

CLEAN ECONOMY COALITION

December 20, 2010

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Re: TCEQ Docket No. 2009-033-AIR and SOAH Docket No. 582-09-2005; Application of Las Brisas Energy Company, LLC. for State Air Quality Permits Nos. 85013, HAP 48, Pal 41 and PSD-TX-1138.

Dear Ms. Castanuela:

Enclosed for filing in the above referenced cause is the Clean Economy Coalition's Exceptions to the December 1 PFD.

By my signature below, I certify that a copy of this filing has been served on Judge Bennett and Judge Broyles, and the parties to this matter (List Attached).

Please call me at (361) 855-7051 if there are any questions about this filing.

Yours Very Truly,



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

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

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**CLEAN ECONOMY COALITION'S EXCEPTIONS TO THE DECEMBER 1 PFD**

**TO: The Honorable Tommy L. Broyles and the Honorable Craig R. Bennett, ALJs**

NOW COMES THE CLEAN ECONOMY COALITION, (CEC) and files its exceptions to the Proposal for Decision (PFD) on Remand, issued by the Administrative Law Judges (ALJs) December 1, 2010.

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### I. Introduction

CEC, and aligned parties, various individual Protestants, Sierra Club, Environmental Defense Fund, Texas Clean Air Cities Coalition, LULAC, Medical Groups, and Roger Landress, have actively opposed the issuance of the air quality permits sought by Las Brisas Energy Center, LLC (LBEC) from the beginning of this direct referral to SOAH. After the first evidentiary hearing November, 2009, and the second remand hearing November 2010, the Public Interest Counsel has concluded that LBEC has failed to meet its burden of proof, and the permits should not be issued. In their PFDs, the ALJs have twice concluded that LBEC has failed to meet its burden of proof<sup>1</sup>. However, because the ALJs limited their findings in the December 1, PFD on Remand, to the narrow issues set out in the Commissioners' remand order of July 1, 2010, and their recommendations are somewhat ambiguous, CEC, and aligned parties find it necessary to file exceptions to the latest PFD on Remand, and particularly to some of the findings set out in the attachment.<sup>2</sup>

### II. Areas of agreement and disagreement with PFD on Remand

CEC agrees with the analysis of the ALJs that there will be an increase in particulate matter (PM) from off-site material handling sources above what was modeled by LBEC.<sup>3</sup> However, the characterization of the material handling associated with the operation as "secondary emissions" is mistaken, as pointed out in III below. Further, the CEC is in agreement that BACT for mercury described in the draft permit must be lowered and that the proper BACT emission limit for mercury is  $5.7 \times 10^{-7}$  lb/MMBtu. With regard to BACT emission limit for total PM/PM<sub>10</sub>, CEC agrees that the limits in the draft permit do not constitute BACT, but believes that the recommended level of 0.025 lb/MMBtu is still higher than the evidence warrants. CEC further argues that the

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<sup>1</sup> In their latest PFD, December 1, 2010, the ALJs based their conclusion on the failure of LBEC to meet its burden of proving compliance with the PM<sub>10</sub> 24-hr increment. But also concluded that BACT for mercury and PM/PM<sub>10</sub> should be lower than in the draft permit, anticipating agreement to the lower limits by LBEC. (PFD p. 52)

<sup>2</sup> In their letter of transmittal the ALJs explained: "*But because the Commission has only remanded specific issues for our consideration, we make no other recommendation as to how the Commission should handle this matter (i.e., remand for additional consideration or deny the application) given this deficiency*". (italics supplied)

<sup>3</sup> PFD on Remand, p.39. sec. 4.

moisture content of material in the amended PCCA Bulk Dock 2 permit is not a proper measure for modeling purposes.

Although the PFD on Remand does not discuss the requirement of a case-by-case MACT analysis for the CFB boilers, the original PFD did find that it was required, and that its omission is fatal to the permitting process.<sup>4</sup>

CEC, and aligned parties and individual protestants believe that the permits should be denied, and that another remand to SOAH for additional evidence is not proper procedure, given the extensive opportunities the Commission has awarded LBEC to cure the deficiencies in its application, and its continual failure to do so.

### **III. Increase in Particulate Matter from off-site material handling sources.**

On Remand, the ALJs were directed to find “whether there will be any increase in particulate matter (PM) from offsite material handling sources above what was modeled, or if the ultimate conclusions from the impacts analysis would be unchanged by secondary sources”. (Interim order p.2, item a).

The PFD on Remand extensively discusses the various scenarios raised by the evidence, and concludes correctly that there will be an increase in particulate matter from offsite material handling above what was modeled by LBEC.<sup>5</sup> As to the second part of the question dealing with the impact analysis, the ALJs correctly concluded that without the improper assistance of the AMDT, in violation of Texas Water Code section 5.228<sup>6</sup>, LBEC did not meet its burden of proof that there would not be a violation of the 24 hour PM<sub>10</sub> increment standard.

However, it is respectfully submitted that the analysis by the ALJs contains several serious flaws; and a careful analysis would further support the failure to LBEC to meet its burden of proof. For example, the ALJs find that the emissions from material

<sup>4</sup> The Commissioners, in their interim order July 1, 2010, overruled the ALJs’ original PFD with regard to MACT, without explanation. See Commissioners interim order, p. 2, item (1)

<sup>5</sup> PFD on remand, p. 39, item 4.

<sup>6</sup> Tex. Water Code Sec. 5.228 (d) provides that in a contested case hearing relating to a permit application, the executive director or his designated representative may not rehabilitate the testimony of a witness except in circumstances not applicable to this case; and section (e) specifically prohibits the executive director or his designated representative in a permit hearing from assisting an applicant in meeting its burden of proof in a hearing before the commission or SOAH.

handling are secondary sources, principally based on the two scenarios proposed by LBEC for the Port of Corpus Christi Authority (PCCA) utilizing the PCCA Bulk Dock 1 and Bulk Dock 3; and the argument that PCCA is a separate entity not under the control of LBEC. This reasoning fails for two reasons. First, it shifts the burden of proof from the applicant to the Protestants. Second, it assumes facts not in evidence.

The ALJs listed four reasons why the material handling facilities are not under common control of LBEC and therefore not a stationary source: 1) no common ownership; 2) no right of control by LBEC over PCCA; 3) no existing contract between PCCA and LBEC; and 4) no support/dependency relationship between LBEC and PCCA. (See PDF, p. 13). These statements are certainly true, but where does that leave the issue of material handling for LBEC.

It is clear from the ALJs' analysis and the testimony of Frank Brogan, the deputy port director, that PCCA is not committed to anything. In his prefiled testimony Mr. Brogan states: "The PCCA has not settled on a final material handling and storage design to serve LBEC." (LBEC Ex. 800, lines 10-11). He testified on rebuttal:<sup>7</sup>

"Q. So in order to supply LBEC's material handling needs, a lot more materials would be moving through these facilities than are currently moving through today. Right?

A. That is correct, if they elected to bring it through that facility.

Q. Where else would they elect to bring it through?"

A. There's always other options for moving material. You know, as I said, the port has publically-owned facilities or privately-owned facilities. There's no – nothing – in the –stated as a requirement in the lease that requires LBEC to move their material through the port's own bulk terminal."

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<sup>7</sup> Transcript. P. 3144, lines 12-25

So, if the PCCA is not going to do the material handling for LBEC, who is? LBCT as originally proposed? Apparently not<sup>8</sup>. Some third party? If so, who? It was LBEC's burden to bring forth a preponderance of the evidence to describe the off-site material handling necessary to furnish their boilers over 7 million tons of petroleum coke and limestone each year; and this they did not do.

Second, the two scenarios (LBEC exhibits 702 and 703) created by for LBEC by HDR Engineering, Inc., have never been adopted by the PCCA; and until they are, if ever, they are purely fictional. The ALJs seem to recognize this fact, and tried to avoid it by finding as follows: PFD on Remand p. 37.

*"However, in considering how to evaluate the impact of secondary emissions, the ALJs do not find that LBEC's lack of commitment to an off-site handling option is a fatal defect or a ground for denying the requested permits. Rather, this concern may be remedied 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."* (Italics supplied)

But both Option 1 and Option 2 depend on the PCCA adopting them, which they have not, and, as far as the evidence is concerned may never. PCCA is not a party, subject to the jurisdiction of SOAH. TCEQ cannot order the PCCA to build something for LBEC. As the record stands, there is no evidence to support any selected material handling option for LBEC. It was LBEC's burden to satisfy this requirement; and speculations, or possibilities, will not satisfy the burden.

Further, the ALJs have mistakenly classified the material handling as secondary emissions apparently assuming that PCCA, as a separate entity was going to build and operate one of the LBEC designed material handling facilities. Where is the evidence to support such an assumption? There is none.

There is no evidence of any agreement between PCCA and LBEC concerning material handling for the LBEC facility, and it is entirely logical from a totality of the

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<sup>8</sup> Frank Brogan testified with regard to LBTC: "It is my understanding that LBTC was formed to explore the privatization of the existing bulk terminal operations at the PCCA. The PCCA has entertained this idea but the discussions have not culminated in any agreement....." (LBEC Ex. 800 p. 8 lines 17-19)

evidence to conclude that LBEC or its offspring, LBTC will be in control of the design, construction and operation of the material handling facility, and therefore the material handling facility would be a stationary source. The only testimony pertinent to this issue was given by Dr. Gasparini. Dr. Gasparini reasoned correctly that for the LBEC facility to operate, the material supply, storage and handling of over 7 million tons annually (approximately 20 thousand tons steady supply each day) would have to be under the control of LBEC. Otherwise, no facility like LBEC could function. No witness contradicted Dr. Gasparini's testimony on the necessity for control of material handling by LBEC.

Given this state of the record, it would have been proper for the PFD on Remand to simply find that LBEC had failed to demonstrate, by modeling or otherwise that material handling for its facility would not violate NAAQ standards.

**IV. Applicant's ability to design and install emission free conveyer system;  
and V. Applicant's truck ash loading system**

The ALJs examined LBEC exhibits 603 and 605, the testimony of David Cabe (LBEC Ex. 600, pp30-31), and the testimony of Randy Hamilton, to conclude that with regard to the applicant's ability to design and install on-site emission free conveyor system and truck ash loading systems were satisfied, and should be incorporated in the permits. However, attached to the PFD on remand is apparently a proposed Order by the Commission, composed of findings of fact and conclusions of law, which do not appear to incorporate the emission free systems described in LBRC exhibits 603 and 605. This oversight should be corrected. If LBEC is going to be allowed to represent certain designs as a part of its application, it should be bound by them.

**VI. Moisture Content of Pet Coke and Limestone**

All the modeling done by experts in this case is based on assumed moisture content of petroleum coke at 4.8%, solely based on the April 29, 2009 amended permit for PCCA Bulk Dock 2. (LBEC Ex. 602). The PFD relies on this because there is no

“actual data” in evidence (PFD of Remand p. 43). Was it not the responsibility of LBEC to produce the “actual data”? If the moisture content of petroleum coke varies from 2% to 4.8%, the conservative approach would seem to be to use the lower number (worst case scenario in other words). The actual moisture content of the material to be used by LBEC makes a huge difference in modeling the emissions calculations. To base the analysis of moisture content solely on the basis of an amendment to the PCCA permit for Bulk Dock 2 (which is not included in either option 1 or option 2 of LBEC’s material handling scenarios), creates an unacceptably low standard of evidence. Even assuming that moisture content of 4.8% is proper for the materials handled by Bulk Dock 2; how does that extend to the pet coke handled by Valero, Koch, and Bulk Docks 1 and 3? The burden is not on protestants here, but on the applicant. CEC excepts to the ALJs’ finding that the modeling inputs with respect to moisture content, for the PCCA facilities are proper.

#### **VII. BACT for mercury and Pm/PM<sub>10</sub>**

CEC agrees to and accepts the ALJs’ conclusion that the mercury content BACT should be  $5.7 \times 10^{-7}$  lb/MMBtu. However, CEC believes that the preponderance of the evidence shows that the proper BACT for PM<sub>2.5</sub>/PM<sub>10</sub> should be lowered to 0.016 lb/MMBtu as proposed by the ALJs in the White Stallion Energy Center Case. The ALJs apparently feel that they are bound by the Commission decision limits of 0.025 lb/MMBtu set in White Stallion; but CEC would point out that that decision is not final, and, as of December 6, decision on re-hearing was still pending. (See Chief Clerk’s Docket, TCEQ Docket No. 2009-0283-AIT; SOAH Docket No. 582-09-3008)

#### **VIII. Issues not included in the PFD on Remand**

The ALJs decline to address issues raised by Protestants that LBEC has not demonstrated compliance with newly promulgated NAAQS standards for SO<sub>2</sub> and NO<sub>2</sub> because those issues were raised for the first time on remand, and was not part of the matters referred by the Commission. This reluctance is understandable, given the narrow scope of the remand, objections to which have been effectively addressed by Sierra Club

and EDF in prior motions and briefs. However, in view of the fact that the ALJs attached to their PFD, a draft order for the consideration of the Commissioners, which may or may not be considered a part of the PFD on Remand, CEC deems it necessary to make some specific exceptions directed at the draft order, including, but not limited to the failure of LBEC to demonstrate compliance the newly promulgated NAAQS standards. Note: Sierra Club and EDF have fully addressed these deficiencies, and their arguments are adopted.

### IX MACT for the CFBS

In its original PFD in this case, March 29, 2010, after extensive discussion and analysis, ALJs Broyles and Bennett reached the conclusion and found that there was no justification for not requiring a MACT analysis for the pet coke-fired CFB boilers in issue; and, *"because no MACT analysis was performed for the boilers LBEC's application is deficient or must either be denied or remanded to the Executive Director 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."* (italic supplied.)<sup>9</sup> On July 1, 2010, after a brief hearing on June 30, 2010, the TCEQ Commissioners issued an interim order in which they found, without explanation, that the primary boilers for the proposed project are not subject to case-by-case MACT preconstruction permitting requirements.<sup>10</sup> This finding by the Commissioners is directly contrary to the finding of the ALJs, and is clearly wrong. Section 2001.058 of the Texas Administrative Procedure Act (TAPA) governs the ability of the Commission to change the findings and conclusions of the ALJs. Section 2001.058 (e) provides:

A state agency may change a finding of fact or conclusion of law made by an administrative law judge, or may vacate or modify an order issued by the administrative judge, *only if the agency determines:*

- (1) That the administrative law judge did not properly apply or interpret applicable law, agency rules, written policies provided under

<sup>9</sup> See PFD March 29, 2010, p. 23, last paragraph

<sup>10</sup> See July 1, 2010 Interim Order, p. 2, item (1)

subsection (c)<sup>11</sup>, or prior administrative decisions;

- (2) That a prior administrative decision on which the administrative law judge relied is incorrect or should be changed; or
- (3) That a technical error in a finding of fact should be changed.

*The agency shall state in writing the specific reason and legal basis for a change made under this subsection. (italics supplied)*

The Commissioners in their interim order made no explanation for overruling the ALJs' findings and conclusions on the subject of MACT, and there are no sound reasons for so doing.

There is good reason to limit the ability of an agency such as TCEQ to change findings and conclusions by the administrative law judges. When a case is referred to SOAH, due process kicks in along with the rules of evidence that are designed to give all parties equal access to justice. The Texas Supreme Court has recognized this in the case of *Montgomery ISD vs. Davis*, 34 SW3d 559 (TX. 2000). The Texas Supreme Court reversed the school board's decision that overruled the hearing examiner, holding "*An independent fact finder is integral to the structure of the hearing-examiner process; permitting a school board to select an independent fact finder avoids having the board, a party to the board, a party to the employment contract and a party to the dispute, act as its own fact finder when reviewing the employment decision of its own administration. The Legislature has further protected the independent nature of the hearing-examiner process by requiring the board to state in writing the reason, including the legal basis for any change or rejection it makes...*" While the cited case was decided under the Texas Education Code, the principle is the same under The TAPA.

CEC understands that the ALJs felt constrained to follow the Commissioner's interim order, however wrong and ill advised it was. However, in the order attached to the PFD on Remand the ALJs included the Commissioners' finding that no MACT

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<sup>11</sup> Subsection (c) states that a state agency shall provide the administrative law judge a written statement of applicable rules or policies.

case-by-case analysis is required, and it is this finding to which CEC objects and takes exception.

#### **X. Carbon Dioxide and XI. Other technology**

The ALJs attached to their PFD on Remand, a draft order for the Commissioners consideration. CEC and parties aligned with CEC have many objections to the proposed order; including, but not limited to finding of fact (FF) 77, PM<sub>10</sub> surrogacy for PM<sub>2.5</sub>; FF 103-105, two material handling scenarios as secondary sources; FF 186, protection of public welfare; FF 194-195, adequacy of measuring; FF 218, rejection of SCR; FF 249-251, impact analysis; that part of FF 252, finding the LBEC scenarios to be secondary emissions; Conclusion of Law (CL) 7, PM<sub>10</sub> surrogacy for PM<sub>2.5</sub>; ( CL 20-21) carbon dioxide not regulated; ( CL 23) IGCC and other technology need not be considered; ( CL 35) pet coke boilers exemption from case-by-case MACT review.

#### **XI. Conclusion and Prayer**

The Texas Clean Air Act, (TCAA), sec. 382.002, (a) clearly states that the policy and purpose of the TCAA is *"to safeguard the state's air resources from pollution by controlling or abating air pollution and emission of air contaminants, consistent with the protection of public health, general welfare and physical property, including the esthetic enjoyment of air resources by the public..."* and (b) *"It is intended that this chapter be vigorously enforced..."*

There is no way that granting air quality permits to LBEC would be consistent with the stated purpose of TCAA. It is time for the Commission to "vigorously enforce" the policy and purpose of the TAAA, and deny LBEC the right to pollute the Nueces/San Patricio County air shed.

Environmental Defense Fund has filed a proposed set of findings of fact and conclusions of law that is consistent with the evidence and law in this case. CEC and aligned parties pray that the ALJs accept the exceptions contained herein, together with those which Sierra Club, EDF, and other Protestants may file; revise their PFD on

Remand accordingly, and recommend the Findings and Conclusions by EDF for the Commissioners' consideration.

Respectfully submitted,

Clean Economy Coalition

By Gerald Sansing

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**CERTIFICATE OF SERVICE**

I certify that on December 20, 2010, a true and correct copy of the foregoing Exceptions to the PFD on Remand was sent to the representatives of parties on the official service list by hand delivery, fax or by mail. Additionally, electronic copies have been served by e-mail upon those parties or counsel of record for whom the undersigned has e-mail addresses.

Gerald Sansing

Gerald Sansing

SOAH Docket No. 582-09-2005  
TCEQ Docket No. 2009-0033-AIR  
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Client/Matter: Docket Number 2009-0033-AIR  
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