simply is not legal to assume without any proof that PM_{10}, in any situation, is in fact a surrogate for $PM_{2.5}$. The logic of this, in the BACT context, at least, is pretty compelling: most PM controls for PM_{10} were not designed to control and do not as well control the smaller and more harmful $PM_{2.5}$ particles.

The EPA announcement is the most discriminating analysis of which I am aware of the limits to the EPA surrogacy policy as it stands, today. This passage is particularly instructive:

> Although the PM10 Surrogate Policy is in effect, in light of the various relevant court decisions discussed above, it is prudent to conclude that the policy should not be read as allowing the automatic use of a PM10 analysis as a surrogate for satisfying PM2.5 requirements. … Thus, in addition to the case law demonstration discussed previously, a source or permitting authority seeking to rely on the PM10 Surrogate Policy should identify any technical difficulties that exist to justify the application of the policy in each specific case.

75 Fed. Reg. 6827, 6833-34 (February 11. 2010).

This recent EPA analysis should be called to the Commissioners' attentions.

Respectfully,

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CERTIFICATE OF SERVICE

By my signature above, I hereby certify that on April 19, 2010, a true and correct copy of the foregoing exceptions of the Medical Group were served upon the following by Facsimile, Electronic mail and/or U.S. First Class Mail.

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