

Bryan W. Shaw, Ph.D., *Chairman*
Buddy Garcia, *Commissioner*
Carlos Rubinstein, *Commissioner*
Mark R. Vickery, P.G., *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

July 26, 2010

LaDonna Castañuela
Office of the Chief Clerk
Texas Commission on Environmental Quality
Office of the Chief Clerk, MC-105
P.O. Box 13087
Austin, Texas 78711-3087

Re: Application of White Stallion Energy Center, LLC for State Air Quality Permit 86088, HAP 28, PAL 26, and Prevention of Significant Deterioration Air Quality Permit PSD-TX-1160; SOAH Docket No. 582-09-3008; TCEQ Docket No. 2009-0283-AIR

Dear Ms. Castañuela:

Attached for filing please find the Executive Director's Exceptions to the Administrative Law Judges' Proposal for Decision in the above-referenced matter.

If you have any questions, please call me at 239- 6501.

Sincerely,

A handwritten signature in black ink, appearing to read "Benjamin Rhem".

Benjamin Rhem
Staff Attorney
Environmental Law Division

**SOAH DOCKET NO. 582-09-3008
TCEQ DOCKET NO. 2009-0283-AIR**

APPLICATION BY WHITE STALLION	§	BEFORE THE
ENERGY CENTER, LLC FOR	§	
PERMIT NOS. 86088, HAP28, PAL26,	§	TEXAS COMMISSION ON
AND PSD-TX-1160	§	
BAY CITY, MATAGORDA COUNTY	§	ENVIRONMENTAL QUALITY

TABLE OF CONTENTS

I.	Introduction / Summary	1
II.	PFD	3
	A. Air Monitoring Data	3
	B. State Health Effects Review for Coal Dust.....	5
	C. MACT for HCL and HF	8
	D. Changes to BACT and MACT Limits	8
III.	CONCLUSION.....	9

**SOAH DOCKET NO. 582-09-3008
TCEQ DOCKET NO. 2009-0283-AIR**

APPLICATION BY WHITE STALLION	§	BEFORE THE
ENERGY CENTER, LLC FOR	§	
PERMIT NOS. 86088, HAP28, PAL26,	§	TEXAS COMMISSION ON
AND PSD-TX-1160	§	
BAY CITY, MATAGORDA COUNTY	§	ENVIRONMENTAL QUALITY

**EXECUTIVE DIRECTOR'S EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGES' PROPOSAL FOR DECISION**

TO HONORABLE CHAIRMAN SHAW, AND COMMISSIONERS GARCIA AND RUBINSTEIN

COMES NOW the Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) and files these exceptions to the Administrative Law Judges' (ALJs) Proposal for Decision and in support thereof shows the following:

I. Introduction / Summary

On September 5, 2008, White Stallion Energy Center, LLC, (White Stallion or Applicant) applied to the TCEQ for issuance of State Air Quality Permit Number 86088, Hazardous Air Pollutant (HAP) Major Source [FCAA § 112(g)] Permit Number HAP28, Plant-Wide Applicability Limit (PAL) Permit Number PAL26, and Prevention of Significant Deterioration (PSD) Air Quality Permit Number PSD-TX-1160, which would authorize construction and operation of a petroleum coke and coal-fired power plant on the west side of FM 2668 south of Bay City, approximately 2.2 miles south of the entrance to the Celanese plant, in Matagorda County, Texas.¹

TCEQ staff from the Air Permits Division, Air Dispersion Modeling Team, and Toxicology Division reviewed the documentation submitted by White Stallion in the application. Upon completing the review, the Executive Director issued the Notice of Application and

¹ White Stallion Ex. 102, at bates page 10.

Executive Director's Exceptions to the ALJs' Proposal for Decision
Application of White Stallion Energy Center, LLC for Permit Nos. 86088, HAP28, PAL 26, and
PSD-TX-1160

Preliminary Decision (NAPD) as well as the Preliminary Determination Summary and draft permit. The NAPD was published on March 15, 2009. In issuing the draft permit, the ED concluded that: 1) White Stallion's proposed controls constituted best available control technology (BACT) for criteria pollutants and maximum achievable control technology (MACT) for hazardous air pollutants; and 2) the modeling analysis demonstrated that the proposed project will not violate the National Ambient Air Quality Standards (NAAQS) or have any adverse impacts on the public health, soils, or the environment.

The Application was direct referred to the State Office of Administrative Hearings (SOAH) at the request of the Applicant on February 27, 2009. A preliminary hearing on the matter was held on April 20, 2009 in Bay City. The hearing on the merits was held February 10 through February 18, 2010 in Austin.

On July 2, 2010, the ALJs issued their Proposal for Decision (PFD) to the Commission. In their proposal, the ALJs recommend that the permit cannot be issued for three reasons.² Specifically, the ALJs concluded that the ambient air monitoring data used by the applicant "does not meet EPA quality assurance criteria and cannot be used for regulatory purposes."³ Second, the ALJs concluded that because coal dust was not reviewed under the state health effects review, the Applicant did not meet its burden of proving the application's compliance with the state's health effects requirements.⁴ Finally, the ALJs determined that the HCL and HF

² The ALJs conclude that "LBEC has failed to meet its burden of proof on a number of required issues" and "given these failures, the permits sought by LBEC may not issue at this time." PFD at 120.

³ PFD at 19.

⁴ PFD at 37-40.

MACT limits as proposed in WSEC's MACT analysis, the ED's testimony, and the limits in the draft permit were inconsistent and thus, they were unable to reach a conclusion as to what those limits should be.⁵ In addition, the ALJs recommend changes to the BACT limits for four pollutants: filterable particulate matter, total particulate matter, including particulate matter with a diameter of less than 2.5 microns (PM/PM_{2.5}), carbon monoxide (CO), and sulfuric acid (H₂SO₄). The ALJs also recommend changes to the MACT limit for non-mercury HAP metals.

II. PFD

The ALJs recommend that additional information be submitted regarding three specific issues: air monitoring data for ozone, coal dust, and MACT for HCl and HF. The ALJs also recommend changes to BACT and MACT limits in the draft permit without the need for additional information or remand.

A. Air Monitoring Data

The ALJs recommend that the air monitoring data used by the Applicant's modeler to conduct his ozone analysis may not be used because a footnote to this data states that this monitoring site "does not meet EPA quality assurance criteria and cannot be used for regulatory purposes."⁶ The ED excepts to this conclusion because the evidence does not support a finding that the phrase "cannot be used for regulatory purposes" precludes White Stallion from using this data in its ozone analysis in compliance with TCEQ rules and guidance.

⁵ PFD at 109.

⁶ COL 113-115.

Executive Director's Exceptions to the ALJs' Proposal for Decision
Application of White Stallion Energy Center, LLC for Permit Nos. 86088, HAP28, PAL 26, and
PSD-TX-1160

The ED's Draft Ozone Procedures state that when one is using representative monitoring data from another county, one should "compare population and county-wide point, area, and mobile source emission to find a similar county with monitored ozone data."⁷ In the memo to the permit engineer, the members of the Air Dispersion Modeling Team reviewing this project - Mr. Eads, Mr. Kovar, and Mr. Jamieson - noted that the Applicant was using a monitor in San Patricio County for background ozone concentrations and concluded that the use of this monitor was reasonable.⁸ In his Deposition upon Written Questions, Mr. Jamieson further explains this statement, saying, "The monitor selected is reasonable given the higher population of San Patricio County compared to Matagorda County, both counties have similar topographies and experience similar weather conditions, and based on a comparison of emissions of ozone precursor pollutants."⁹ Finally, in his prefiled testimony, Mr. Jamieson states that the ozone analysis performed by the Applicant was conducted in accordance with TCEQ guidance.¹⁰ Mr. Kovar echoed Mr. Jamieson's conclusions and testified that the use of this monitor was reasonable and complied with TCEQ guidance.¹¹

It is clear from the evidence in the record that ED staff reviewed the ozone analysis submitted by the applicant, evaluated the specific monitor the Applicant used to determine the

⁷ White Stallion Ex. 209, p. 1.

⁸ Ex. ED-19, p. 6, bates p. 625.

⁹ White Stallion Ex. 401, p. 26:6-10.

¹⁰ Ex. ED-41, p. 17, bates p. 998.

¹¹ Ex. ED-29, p. 17:13-22, bates p. 690.

Executive Director's Exceptions to the ALJs' Proposal for Decision
Application of White Stallion Energy Center, LLC for Permit Nos. 86088, HAP28, PAL 26, and
PSD-TX-1160

background concentration of ozone, and approved this analysis as compliant with TCEQ regulations. The evidence in the record regarding these monitors is as follows:

- 1) a footnote states that the Aransas Pass monitor, "does not meet EPA quality assurance criteria and cannot be used for regulatory purposes;"
- 2) the term "regulatory purpose" is not defined;
- 3) two members of the ED's modeling team stated that this monitor was reasonable to use and that the Applicant had complied with TCEQ rules and guidance; and
- 4) the Applicant's modeler testified that "cannot be used for regulatory purposes" was limited to determining attainment/nonattainment designations and that he had used this same monitor in previous cases without objection from protestants or the ED.

Thus, the ED respectfully disagrees with the ALJs recommendations and maintains the position that the use of air monitoring data from the Aransas Pass monitor in San Patricio County for the ozone analysis was acceptable and complied with TCEQ rules and guidance.

B. State Health Effects Review for Coal Dust

The ALJs determined that White Stallion did not meet its burden of proving compliance with the state's health effects requirements. Specifically, the ALJs state that the application's proposed off-site exceedance of established effects screening levels (ESLs) for coal dust in ambient air would not protect the public health or physical property. The ED excepts to this conclusion because the evidence in the record supports a finding that coal dust emissions from the proposed plant would not pose a threat to public health or physical property.

Executive Director's Exceptions to the ALJs' Proposal for Decision
Application of White Stallion Energy Center, LLC for Permit Nos. 86088, HAP28, PAL 26, and
PSD-TX-1160

The evidence and testimony of both the TCEQ permit engineer and toxicologist describe the toxicology review for the White Stallion draft permit. Mr. Hamilton offered testimony explaining the agency's process for health effects review. His testimony and the ED's Response to Comments both describe what a health effects evaluation entails and who conducts this review.¹² TCEQ toxicologist, Dr. Jong-Song Lee, offered testimony explaining the toxicology review process in general and the specific steps used to evaluate the pollutants reviewed for the White Stallion draft permit.¹³ Dr. Lee testified that adverse health effects among the general public including sensitive subgroups are not expected, which he documented in his memorandum to Mr. Hamilton.¹⁴ Additionally, Dr. Lee stated that operation of this facility will not be detrimental to public health or welfare, animal life, vegetation or property, or cause any nuisance conditions that would affect the normal use and enjoyment of property.¹⁵

Evidence admitted in the hearing outlines the specific pollutants reviewed for the White Stallion draft permit which was based on the modeling submitted by the Applicant during the application review process.¹⁶ During his review of the modeling submitted by the Applicant, the Applicant's toxicologist, Dr. Thomas Dydek requested that the Applicant submit additional modeling for coal dust and pet coke.¹⁷ After reviewing the modeling submitted by the Applicant,

¹² Ex. ED-1, p. 40:13-27, at bates page 40.

¹³ Ex. ED-43, pp. 7:9-21:5, at bates pages 1010-1024.

¹⁴ Ex. ED-25, p.2, at bates page 659; Ex. ED-26, p. 2, at bates page 661.

¹⁵ Ex. ED-43, p. 20:7-9.

¹⁶ Ex. ED-43, pp. 16:32-18:6, at bates pages 1019-1021.

¹⁷ White Stallion Ex. 300, pp. 29:18-30:4.

Executive Director's Exceptions to the ALJs' Proposal for Decision
Application of White Stallion Energy Center, LLC for Permit Nos. 86088, HAP28, PAL 26, and
PSD-TX-1160

Dr. Dydek reached the conclusion that coal dust and pet coke would not cause any adverse health or welfare effects¹⁸

The additional modeling requested by Dr. Dydek was not sent to TCEQ as part of the application.¹⁹ Therefore, when Mr. Hamilton reviewed the application to determine which pollutants should undergo a state health effects review, Mr. Hamilton did not include coal dust. Subsequently, coal dust was not included in Dr. Lee's toxicology review.

However, Dr. Lee reviewed Dr. Dydek's testimony and analysis regarding coal dust. Dr. Lee agreed with Dr. Dydek's conclusions that no adverse health or welfare effects would result from coal dust emissions.²⁰ Despite the fact that Dr. Lee did not conduct a health effects review of coal dust emissions himself, his professional opinion concurred with that of Dr. Dydek. Thus, the only two expert toxicologists that testified in this case agreed that no adverse health effects would result from coal dust emissions.

Based on the evidence in the record, the ED believes coal dust emissions from the proposed plant would not pose a threat to public health or physical property. Thus, the ED excepts to the ALJs conclusion that the Applicant did not meet its burden of proving compliance with the state's health effects requirements.

¹⁸ *Id.* at 31:4-32:5.

¹⁹ *See* White Stallion Exs. 102 and 108.

²⁰ Lee Testimony, Tr. Vol. 5, pp. 1227:17-1228:15; *see* White Stallion Ex. 300, pp. 39:23-41:2.

C. MACT for HCL and HF

The ALJs concluded that they could not make a proper determination of the MACT limit for HCl and HF based on the inconsistent and confusing evidence presented during the hearing. The ED maintains that the MACT limits set forth in the Draft Permit are the proper limits for the proposed plant. The limits listed in the Draft Permit are as follows:

Pollutant (fuel)	3-Hour Average (lb/MMBtu)
HCl (coke)	0.0013
HCl (coal)	0.005
HF (coke)	0.0004
HF (coal)	0.0003

The ED's proposed limits are based on a three hour averaging period, which must be flexible enough to account for short term variances that occur in normal day-to-day operations. Furthermore, the limits proposed by the ED differentiate between fuel sources. Therefore, the ED believes the three hour averaging period and a different limit based on the type of fuel being used as proposed in the draft permit represents MACT.

D. Changes to BACT and MACT Limits

The ALJs also recommended changes to three BACT limits and one MACT limit, but did not recommend that any additional information be submitted regarding these limits. The ALJs' recommended BACT changes are listed below:

Executive Director's Exceptions to the ALJs' Proposal for Decision
 Application of White Stallion Energy Center, LLC for Permit Nos. 86088, HAP28, PAL 26, and
 PSD-TX-1160

Pollutant	Draft Permit	ALJ Recommendation
filterable PM	0.011 lb/MMBtu	0.010 lb/MMBtu
total PM	0.025 lb/MMBtu	0.016 lb/MMBtu
PM _{2.5}	0.025 lb/MMBtu	0.016 lb/MMBtu
CO	0.11 lb/MMBtu	0.10 lb/MMBtu
H ₂ SO ₄	0.022lb/MMBtu (pet coke) 0.012 lb/MMBtu (coal)	0.0045 lb/MMBtu for both

The ALJs also recommended a change to one of the draft permit's MACT limits. The ALJs recommended that the MACT limit for non-mercury HAP metals should be the same as the filterable PM limit of 0.010 lb/MMBtu. The ED contends that the evidence in the record at the time of the application supports the limits found in the draft permit.

III. CONCLUSION

As outlined above, the ALJs have identified the validity of air monitoring data, the state health effects review of coal dust, and the MACT limits for HCL and HF as issues that require further information. These are all issues within the Commission's discretion for consideration and ultimate determination. The ED has offered his exceptions to those conclusions, and with these exceptions recommends that the draft order be issued.

Executive Director's Exceptions to the ALJs' Proposal for Decision
Application of White Stallion Energy Center, LLC for Permit Nos. 86088, HAP28, PAL 26, and
PSD-TX-1160

Respectfully submitted,

Texas Commission on Environmental Quality
Mark R. Vickery, P.G., Executive Director

Stephanie Bergeron Perdue, Deputy Director
Office of Legal Services

Robert Martinez, Director
Environmental Law Division



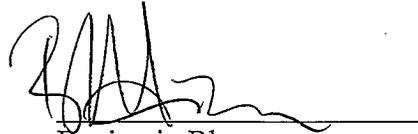
Booker Harrison, Senior Attorney
Environmental Law Division
State Bar No. 00793910
(512) 239-4113
booharri@tceq.state.tx.us

Benjamin Rhem, Staff Attorney
Environmental Law Division
State Bar No. 24065967
(512) 239-6501
brhem@tceq.state.tx.us
P.O. Box 13087, MC 173
Austin, Texas 78711-3087

REPRESENTING THE EXECUTIVE DIRECTOR
OF THE TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

CERTIFICATE OF SERVICE

I certify that true and correct copies of the foregoing Executive Director's Exceptions to the ALJs' Proposal for Decision have been served on the following in the manner indicated below on this 26th day of July, 2010.

A handwritten signature in black ink, appearing to read 'BRhem', is written over a horizontal line.

Benjamin Rhem
Staff Attorney
Environmental Law Division

Service List for White Stallion Energy Center, L.L.C.
SOAH Docket No. 582-09-3008; TCEQ Docket No. 2008-0283-AIR

For the State Office of Administrative Hearings

Via Facsimile
ATTN: Docket Clerk
Hon. Paul Keeper
Hon. Kerrie Qualtrough
State Office of Administrative Hearings
P.O. Box 13025
Austin, Texas 78711-3025
Phone: (512) 475-4993
Facsimile: (512) 475-4994

For the Office of Public Interest Counsel

Via E-mail
Scott Humphrey
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087
Phone: (512) 239-0574
Facsimile: (512) 239-6377
E-mail:shumphre@tceq.state.tx.us

For the Applicant

Via E-mail
Eric Groten
Patrick Lee
Vinson & Elkins, L.L.P.
2801 Via Fortuna, Suite 100
Austin, Texas 78746-7658
Phone: (512) 542-8709
Facsimile: (512) 236-3272
E-mail:egroten@velaw.com
plee@velaw.com

For the Sierra Club and No Coal Coalition

Via E-mail
Christina Mann
Environmental Integrity Project
1303 San Antonio Street, Suite 200
Austin, Texas 78701
Phone: (512) 637-9477
Facsimile: (512) 584-8019
E-mail:cmann@environmentalintegrity.org

For the Environmental Defense Fund

Via E-mail
Tom Weber
Greg Friend
Paul Tough
McElroy, Sullivan, & Miller L.L.P.
P.O. Box 12127
Austin, TX. 78711
Phone: (512)327-8111
Facsimile: (512) 327-6566
E-mail:tweber@msmtx.com
gfriend@msmtx.com
ptough@msmstx.com

For the Office of the Chief Clerk

Via E-filing
LaDonna Castanula
Chief Clerk
Office of the Chief Clerk
TCEQ MC-105
12110 Park 35 Circle, Bldg. F
Austin, TX 78753
Phone: (512) 239-3300
Facsimile: (512) 239-3311