

**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 REPLIES TO 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 July 26, 2010, the following parties filed Exceptions to the ALJs' PFD: the Applicant, White Stallion Energy Center (White Stallion or WSEC); Environmental Defense Fund, Inc., (EDF); Sierra Club and No Coal Coalition (SC/NCC); and the ED. The Protestants' and Applicant's exceptions to the PFD cover a wide variety of issues. At the risk of being repetitive, the ED will attempt to address all of the relevant issues set forth in the Exceptions to the PFD despite the fact that many of these issues have already been discussed by the ED in his Closing Arguments and his Replies to Closing Arguments.

II. Exceptions to the PFD

A. Ozone Modeling Procedure

1. TCEQ's Draft Ozone Procedures

EDF argues that when conducting ozone modeling, an applicant is required to follow the requirements set forth in 40 CFR Part 51, Appendix W (Appendix W).¹ However, the ALJs concluded that as an alternative to using Appendix W, applicants may also use the Commission's Draft Ozone Procedures, which are a part of TCEQ's "Air Quality Modeling Guidelines."

The ED supports the ALJs determination that it is appropriate for an applicant to rely on the Commission's "Draft Ozone Procedures" when conducting ozone modeling. As noted in the PFD, this specific issue has previously been addressed *Blue Skies Alliance v. TCEQ*. In this case, the Amarillo Court of Appeals upheld the Commission's reliance on the modeling process in the Draft Ozone Procedures.² The ALJs note that applicants may rely on the Draft Ozone Procedures, "unless a protesting party can show that the manner in which the Commission interprets the procedure is plainly erroneous or inconsistent."³ As argued by the ED in his Response to Closing Arguments, there is nothing in the record that suggests the ED's "Draft Ozone Procedures" is erroneously or inconsistently applied.⁴ Thus, it was appropriate for the Applicant to rely on the Draft Ozone Procedures when conducting its ozone modeling.

2. Use of EKMA Model

SC/NCC argues that the Draft Ozone Procedures guidance is not appropriate to use as a regulatory tool because it relies on the Empirical Kinetic Modeling Approach (EKMA) which

¹ EDF Exceptions to PFD at 4.

² *Blue Skies Alliance v. Tex. Comm'n on Envtl. Quality*, 283 S.W.3d 525 (Tex.App.—Amarillo 2009, no pet.)

³ PFD at 16.

⁴ Ed's Response to Closing Arguments at 6-7.

is outdated and lacks scientific merit.⁵ EDF also argues that the ED's reliance on EKMA in the Draft Ozone Procedures should result in denial of the application.⁶ The ED has set forth his position on this matter in both his Closing Arguments and Replies to Closing Arguments.⁷ In summary, the EPA has not approved any model or screening method for evaluating ozone impacts from single sources.⁸ Since the EPA has no preferred model for single-source ozone impact analysis, the TCEQ uses the EKMA as a screening tool for VOC-limited sources.⁹ The ALJs determined that based on several prior decisions and the *Blue Skies Alliance* case, the Draft Ozone Procedures guidance was the appropriate regulatory tool. As the ALJs state:

The answer is clear. EKMA is part of the Commission's Air Quality Modeling Guidelines. The guidelines have been adopted by the Commission. The Commission's processes have been accepted by the EPA as part of the SIP. The guidelines have passed state judicial review in *Blue Skies Alliance* . . . Unless EPA rejects the SIP, the Commission's procedures—and screening tests on which they rely—pass legal muster."¹⁰

Thus, the ED recommends that the Commission adopt the ALJs findings of fact and conclusions of law with regard to the adequacy of TCEQ's Draft Ozone Procedures and the use of EKMA as a regulatory tool.

B. PM Surrogate Policy

EDF and SC/NCC argue that the ED failed to demonstrate that PM₁₀ is an adequate surrogate for PM_{2.5}.¹¹ Protestants note that the EPA has stated that the technical difficulties that led to the adoption of the surrogate policy have largely been resolved. Furthermore, EDF argues

⁵ SC/NCC Exceptions to PFD at 2-3.

⁶ EDF Exceptions to PFD at 7-8.

⁷ See ED's Closing Arguments at 3-4; Ed's Response to Closing Arguments at 6.

⁸ Tran Testimony, Tr. Vol. 4, p. 941:3-14.

⁹ Ex. ED-17, p. 22, at bates page 571.

¹⁰ PFD at 18.

¹¹ EDF Exceptions to PFD at 10-11; SC/NCC Exceptions to PFD at 14.

that the application is deficient because it is the EPA's policy that the Applicant must either: a) quantify, model, and account for PM_{2.5} emission and demonstrate that 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.¹²

In his Response to Comments, the ED provides a very detailed explanation of the difficulties of PM_{2.5} quantification and modeling.¹³ Furthermore, the ED explains why the application of BACT controls for PM₁₀ will also achieve BACT for PM_{2.5}. The ED notes that the use of fabric filters meeting an emission limit of 0.011 lb of filterable PM/MMBtu of heat input has been proposed as BACT for all sizes of filterable PM.¹⁴ This technology and emission limit will achieve BACT for filterable PM₁₀ and PM_{2.5} because the limit requires approximately 99.9 percent removal of potential PM emissions, and such high removal efficiency requires efficient collection of PM_{2.5}.¹⁵ Finally, approximately 97 percent of the condensable PM has been estimated by White Stallion to be PM_{2.5}. The combination of a CFB boiler with limestone bed, spray dryer, and baghouse technology and emission limits for total PM also achieve BACT for condensable PM_{2.5} because there is little difference between condensable PM and condensable PM_{2.5}.¹⁶

The ED explained the difficulties in evaluating BACT limits for secondary PM_{2.5} due to the lack of guidance or experience available with regard to these emissions. The ED further explained that the use of control measures used to achieve BACT for SO₂ and NO_x also achieve

¹² EDF Exceptions to PFD at 11.

¹³ See Ex. ED-17, p. 41, at bates page 590.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

BACT for secondary PM_{2.5}, because minimizing emissions of SO₂ and NO_x is the only logical way of minimizing secondary PM_{2.5} from the proposed facilities.¹⁷

After a thorough review of the predicted PM₁₀/PM_{2.5}/PM total emissions and the proposed control devices, the ED determined that the PM Surrogacy Policy is appropriate for this application. The ED has expressed in clear detail the technical reasons for applying the Surrogacy Policy in this particular case and has demonstrated that the proposed plant will be in compliance with the PSD requirements. The evidence in the record supports these conclusions.

C. Dispersion modeling

1. Receptor Grid/Dockside Guidance Document

EDF and SC/NCC argue that the ALJs erred when they determined that the Applicant was not required to place receptors along the property line.¹⁸ However, as noted in the ED's Closing Arguments, the ED's modelers, Matthew Kovar and Daniel Jamieson, followed the EPA's "Draft October 1990 New Source Review Workshop Manual: Prevention of Significant Deterioration and Nonattainment Area Permitting," "Air Quality Modeling Guidelines" (RG-25), and EPA's "Guideline on Air Quality Models" when conducting the Air Dispersion Modeling Audit.¹⁹ The ED maintains that all applicable rules and regulations were followed.

EDF also argues that the ALJs erred when they chose "among the least objectionable of the two proposals," but were not completely satisfied that either the Applicant's or Protestants' arguments actually complied with the applicable guidance.²⁰ It appears the choice the ALJs contemplated was predicated upon a misunderstanding of the Applicant's proposal. The ALJs

¹⁷ *Id.*

¹⁸ EDF Exceptions to PFD at 13.

¹⁹ ED Closing Arguments at 6.

²⁰ EDF Exceptions to PFD at 12; PFD at 31.

state that "WSEC proposes that the receptors be moved 25 meters landward, into the footprint of the facility's site."²¹ This is simply not the case. An applicant does not need to place receptors on its own property for air dispersion modeling, because the air over its own property is not considered ambient air. The 25 meter buffer zone proposed by White Stallion extends from the barge loading area out across the Colorado River, where receptors are required to be located, not inward onto the Applicant's property. Thus, the evidence supports the conclusion that the proposed 25 meter buffer complies with TCEQ's "Air Dispersion Modeling for Dockside Marine Vessels and Related Activities" guidance document and the ALJs are not required to choose "the least objectionable proposal."

2. New NAAQS

On February 9, 2010, the EPA published a final rule establishing a new one-hour NAAQS for NO₂.²² The new standard became effective on April 12, 2010. On June 22, 2010, the EPA also published a final rule establishing a new one-hour NAAQS for SO₂.²³ This standard becomes effective on August 23, 2010. All owners operators of new and modified facilities, including White Stallion, will be required to demonstrate that their emissions will not cause or contribute to a violation of the new NAAQS.

D. State Effects Review

EDF states that the permit cannot be issued because the Applicant failed to provide information relating to coal dust in its application.²⁴ As noted in the ED's Exceptions to the PFD, coal dust emissions from the proposed plant would not pose a threat to public health or

²¹ PFD at 31.

²² 75 Fed. Reg. 6474 (February 9, 2010).

²³ 75 Fed. Reg. 35520 (June 22, 2010).

²⁴ EDF Exceptions to PFD at 15-16.

physical property.²⁵ The ED's toxicologist, Dr. Lee, did not perform his own analysis of coal dust, but 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.²⁶ 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.

E. BACT

1. Federal definition must be used

EDF argues that the proper definition of best available control technology (BACT) is the one approved into Texas' state implementation plan (SIP) that incorporates the federal definition of BACT.²⁷ SC/NCC argue that TCEQ's interpretation of its own BACT definition must be consistent with the language of EPA's definition and with EPA's interpretation of the definition, and that TCEQ has failed to do so.²⁸

As noted in the ED's Response to Closing Arguments, the record is clear that TCEQ has been conducting BACT reviews using the same process since EPA approved Texas' prevention of significant deterioration (PSD) permitting program into the SIP in 1992. Texas has a fully federally approved PSD program to issue and enforce PSD permits²⁹ subject to basic agreements between TCEQ and the EPA as specified in the rule-making.³⁰ As part of that rule-making, the

²⁵ ED Exceptions to PFD at 5-7.

²⁶ See *id.*; Lee Testimony, Tr. Vol. 5, pp. 1227:17-1228:15; see White Stallion Ex. 300, pp. 39:23-41:2.

²⁷ EDF Exceptions to PFD at 16-17.

²⁸ SC/NCC Exceptions to PFD at 6.

²⁹ Ex. ED-7, p. 28096, at bates page 416; see Ex. ED-1, p. 10:16-34, at bates page 10.

³⁰ Ex. ED-6, p. 52825, at bates page 411.

EPA also interpreted the Federal Clean Air Act (FCAA) BACT definition as possessing two fundamental concepts.³¹ First, the most stringent available control technology (and associated emission limitation) must be evaluated.³² Second, if BACT is proposed that is less than the most stringent available, there must be a case-specific demonstration why the most stringent control is not selected.³³ Consistent with the definition of BACT, the TCEQ three-tiered approach captures these fundamental concepts. In the rule-making, the EPA acknowledged “[S]tates have the primary role in administering and enforcing the...PSD program” and “EPA’s involvement in interpretive and enforcement issues is limited to only a small number of cases.”³⁴ Consequently, EPA’s continuing oversight role under the FCAA leaves Texas and other states with considerable discretion to implement the PSD program as they see fit.³⁵

Mr. Randy Hamilton testified that the two primary guidance documents used by the TCEQ in conducting a BACT review are the TCEQ guidance document “Evaluating Best Available Control Technology (BACT) in Air Permit Applications” Draft RG-383, dated April 2001, and EPA’s “New Source Review Workshop Manual: Prevention of Significant Deterioration and Non-Attainment Area Permitting” Draft, dated October 1990.³⁶ Mr. Hamilton also testified to the TCEQ’s three-tiered process for conducting BACT analyses,³⁷ the differences between the three-tiered approach and EPA’s Top-Down approach,³⁸ and that the two

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ Ex. ED-7, p. 28095, at bates page 415.

³⁵ *Id.*

³⁶ Ex. ED-1, pp. 10:16-40, 11:29-32, at bates page 10-11; Ex. ED-3; Ex. ED-4.

³⁷ Ex. ED-1, pp. 11:37 – 12:2, at bates page 11-12.

³⁸ Ex. ED-1, p. 12:12-31, at bates page 12.

processes are equivalent.³⁹ Therefore, the record is clear that the TCEQ has been conducting BACT reviews for PSD permits consistent with the rule-making approving Texas' PSD program and contemporaneous agreements approving delegation of the PSD permitting program.

2. Consideration of Alternative Fuels

EDF asserts that in the review of BACT the Applicant and ED only reviewed one type of production process or combustion technique and failed to properly consider Integrated Gasification Combined Cycle (IGCC) as BACT.⁴⁰ In this case, the following evidence reflects the thoroughness of Mr. Hamilton's review of BACT: 1) Mr. Hamilton's testimony documenting his review of the information White Stallion submitted with its application, the RACT/BACT/LAER Clearinghouse, recently permitted facilities, and generally available public information on air pollution technology for coal and pet coke development;⁴¹ 2) documentation in the Review Analysis and Technical Review, commonly referred to as the "Tech Review";⁴² 3) the documentation in the Preliminary Determination Summaries (PDS);⁴³ and 4) the documentation in the Response to Comments (RTC).⁴⁴ The PDS and RTC documents also reflect, pollutant-by-pollutant, the information that Mr. Hamilton considered and the conclusions he drew from that information.⁴⁵

The NSR manual provides guidance on redefining the source. First, the guidance on redefining the source applies only to inherently lower polluting processes.⁴⁶ As stated in the

³⁹ Ex. ED-1 12:33-42, at bates page 12.

⁴⁰ EDF Exceptions to PFD at 17.

⁴¹ Ex ED-1, 13:22-35, at bates page 13.

⁴² Ex. ED-16.

⁴³ Ex. ED-15.

⁴⁴ Ex ED-17.

⁴⁵ *Id.*

⁴⁶ Ex. ED-4, NSR Manual, pp. B-13-14, at bates page 168-69.

ED's Response to Comment, IGCC is not an inherently lower polluting process based on the treatment of the syngas.⁴⁷ Second, the guidance provides, "...the ability of design considerations to make the process inherently less polluting must be considered as a control alternative for the source."⁴⁸

Finally, unlike other permitting authorities, the specific question of whether or not IGCC must be analyzed as part of the BACT analysis in a proposed coal-fired power plant in Texas has been addressed by the Commission. A Certified Question from the Administrative Law Judges in the matter concerning the application of Sandy Creek Energy Associates, LP, for Air Quality Flexible Permit No. 70861 and PSD Permit No. PSD-TX-1039 asked the following:

In an air permit application that includes a PSD review, must an applicant that proposes to construct a pulverized coal boiler power plant include other electric generation technologies, in its BACT?

The Commission answered the question in the negative, ("No"). This order confirms that in an air permit application that includes a PSD review, an applicant that proposed to construct a pulverized coal boiler power plant is not required to include other electric generation technologies, such as IGCC technology, in its BACT analysis. Furthermore, in 2009, the Seventh Court of Appeals of Texas upheld the Commission's determination that an applicant intending to use different types of boilers is not required to consider other electric generating technologies such as IGCC in its BACT analysis.⁴⁹ Therefore, the TCEQ does not require a review of IGCC as part of the BACT review for electric generating facilities.

⁴⁷ Ex. ED-17, pp. 29-30, at bates page 578-79.

⁴⁸ Ex. ED-4, NSR Manual, p. B-14, at bates page 169.

⁴⁹ *Blue Skies Alliance*, 283 S.W.3d at 535-37.

3. ED's BACT Review

In this case, the following evidence reflects the thoroughness of Mr. Hamilton's review of BACT: 1) Mr. Hamilton's testimony documenting his review of the information White Stallion submitted with its application, the RACT/BACT/LAER Clearinghouse, recently permitted facilities, and generally available public information on air pollution technology for coal and petroleum coke;⁵⁰ 2) documentation in the Review Analysis and Technical Review, commonly referred to as the "Tech Review,"⁵¹ and 3) the documentation in the Preliminary Determination Summaries.⁵²

Mr. Hamilton began reviewing the White Stallion application only two weeks after finishing his review of a similar application submitted by Las Brisas Energy Center LLC (Las Brisas).⁵³ Unless there had been some technological development regarding emission controls on petroleum coke or coal-fired CFBs during this time period, as Mr. Hamilton testified, there was no need for him to go beyond a Tier I BACT analysis for the White Stallion plant.⁵⁴ Specifically, Mr. Hamilton stated that he was not aware of any such developments and therefore, a Tier I analysis was sufficient for the BACT review.⁵⁵

Therefore, the permit reviewer, Mr. Hamilton, testified that White Stallion had proposed appropriate BACT and MACT limits and that the suite of control technology proposed by the Applicant was capable of meeting the emissions limits proposed by the Applicant.⁵⁶

⁵⁰ Ex. ED-1; Ex. ED-17.

⁵¹ Ex. ED-16.

⁵² Ex. ED-15.

⁵³ Hamilton Testimony, Tr. Vol. 5, p. 1110:19-22.

⁵⁴ *Id.*

⁵⁵ *Id.* at 1110:3-22.

⁵⁶ Ex. ED-1, p. 28:14-16; Ex. ED-17, p. 36, at bates page 585.

4. NO_x

EDF and SC/NCC argue that SCR should be required for the White Stallion plant for NO_x control.⁵⁷ Mr. Hamilton reviewed the EPA's RBLC database of emission limit determinations and other permit limits not yet entered into the RBLC to identify the lowest NO_x emission limits applied to similar CFB facilities.⁵⁸ Mr. Hamilton's testimony showed that SCR technology had not been applied to any other coal-fired CFBs⁵⁹ and that he was satisfied with his determination that selective catalytic reduction (SCR) was not required as BACT.⁶⁰ Mr. Hamilton also testified that he was aware of a tail-end SCR being applied to only one other power plant in this country and that was more in the context of the nonattainment review rather than the PSD review.⁶¹ Based on his review of technical literature and other CFB projects, Mr. Hamilton concluded that the NO_x emission limits in the draft permit represented BACT.⁶²

Mr. Hamilton's pre-filed testimony demonstrated that he conducted a Tier II analysis for SCR during his BACT review for the Las Brisas application, and that he determined SCR was not technically feasible for pet coke fired CFBs.⁶³ He also testified that there were not any new technological developments from the time he finished reviewing Las Brisas to the time he began reviewing White Stallion.⁶⁴ The guarantee of one catalyst vendor was not a "technological development" sufficient to change Mr. Hamilton's BACT determination. Having determined that SCR was not applicable to CFBs during his review of the Las Brisas application and being

⁵⁷ EDF Exception to PFD at 18; SC/NCC Exceptions to PFD at 7.

⁵⁸ Ex. ED-17, p. 37, at bates page 586.

⁵⁹ Hamilton Testimony, Tr. Vol. 5, 1079:8-12; *see also*, Sahu Testimony, Tr. Vol. 3, p. 635:10-19.

⁶⁰ Hamilton Testimony, Tr. Vol. 5, pp. 1116:21-1117:2.

⁶¹ *Id.* at 1095:1-23.

⁶² Ex. ED-17, p. 37, at bates page 586.

⁶³ Ex. ED-1, pp. 14:10-15:19 at bates page 18-19.

⁶⁴ Hamilton Testimony, Tr. Vol. 5, pp. 1110:19-22.

unaware of any technological developments since that review, Mr. Hamilton determined that SCR was not required as BACT for White Stallion.⁶⁵

F. MACT

1. Emission Limits Achieved in Practice

When setting a MACT limit, the emission limit should not be less stringent than that achieved in practice by the best controlled similar source and reflects the maximum degree of emission reductions taking into consideration the cost of controlling the emissions. Both EDF and SC/NCC argue that the proposed MACT limits are based on previously permitted emissions limits and vacated standards, when in fact they should also consider one time stack tests as part of the MACT review. However, as articulated in the ED's prefiled testimony, the ED does not consider a one-time stack test to be an appropriate basis upon which to base a MACT emission limit. Stack tests are "snapshots" of how a plant is operating at a particular time under a very specific set of conditions. The conditions under which a plant operates vary from day to day. Thus, basing a MACT limit on a one time stack test does not account for the variety of operating conditions a plant will face and thus does not demonstrate what is "achieved in practice."

2. Use of Surrogates for HAPS

SC/NCC argue that the record does not support the use of surrogates chosen for all HAPS as a part of the MACT review.⁶⁶ It is clear from the record that the ED agreed with the surrogates chosen by the Applicant for this analysis.⁶⁷ Furthermore, as noted in the PFD, the Commission has previously approved the use of these same surrogates for the HAP groups in the

⁶⁵ *Id.* at 1116:21-1117:2.

⁶⁶ SC/NCC Exceptions to PFD at 14.

⁶⁷ See ED Ex.1, pp. 35:31-37:3, at bates page 35-37; White Stallion Ex. 400 at 38.

recent NRG case.⁶⁸ Therefore, the ED recommends approval of the use of the surrogates chosen for HAPS as part of the MACT review.

G. Special Condition 45

EDF argues that Special Condition 45, also referred to as the "Optimization Clause," is a post-construction permitting provision and therefore, does not constitute BACT.⁶⁹ However, the limits proposed in the draft permit constitute BACT regardless of the optimization clause. In his Closing Arguments and Replies to Closing Arguments, the ED discusses in great detail the control technology proposed for each of the pollutants subject to the Optimization Clause and why these control technologies constitute BACT on their own.

Furthermore, use of optimization clauses to establish BACT limits has been accepted in prior cases reviewed by the EPA's Environmental Appeals Board (EAB). In the matter of *In re: Prairie State Generating Company PSD Permit No. 189808AAB*, the EAB found no clear error in the Illinois Environmental Protection Agency's (IEPA's) permitting decision with respect to the permit's BACT limit for total filterable and condensable PM₁₀.⁷⁰ In *Prairie State*, the EAB gave credence to IEPA's conclusion that there was scientific uncertainty regarding the achievable PM₁₀ emission limit.⁷¹ Under these circumstances, the EAB concluded that the use of an adjustable limit, constrained by certain parameters, and backed by worst case air quality analysis, is a reasonable approach.⁷²

⁶⁸ PFD at 94; NRG Order at FOF Nos. 295 and 302; COL Nos. 38-43.

⁶⁹ EDF Closing Brief, pp. 56-57.

⁷⁰ *In re: Prairie State Generating Co.*, No. 05-05, slip op. at 112 (EAB Aug 24, 2006). IEPA accepted as BACT a limit of 0.035 lb/MMBtu for total PM when other facilities had lower limits at 0.018 lb/MMBtu.

⁷¹ *Id.*

⁷² *Id.*

The same factors present in *Prairie State* can also be found in the ED's evaluation of the White Stallion application. Specifically, the ED's RTC establishes that Mr. Hamilton compared White Stallion's mercury emissions to nine other CFB boilers.⁷³ Furthermore, he testified during the hearing that "because there was a limited amount of test data available, the BACT numbers that are in the White Stallion draft permit are acceptable BACT."⁷⁴ As noted above, these factors were also present when Mr. Hamilton was conducting his BACT review for H₂SO₄, HCl, HF, VOC, and total PM. Therefore, Mr. Hamilton relies on the optimization clause to require the permit limit to be adjusted downward based on the results of the first annual compliance sampling. For these reasons, the record evidence, including the ED's RTC, and Mr. Hamilton's testimony regarding Special Condition 45, support the ED's recommendation with respect to the draft permit.

H. Multiple Site Plans

On the first day of the hearing, EDF moved to dismiss, or alternatively, to remand, this matter based on the fact that the Applicant had submitted a different site plan in its waste water discharge and 404 dredge and fill permit application than the one it submitted as part of air permit application.⁷⁵ EDF argues that they have not had a chance to review, model emissions from, or conduct any sort of analysis on the other site plan.⁷⁶ However, as noted by the ED, the application submitted to the TCEQ, reviewed by the ED staff, and upon which the draft permit was predicated, has not changed.⁷⁷ Furthermore, when reviewing an air permit application for a power plant, the Air Permitting Division does not consider the entire universe of permits the

⁷³ Exhibit ED-17, pp. 44-45.

⁷⁴ Hamilton Testimony, Tr. Vol. 5, pp. 1052-53.

⁷⁵ Tr. Vol. I, pp. 8:21-9:22.

⁷⁶ *Id.* at 9:9-17.

⁷⁷ *Id.* at 32:8-17.

applicant is required to obtain before beginning operation. The Air Permitting Division (APD) only considers whether the representations made by the applicant in its air permit application will meet the requirements of the Federal and Texas Clean Air Acts.⁷⁸ In this instance, APD considered only the map submitted in this application.

I. PM CEMS

EDF urges that PM CEMS be required because even if PM CEMS cannot accurately measure condensable PM it could still be used to effectively monitor filterable PM. SC/NCC argues that continuous monitoring would result in a lower BACT due to more frequent monitoring data.

The Executive Director did not require PM CEMS for filterable PM because neither TCEQ nor EPA rules required it. Compliance monitoring is not technology driven in the same manner as BACT. Further, the Executive Director does not agree that the frequency of monitoring changes the BACT if the averaging period is unchanged. It only changes the compliance monitoring method. The evidence supports the conclusion that bag leak detection complied with the continuous monitoring requirements for PM.

J. PAL Permit

Both EDF and SC/NCC argue that it would not be appropriate to issue a Plantwide Applicability Limit (PAL) until the EPA approves the Commission's PAL rules. White Stallion applied for a PAL in accordance with TCEQ rules at 30 TAC §§ 116.180 through 116.198.⁷⁹ On September 23, 2009 the EPA issued notice of the proposed disapproval of TCEQ submittals to

⁷⁸ *Id.* at 42:18-43:1.

⁷⁹ White Stallion Ex. 102, pp. 11, 71-74.

revise the Texas Major and Minor NSR SIP.⁸⁰ This notice states that EPA is taking comments on the proposal and intends to take final action by August 31, 2010.⁸¹ As of the day of this filing, EPA has not taken final action on this matter and thus, the TCEQ rules are still in effect.

III. Conclusion

As outlined above and in the ED's Exceptions to the PFD, 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 permit be issued.

⁸⁰ 74 Fed. Reg. 48467, 48474 (Sept. 23, 2009).

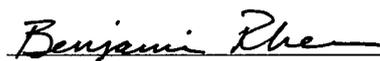
⁸¹ *Id.* at 48477.

Respectfully submitted,

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REPRESENTING THE EXECUTIVE DIRECTOR
OF THE TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing disclosure has been served on the following via hand delivery on this 6th day of August 2010.


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

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