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December 21, 2010

Via Electronic Filing

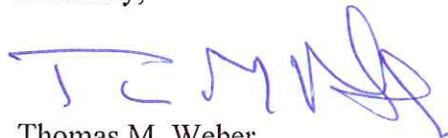
Ms. LaDonna Castanuela
Chief Clerk, MC-105
Texas Commission on Environmental Quality
12100 Park 35 Circle
Austin TX 78753

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

Dear Ms. Castanuela:

Attached for filing in the above matter are Environmental Defense Fund's Exceptions to the Proposal for Decision on Remand and Supplement to Proposal for Decision on Remand.

Sincerely,



Thomas M. Weber

TMW/jam
5043-09
Enclosure

cc: Service List
Mr. Les Trobman

McELROY, SULLIVAN & MILLER, L.L.P.
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December 21, 2010

Via Hand Delivery

Honorable Craig R. Bennett
Administrative Law Judge
Honorable Tommy L. Broyles
Administrative Law Judge
State Office of Administrative Hearings
300 West 15th Street
Austin, Texas 78701

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

Dear Judges Bennett and Broyles:

Enclosed please find a copy of Protestant Environmental Defense Fund's ("EDF")
Exceptions to the Proposal for Decision on Remand.

As the Judges are aware, on October 7, 2010, EDF filed its Motion to Exclude Evidence
in the referenced matter, objecting to air dispersion modeling performed by ED witness Daniel
Jamieson, and any other evidence based upon such modeling, on the basis that such modeling
violated Texas Water Code §5.228(e). At hearing, the Judges noted that they were reserving a
ruling on EDF's objections until issuance of the PFD.

As discussed in EDF's Exceptions, the Judges have concluded that the subject modeling
violated Water Code §5.228(e) and consequently "should not be considered." In light of the
Judges' PFD, it appears that the Judges may have granted EDF's Motion to Exclude Evidence
and ruled that Mr. Jamieson's modeling and evidence based upon such modeling are not
admissible. However, as EDF reads the PFD, the ALJs do not expressly state in the PFD the
precise disposition of EDF's Motion to Exclude.

Accordingly, EDF hereby respectfully requests that the Judges formally rule on EDF's Motion to Exclude Evidence. For the Judges' convenience, a proposed Supplement to the Proposal for Decision granting EDF's Motion to Exclude Evidence is attached.

Thank you very much for your consideration of this matter.

Sincerely,

A handwritten signature in blue ink, appearing to read 'T M Weber', with a stylized flourish at the end.

Thomas M. Weber

TMW/jam
Enclosure

cc: Service List
Mr. Les Trobman

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

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

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

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

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

I.

INTRODUCTION

EDF agrees with the ALJs that Applicant Las Brisas Energy Center, LLC (“Las Brisas” or “Applicant”) failed to meet its burden of proof as to compliance with the 24-hour PM₁₀ PSD increment and NAAQS. In addition, EDF agrees with the ALJs that Texas Water Code § 5.228(e) precludes the TCEQ Executive Director (“ED”) from assisting the Applicant in meeting its burden of proof in a hearing before SOAH as a matter of law and that the Applicant cannot rely upon air dispersion modeling performed by the ED – modeling which corrects errors in the Applicant’s modeling.

EDF excepts, however, to the ALJs’ conclusion that the Applicant has met its burden of proof on certain other issues. In particular, in light of the Applicant’s own witnesses’ testimony establishing that the Applicant has no definite plans as to material

handling and does not even know who will perform material handling, the Application should additionally be denied because: (1) the Applicant failed to demonstrate that the required material handling facilities will not be a part of the LBEC “stationary source” and therefore failed to demonstrate how the material handling facilities can be excluded in determining LBEC’s area of impact or “AOI”; and (2) the Applicant cannot demonstrate compliance with the NAAQS and PSD increment standards based on mere hypothetical material handling scenarios. For these additional reasons, the Applicant has failed to meet its burden to demonstrate compliance with 40 CFR § 52.21(k) as incorporated in TCEQ’s rules at 30 TAC § 116.160(c)(2)(A). Further, as discussed at length below, the Applicant has failed to make these required demonstrations either in its Application or at hearing, and these fatal defects cannot be fixed absent requiring the Applicant to re-file and re-notice its Application pursuant to Texas Health & Safety Code § 382.0291(d).

For these and other reasons discussed below, the Application cannot be granted. Therefore, EDF urges the Commissioners to either deny the Application or, in the alternative, require the Applicant to re-file and re-notice its Application pursuant to Texas Health & Safety Code § 382.0291(d).¹

¹ EDF incorporates by reference the Exceptions filed by other Protestants and the arguments set forth in EDF’s Closing Brief and Reply Brief previously filed in these dockets.

II. REQUEST FOR CLARIFICATION AS TO RULING ON EDF'S MOTION TO EXCLUDE AND EXCEPTIONS ON ADDITIONAL REMAND AS TO MODELING ISSUES.

A. Request for Confirmation of ALJs' Ruling as to EDF's Motion to Exclude Evidence.

As alluded to in the PFD, EDF filed a Motion to Exclude Evidence on October 7, 2010 objecting to air dispersion modeling performed by ED witness Daniel Jamieson, and any other evidence based upon such modeling on the basis that such modeling violated Texas Water Code § 5.228(e)² by assisting the Applicant in meeting its burden of proof. See PFD at 15 n. 25. At hearing, the Judges noted that they were reserving ruling on these objections to the ED's air dispersion modeling until issuance of the PFD. *Id.*

In the PFD, the Judges now conclude that Mr. Jamieson's modeling in fact violated Water Code § 5.228(e) and consequently "should not be considered." See PFD at 21; PFD at 32 (stating "it would violate the law to consider the ED's modeling"); *see also* COL 32 (stating "the [ED's] modeling constitutes improper assistance to the Applicant in meeting its burden of proof in violation of Tex. Water Code § 5.228(e); and therefore, it may not be considered"). In light of the Judges' PFD, it appears that the Judges have granted EDF's Motion to Exclude Evidence and have ruled that Mr. Jamieson's modeling and evidence based upon such modeling are not admissible. However, because the ALJs do not expressly state in the PFD the disposition of EDF's

² This statute mandates that "[t]he executive director or the executive director's designated representative may not assist a permit applicant in meeting its burden of proof in a hearing before the commission or the State Office of Administrative Hearings unless the permit applicant fits a category of permit applicant that the commission by rule has designated as eligible to receive assistance. Tex. Water Code § 5.228(e)(emphasis added). It is undisputed that the Applicant does not fall within any category of applicant that is eligible to receive assistance under Commission rules.

Motion to Exclude, EDF is requesting, via separate letter to the ALJs, that the Judges formally confirm their granting of EDF's Motion to Exclude Evidence.

B. Exceptions as to Judges' Comments Regarding Further Remand.

1. *The Application Should Be Denied.*

In their December 1, 2010 transmittal letter forwarding the PFD to TCEQ General Counsel Les Trobman, the ALJs note that Texas Health & Safety Code § 382.0518 need not be read to allow the Applicant "unlimited opportunities to correct errors." However, the ALJs then conclude that, while "Tex. Health & Safety Code §382.0518 arguably may allow LBEC the opportunity to correct its errors" via a remand, such a remand "would seem like a pointless exercise" insofar as the Applicant would then merely put on "modeling similar to what the ED has already offered."

EDF whole-heartedly agrees with the Judges that Texas Health & Safety Code §382.0518 does not grant an applicant unlimited opportunities to correct errors. In fact, Section 3.27 of the Texas Clean Air Act – the predecessor to Texas Health & Safety Code § 382.0518 – has long been construed to grant the Commission authority to deny permits. See Attachment A, Excerpts from Revision to Texas SIP adopted April 15, 1973.³ Nothing in Health & Safety Code §382.0518 prevents the Commission from denying an Application. Here, the Applicant has *twice* been afforded a full contested-case evidentiary hearing, and has *twice* failed to meet its burden of proof. Under these circumstances, the application can and should be denied.

³ TCAA Section 3.27(c) and (d) contained provisions that are substantively identical to current Texas Health & Safety Code §382.0518(d) and (e). See Attachment C at V-18. Applying the TCAA, the TCEQ's predecessor interpreted the Act as permitting the grant or denial of permits. *Id.* at X-3, X-4.

2. Because the Application Must Be Amended, the Applicant Cannot Correct the Errors in Its Case By Remand.

Furthermore, the deficiencies in the Application in this case cannot simply be corrected by a token remand for multiple reasons. First, as the ALJs found, the Applicant submitted “deficient” air dispersion modeling and will need to submit new and different modeling than the modeling it offered into evidence. Submitting wholly new air dispersion modeling is an amendment to the Application. The Applicant cannot simply submit new modeling in a summary fashion because Texas Health & Safety Code §382.0291(d) mandates that the Applicant re-submit its Application and comply with all applicable requirements, including notice requirements:

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 31st day before the date on which a public hearing on the application is scheduled to begin. If an 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.

Tex. Health & Safety Code § 382.0291(d).

Second, even setting aside the Applicant’s defective air dispersion modeling, the Application must be amended for other reasons. As the ALJs acknowledge in the PFD, the Application is also defective insofar as it fails to specify or commit to any actual material handling plan to be used by the Applicant. See PFD at 36-37. Indeed, as discussed in Section IV below, the Judges conclude that in order to remedy the Applicant’s failure to commit to any material handling plan, the Commission would need to “treat” the material handling facilities “*as if* they were included in the Application.” See PFD at 37 (emphasis added). TCEQ’s own rules dictate that information necessary

to demonstrate compliance with NAAQS and PSD increments must be included in the Application.⁴ Absent evidence demonstrating that the Applicant has committed to a specific material handling plan in its Application, the Applicant has not demonstrated compliance with applicable requirements including the NAAQS and PSD increments. As such, the Applicant cannot be granted a permit absent an amendment of its Application.

Third, as discussed in Section III below, the Applicant has failed to demonstrate in its Application (or otherwise) that it will not perform the required material handling and consequently has failed to show that the required material handling facilities for LBEC will not be part of the LBEC stationary source. In fact, in its current state, the Application still states that the Applicant “LBEC will utilize [the Las Brisas Terminal Company] for a significant portion of material handling activities.” See LBEC Ex. 6, p.26. However, prior to the initial November 2009 hearing, the Applicant disavowed the plan to use LBTC for the required material handling. And as discussed below, the testimony of the Applicant’s witnesses presented at the remanded hearing proves that no decision has been made as to who will perform the material handling. LBEC Ex. 800 at 10:8-11 (testimony of Frank Brogan) Tr. 13: 3134:5-3135:1. This failure to demonstrate that the required material handling facilities are a different source – if it can be rectified at all –would at a minimum require amendment of the Application to specify a specific

⁴ TCEQ’s rules at 30 TAC § 116.111 state that “the application must include. . . (2) information which demonstrates that emissions from the facility, including any associated dockside vessel emissions, meet all of the following . . . (I) Prevention of Significant Deterioration (PSD) review.” 30 TAC § 116.111(a)(2)(I) (emphasis added). In turn, TCEQ rule 30 TAC § 116.160 incorporates by reference 40 CFR § 52.21(k), which requires that: “[t]he owner or operator of the proposed source or modification shall demonstrate that allowable emission increases from the proposed source or modification, in conjunction with all other applicable emissions increases or reductions (including secondary emissions), would not cause or contribute to air pollution in violation of” any NAAQS or PSD increment. 30 TAC § 116.160(c)(2)(A); 40 CFR § 52.21(k)(emphasis added).

material handling plan and demonstrate that such plan would actually be a separate source than LBEC.

There is no dispute that this case is long past “the 31st day before the date on which a public hearing on the application is scheduled to begin.” There is no dispute that the Application fails to contain the materials required to support issuance of any permit. Accordingly, the Applicant’s multiple failures to meet its burden of proof cannot be remedied by a cursory remand. Indeed, as the ALJs recognize, it is exactly the remand of this matter to SOAH (instead of requiring the Applicant to re-file and re-notice its Application) at the Applicant’s behest which occasioned the procedural morass that currently exists in this case. See PFD at 27-28. A remand to SOAH is not a substitute for the re-filing, notice and demonstration of compliance required under Texas Health & Safety Code § 382.0291(d).⁵ If the Applicant is to make any further attempt to obtain the requested permits, it must comply with Health & Safety Code § 382.0291(d).

3. The Commission Cannot Grant the Permit on the Basis That a Remand Would Be “a Pointless Exercise.”

Finally, whatever the procedural disposition of this case, one cannot simply conclude that any further hearing would be “a pointless exercise” because the ED has performed its own modeling attempting to correct the errors in the Applicant’s modeling. Due process and the TCEQ’s own rules dictate that Protestants and all other parties have

⁵ Although the Commission previously remanded this matter pursuant to 30 TAC § 80.265 and Texas Health & Safety Code § 2003.047(m), neither of these provisions provide any exception to the requirements of Health & Safety Code § 382.0291(d). 30 TAC § 80.265 merely allows the Commission the procedural authority to “remand for further proceedings on specific issues in dispute” – and provides no basis for allowing the amendment of the Application without compliance with § 382.0291(d). Texas Government Code § 2003.047(m) is similarly devoid of any authorization to override the statutory requirements in Health & Safety Code § 382.0291(d), merely allowing the Commission the procedural ability to “refer the matter back to the [ALJs] to reconsiders any findings or conclusions . . . and take additional evidence or to make additional findings of fact or conclusions of law.” Neither of these provisions authorize applicants to *amend their applications* without complying with § 382.0291(d).

the right to cross-examine witnesses and present their own evidence in any hearing, and it would be a gross abrogation of such rights to forego such a hearing on the assumption that it would reach a preordained result.⁶ Furthermore, in this case, the Applicant itself contends that there are errors in the ED's location of emissions sources and corresponding modeling. See PFD at 30 n.58. This attack on the ED's modeling by the Applicant demonstrates that the Applicant could not merely substitute the ED's modeling for its own in a subsequent hearing – rather, given its disagreement with Mr. Jamieson's location of emission points at the remanded hearing, the Applicant would necessarily have to make changes to Mr. Jamieson's modeling. One cannot simply conclude that a subsequent hearing on this modeling would reach the same result, and doing so would effectively deny Protestants their due process rights to cross-examine the Applicant's witnesses and present their own evidence in the subsequent hearing.⁷

Because the ED's modeling violated Texas Water Code § 5.228(e) and could not properly be considered in the hearing, the Commission likewise cannot simply conclude based upon comments in the ALJs' letter that the ED's modeling would suffice to meet the Applicant's burden of proof in a hypothetical remand hearing. Doing so would amount to relying on the ED's modeling as the basis for the Commission's decision – again, this would be assisting the Applicant which is expressly prohibited by Texas Water Code § 5.228(e). The Application should be denied. To the extent, if any, that the Applicant can correct the defects in its Application, it must do so in accordance with

⁶ See *Lewis v. Metropolitan Savings and Loan Ass'n*, 500 S.W.2d 11 (Tex. 1977) (parties in administrative hearings have due process rights including the right to cross-examine witnesses and rebut evidence) Tex. Gov't Code § 2001.051(2), -.087 (stipulating that parties have the right to present evidence and conduct cross-examination); 30 TAC § 80.115(a) (parties to TCEQ proceeding have procedural rights including the right to present a direct case and the right to cross-examine witnesses).

⁷ *Lewis*, 500 S.W.2d 11; Tex. Gov't Code § 2001.051(2), -.087; 30 TAC § 80.115(a).

Texas Health & Safety Code § 382.0291(d).

III. THE APPLICANT FAILED TO PROVE THAT THE REQUIRED MATERIAL HANDLING SOURCES WILL BE A SEPARATE “STATIONARY SOURCE.”

As the Judges recognize, one major issue raised at hearing is whether the required material handling facilities for LBEC should be treated as part of the LBEC “stationary source” or as “secondary emissions” from a different source. See PFD at 8-14. This is a critical issue because, as EDF witness Dr. Roberto Gasparini’s undisputed modeling results reveal, massive exceedances of the 24-hour PM₁₀ PSD increment result if the required material handling facilities are in fact part of the “stationary source.” See EDF Exs. 405, 411; EDF Closing Br. on Remand at 22-23. In other words, unless the Applicant is permitted to define the LBEC “stationary source” in a manner that excludes the massive material handling facilities that the Applicant admits are “required” for LBEC to operate – thereby greatly shrinking the scope of the area of impact (“AOI”) – then LBEC simply cannot demonstrate compliance with 40 CFR § 52.21(k).

In the PFD, the Judges note that under the three-part test for determination of whether a facility constitutes part of a stationary source, one must aggregate all of the pollutant-emitting activities that: (i) are located in one or more contiguous or adjacent properties; (ii) belong to the same industrial grouping; and (iii) are under the control of the same person (or persons under common control). See PFD at 10. The Judges agree that the “adjacent property” test is met, and agree that the second test is arguably met because the material handling facilities would be support facilities for LBEC. PFD at 10. The Judges furthermore note that EPA guidance shows that “control” may exist under a number of different scenarios. However, the Judges then conclude that the “control”

factor is not present here, finding “there is no current basis for finding that the proposed material handling facilities would be under the control of LBEC.” PFD at 13.

The problem with this analysis is that it shifts the burden of proof in this case to Protestants. As the ALJs point out in their proposed Findings of Fact and Conclusions of Law (“Proposed FOF and COL”), in this case “the burden of proof is on the [A]pplicant to prove by a preponderance of evidence that it satisfies all statutory and regulatory requirements.” See COL 6. And as the ALJs also recognize in their PFD, it is the Applicant’s burden of proof to show that the proposed new source, in conjunction with existing sources, will not cause or contribute to a violation of any NAAQS or PSD increment. See PFD at 23; *accord* 40 CFR § 52.21(k). Critically, the evidence at hearing failed to demonstrate that the proposed material handling facilities *will* be under control of POCCA, or that the facilities *will not* be under the control of LBEC.

In addition to relying on merely hypothetical material handling plans, the Applicant also refuses to commit to the identity of the person or entity who will perform the required material handling, or otherwise make any demonstration that the required material handling facilities will in fact be part of a different “stationary source.” Rather, it was undisputed at hearing that there is no agreement whatsoever between the Applicant and POCCA – or between the Applicant and anyone else – as to who will perform the “required” material handling. Even more damaging to the Applicant, Frank Brogan, Deputy Port Director for Engineering, Finance and Administration for POCCA, admitted there has not even been any determination as to whether or not POCCA will in fact perform the material handling:

Q: [By Mr. Riley] Now, could you tell the administrative law judges whether either of these options in facilities described in the – in your

testimony – the prefiled testimony – whether those have been considered by the Port of Corpus Christi for actual construction?

A: [By Mr. Brogan] No. They have not been presented to our board for any sort of recommended capital expansion program.

Q: And at this time, is there any contract with the Las Brisas entity to construct either of those two scenarios?

A: Not with the Port of Corpus Christi.

Q: Or anyone else, as far as you know?

A: No, I'm not aware of any contract.

Q: Are there existing port operations or tenants that could also provide material handling to the Las Brisas Energy Center?

A: There are current customers at the port's bulk terminal that could provide similar services. We've also had other companies, you know, express interest in providing services at our port that are not currently located there.

Tr. 13: 3134:5-3135:1.

Furthermore, in his pre-filed testimony Mr. Brogan admits that no material handling and storage design has been chosen. LBEC Ex. 800:10:8-11. This evidence establishes beyond dispute that LBEC has no definite plan for performance of the required material handling, nor any definite plan as to *who* will perform the material handling. LBEC Ex. 800:10:8-11; 3134:5-3135:1; Tr. 13: 3141:14-23. In light of this undisputed testimony, the Applicant through its own questioning established that it cannot demonstrate that the required material handling facilities will not be under LBEC's control. The fact that it is merely possible that POCCA will perform material handling does not demonstrate that the Applicant will not have control over the required material handling. This is a fatal defect in the Application and the record in this case.

As the Judges observe in the context of the Applicant's refusal to commit to either

the Option 1 or Option 2 material handling plans, mere hypothetical material handling plans are not sufficient to meet the Applicant's requirement to demonstrate compliance with NAAQS and PSD increments. PFD at 35-37. Likewise, merely offering up a hypothetical possibility that POCCA or another third party *may* perform the required material handling does not suffice to demonstrate that the required material handling facilities will not be under the control of LBEC. As the party who has the burden of proof to demonstrate compliance with NAAQS and PSD increments, and as the party claiming it has the right to exclude the required material handling facilities, it is incumbent on the Applicant to demonstrate that the required material handling facilities will not be under the control of the Applicant. But the Applicant's own witnesses flatly refused to make any such commitment – much less a demonstration – that the material handling facilities *will* be under POCCA control, leaving open the possibility that these facilities will be under LBEC control.⁸

Given the undisputed testimony of Mr. Brogan, the Applicant has wholly failed to demonstrate that it will not have control over material handling. Protestants have no burden in this case to prove anything. Therefore, it cannot be the Protestants' burden to present evidence establishing that the required material handling facilities will not be operated by POCCA, or will be controlled by LBEC – indeed, Protestants cannot possibly make such a demonstration as the Protestants are not the decision-makers as to the Applicant's plans. It is the Applicant's burden to demonstrate that the required

⁸ The ALJs contend that Protestants' control arguments "depend on certain assumptions that are not currently true." See PFD at 13. In fact, the Applicant's argument that there is no "control" likewise depends upon an assumption that is not currently true – namely, that the required material handling facilities will in fact be performed by POCCA. There is no definite statement, commitment, or any evidence that POCCA will perform the material handling, and in fact POCCA's own witness admitted that there is no commitment by POCCA to handle the materials. It is the Applicant's burden to demonstrate there is no control – not the Protestants' burden to demonstrate the contrary.

material handling facilities *will* be under the control of a third party such that they may be excluded from the LBEC source. And the undisputed evidence shows there has been no delegation of the required material handling activities to any third party, nor even any decision or commitment to so delegate such activities. Accordingly, the required material handling facilities cannot be treated as a separate stationary source under this record and EDF excepts to the PFD and to FOF 104-105 insofar as they reach the conclusion that the material handling facilities may be carved out from the LBEC stationary source.

IV. THE APPLICANT'S FAILURE TO COMMIT TO A MATERIAL HANDLING PLAN CANNOT BE CURED BY A PERMIT CONDITION RETROACTIVELY AMENDING THE APPLICATION

As noted above, there was no evidence of any kind presented by any person authorized to bind the Applicant as to what exactly the Applicant proposes to do with regard to material handling. Moreover, the testimony presented on remand by Frank Brogan affirmatively and repeatedly reveals that the Applicant has not committed to any material handling plan at all – including the two implausible material handling “options” that Applicant has submitted as evidence. See LBEC Ex. 800:10:8-11; Tr. 13: 3134:5-3135:1.⁹ Accordingly, EDF noted in its Closing Brief on Remand that the Applicant’s case furthermore fails because the Applicant has not made any commitment to utilize either the “Option 1” or “Option 2” material handling scenarios that are the basis for its

⁹ Applicant’s hypothetical “Option 1” and “Option 2” material handling scenarios are designed to feign compliance with the PSD increment standard for PM₁₀. These improbable, hypothetical material handling plans presented by the Applicant call for nearly mile-long enclosed conveyors (moving the huge sources of particulate emissions caused by the required material handling far away from LBEC’s AOI) and construction of a “bubble” over the massive limestone pile required for LBEC – showing the absurd lengths the Applicant must go to in order to pretend that the Applicant can somehow comply with the PM₁₀ PSD increments and NAAQS. See LBEC Exs. 702, 703. As noted above, even using these improbable plans, the Applicant must resort to the strategy of treating the required material handling sources for LBEC as a different “stationary source” from LBEC, as treating LBEC and its required material handling facilities as a single stationary source results in the massive and pervasive exceedances of allowable PM₁₀ emissions shown by Dr. Gasparini’s air dispersion modeling. See EDF Exs. 405, 411; EDF Closing Br. on Remand at 22-23.

air dispersion modeling. See EDF Closing Br. on Remand at 3-9. In the PFD, the ALJs agree, observing:

[A] showing that there are hypothetical ways to not cause or contribute to violations of the NAAQS or PSD increment is not the same as showing that emissions from the source along with secondary emissions "would not cause or contribute to air pollution" in violation of any NAAQS or PSD increment. [footnote omitted]. To make the necessary showing, an applicant has to be bound to the operations it has modeled. Otherwise, any showing is merely illusory. So, in order to give credence to LBEC's modeling, the ALJs find that LBEC must be bound to use the material-handling options that it has modeled, or options that have emissions impacts that are no worse than the modeled options. Otherwise, LBEC's modeling shows only that it is possible to comply with applicable air quality standards.

PFD at 37. However, the Judges then conclude that this error may be fixed by "the inclusion of an ordering provision mandating treatment of the two off-site material handling options as if they were included in the Application." *Id.* (emphasis added).

This attempted remedy poses multiple problems. First, by its terms it would retroactively treat the Application as if it contains required materials when it does not. Such actions are tantamount to a permit amendment after the hearing, something expressly prohibited by the Texas Clean Air Act. As noted above, Texas Health & Safety Code § 382.0291(d) states that "[a]n 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 31st day before the date on which a public hearing on the application is scheduled to begin.*" Tex. Health & Safety Code § 382.0219(d) (emphasis added). In such a case, the statute requires that the Applicant "resubmit the application to the commission and . . . 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." *Id.*

As the Judges' PFD recognizes, in order for the Applicant to meet the required showings at this late juncture it would be necessary to "treat" the Application as including required information that it does not – a clear recognition that the Application is deficient. See PFD at 37. But under Health & Safety Code § 382.0291(d), if an amendment to an application is necessary less than 31 days before the date on which the hearing begins, the Applicant must re-submit its Application and comply with notice requirements and other requirements of law existing as of the re-submittal date. Resorting to the legal fiction of "treating" the Application as containing required matters which it in fact does not therefore contravenes Health & Safety Code §382.0291(d).

Second, because there is absolutely no testimony, assertion or other evidence whatsoever in the record that the Applicant actually intends to utilize the Option 1 or Option 2 scenarios, deeming the Application to include such information would once more assist the Applicant by supplying crucial evidence that the Applicant failed to supply in the hearing. It is the Applicant's burden to supply information that satisfies all statutory and regulatory requirements. It is be improper for the TCEQ to do so by resort to a legal fiction.

In this regard, the Applicant has once again failed to meet its burden of proof and failed to submit the information and evidence required to demonstrate entitlement to its permit. It would be improper as a matter of law and violate Texas Health & Safety Code § 382.0291(d) for the Commission to treat the Application as containing required information when in fact the Application does not contain such required information. For this reason, EDF excepts to the PFD and the ordering provisions in the Proposed FOF and COL insofar as they propose that the Commission treat or deem any representation to use

“Option 1” or “Option 2” material handling scenarios as being included in the Application.

V. EXCEPTIONS TO PROPOSED FOF AND COL REGARDING MACT.

As was discussed at great length in the briefing after the initial November 2009 hearing, the Applicant contends that the proposed LBEC CFB boilers are exempt from case-by-case MACT review requirements under the federal Clean Air Act because petroleum coke-fired boilers have not been included in any source category listed as being subject to MACT by the United States Environmental Protection Agency (“EPA”). While EDF will not repeat the voluminous and detailed arguments regarding this issue here, it will suffice to note that in the initial PFD issued by the ALJs on March 29, 2010 (the “Initial PFD”), the ALJs concluded that “there is no justification for not requiring a MACT analysis for the pet coke-fired CFB boilers in issue” and that consequently “LBEC's application is deficient and must either be denied or remanded to the ED for further technical review to cure this deficiency and to ensure that the emission limits and/or technology used to achieve those limits represent [MACT].” See Initial PFD at 23.

When the Initial PFD was presented to the Commission at the Agenda held June 30, 2010, the Commissioners disagreed with the ALJs that MACT review was required and did not include MACT analysis within the scope of the issues remanded to SOAH. Given the limited scope of issues remanded by the Commission, the ALJs do not address the MACT issues in the new PFD. However, in the Proposed FOF and COL, the ALJs include COL 35, stating “[t]he LBEC petroleum coke-fired CFB boilers are exempt from case-by-case MACT review pursuant to 30 Tex. Admin. Code § 116.402(a)” and COL 36

stating that “[i]n accordance with 30 Tex. Admin. Code § 116.111(a)(2)(K), the LBEC complies with all applicable requirements of Chapter 116 regarding case-by-case MACT review.”

It appears that these FOF and COL have been added in accordance with ordering provision (3) of the TCEQ’s July 1, 2010 Interim Order, which directed the ALJs to “issue a . . . Proposed Order that incorporates . . . the other findings made by the Commissioners at the June 30, 2010 Agenda meeting.” Nevertheless, these COL are inconsistent with the Judges’ conclusions in the Initial PFD and incorrect as a matter of law. As the Judges concluded in their Initial PFD:

Absent evidence of a specific intention to treat pet coke-fired boilers differently from coal-fired or oil-fired boilers, the ALJs must interpret the applicable regulations consistently. If one uses a strict legal interpretation, then pet coke is not included in the pertinent definitions of "coal" or "fossil fuels" under section 112 related to EGUs. Therefore, LBEC's proposed pet coke-fired boilers would be considered industrial, commercial, or institutional boilers under section 112, for which a case-by-case MACT analysis is required. On the other hand, if one applies a technical understanding . . . then pet coke is considered a fossil fuel and pet coke-fired boilers may be considered coal-fired or oil-fired for purposes of subjecting them to the MACT analysis requirements. This is because pet coke is a major source of HAPs, just like coal and oil, and has been included within the definition of coal and petroleum at different times in EPA's rules. Either way, the ALJs find there is no justification for not requiring a MACT analysis for the pet coke-fired CFB boilers in issue. In fact, it would be an absurd result to find that EPA intended to subject smaller pet coke-fired boilers (such as industrial or commercial boilers) to a MACT analysis, but not larger ones. Because no MACT analysis was performed for the boilers, LBEC's application is deficient and must either be denied or remanded to the ED for further technical review to cure this deficiency and to ensure that the emission limits and/or technology used to achieve those limits represent the maximum achievable control technology.

Initial PFD at 23.

The Judges’ conclusions regarding MACT in the Initial PFD were correct and

there is no legal support for any departure from those conclusions. As a matter of law, the LBEC CFBs are subject to MACT. Accordingly, EDF excepts to proposed COL 35 and COL 36 to the extent they conclude that the LBEC CFBs are not subject to MACT review.

VI. THE APPLICANT FAILED TO DEMONSTRATE COMPLIANCE NEW 1-HOUR NO₂ AND SO₂ NAAQS.

As the Judges note in the PFD, since the original hearing in this matter the EPA has enacted new NAAQS for NO₂ and SO₂ based on a 1-hour averaging time. See 75 FR 6474 (February 9, 2010); 75 FR 35520 (June 22, 2010). The new 1-hour NAAQS for NO₂ became effective on April 12, 2010, while the one-hour NAAQS for SO₂ based on a 1-hour averaging time became effective on August 23, 2010 – both having become the law well before the hearing on remand. As noted above, under 40 CFR § 52.21(k) and 30 TAC § 116.160, proposed sources must demonstrate that their allowable emissions will not cause or contribute to a violation of “any national ambient air quality standard in any air quality control region.”

The owner or operator of any major stationary source obtaining a final PSD permit on or after the effective date of the new NAAQS is required, as a prerequisite for issuance of a PSD permit, to demonstrate that the emissions increases will not cause or contribute to a violation of that new NAAQS. See 75 FR 35520, 35578 (June 22, 2010). At the time a new NAAQS is promulgated, EPA interprets the federal Clean Air Act and EPA regulations to require implementation of the new standard in the federal PSD permitting process upon the effective date of the new standard. *Id.* at 35580 (stating “in the case of pollutants that are already ‘regulated NSR pollutants,’ at the time a new NAAQS is promulgated or an existing NAAQS is revised, EPA interprets the CAA and

EPA regulations to require implementation of the new or revised standard . . . upon the effective date of any new or revised standards”). It is undisputed that the Applicant has not made any demonstration of compliance with these new NAAQS, even though it could have requested that the scope of the hearing on remand be expanded to allow evidence on these issues.

In the PFD, the ALJs note the existence of the new standards and the lack of any modeling demonstration by the Applicant, but decline to directly rule on the issue, although the ALJs note that “if the Commission believes that the law requires an applicant to demonstrate compliance with all applicable NAAQS standards at the time a permit issues, then LBEC has not done this.” See PFD at 39. As a matter of law, the Applicant must demonstrate compliance with the new one-hour NO₂ and SO₂ NAAQS. It is undisputed that the Applicant has not done so. Accordingly, the Application should be denied on this additional basis. In addition, EDF excepts to the PFD and to FOF 48, 56, and 85 to the extent that they fail to reflect the requirement that the Applicant comply with the one-hour NAAQS for NO₂ and SO₂ and fail to find that the Applicant has not demonstrated compliance with the one-hour NO₂ and SO₂ NAAQS.

VII. FAILURE TO REQUIRE COMPLIANCE WITH BACT

Proposed FOF 216 – 236 contains various fact findings regarding BACT.

Furthermore, Proposed COL 23 and 24 provide as follows:

23. An applicant that is proposing to construct a CFB boiler power plant is not required to include other electric generation technologies, such as integrated gasification/combined cycle (IGCC) technology, in its BACT analysis.
24. In accordance with 30 TEX. ADMIN. CODE § 116.11 1(a)(2)(C), the LBEC will utilize BACT, with consideration given to the technical practicability and economic reasonableness of reducing or eliminating

emissions from the facilities of which it will be comprised.

Proposed Conclusion of Law 24 tracks – nearly verbatim – the TCEQ’s definition of “Best Available Control Technology” (“BACT”) contained in 30 TAC § 116.10(3).

As EDF noted in its initial Closing Brief filed December 14, 2009, in determining whether or not the Applicant complied with Best Available Control Technology (“BACT”) requirements, the ED incorrectly relied upon the Texas definition for BACT set forth in 30 TAC § 116.10, not the different federal definition contained in the Texas SIP. Tr. 7 at 1789:4-21 (testimony of ED witness Randy Hamilton that he applied the definition of BACT set forth in 30 TAC § 116.10); see also see 40 CFR §52.2270 and former 30 TAC § 116.160 (courtesy copy attached at Attachment “B,” specifically incorporating by reference the federal BACT definition set forth in 40 CFR § 52.21(b)(12)).

The definition applied by the ED is circular and self-referential, providing that “Best Available Control Technology” means “BACT with consideration given to the technical practicability and the economic reasonableness of reducing or eliminating emissions from the facility.” 30 TAC § 116.10. By contrast, the federal BACT definition expressly requires consideration of “production processes or available methods, systems, and techniques, including fuel cleaning or treatment or innovative fuel combustion techniques for control of” pollutants. See 40 CFR § 52.21(b)(12). The undisputed evidence indicates that, not only did the ED improperly apply the state BACT definition, but the ED furthermore failed to require consideration of alternative “production processes” and “innovative fuel combustion techniques” such as IGCC –

thereby ignoring the express language of the federal BACT definition. *See, e.g.*, LBEC Ex. 1 at 62:4-63:11; EDF Ex. 1 at 650:22-24.¹⁰

Since the original hearing in this matter, the EPA has expressly rejected the TCEQ's attempt to delete the federal BACT definition from the Texas SIP or otherwise apply the BACT definition at 30 TAC 116.10(3) to major NSR sources. See 75 FR 55978 (September 15, 2010); see also 74 FR 48464 (stating that "Texas must revise the submitted BACT definition at 30 TAC 116.10(3) to clearly apply only in the minor NSR SIP and only for minor sources and minor modifications") (emphasis added). In this connection, the EPA has expressly found that the definition of "BACT" in 30 TAC § 116.10(3) "d[oes] not meet the federal PSD BACT definition." 75 FR 55978, 55982 (citing 54 FR 52823 (December 22, 1989) and 57 FR 28093 (July 24, 1992)).

In response, the TCEQ amended its rules to reinstate the federal BACT definition. See current 30 TAC § 116.160(c)(1)(A) (amended effective June 24, 2010, 35 Tex. Reg 5344); see also 75 FR 55981. Nevertheless, as Mr. Hamilton's testimony establishes, TCEQ applied the 30 TAC 116.10(3) definition in this case, which does not meet the proper federal BACT definition. Because the ED applied the incorrect definition of BACT, there has been no demonstration that the proposed LBEC complies with applicable BACT requirements – i.e., that it will employ BACT as defined under the federal Clean Air Act.¹¹ In fact, Conclusion of Law No. 24 expressly recites that the

¹⁰ See also Attachment C at p. 4-5 (EPA comments to TCEQ regarding White Stallion Energy Center application noting that, under federal BACT definition, "when a potential pollution control strategy is not considered in a BACT analysis, the record should provide a reasoned basis to show why that option is not available").

¹¹ Nor does the fact that the TCEQ temporarily deleted the federal BACT definition from its rules excuse the failure to apply the federal BACT definition, as at all relevant times the Texas SIP has included the federal BACT definition. A state is bound under federal law to enforce its SIP and cannot administer the federal Clean Air Act pursuant to amended rules unless and until such rules are approved by the EPA as a

language of the Texas BACT definition is met – not the federal BACT definition with which the Applicant must demonstrate compliance. For this reason, the Applicant has failed to meet its burden of showing that the proposed LBEC will employ BACT, and therefore the Application must be denied. Consequently, EDF excepts to proposed FOF 216 – 236 and COL 23-24 insofar as such proposed FOF and COL conclude that the Applicant has demonstrated compliance with BACT requirements.

VIII. THE APPLICANT AND TCEQ FAILED TO JUSTIFY RELIANCE ON THE PM_{2.5} SURROGACY POLICY.

In 1997, EPA adopted a NAAQS for PM_{2.5}. 62 FR 38652 (July 18, 1997). 40 C.F.R. § 52.21(k), which has been adopted into the Texas SIP, requires that the Applicant demonstrate that its proposed emissions of PM_{2.5} will not “cause or contribute” to a violation of any NAAQS. The evidence is undisputed that PM_{2.5} emissions cause a number of serious health effects, including premature mortality, aggravation of respiratory and cardiovascular disease, lung disease, decreased lung function, asthma attacks, and cardiovascular problems such as heart attacks and cardiac arrhythmia. See EDF Ex. 200 at 18:11-18. In this case, the PM_{2.5} issue is particularly acute given that the proposed source would be massive source of PM_{2.5} emissions located in a densely-populated metropolitan area and in close proximity (within ½ mile) of schools, neighborhoods, and churches.

As discussed in EDF’s Closing Brief filed after the initial November 2009 hearing, both the Applicant and ED simply presumed that compliance with the PM₁₀ NAAQS is sufficient to demonstrate compliance with the PM_{2.5} NAAQS (the “surrogacy

SIP revision. *Sierra Club v. Tennessee Valley Auth.*, 430 F.3d at 1346-50 (holding state's employment of 2% *de minimis* exception rule to opacity limitation incorporated in SIP was improper in absence of acceptance of exception rule by EPA as SIP revision); *see also Sweat v. Hull*, 200 F.Supp.2d at 1169-72.

policy”). Tr. 2 at 492:22-493:17; 496:16-20; see also Tr. 7: 1799:13-18 (testimony of Randy Hamilton that the surrogacy policy is “presumed to apply”). Proposed FOF 77 states that “[b]oth EPA and TCEQ accept demonstration of compliance with the PM₁₀ NAAQS as a surrogate for demonstration of compliance with the PM_{2.5} NAAQS.” Proposed FOF 79 then states that “[t]he LBEC’s emissions of PM_{2.5} will not cause or contribute to an exceedance of the PM_{2.5} NAAQS.” Proposed COL 7 states that “a demonstration of compliance with the PM₁₀ NAAQS suffices to demonstrate compliance with the PM_{2.5} NAAQS.”

However, EPA has made clear that the surrogacy policy cannot be applied in the absence of a case-specific inquiry showing that the surrogacy policy is appropriate. EDF Ex. 318 at pp. 5-6; see also EDF Ex. 319. Specifically, EPA policy requires that an Applicant *must* either: (a) quantify, model and account for PM_{2.5} emissions and demonstrate they do not cause or contribute to violations of the NAAQS; or (b) address the propriety of applying the surrogacy policy to demonstrate “compliance with the PSD requirements,” including showing the particular technical difficulties that preclude PM_{2.5} quantification and modeling. EDF Ex. 318 at pp. 5-6. The EPA has repeatedly advised TCEQ that such an accounting of actual PM_{2.5} emissions or a case-specific justification of the surrogacy policy must be made. See EDF Exs. 318, 319; see also Attachment B at p. 4 (EPA comments in White Stallion case stating “[t]he permit record must reflect a demonstration to support the use of PM₁₀ as a surrogate for PM_{2.5}”).

It is undisputed that neither the Applicant nor the ED made any such case-specific demonstration as to why reliance on PM₁₀ as a surrogate for PM_{2.5} is appropriate here. The law and EPA policy mandate that the Applicant and ED demonstrate that the use of PM₁₀ as a surrogate for PM_{2.5} is reasonable under the facts of this Application.

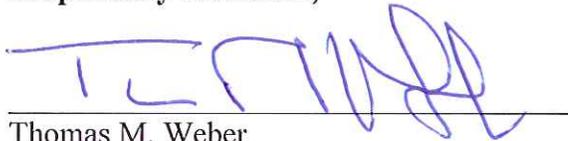
Because they did not, the Application should be denied. Furthermore, EDF excepts to proposed FOF 77-79 and COL 7 to the extent that they imply the surrogacy policy can be applied absent a case-specific showing that such policy is appropriate, or that any case-specific showing was made in this case.

IX. CONCLUSION

For the reasons identified by the ALJs, the ED's actions in this matter violate Texas Water Code § 5.228(e) and preclude issuance of the permits requested by the Applicant. But the Application is also deficient in multiple other respects, including in its complete failure to demonstrate how required material handling will be performed, or to demonstrate that such required material handling activities in fact will not be part of the LBEC stationary source. Further, the Applicant made no attempt to demonstrate compliance with the legally applicable short-term NO₂ and SO₂ standards despite ample opportunity to do so at the hearing on remand, with the applicable BACT and MACT standards, or with the PM_{2.5} NAAQS. Given the Applicant's repeated failures to demonstrate that the proposed LBEC may be operated within violations of applicable NAAQS and PSD increments, and the other failures to meet applicable requirements set forth above, the Application must be denied.

WHEREFORE, PREMISES CONSIDERED, EDF respectfully requests that the Application either be denied outright or remanded pursuant to Texas Health & Safety Code §382.0291(d) until such time as the Applicant amends its Application to properly address material handling and the other deficiencies previously identified by the Protestants, the ED and the ALJs. Further, EDF requests that the Judges and TCEQ grant such other and further relief to which EDF and the other Protestants show themselves entitled.

Respectfully submitted,

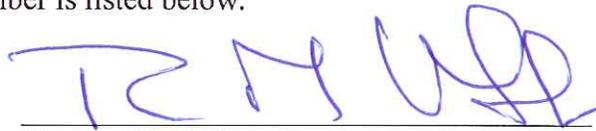


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CERTIFICATE OF SERVICE

I certify that on December 21, 2010 a true and correct copy of the foregoing document has been sent to the representatives of parties on the official service list by hand delivery, fax or by mail, if no fax number is listed below.



Thomas M. Weber

SERVICE LIST

AGENCY: TEXAS COMMISSION ON ENVIRONMENTAL QUALITY (TCEQ)

STYLE/CASE: APPLICATION OF LAS BRISAS ENERGY CENTER, LLC FOR STATE AIR QUALITY PERMIT; NOS. 85013, HAP48, PAL41, AND PSD-TX-1138

SOAH DOCKET NUMBER: 582-09-2005

TCEQ DOCKET NUMBER: 2009-0033-AIR

STATE OFFICE OF ADMINISTRATIVE HEARINGS	CRAIG R. BENNETT TOMMY L. BROYLES ADMINISTRATIVE LAW JUDGES
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SIP Revision: Texas, April 15, 1973

This page contains the complete text of the Texas State Implementation Plan (SIP), based on the original Texas SIP, dated January 26, 1972, and reflects all revisions made up to April 15, 1973.

Summary of the SIP Revision

Adoption Date: 04/15/1973

EPA Approval Date (Partial): 07/06/1977 (42 FR 34517)

Background: The Texas SIP was revised on February 15, 1973, and on April 15, 1973. As a result of legislation passed by the Texas Legislature in 1973, the Texas Air Control Board (TACB) became an independent agency, and the related functions and personnel from the Texas State Department of Health (TSDH) were transferred to the new agency. There were also several rules that changed, including general rules for the TACB, motor vehicle rules, and rules for the control of carbon monoxide (CO) and volatile organic compound (VOC) emissions.

Key Changes: This SIP revision included changes in classifications for some areas, and as a result of the nitrogen dioxide (NO₂) reclassifications, no control strategy was required for NO₂. The SIP revision also included updated projections for the emissions reductions needed for attainment, additional quantification of control measures, an updated episode plan, updated details on the resources available to implement the SIP, updated compliance abatement schedules, changes to the air quality surveillance plan, and an updated intergovernmental cooperation section.

SIP Narrative

Files linked from this page are in Portable Document Format (PDF).

- Preliminary
- Section I—Introduction
- Section II—Regional Classifications
- Section III—Public Hearings
- Section IV—Preliminary Review
- Section V—Legal Authority
- Section VI—Control Strategy
- Section VII—Compliance Schedule
- Section VIII—Episode Plan
- Section IX—Air Quality Surveillance Plan
- Section X—The Permit System
- Section XI—Source Surveillance
- Section XII—Resources
- Section XIII—Intergovernmental Cooperation
- Section XIV—Rules and Regulations

SECTION V

LEGAL AUTHORITY

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.

"Sec. 3.26. The filing of a petition for variance or to amend a variance, or of a request to extend a variance, does not serve to abate any suit, whether by the board or a local government, or any hearing, investigation, or other proceeding which the board or a local government may then have in process or may thereafter initiate. The granting of a variance or amendment to a variance, or of an extension of a variance, shall operate to authorize emissions of air contaminants or other activities beyond the limitations prescribed in this Act or in the rules and regulations of the board from the effective date of the board's action, but only for the period and to the extent specified in the board's order.

Construction Permit

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

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

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

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

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

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

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

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

SECTION X

REVIEW OF NEW SOURCES AND MODIFICATIONS

Reference Section V, the Texas Clean Air Act, Sections 1.03, 3.27, and 3.28 for authority to prevent construction modification or operation of any stationary source at any location where emissions from such source will prevent the attainment or maintenance of a national standard. Procedures outlined will provide for submission by the owner or operator of a new stationary source or existing source which is to be modified, information which will permit the State to make a determination whether construction or modification will result in violation of applicable portions of the control strategy or will interfere with attainment or maintenance of a national standard. Disapproval procedures for such construction or modification is included. There is no provision which will relieve the owner or operator of his responsibility to comply with applicable portions of the control strategy.

PERMIT SYSTEM PROCEDURES

I. Permit to Construct

A. Applications

1. Application forms for a permit to construct will be provided by the Texas Air Control Board, and may be obtained from a city or county air pollution control program, or the Air Pollution Control Services of the Texas State Department of Health at 820 East 53rd Street, Austin, Texas 78751, or from a regional office of the Texas Air Pollution Control Services.
2. A complete application for permit to construct will consist of two application forms. The first form will be a general form requesting general information. The second form will be a detailed form requesting engineering data. The second form is designed to apply to specific processes and controls.
3. The forms will consist of an original and three copies. The original and two copies will be used by the Air Pollution Control Services. One copy will be retained by the applicant.
4. When a general application form is received by the Texas Air Pollution Control Services, the application will be reviewed and additional information will be requested, if needed to complete the review. Any additional information received will become a part of the application.
5. When all the information needed to complete the review is received by the Texas Air Pollution Control Services, a copy of the complete application will be sent to the local air pollution control program and the regional office with a request that any comments they may wish to make be received within fifteen (15) days.

B. Review

1. When an application is received, it will be assigned to an air pollution control engineer for review. Comments from the local and regional control programs will be considered in the review. Conferences with the applicant may be requested when necessary.

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.

Texas Administrative Code

Title 30 Environmental Quality

2006—Part One
§§ 1.1 to 299.61

[Replaces 2005 Pamphlet]

Amendments effective through
December 31, 2005

THOMSON
★
WEST

Mat #40407118

Attachment B

30 TAC § 116.151

(4) In accordance with the Federal Clean Air Act, the permit application shall contain an analysis of alternative sites, sizes, production processes, and control techniques for the proposed source. The analysis shall demonstrate that the benefits of the proposed location and source configuration significantly outweigh the environmental and social costs of that location.

Source: The provisions of this §116.151 adopted to be effective September 13, 1993, 18 TexReg 5746; amended to be effective April 7, 1998, 23 TexReg 3515.

DIVISION 6. PREVENTION OF SIGNIFICANT DETERIORATION REVIEW

§ 116.160. Prevention of Significant Deterioration Requirements

(a) Each proposed new major source or major modification in an attainment or unclassifiable area shall comply with the Prevention of Significant Deterioration (PSD) of Air Quality regulations promulgated by the EPA in Title 40 Code of Federal Regulations (CFR) at 40 CFR §52.21 as amended March 12, 1996 and the Definitions for Protection of Visibility promulgated at 40 CFR §51.301 as amended July 1, 1999, hereby incorporated by reference.

(b) The following paragraphs are excluded:

(1) 40 CFR §52.21(j), concerning control technology review;

(2) 40 CFR §52.21(l), concerning air quality models;

(3) 40 CFR §52.21(q), concerning public notification (provided, however, that a determination to issue or not issue a permit shall be made within one year after receipt of a complete permit application so long as a contested case hearing has not been called on the application);

(4) 40 CFR §52.21(r)(2), concerning source obligation;

(5) 40 CFR §52.21(s), concerning environmental impact statements;

(6) 40 CFR §52.21(u), concerning delegation of authority; and

(7) 40 CFR §52.21(w), concerning permit rescission.

(c) The definitions of building, structure, facility, or installation (40 CFR §52.21(b)(6)) and secondary emissions (40 CFR §52.21(b)(18)) are excluded and replaced with the following definitions:

(1) building, structure, facility, or installation—all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or

COMMISSION ON ENVIRONMENTAL QUALITY

more contiguous or adjacent properties, and are under the control of the same person (or persons under common control). Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same "Major Group" (i.e., which have the same first two-digit code) as described in the Standard Industrial Classification Manual, 1972, as amended by the 1977 supplement.

(2) secondary emissions—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 emission 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.

(d) The term "executive director" shall replace the word "administrator," except in 40 CFR §52.21(b)(17), (f)(1)(v), (f)(3), (f)(4)(i), (g), and (t). "Administrator or executive director" shall replace "administrator" in 40 CFR §52.21(b)(3)(iii), and "administrator and executive director" shall replace "administrator" in 40 CFR §52.21(p)(2).

(e) All estimates of ambient concentrations required under this subsection shall be based on the applicable air quality models and modeling procedures specified in the EPA Guideline on Air Quality Models, as amended, or models and modeling procedures currently approved by the EPA for use in the state program, and other specific provisions made in the PSD state implementation plan. If the air quality impact model approved by the EPA or specified in the guideline is inappropriate, the model may be modified or another model substituted on a case-by-case basis, or a generic basis for the state program, where appropriate. Such a change shall be subject to notice and opportunity for public hearing and written approval of the administrator of the EPA.

Source: The provisions of this §116.160 adopted to be effective September 13, 1993, 18 TexReg 5746; amended to be effective April 5, 1995, 20 TexReg 2052; amended to be effective July 8, 1998, 23 TexReg 6973; amended to be effective November 1, 2001, 26 TexReg 8539.

§ 116.161. Source Located in an Attainment Area with a Greater Than De Minimis Impact

The commission may not issue a permit to any new major stationary source or major modification



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 6
1445 ROSS AVENUE, SUITE 1200
DALLAS, TX 75202-2733

FEB 10 2010

Mr. Richard Hyde, P.E.
Deputy Director
Office of Permitting and Registration
Texas Commission on
Environmental Quality
P.O. Box 13087
Austin, TX 78711-3087

Re: White Stallion Energy Center, PSD Permit Nos. PSD-TX-1160, PAL 26, and HAP 28,
Matagorda County, Texas

Dear Mr. Hyde:

Enclosed is the U.S. Environmental Protection Agency (EPA) analysis of the above-referenced permit actions. We performed this analysis in light of the recent issuance of the Texas Commission on Environmental Quality (TCEQ) Response to Comments (RTC) regarding this matter on October 2, 2009, and the upcoming "Hearing on the merits", scheduled to begin on February 10, 2010. Our comments focus on aspects of the permit actions that appear to be inconsistent with the requirements of the federal Clean Air Act and the implementing regulations, including the federally-approved Texas State Implementation Plan (SIP).

If the issues detailed in this letter are not appropriately responded to by TCEQ prior to final resolution of this permitting action, EPA may consider using Clean Air Act authorities to object to the subsequent Title V operating permit for this facility, or other remedies under the statute. Please contact me at (214) 665-7200, or Jeff Robinson of my staff at (214) 665-6435, if you should have any questions concerning this matter.

Sincerely yours,

Carl E. Edlund, P.E.
Director
Multimedia Planning
and Permitting Division

Enclosure

cc: TCEQ Commissioners
Mark Vickery, TCEQ Executive Director
Steve Hagle, TCEQ

ENCLOSURE

I. Air Quality Impacts Analysis

We commented on the draft permit for the proposed White Stallion facility on April 14, 2009. In the Executive Director's response to comments (RTC), the TCEQ disagreed with our comments that photochemical modeling for ozone was needed to demonstrate that the proposed source would cause or contribute to violation of the National Ambient Air Quality Standards (NAAQS). TCEQ also disagreed with our comment that the ozone analysis performed by the applicant was in direct conflict with NOx control strategies developed to reduce ozone in the nearby Houston, Galveston, Brazoria (HGB) non-attainment area. TCEQ indicated if an evaluation of ozone impacts on a non-attainment area is needed, that the non-attainment SIP process is best suited for such an evaluation. As you are aware, 40 CFR § 51.165 and 51.166 requires permitting authorities to demonstrate that the proposed source will not cause or contribute to violation of the ozone NAAQS per 40 CFR 52.21(k). However, since this facility is proposed immediately outside the HGB non-attainment area, we continue to believe that appropriate air quality modeling must be conducted to clearly demonstrate that the project will not negatively impact ozone concentrations at specific monitors in the HGB area.

The TCEQ also stated in its RTC that EPA has no preferred model to determine impacts from a single source; no requirement for photochemical modeling; and no requirement for applicant to conduct regional ozone analysis. Our PSD regulations at 40 CFR § 51 Appendix W 5.2.1 recommend models for evaluating ozone impacts. Specifically, control agencies with jurisdiction over areas with ozone problems are encouraged to use photochemical grid models such as Models-3/Community Multi-scale Air Quality (CMAQ) modeling system to evaluate the relationship between precursor species and ozone. In our April 14, 2009 comment letter to TCEQ on the draft permit we also discussed potentially using a CAMx based analysis, since TCEQ has multiple episode databases that evaluate ozone levels in the Houston area. Appendix W 5.2.1 also recommends that permitting authorities consult with EPA on estimating the impacts of individual sources to determine the most suitable approach for estimating ozone impacts on a case-by-case basis. In an effort to determine that the proposed source will not cause or contribute to an air pollution in violation of ozone NAAQS standard, we have offered to work on a modeling protocol with TCEQ for this facility. To date, neither TCEQ nor the applicant have elected to consult with us on use of a modeling protocol that would estimate potential ozone impacts from the proposed source despite EPA's direct comment to TCEQ on this matter.

In addition, the TCEQ RTC expressed concern that the scope of the modeling and associated review required for multiple episodes and monitors (and potential control scenarios for any monitors currently above the ozone standard) would be costly, take up to a year to complete, and still not provide information to definitively address EPA's concerns, since the EPA does not have an established significant impact level (SIL) for ozone. Other permit applicants and permitting authorities in Region 6 (including TCEQ) have worked with us to conduct photochemical modeling to demonstrate that a proposed source would not cause or contribute to a violation of the ozone NAAQS. These projects have typically only taken a few months to

conduct and the cost, when a contractor has been used, is minimal with most analyses costing less than the other criteria pollutant modeling.

TCEQ also stated that EPA does not have a requirement for photochemical modeling of SIP attainment demonstration modeling techniques for NSR permitting purposes for sources of VOC or NO_x within 100 and 200 kilometers, respectively of these precursors outside a non-attainment area. However, the TCEQ has developed multiple ozone SIPs where sources of NO_x, that were at least 100-200 km outside the non-attainment areas, have been controlled to yield ozone decreases in the non-attainment areas (DFW and HGB SIPs in 2000/2001, DFW SIP 2007). TCEQ also commented that winds would not transport the proposed source's emissions to the HGB nonattainment area, but considering the proximity of the source to the HGB area, we are concerned because previous modeling episodes have had multiple days with winds from the west that could transport emissions towards the HGB nonattainment area.

We remain extremely concerned about the TCEQ guidance referenced by the applicant in the Modeling Report that was submitted as an assessment of the ozone impacts from the proposed source in its PSD permit application. Based on the results of this guidance, TCEQ and the applicant determined that the project is "ozone neutral." In the past, TCEQ has relied upon large NO_x reductions to decrease ozone levels in ozone SIPs for the HGB and DFW areas. The current TCEQ approach for this permit relies upon science that assumes that the source has to emit VOCs at a sufficient level to chemically react with the source's NO_x emissions to generate ozone. We disagree that VOC emissions have to be co-emitted at the source to cause impacts on ozone levels. Although TCEQ indicated this analysis is not based on the Scheffe Point Source Screening Tables for determining ozone ambient impacts, the approach and interpretation does not clearly demonstrate that the source will not adversely impact control strategies developed to reduce ozone in the nearby HGB non-attainment area. TCEQ and the applicants should utilize a technically appropriate modeling technique and should work with us (in accordance with PSD regulations and Appendix W) to determine whether a potential impact from this facility would cause or contribute to a potential violation of the ozone NAAQS standards or impacts on nearby non-attainment areas. TCEQ has not provided us a demonstration that this facility will not negatively impact ozone levels in Matagorda County or the HGB non-attainment area. If such modeling has been prepared by the applicant or TCEQ, we request that it be made available to us and the public for review.

II. Plantwide Applicability Limit (PAL)

Since EPA has not approved TCEQ's PAL provisions into the SIP and proposed disapproval of such provisions on September 23, 2009, (74 FR 48474), any PAL permit issued by TCEQ to a new major stationary source may be considered a non-SIP-approved permit by EPA. We identified in our Federal Register notice that PAL permits can only be issued to *existing* major stationary sources, which precludes applicability of a PAL to a new major stationary source, as required under 40 CFR §§ 51.165(f)(1)(i) and 51.166(w)(1)(i). Without at least 2 years of operating history, a potential source like White Stallion Energy Center has not established actual emissions to facilitate development of a PAL.

required under 40 CFR §§ 51.165(f)(1)(i) and 51.166(w)(1)(i). Without at least 2 years of operating history, a potential source like White Stallion Energy Center has not established actual emissions to facilitate development of a PAL.

III. Particulate Matter (PM) 2.5

We reviewed the TCEQ's Response No. 4 in the RTC filed on October 2, 2009, regarding PM_{2.5}. However, we have concerns regarding TCEQ's reliance on the PM₁₀ surrogate policy. It is now necessary to provide a demonstration to support the use of PM₁₀ as a surrogate for PM_{2.5}. The applicant should submit a revised application or demonstration addressing PM_{2.5} emissions. *See, In re Louisville Gas and Electric*, Petition No. IV-2008-3 (Order on Petition). The additional information should either address PM_{2.5} emissions directly or show how compliance with the PSD requirements for PM₁₀ will serve as an adequate surrogate for meeting the PSD requirements for PM_{2.5} in this specific permit, after considering and identifying any remaining technical difficulties with conducting an analysis of PM_{2.5} directly. The permit record must reflect a demonstration to support the use of PM₁₀ as a surrogate for PM_{2.5}. We have worked with other permitting authorities and permit applicants to establish an appropriate PM_{2.5} modeling protocol. If the applicant chooses to model for PM_{2.5} impacts directly, please contact us to develop a methodology that will ensure that an appropriate analysis is performed.

IV. Integrated Gasification Combined Cycle (IGCC) Consideration

The TCEQ indicated in its RTC on page 29 of 61 in the Executive Director's Response to Comments that neither the applicant nor TCEQ evaluated any other electrical generation methods such as IGCC or pulverized coal (PC) boilers. TCEQ indicated that inclusion of IGCC in the Best Available Control Technology (BACT) evaluation would require substantial redesign of the applicant's proposed facility. Later in the same response, TCEQ indicates that it does not require a review of IGCC as part of the BACT review for electric generating units (EGUs).

In at least one federal permitting action, IGCC was considered an available control option in the BACT analysis for a facility proposed to generate electricity from coal. *See Prairie State Generating Company (Illinois)*. Further, in a recent decision, the EPA Environmental Appeals Board (EAB) remanded the permit because it did not contain an adequate justification for excluding IGCC from the BACT analysis for a coal fired power EGU. *See Desert Rock Energy Company, LLC, PSD Appeal Nos. 08-03 et.al. Slip. Op. at 76-77 (EAB Sept. 25, 2009)*. This EAB decision was followed in the Title V order for the petition on the American Electric Power Service Corporation, Southwestern Public Service Company John W. Turk order responding to a Title V petition (Petition Number VI-2008-1), where the EPA Administrator found that the Arkansas Department of Environmental Quality (ADEQ) failed to provide an adequate justification to support its conclusion in the PSD BACT analysis that IGCC technology should be eliminated from consideration on the grounds that it would "redefine" the proposed source. To meet the applicable legal criteria under the PSD program, a BACT analysis for each pollutant must consider "application of production processes or available methods, systems, and techniques ... for control of such pollutant." *See 40 C.F.R. §§ 51.166(b)(12) and 40 C.F.R. § 52.21(b)(12)*. Therefore,

when a potential pollution control strategy is not considered in a BACT analysis, the record should provide a reasoned basis to show why that option is not available in a particular instance. We recognize that TCEQ has made a good faith effort to address this issue consistent with prior BPA determinations. However, in light of the EAB's recent conclusions, we strongly recommend that TCEQ and the permit applicant specifically address any IGCC technology considerations as a part of their BACT analysis and provide a reasoned explanation consistent with the BAB's position to support any decision to eliminate such an option or to exclude it altogether from a BACT analysis for this proposed source.

V. BACT Limits Based on Clean Fuels

It is unclear if the TCEQ or the applicant considered "clean fuels" in its BACT analysis. Comment 27 in the response to comments indicates that commenters stated that the applicant and TCEQ failed to consider alternative fuels to reduce emissions such as using only Powder River Basin (PRB) coals. TCEQ stated in its response that the "applicant proposes the facility to accomplish its objective based upon its business decisions. Those decisions include the applicant's choice of fuels. The applicant designed the plant using its choice of fuels and TCEQ reviewed the application as it was submitted. TCEQ does not specify the type of fuel to use in a fossil fuel electric generation plant because the cost of fuel is a primary business decision consideration that is up to the applicant to determine."

We believe the TCEQ should analyze the possibility of cleaner fuels as an alternative primary fuel source in the RTC. At this time, TCEQ does not include a federally approved definition of BACT in its State rules. The Clean Air Act includes the term "clean fuels" in the definition of BACT after the term "fuel cleaning." 42 U.S.C. § 7479(1). Thus, when a potential pollution control strategy is not evaluated in detail in a BACT analysis, the record should provide a reasoned basis to show why that option is not "available" in a particular instance. EPA has recognized that "available" options for a particular facility do not necessarily have to include options that would fundamentally "redefine" the source proposed by the permit applicant. See, e.g., *In re: Desert Rock Energy Company, LLC*, PSD Appeal No. 08-03 et al, slip op. at 59-65 (EAB, September 24, 2009). However, EPA interprets the Act to require a reasoned justification, based on an analysis of the underlying administrative record for each permit, to support a conclusion that an option is not "available" in a given case on the grounds that it would fundamentally "redefine the source." *Desert Rock*, slip op. at 63-72, 76. Based on the record here, it does not appear that TCEQ has provided a reasoned explanation demonstrating why the option of using PRB coals is not "available" for this facility.

We believe TCEQ must clearly provide a rationale for why utilizing fuels other than Illinois coal and/or petroleum coke, or blends from each of the proposed identified fuels constitutes "redefining the source". Further, the rationale should state if there are economic, environmental, or energy impacts from the use of PRB coals (or lower sulfur petroleum coke) that weigh against its selection as BACT. We acknowledge that States with SIP-approved PSD programs have independent discretion and are not necessarily required to follow all EPA policies or interpretations. See, e.g., 57 Fed. Reg. 28093, 28095 (June 24, 1992). However, states that issue PSD permits under SIP-approved regulations are required to conduct a BACT analysis that is

reasoned and faithful to the statutory framework. See *Alaska Dept of Env'tl Conservation v. EPA*, 540 U.S. 461, 484-91 (2004).

On the question of whether an option may be excluded because it redefines the proposed source, the EAB has developed an analytical framework that EPA uses to assess this issue in its own permitting decisions. See, e.g., *Prairie State*, slip op. at 26-37 ; *Desert Rock*, slip op. at 59-65. Since the EAB has articulated a foundation for its approach that has been upheld by one U.S. Court of Appeals, we strongly recommend that SIP-approved States follow the framework articulated by the EAB. We are not concluding that the present permit limits do not represent BACT - only that the present permit record does not appear to provide a sufficient rationale to demonstrate the adequacy of the BACT determinations for this facility. In addition, we are not expressing a policy preference for utilization of a particular coal type, or coal from a particular coal basin. EPA supports the development and use of a broad range of fuels and technologies across the energy sector including those that will enable the sustainable use of coal. Our primary concern is the adequacy of TCEQ's response and rationale for excluding PRB or the possibility of utilizing lower sulfur coal or lower sulfur petroleum coke as fuel options.

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

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

SUPPLEMENT TO PROPOSAL FOR DECISION ON REMAND

On October 7, 2010, Protestant Environmental Defense Fund filed its Motion to Exclude Evidence, taking the position that the modeling performed by the Executive Director (“ED”) in support of its August 25th, 2010 modeling audit violated Texas Water Code § 5.228(e), which prohibits the ED from assisting a permit applicant in meeting its burden of proof in a hearing before the Commission or the State Office of Administrative Hearings. In its Motion to Exclude Evidence, EDF moved that the Judges exclude from evidence the ED’s modeling and any other evidence relying on such modeling.

For the reasons set forth in the Judges’ Proposal for Decision on Remand issued December 1, 2010, and after reviewing the proposed evidence in question and the Parties’ arguments concerning such evidence, the Judges agree that admission of the ED’s modeling, or any evidence based upon such modeling, would violate Texas Water Code § 5.228(e).

Accordingly, the Judges hereby amend and supplement their Proposal for Decision on Remand to further provide that EDF’s Motion to Exclude Evidence is granted. The Judges hereby exclude and order stricken from the record in this case the following: (1) the ED’s modeling discussed in its August 25th Modeling Audit; (2) any portions of such modeling audit that discusses the ED’s modeling performed in support of same; (3) any modeling, analysis or testimony based on the ED’s modeling (including, without limitation, any testimony or exhibits

presented at hearing by Daniel Jamieson and/or Kevin Ellis related to such modeling), and (4) any other modeling, analysis or testimony by the ED that would assist the Applicant in meeting its burden of proof.

SIGNED this ____ day of _____, 201_.

Tommy L. Broyles
Administrative Law Judge
State Office of Administrative Hearings

Craig R. Bennett
Administrative Law Judge
State Office of Administrative Hearings