

SOAH DOCKET NO. 582-09-6185
TCEQ DOCKET NO. 2009-1093-AIR

IN RE: APPLICATION OF
TENASKA TRAILBLAZER
PARTNERS, LLC FOR AIR
PERMIT NOS. 84167, HAP13,
AND PSD-TX-1123

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

APPLICANT TENASKA TRAILBLAZER PARTNERS, LLC'S
REPLY TO EXCEPTIONS

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TO THE HONORABLE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY AND THE HONORABLE ADMINISTRATIVE LAW JUDGES:

Applicant, Tenaska Trailblazer Partners, LLC (“Tenaska,” “Applicant,” or “the Company”) submits this its Reply to Exceptions (“Reply”) to the Administrative Law Judges’ (“ALJs”) Proposal for Decision (“PFD”) filed by the Protestants, Sierra Club and the Multi-County Coalition (“MCC”).

I. INTRODUCTION

Sierra Club and MCC filed exceptions to the PFD in this case that largely rehash arguments they have already made, either in their respective closing arguments or replies to closing arguments. As a consequence, many of their arguments have been addressed in Tenaska’s Closing Argument and Reply to Closing Arguments, and both documents are incorporated by reference into this Reply. The Executive Director (“ED”) also filed exceptions to the PFD in this case, and Tenaska is in full agreement with his analysis and recommendations. This Reply will address Sierra Club’s exceptions first followed by those of MCC.

II. NEW EPA NAAQS ARE NOT APPLICABLE TO THIS PROCEEDING

In its exceptions, Sierra Club argues that EPA’s recently-promulgated SO₂ 1-hour National Ambient Air Quality Standard (“NAAQS”) is an applicable requirement in this case,

and since the record does not contain a demonstration that Trailblazer will comply with the new 1-hour SO₂ standard, the Application should be denied or remanded.¹ Sierra Club is incorrect on this issue, because it reaches this conclusion based on a misinterpretation of applicable Texas law.

The new EPA NAAQS 1-hour SO₂ standard was promulgated on June 22, 2010, and became effective on August 23, 2010.² Thus, this new EPA rule was promulgated in the Federal Register 12 days after the close of the Hearing on the Merits in this proceeding,³ and approximately 17 months after close of technical review and issuance of the Draft Permit in this case.⁴ Prior TCEQ precedent, in the *Mirant* Order,⁵ holds that new permitting standards issued or promulgated after technical review are not applicable in permit proceedings, as discussed in Tenaska's Exceptions at pages five through six.⁶ Accordingly, this newly-issued EPA NAAQS is not an applicable requirement in this proceeding.

There is another basis for why this new EPA NAAQS is also not an applicable requirement in this proceeding. Sierra Club cites TCEQ rules at 30 TAC § 116.160(c)(2), for the proposition that TCEQ permitting rules incorporate by reference EPA's PSD requirement for compliance with the NAAQS.⁷ This incorporation by reference, however, does not automatically incorporate the new 1-hour NAAQS for SO₂ into the Texas State Implementation Plan ("SIP") or Texas permitting program. Texas law prevents ongoing incorporation of future, prospective rules to be issued by another agency, absent some affirmative act by the

¹ Sierra Club's Exceptions at pp. 3-4.

² 75 Fed. Reg. 35520 (June 22, 2010).

³ See PFD at p. 3.

⁴ See Tenaska's Exceptions at p. 4.

⁵ TNRCC Order, Jan. 7, 2002, issuing permit numbers 40619 and PSD-Texas-933 to *Mirant Parker LLC*, TNRCC Docket No. 2000-0346-AIR; SOAH Docket No. 582-00-1045.

⁶ See Tenaska's Exceptions at pp. 5-6; see also ED's Exceptions at pp. 6-7.

⁷ Sierra Club's Exceptions at pp. 2-3.

administrative agency to update or ratify the new rule.⁸ Further, Texas law requires the TCEQ to follow its own rules until they are changed.⁹ TCEQ has taken no action to adopt the new 1-hour SO₂ standard promulgated by EPA, and so those standards do not yet have legal effect in Texas. Accordingly, the 1-hour SO₂ NAAQs is not applicable to air permitting in Texas at this time, and is not an applicable standard for consideration in this proceeding.

III. MAXIMUM ACHIEVABLE CONTROL TECHNOLOGY (“MACT”)

A. General

In its exceptions, Sierra Club claims that Tenaska’s case-by-case MACT analysis was deficient. Their claims, however, are based on the same misinterpretations of Commission rules, precedent, and case-by-case MACT procedures that the ALJs made, as discussed in Tenaska’s Exceptions at pages three through six and seven through eleven. Sierra Club first alleges that the MACT analysis results were deficient, since the Applicant did not present a demonstration for why lower limits in other permits, which have not been achieved in practice, are not achievable for Trailblazer.¹⁰ As noted in Tenaska’s Exceptions at pages seven through ten, this interpretation of Commission MACT determination procedures is in error. There is simply no

⁸ See, e.g., *Ex parte Elliott*, 973 SW2d 737, 741-742 (Tex. App. – Austin 1998, pet. ref’d). In *Ex parte Elliott*, the Austin Third Court of Appeals found that the definition of “hazardous waste” under the Texas Solid Waste Disposal Act was unconstitutional (violated the non-delegation clause) if it was interpreted to read that the EPA had the power to change the definition on an ongoing basis from time to time. *Id.* at pp. 741-742. The Appeals Court interpreted the definition under the Act, however, to be constitutional, because the definition should be read to incorporate by reference federal law as it existed when the statutory definition was adopted, not prospectively on an ongoing basis. *Id.* The Commission very recently cited *Ex parte Elliott* in its letter to EPA concerning why the State could not implement EPA greenhouse gas regulations under the Texas Air Permit Program. See letter from General Abbot and Chairman Shaw to Administrator Jackson and Regional Administrator Armendariz, dated August 2, 2010.

⁹ TEXAS WATER CODE § 5.103(c) (“The Commission shall follow its own rules as adopted until it changes them in accordance with [the APA].”) *Rodriguez v. Service Lloyds Ins. Co.*, 997 SW2d 248, 255 (Tex. 1999) and *Public Util. Comm’n v. Gulf States Util. Co.*, 809 SW2d 201, 207 (Tex. 1991) (If a Texas agency fails to follow the clear, unambiguous language of its own regulations, its action is arbitrary and capricious.)

¹⁰ Sierra Club’s Exceptions at p. 4.

such demonstration requirements for lower limits that have not been achieved in practice.¹¹ Further, in accordance with Commission precedent, neither the Applicant, nor the ED, is required to consider lower limits associated with permits issued after the close of technical review.¹² Accordingly, as summarized in Tenaska's and the ED's Exceptions, reducing the MACT limits in the Draft Permit to emissions limits in permits issued after technical review for this Application or to lower limits in other permits that have not been achieved in practice is not consistent with Commission MACT determination procedures and is unwarranted in this case.

Sierra Club goes further, however, and claims on the basis of these misunderstandings of Commission precedent and procedures, that Tenaska's MACT *analysis* (as opposed to the *results* of the MACT analysis) is also deficient.¹³ Sierra Club claims that Tenaska's MACT analysis is deficient, because it failed to not only consider the limits in recently-issued permits, which Tenaska has conclusively demonstrated is not required under TCEQ precedent as described above, but that Tenaska failed to conduct a beyond-the-floor ("BTF") MACT analysis for filterable PM (which is a surrogate for non-mercury metallic HAPs), and also failed to submit evidence sufficient to determine the proper MACT floor for mercury (Hg).¹⁴ Both allegations by Sierra Club are in error and are addressed in subsequent sections relating to filterable PM and Hg.

Sierra Club also invokes the term "available information," as defined under EPA rules, and uses this term as a basis for arguing that Tenaska's case-by-case analysis was not sufficient, because it did not consider performance data. The ALJs did not find this argument persuasive,¹⁵

¹¹ See Tenaska's Exceptions at pp. 7-10; see also ED's Exceptions at pp. 4-6.

¹² Tenaska's Exceptions at pp. 3-6.

¹³ Sierra Club's Exceptions at pp. 4-5.

¹⁴ *Id.*

¹⁵ See PFD at p. 18.

and it still is not. This argument is addressed in more detail below in relationship to the discussion regarding “available information.”

In addition, Sierra Club claims that Tenaska’s MACT analysis is insufficient, because it only considered other permit limits in establishing its proposed MACT limits.¹⁶ Sierra Club mischaracterizes the evidence in the record. The overwhelming weight of the evidence supports the position that Tenaska relied on more than just limits in other permits. As the Tenaska case-by-case MACT analysis shows, and the ED acknowledged in his Preliminary Determination Summary, Tenaska provided a detailed evaluation of emissions controls for each HAP considered, along with recent permit limits for each pollutant.¹⁷ Furthermore, Tenaska’s MACT analysis reviewed and considered the proposed utility MACT as a presumptive MACT standard for Hg,¹⁸ and the analysis considered on a pollutant-by-pollutant basis whether the limits in other permits were achieved in practice. Tenaska performed a thorough MACT analysis for Trailblazer, in accordance with TCEQ procedures, that considered all available information, as that term is defined under EPA rules, and that met all applicable legal requirements. Moreover, all the expert witness testimony in the record supports this finding.¹⁹ In addition, the ED conducted his own MACT review and did not simply rely on Tenaska’s MACT analysis.²⁰ The ED’s review resulted in lower MACT limits for Hg and filterable PM (as a surrogate for non-Hg

¹⁶ Sierra Club’s Exceptions at p. 6.

¹⁷ Tenaska Exhibit 2B (Application), Vol. I, Tab B; Exhibit ED-11 (Preliminary Determination Summary), pp. 10-14.

¹⁸ Tenaska Exhibit 2B (Application), Vol. I, Tab B, pp. 3-1–3-2.

¹⁹ Exhibit ED-1 (Hughes Prefiled) at 32:30-39; Tenaska Exhibit 2 (Greywall Prefiled) at 76:18-77:9; Tenaska Exhibit 3 (Bailey Prefiled) at 26:4-18.

²⁰ See Exhibit ED-11 (Preliminary Determination Summary), pp. 9-15.

metallic HAPs).²¹ Finally, and notably, contrary to Sierra Club's claim, EPA determined that the Applicant's MACT analysis and the ED's review was sufficient.²²

B. Available Information

Once again, based on its reading of the definition of "available information," and its interpretation of the evidence in this proceeding,²³ Sierra Club argues in its exceptions that Tenaska was required to obtain and evaluate stack testing and performance data from other facilities for the Trailblazer MACT floor determinations in this case.²⁴ The definition of "available information" from the EPA MACT rules very clearly does not include stack testing or performance data.²⁵ The ALJs rightly rejected Sierra Club's arguments based on its presumption that (1) the data is readily available and (2) the rates achieved during performance testing are indicative of emission rates that can be met continuously over time by the tested source.²⁶ In response, Sierra Club tries to argue that, because emissions data must be made available to the public, and must be made available to permitting agencies such as the TCEQ, it is therefore readily available. Sierra Club assumes that since such data is required to be submitted that it is

²¹ *Id.* at pp. 10-15.

²² *See* Sierra Club Cross Exhibit 11.

²³ Sierra Club continues to misinterpret testimony by Tenaska's expert, Mr. Greywall, suggesting that he testified that "available information" is defined to include stack tests and performance data. He did not. *See* Tr. at 142:4-16. The definition of "available information" at 40 CFR § 63.41, clearly does not enumerate stack tests or performance data in the items included in the definition. There is, however, a general catch-all provision that specifies "For the purpose of determinations by the permitting authority, any additional information provided by the applicant or others, and any additional information considered available by the permitting authority." *Id.* Thus, consistent with Mr. Greywall's testimony, stack tests and performance data, if "considered available" by the permitting authority in a specific case, are available information. Nevertheless, there is no specific requirement, even under EPA's rules, for the Applicant to obtain such data, and the definition itself does not establish that such data is available information. *See* 40 CFR § 63.43; *see also* Tenaska's Reply to Closing Arguments at pp. 39-40.

²⁴ Sierra Club's Exceptions at pp. 6-7.

²⁵ 40 CFR § 63.41.

²⁶ PFD at p. 17.

easily obtainable. That is clearly not the case, as even EPA has noted on several occasions in development of its own MACT rules.²⁷

With respect to stack tests being indicative of emission rates that can be achieved in practice, Sierra Club essentially argues that since stack testing is all that is required under a permit to establish compliance with regulatory limits, it should be presumed that the same data reliably indicates the emission control achieved by a particular facility.²⁸ This issue was addressed by Tenaska in its Reply to Closing Arguments at pages 19 through 20. Sierra Club continues to fail to appreciate that a stack test represents emissions at a single point in time, and is not indicative of the emissions rates that will occur over the lifetime of the source.²⁹ At bottom, Sierra Club's efforts to argue that MACT floor determinations require obtaining performance data and presuming that such data represents achievable emissions rates fail, because there is no requirement under Commission rules or procedures requiring performance data in MACT floor determinations, nor is there a presumption that such data represents the MACT floor limit absent a demonstration to the contrary.³⁰

C. Mercury (Hg)

In its exceptions, Sierra Club argues that the Trailblazer Hg MACT limit should be lower than that proposed by the ALJs in their PFD and that Tenaska's MACT analysis for Hg was insufficient. Both arguments are misplaced, because they are based on misinterpretations of TCEQ rules, precedent, and procedure.

First, Sierra Club argues that a lower Hg MACT limit should be imposed by the Commission, since the ALJs erroneously relied on the limit in the draft Plant Washington permit,

²⁷ See Tenaska's Reply to Closing Arguments, p. 20, note 99.

²⁸ Sierra Club's Exceptions at pp. 7-8.

²⁹ See Tr. at 225:1-7 (Bailey Redirect).

³⁰ See Tenaska's Reply to Closing Arguments at pp. 39-40.

as opposed to the permit that was issued by the Georgia Environmental Protection Division.³¹ As described more fully in Tenaska's Exceptions, reliance on the Plant Washington permit, whether draft or issued, is contrary to Commission precedent, since the permit was issued after technical review in this case.³² Further, even if the Plant Washington permit were considered, as more fully summarized in Tenaska's Exceptions, the Plant Washington permit limits would not be the basis of either a MACT floor or BTF MACT limit, because the Plant Washington limits were not achieved in practice and its control technology, in comparison to that of Trailblazer's for Hg, is not recognized as capable of achieving greater control since both facilities are proposed to have the same type of emission controls for Hg.³³

Sierra Club's second argument regarding Tenaska's MACT analysis for Hg being insufficient, focuses on the ALJs' discussion of the Plant Washington permit limit for Hg and whether it would represent the MACT floor or the BTF MACT limit for Trailblazer.³⁴ Again, this argument has no foundation, since according to TCEQ precedent, the Plant Washington permit limits were not required to be evaluated, because that permit was issued well after technical review. Further, even if the Hg limit from the Plant Washington Permit were evaluated, it would not be a basis for the Trailblazer Hg MACT floor or BTF limit as described above and in Tenaska's Exceptions at pages 11 through 14.³⁵

D. Filterable Particulate Matter (PM)

With respect to filterable PM, which is a surrogate for non-Hg metallic HAPs, Sierra Club argues that, based on the ALJs' finding that Tenaska did not conduct a BTF MACT

³¹ Sierra Club's Exceptions at p. 8.

³² See Tenaska's Exceptions at pp. 3-6; see also ED's Exceptions at pp. 7-8.

³³ Tenaska's Exceptions at pp. 7-14.

³⁴ Sierra Club's Exceptions at p. 9-10.

³⁵ See Tenaska's Exceptions at pp. 11-14.

analysis for filterable PM, the permit may not issue.³⁶ As more fully summarized in Tenaska's Exceptions at pages 15 through 16, Tenaska did conduct a BTF MACT analysis and determined that fabric filtration is the best available (i.e., maximum) control technology for PM.³⁷ This was the same control technology determination made in the BACT analysis. In the BACT analysis, Tenaska made the same determination, which may have confused the ALJs and the Sierra Club.³⁸ Based on this control technology analysis, Tenaska proposed no BTF MACT limit, since there is no more effective control for filterable PM.³⁹ The ED also did a BTF MACT review and determined that based on advances in fabric filter technology, that a lower limit is achievable and represented the BTF MACT limit, which is the limit proposed in the Draft Permit.⁴⁰ Consequently, a BTF MACT analysis was conducted by both the Applicant and the ED and is actually the MACT limit that is used in the Draft Permit.⁴¹ Thus, Sierra Club's argument has no merit.

E. Acid Gases (HCl and HF)

With respect to the acid gases, Sierra Club disagrees with the ALJs' determination that Tenaska's consideration of only wet flue gas desorption ("FGD") sources for its MACT analysis of the acid gases was proper. The ALJs reached this determination finding that the preponderance of the evidence demonstrates that (1) dry FGD can better control HF than wet FGD and (2) wet FGD was selected by Tenaska based on its ability to better control SO₂ emissions as well as its effectiveness in removing a form of water soluble Hg.⁴² There is no evidence in the record disputing these findings. The ALJs were correct in their determination on

³⁶ Sierra Club's Exceptions at p. 11.

³⁷ Tenaska Exhibit 2B (Application), Vol. I, Tab B, pp. 6-3-6-4.

³⁸ *Id.* at Vol. I, Tab A, p. 11-9.

³⁹ *Id.* at Vol. I, Tab B, pp. 6-3-6-4.

⁴⁰ Exhibit ED-11 (Preliminary Determination Summary), pp. 11-12.

⁴¹ *See id.*; Exhibit ED-12 (Draft Permit), p. 4.

⁴² Sierra Club's Exceptions at p. 11.

this issue in the PFD. The overwhelming weight of the evidence supports the conclusion that dry scrubbing is more effective at controlling HF. The record contains expert testimony supporting this conclusion from the ED's expert, Mr. Hughes and documentary evidence supporting this determination in Tenaska's case-by-case MACT analysis.⁴³ Further, there is no dispute that wet FGD was chosen for Trailblazer, because it allows for greater SO₂ control in the Main Boiler,⁴⁴ and as Tenaska's expert, Mr. Bailey, testified, wet FGD is also very effective at removing Hg.⁴⁵

Sierra Club argues that the distinction between use of a dry or wet FGD does not matter, because the MACT definition for "similar source" requires consideration of dry FGD facilities if that control results in the lowest emissions of the acid gases.⁴⁶ Sierra Club reaches its positions on this issue based on its interpretation of federal rules, not even mentioning state law or TCEQ rules, guidance, or procedures. By this argument, it is clear that Sierra Club wants it both ways: it wants wet FGD for SO₂ and HG control, and dry FGD for acid gas control. No matter which control train Tenaska chooses and the ED approves, Sierra Club would object. Tenaska did consider dry FGD facilities for acid gas control and even included facilities that use such technology in its analysis.⁴⁷ Tenaska, for good reason, however, chose to base its MACT limits for the acid gases on wet FGD limits in other permits, as described above. And, the ED agreed with this analysis and determination.⁴⁸ Simply put, Sierra Club's position in this case is unreasonable and unsupported. The acid gases MACT limits determination based on wet FGD for Trailblazer was based on sound, reasonable engineering judgment, in accordance with Commission practice, and the ALJs correctly agreed with this determination.

⁴³ Exhibit ED-13 (RTC), p. 43; Tenaska Exhibit 2B (Application), Vol. I, Tab B, p. 6-4.

⁴⁴ Tenaska Exhibit 2B (Application), Vol. I, Tab B, p. 6-4.

⁴⁵ Tenaska Exhibit 3 (Bailey Prefiled) at 14:1-7.

⁴⁶ Sierra Club's Exceptions at p. 12.

⁴⁷ See Tenaska Exhibit 2B (Application), Vol. I, Tab B, pp. 6-4-6-5, and Table 6-3.

⁴⁸ See Exhibit ED-13 (RTC), p. 43; see also ED's Exceptions at p. 8.

F. Carbon Monoxide (CO)

With respect to CO, which is a surrogate for organic HAPs, Sierra Club argues that the permit limit the ALJs base their recommendation on, the Plant Washington CO permit limit, is not sufficiently low enough, because there is another permit that has an even lower limit.⁴⁹ Sierra Club acknowledges that the other permit, the Desert Rock permit, has been remanded, but believes such remand does not reflect on any uncertainty about the achievability of CO limits in that permit.⁵⁰ Sierra Club also acknowledges the “out clause” in the Desert Rock permit casts doubts about the achievability of the NO_x limits, but believes that this should not affect the credibility of the CO limit.⁵¹

As summarized in Tenaska’s Exceptions at pages 21 through 23,⁵² the ALJs’ reliance on the Plant Washington permit limit for CO as a surrogate for organic HAPs is based on a misinterpretation of TCEQ precedent and procedures for MACT determinations. For some of the same reasons discussed in Tenaska’s Exceptions at pages 21 through 23,⁵³ Sierra Club is in error in its arguments that a lower limit should be based on the Desert Rock permit. As evidence in the record clearly demonstrates, the Desert Rock facility is not operational, the permit has been remanded, and is possibly no longer valid.⁵⁴ Thus, the Desert Rock permit limits have not been achieved in practice. Moreover, with respect to BTF MACT, Tenaska determined, and the ED agreed, that the best-controlled similar sources all use good combustion practices for control of CO emissions and organic HAPs, which is the control methodology proposed for Trailblazer,

⁴⁹ Sierra Club’s Exceptions at p. 13.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *See also* ED’s Exceptions at p. 9.

⁵³ *See id.*

⁵⁴ Exhibit ED-1 (Hughes Prefiled) at 14:11-12; Tr. at 192:5-10 (Greywall Cross); Exhibit ED-13 (RTC), p. 43.

irrespective of costs or the control technology proposed in the Desert Rock permit.⁵⁵ Thus, there are no other more effective control methods available for establishment of a BTF CO MACT limit. Consequently, in accordance with Commission MACT procedure determinations, the Desert Rock permit limit for CO as a surrogate for organic HAPs should not be the basis for the CO MACT limit for Trailblazer.

IV. BACT

A. **Sierra Club's allegation that the ED did not conduct a Tier I BACT review is incorrect.**

Sierra Club continues to misunderstand TCEQ's Tier I BACT analysis requirements. Under Sierra Club's reading, a Tier I analysis begins and ends with selecting the lowest pollutant-specific permit limit found in any permit whenever issued, wherever issued and by whomever issued.⁵⁶ No further analysis is required or allowed, according to Sierra Club, under TCEQ's Tier I BACT review. Their view is simple: if any single proposed limit for Trailblazer's Main Boiler is higher than one found in another permit, then according to Sierra Club, the ED has not conducted a proper Tier I BACT review. Sierra Club's proposed standard would preclude the ED and Commission from exercising any judgment in a Tier I BACT, and would require a Tier II or III review to vary from the lowest emission limit identified.

Sierra Club's position ignores the extensive amount of guidance TCEQ has on the subject, and ignores the amount of resources the ED and applicants expend on examining and deciding on Tier I BACT.⁵⁷ In Sierra Club's view every final Tier I determination should be identical for similar sources. However, the correct standard as set out in TCEQ Guidance is not

⁵⁵ See Tenaska's Exceptions at pp. 21-22.

⁵⁶ Sierra Club's Exceptions at pp. 14-15. The issue of what should constitute a similar source for comparison to Trailblazer is addressed below in Tenaska's Reply to Exceptions.

⁵⁷ Tenaska's Application review spanned 11 months.

so restrictive. A Tier I BACT review does not end with a selection of the lowest pollutant-specific permit limits. The ED's expert, Mr. Hughes, testified, and TCEQ Guidance explains why: BACT is a range⁵⁸ and, once proposed limits for each pollutant are selected, TCEQ's BACT Guidance, Step 6, directs the ED to then view the suite of controls and limits *in toto*.⁵⁹ Step 6 does not direct the ED to select the lowest pollutant-specific emission limit he finds and end the analysis. If it did, the Guidance would say exactly that and Tier I permit reviews should take no more than an hour of the ED's time. Further undercutting Sierra Club's proposed standard for a Tier I review is that Sierra Club insists on demanding BACT reflect emission limits that have not been demonstrated in practice. This proposition was appropriately discredited at length in Tenaska's Exceptions.⁶⁰

The Sierra Club further argues that to accept any permit limit other than the absolute lowest, Tenaska needs to establish through "compelling technical differences" why it cannot achieve the same level of control accepted in recent permit reviews.⁶¹ The ALJs correctly reject this notion, because it would expand the regulatory requirements.⁶² Compelling technical differences only come into play when an Applicant has not proposed limits which fall within recent BACT determinations.⁶³

⁵⁸ See Tenaska's Exceptions at pp. 27-28; Tenaska's Closing Argument at pp. 14-16; *see also* ED's Exceptions at p. 11.

⁵⁹ Exhibit ED-3 (RG-383), Bates p. 56: "Now to begin Tier I of the evaluation, determine whether the *overall performance proposal* is greater than or equivalent to that accepted as BACT in recent permit reviews for the same industry." (emphasis added), Bates p. 57: Assess the performance level based on the *overall* ability of the proposal to reduce or eliminate emissions from the facility.... Specific proposals may be different than those accepted as BACT in recent permit reviews." (emphasis in the original). Accordingly, the TCEQ looks at the entire suite of emissions controls for all pollutants that is proposed for a source.

⁶⁰ Tenaska's Exceptions at pp. 23-25; *see also* ED's Exceptions at pp. 4-12.

⁶¹ Sierra Club's Exceptions at p. 14.

⁶² PFD at p. 49.

⁶³ Exhibit ED-3 (RG-383) at Bates pp. 56, 58-59 (Step 12); *see also* ED's Exceptions at p. 11.

B. BACT evaluation was proper.

Under the title “*Neither Tenaska nor the ED Conducted an Adequate BACT Evaluation*” (emphasis in the original), Sierra Club tries to clarify its position with respect to TCEQ’s BACT Guidance in RG-383. Sierra Club acknowledges the Guidance is not a rule, but claims that failure to follow RG-383 is evidence that a proper BACT evaluation was not conducted on Trailblazer’s Application.⁶⁴ That might be true if, in fact, the ED and Tenaska did not follow RG-383. But the overwhelming weight of the evidence in the record supports a contrary conclusion: that the ED followed RG-383 in evaluating the Application. The ALJs agreed.⁶⁵ It appears Sierra Club’s complaint is that it disagrees with the Commission’s interpretation of its own rules.⁶⁶

Perhaps most important, to the extent Sierra Club points to permits with limits lower than those proposed for Trailblazer, those permits fall into one of the following categories, each of which Tenaska has shown in its Closing Arguments, Reply to Closing Arguments, and Exceptions to the PFD, is not a proper basis for comparison to Trailblazer:

- (1) Permit limits set for sources that are not similar and that are fundamentally different than Trailblazer;⁶⁷
- (2) Permit limits that have not been demonstrated in practice;⁶⁹

⁶⁴ Sierra Club’s Exceptions at pp. 15-16.

⁶⁵ PFD at pp. 43-45. The ALJs did, however, misinterpret RG-383 in some respects, and those issues are addressed in Tenaska’s Exceptions at pp. 23-28.

⁶⁶ See Tenaska’s Reply to Closing Arguments at p. 11, citing the proposition that an agency’s interpretation of its own rules is entitled to deference.

⁶⁷ Tenaska’s Closing Argument at pp. 11-15; Tenaska’s Reply to Closing Arguments at pp. 7-8, 16-17; Tenaska’s Exceptions at p. 31.

⁶⁸ Tenaska’s Closing Argument at pp. 11-15; Tenaska’s Reply to Closing Arguments at pp. 7-8, 16-17; Tenaska’s Exceptions at p. 31.

⁶⁹ Tenaska’s Closing Argument at pp. 6-8; Tenaska’s Exceptions at pp. 23-25.

⁷⁰ Tenaska’s Closing Argument at pp. 6-8; Tenaska’s Exceptions at pp. 23-25.

- (3) Permit limits demonstrated in practice but based on the use of a different suite of control technology;⁷¹
- (4) Permits issued long after the close of technical review and issuance of the Draft Permit;⁷³ and
- (5) Permit limits based on MACT requirements rather than BACT.⁷⁵

Neither Sierra Club nor any other party has pointed to a permit limit lower than those proposed for Trailblazer that does not fail to be appropriate for one – or more – of the above reasons.

C. NO_x 12-month limit.

In excepting to Trailblazer’s proposed 12-month average limit for NO_x, Sierra Club continues to point to Plant Washington as setting the standard by which Tenaska’s permit limits must be judged. But here again, Commission precedent established in the *Mirant* Order appropriately forecloses the consideration of permit limits established after the close of the ED’s technical review and issuance of a draft permit.⁷⁷ Tenaska and other applicants cannot be placed in an endless cycle of reopening BACT determinations, because a significant amount of subsequent technical analysis and decisions rely on the emission rates established in the BACT analysis.⁷⁸ Moreover, TCEQ’s BACT guidance establishes a general rule that proposed emission limits be demonstrated in practice and that “demonstrated in practice” means in *operating*

⁷¹Tenaska’s Exceptions at pp. 32-33.

⁷²Tenaska’s Exceptions at pp. 32-33.

⁷³ Tenaska’s Exceptions at pp. 3-6.

⁷⁴ Tenaska’s Exceptions at pp. 3-6.

⁷⁵ Tenaska’s Exceptions at p. 34.

⁷⁶ Tenaska’s Exceptions at p. 34.

⁷⁷ TNRCC Order, Jan. 7, 2002, issuing permit numbers 40619 and PSD-Texas-933 to Mirant Parker LLC, TNRCC Docket No. 2000-0346-AIR; SOAH Docket No. 582-00-1045 (“*Mirant* Order”).

⁷⁸ Reopening the BACT review could require re-evaluating the subsequent modeling and other analyses, taking additional time during which even newer permits may be issued, and therefore require further reconsideration of BACT resulting in an endless cycle.

facilities.⁷⁹ Plant Washington fails for both reasons: the permit was issued long after the close of technical review and its emission limits for NOx have not been demonstrated in practice.⁸⁰

Sierra Club also disagrees that the “out clause” contained in Plant Washington’s permit only allows a 6-month optimization period.⁸¹ What Sierra Club ignores is that the permit specifically allows Plant Washington to obtain an exemption from that deadline and the permit establishes no maximum time limit by which Plant Washington must demonstrate compliance.⁸² Extensions may be granted *ad infinitum*.

Sierra Club quibbles with testimony by Tenaska’s expert, Mr. Bailey, regarding the NOx limit set in the Plant Washington permit.⁸³ Sierra Club first mischaracterizes Mr. Bailey’s testimony and then tries to contrast it with language from the Plant Washington permit Final Determination with little effect. Mr. Bailey actually testified that the Plant Washington Final Determination document notes that not only is the 0.03 lb/MMBtu limit the lowest limit ever set, but based upon the data from 2009, no unit has ever met this limit.⁸⁴ Sierra Club claims that is not what the Final Determination document says and then quotes it as follows: “in 2009 not a single coal-fired unit emitted less than 0.030 lb/MMBtu.”⁸⁵ Sierra Club notes a distinction without a difference. Tenaska fails to understand what other reasonable interpretation one can draw, other than that reached by Mr. Bailey, that no other unit has achieved or demonstrated in practice this limit. It stands to reason that if no unit has emitted less than 0.03 lb/MMBtu, such units have operated at that emission level (i.e., 0.03 lb/MMBtu) or higher. Thus, it would be

⁷⁹ Tenaska’s Exceptions at p. 24; *see also* ED’s Exceptions at p. 5.

⁸⁰ Sierra Club Cross Exhibit 4 (Plant Washington Permit), issued April 18, 2010; Tr. at 192:5-10 (Greywall Cross).

⁸¹ Sierra Club’s Exceptions at pp. 16-17.

⁸² Sierra Club Cross Exhibit 5 at p. 38, “Condition 2.13r.... This condition becomes effective 6 months after initial start-up... *absent approval by the Division for an extension of this date.*” (emphasis added). None of the permit conditions establish a maximum time frame for how long the extension may last.

⁸³ Sierra Club’s Exceptions at p. 17.

⁸⁴ Tr. at 977:8-11 (Bailey).

⁸⁵ Sierra Club’s Exceptions p. 17, citing Sierra Club Cross Exhibit 5 at p. 38.

virtually impossible for a unit to meet a standard set at 0.03 lb/MMBtu, because it would require operating at that emission level, and exactly that level, over the range of operating conditions 24 hours per day. Accordingly, Sierra Club's argument here is without merit.

Lastly, Sierra Club argues that, because the Plant Washington NOx limit is the lowest ever established, the Commission should not take this as evidence that the limit is unachievable. The problem with Sierra Club's argument is that TCEQ guidance and policy do not require an applicant to "prove a negative" – that the limit is unachievable. Rather, the Commission requires an applicant to evaluate demonstrated emission limits to establish an appropriate BACT emission limit. There is no evidence in the record that Plant Washington's NOx limit has been achieved in practice. In point of fact, the evidence in the record establishes that it has not been achieved in practice.⁸⁶

In sum, Sierra Club charges that Tenaska failed to show a lower NOx 12-month rolling average limit is unachievable or otherwise unreasonable. Sierra Club simply articulates the wrong standard. Under its view, applicants must accept as BACT the lowest emission limit found in any other permit regardless of whether the limit has been demonstrated in practice.⁸⁷ The standard articulated in TCEQ's Guidance and followed in practice is that applicants must evaluate permit limits that have been demonstrated in practice – by operating facilities – and shown to be achievable over a sufficient period of time to ensure they can be met consistently.⁸⁸

As explained in Tenaska's Exceptions, TCEQ precedent holds that the appropriate cut-off for evaluating BACT is the close of the ED's technical review.⁸⁹ Even if TCEQ were to consider

⁸⁶ Tenaska Exceptions at pp. 23-24; *see also* ED's Exceptions at pp. 6-7, 9.

⁸⁷ Sierra Club's Exceptions at p. 18.

⁸⁸ Exhibit ED-3 (RG-383), p. 57; Tenaska's Closing Argument at pp. 6-8; ED's Exceptions at pp. 4-6.

⁸⁹ Tenaska's Exceptions at pp. 5-6; ED's Exceptions at pp. 6-7.

Plant Washington's permit limits, the annual NOx limit is generally irrelevant unless and until it has been demonstrated in practice.

D. SO₂.

Sierra Club again points to the Plant Washington permit and attempts to clarify that that permit contains more stringent SO₂ emission limits than that proposed for Trailblazer.⁹⁰ Tenaska respectfully disagrees for the reasons cited in its Exceptions: Plant Washington's permit is inapplicable to this proceeding, because its limits have not been demonstrated in practice, and it was issued long after the close of technical review.⁹¹ That being said, Tenaska notes that the ALJs correctly concluded that while Plant Washington's annual limit for SO₂ appears lower, its 30-day limit is higher than Trailblazer's.⁹² Sierra Club's lengthy argument that a control efficiency level cited in the Plant Washington permit discussion rises to a more stringent limit, neatly sidesteps the fact Sierra Club wishes to ignore: the Plant Washington permit sets SO₂ emission limitations that in one averaging period is lower, yet in another averaging period is higher, than Trailblazer.⁹³ How that permit limit was developed is immaterial to what the permit limit ends up actually being. The conclusion reached by the ALJs is reasonable – no firm conclusion can be drawn that Tenaska's limit should be lower based on the evidence in the record.

E. VOC.

In its exceptions, Sierra Club raises a concern regarding what appears to be a typographical error in the PFD recommending a 0.024 lb/MMBtu, instead of the Plant Washington permit limit of 0.0024 lb/MMBtu (3-hour average) for VOC. In its Exceptions at

⁹⁰ Sierra Club's Exceptions at pp. 19-22.

⁹¹ See Tenaska's Exceptions at pp. 5-6, 11-14.

⁹² PFD at pp. 62-63.

⁹³ *Id.* at p. 63.

page 30,⁹⁴ Tenaska addressed the ALJs' proposed change to the VOC limit of 0.0036 lb/MMBtu (annual average) in the Draft Permit, and for the same reasons stated in its Exceptions, Tenaska respectfully requests that the Commission deny Sierra Club's request in its exceptions and find that the VOC limit in the Draft Permit is BACT for Trailblazer.

F. Pb.

In its Exceptions concerning the proposed lead limit in the PFD, Sierra Club again misstates the standard for evaluating BACT limits. Without burdening the Commission with lengthy repetition of arguments previously presented in Applicant's Exceptions, Tenaska points out that the general rule for evaluating BACT is that the applicant compare proposed emission limits to those that are demonstrated in practice.⁹⁵ Sierra Club's reliance on the J.K. Spruce Unit 2 permit is misplaced, because nothing in the record indicates its limits are demonstrated in practice.⁹⁶ Further, as Tenaska explained in its Closing Argument, the proposed lead limits are directly tied to filterable PM limits, because both are extracted by fabric filters.⁹⁷ Fabric filters are the chosen control technology for filterable PM emissions, and therefore a lead emission limit should be no more strict than its anticipated concentration in the corresponding filterable PM limit.⁹⁸

G. Monitoring.

In its Exceptions, Sierra Club once again argues that Trailblazer's Draft Permit requirements for continuous opacity monitoring ("COM") and stack testing are insufficient to

⁹⁴ See also ED's Exceptions at p. 10.

⁹⁵ Tenaska's Exceptions at p. 24 and Exceptions notes 104-106; see also ED's Exceptions at p. 5.

⁹⁶ Mr. Hughes testified in his deposition that J.K. Spruce Unit 2 is not operational. Sierra Club Cross Exhibit 15 (Hughes Deposition) at 33:23-34:5.

⁹⁷ Tenaska's Closing Argument at p. 22.

⁹⁸ Exhibit ED-13 (RTC).

assure compliance with the Draft Permit limits for PM.⁹⁹ The monitoring requirements in the Draft Permit are, however, clearly adequate to ensure compliance, because they meet new EPA NSPS requirements in 40 CFR Part 60, Subpart Da, which continue to rely on a COM in combination with bag leak detection systems and periodic (annual) stack testing.¹⁰⁰ Tenaska covered this issue in its Reply to Closing Arguments on pages 28 through 29.

Compliance with Subpart Da monitoring requirements is, by definition, reasonable assurance of compliance with PM limits, because Trailblazer is exempt from further monitoring requirements under EPA's Compliance Assurance Monitoring ("CAM") rules at 40 CFR Part 64.¹⁰¹ The CAM rules set out additional monitoring requirements for pollutant-specific units "to provide a reasonable assurance of compliance with emissions limitations . . . for the anticipated range of operations . . ."¹⁰² Sources subject to post-1990 NSPS or NESHAP are deemed to have adequate monitoring requirements.¹⁰³

Sierra Club points to the recently-issued Portland Cement NESHAP as evidence that PM CEMS are available and superior to Subpart Da requirements.¹⁰⁴ However, Sierra Club ignores several inconvenient truths: (1) a PC-fired boiler is not a Portland Cement plant; (2) Part 64 and NSPS Subpart Da rules have already determined the reasonable monitoring requirements for Trailblazer and PC-fired boilers; and (3) numerous post-1990 NSPS and NESHAP MACT

⁹⁹ Sierra Club's Exceptions at pp. 23-24.

¹⁰⁰ 71 Fed. Reg. 9866, 9867-68 (February 27, 2006). The final NSPS requirements apply to sources constructed, reconstructed, or modified after February 28, 2005. Codified at 40 CFR Part 60, Subpart Da, Standards of Performance for Fossil-Fuel-Fired Steam Generating Units for which Construction Commenced after September 18, 1978.

¹⁰¹ 40 CFR § 64.2(b)(1)(i).

¹⁰² 40 CFR § 64.3(a).

¹⁰³ 40 CFR § 64.2(b)(1).

¹⁰⁴ Sierra Club's Exceptions at pp. 27-28, citing final Portland Cement NESHAPs.

standards do not require PM CEMS and yet are wholly adequate as far as ensuring compliance with short term PM limits.¹⁰⁵

Sierra Club also notes that some facilities in Texas are now using PM CEMS to determine compliance with short-term PM limits. Those facilities, however, are not required by TCEQ or EPA to use them.¹⁰⁶ Time will tell whether their voluntary decision was sensible, but for now, TCEQ has not required recently permitted PC-fired boilers to use PM CEMS,¹⁰⁷ and EPA's position insofar as this subject is concerned remains the same.¹⁰⁸ Mr. Hughes and the ED considered monitoring requirements, as called for in the Commission's BACT guidance, and correctly concluded that the proposed monitoring is sufficient to assure compliance with the short-term PM limits.¹⁰⁹

Lastly, Sierra Club complains that neither a COMs-detected opacity violation nor a leak identified by bag leak detectors proves noncompliance with Trailblazer's PM limits. The question, however, is not whether it does or does not prove a PM violation, but whether maintaining compliance with its opacity limit and bag leak detection requirements is adequate to ensure the PM limits are being met. Although indirect, if Trailblazer is in compliance with its opacity limits and bag leak detection limits, it is a reasonable conclusion that the control device is operating properly and is in compliance with its PM limits.¹¹⁰ In sum, Sierra Club's arguments on this issue are well wide of the mark, and Tenaska respectfully requests the Commission to set aside Sierra Club's exceptions on this topic in their entirety.

¹⁰⁵ E.g., consider the PM monitoring requirements at 40 CFR § 63.1511 (Secondary Aluminum Production NESHAP); and 40 CFR § 63.9630 (Taconite Iron Ore Processing NESHAP).

¹⁰⁶ Sierra Club Cross Exhibit 15 (Hughes Deposition) at 70:19-23.

¹⁰⁷ OPIC Cross Exhibit 1 (Coletto Creek Permit), finding of fact no. 186, p. 30; OPIC Cross Exhibit 2 (NRG Permit), finding of fact no. 229, p. 30.

¹⁰⁸ 40 CFR Part 60, Subpart Da.

¹⁰⁹ Exhibit ED-13 (RTC), Bates pp. 486-487.

¹¹⁰ Exhibit ED-13 (RTC), Bates p. 487.

H. CFB.

Sierra Club takes exception to the ALJs' finding that CFB boilers are not similar sources with respect to Trailblazer's proposed PC boiler technology in terms of BACT evaluations done for filterable PM emissions.¹¹¹ Tenaska addressed this issue extensively in its Exceptions to the ALJs' finding that CFB boilers are similar sources with respect to filterable PM.¹¹² At bottom, the record provides no credible support for the Commission to vary from its recent decisions that CFB boilers are not similar sources to PC boilers for purposes of filterable PM or, for that matter, any other air contaminant.¹¹³ Sierra Club's only basis for its argument is reference to a single comment in Tenaska's Application which, viewed in the most favorable light to Sierra Club, is ambiguous.¹¹⁴ But, when the question was posed directly to each of the experts in this case, every expert agreed that CFBs are not, and should not be considered, similar sources for any pollutant, even filterable PM.¹¹⁵ Moreover, when the ED reached that very conclusion in his technical review, he recognized that filterable PM emissions from CFB and PC boilers are close, but not the same.¹¹⁶ CFBs have slightly lower emissions, and because of this fact, the ED concluded that they are different sources.¹¹⁷ Tenaska believes the conclusion is correct and, as noted, is consistent with recent Commission precedent in its Coletto Creek and NRG decisions.¹¹⁸

¹¹¹ Sierra Club's Exceptions at pp. 30-31.

¹¹² Tenaska's Exceptions at pp. 4-18. The ALJs appear to come to contrary conclusions regarding the applicability of CFB emission limits for filterable PM in their MACT and BACT discussions. PFD at pp. 30-31, 52-53. Tenaska supports the ALJs' conclusion with respect to their filterable PM BACT finding that CFBs are not similar sources and takes exception to the ALJs' contrary finding that CFBs are similar sources for purposes of filterable PM as a surrogate for non-metallic HAPs.

¹¹³ OPIC Cross Exhibit 1 (Coletto Creek Permit); OPIC Cross Exhibit 1 (NRG Permit).

¹¹⁴ Sierra Club's Exceptions at p. 30 citing Tenaska Exhibit 2B (Application), Vol., I, Tab A, p. 11-7: "For filterable PM, which is captured in traditional PM control devices..., all coal-fired boilers are capable of achieving *essentially* the same emissions rate regardless of combustion type or fuel type."

¹¹⁵ Sierra Club Cross Exhibit 15 (Hughes Deposition) at 82:4-7, 98:17-99:5; Tr. at 228:2-11 (Bailey Redirect); Tr. at 539:9-16 (Hughes Cross).

¹¹⁶ Exhibit ED-13 (Response to Comments), pp. 29, 32, 36.

¹¹⁷ *Id.*

¹¹⁸ OPIC Cross Exhibit 1 (Coletto Creek Permit) and OPIC Cross Exhibit 2 (NRG Permit).

V. PUBLIC NOTICE.

Multi County Coalition (MCC) re-raises a complaint made at the public meeting and in written comments.¹¹⁹ Specifically, MCC complains that a *portion* of the Application and other documents were not available at the TCEQ Regional Office in Abilene during the entire public comment period on the Draft Permit. MCC alleges that the ED Staff's extension of the public comment period, after this issue was raised to their attention, was insufficient to cure the alleged deficiency, because the ED did not re-publish notice.¹²⁰ MCC similarly claims its complaint was not cured by the Notice of Hearing and the present contested case hearing, because that notice and forum do not apprise the public of an opportunity to comment. Lastly, MCC complains that the notice rules followed by Tenaska, which do not require a copy of the Application and certain supporting documents be placed at the TCEQ Regional Office, have not been approved by EPA as revisions to the Texas State Implementation Plan (SIP).

Given the circumstances under which the alleged notice issue occurred and given TCEQ's response, MCC's complaint is without merit. First, the notice Tenaska published was not deficient in any way. Tenaska published the exact notice TCEQ specified.¹²¹ There is nothing in the record indicating the "notice" was not overwhelmingly effective. In fact, the contrary conclusion should be reached given the volume of public comments filed with TCEQ during the comment period.¹²² Second, upon receiving MCC's complaint, TCEQ in fact did extend the public comment period to April 16, well beyond the original 30 day public comment deadline, thereby providing a total of 74 days (two and one-half months) for the public to

¹¹⁹ MCC's Exceptions at pp. 2-6.

¹²⁰ MCC's Exceptions at p. 3. The ED did, however, send letters to the complaining entities.

¹²¹ Tenaska Exhibits 1F ((Clippings and Affidavit for Notice of Application and Preliminary Decision) and 1H (Public Notice Verification, dated March 5, 2009).

¹²² Exhibit ED-13 (RTC).

comment. Third, there are no TCEQ rules (or federal rules for that matter) requiring any sort of specific notice if the ED extends the public comment period.

Perhaps most importantly, to say as MCC alleges, that the public was deprived of its opportunity for meaningful public participation,¹²³ is absolutely false. A copy of the Application was available closer to the facility at the Sweetwater Public Library. It was available in Austin at TCEQ headquarters. It also could have been obtained through the TCEQ Regional Office if anyone had bothered to request it. In fact, notably, MCC points out that the issue was brought to TCEQ's attention by counsel for MCC *only* when, on the very last day of public comment, counsel inquired at the TCEQ Abilene Regional Office concerning the Application.¹²⁴ Assuming, *arguendo*, that the entire Application was not *physically present* in the Abilene Regional Office, it does not follow that the Application was not *available*, or could not have been made available, in a reasonable timeframe. The argument Counsel for MCC makes is very nuanced; she does not allege that she could not obtain pertinent documents at the Regional Office, rather, she alleges that she could not have them at the instant she requested them.

Finally, MCC's citation to EPA's limited approval and disapproval of Texas' public participation rules rings hollow. First, the cited notice was merely a proposed limited approval and disapproval, not EPA's final decision.¹²⁵ Second, in its notice, EPA details its concerns about proposed SIP revisions, yet none relate to the availability of information to the general public and the stated purpose of the rules was to incorporate and revise the existing rules to meet statutory requirements.¹²⁶

¹²³ MCC's Exceptions at p. 4.

¹²⁴ MCC's Exceptions at p. 3.

¹²⁵ 73 Fed. Reg. 72001 ("ACTION: Proposed Rule").

¹²⁶ EPA notes that the new rules would make a copy of the Application "also" available in the municipality nearest the proposed facility (73 Fed. Reg. 72001, 72007), implying that a copy would continue to also be available in the Regional Office. However, the clearly stated purpose of Texas' HB 801 rules was to incorporate and revise the

Notably, MCC does not allege any specific harm whatsoever, relying instead on broad conclusory generalizations. In fact, far from being harmed, MCC and other members of the public ultimately *benefited*, because they were provided nearly 2.5 times longer to review and comment on the Application, Draft Permit and supporting documents than is normally afforded. In sum, the Commission should dismiss MCC's complaint and exceptions on these points in total. TCEQ's response to these allegations was swift, reasonable, more than fair, and in full compliance with state and federal rules.

VI. CO₂ AMINES.

MCC contends that the ED failed to conduct a thorough review of Tenaska's carbon capture technology.¹²⁷ Tenaska comprehensively disproved this claim in its Reply to Closing Arguments at pages three through seven.¹²⁸ Moreover, in its exceptions, MCC does not specify what the review lacked. MCC did not even present a rule, guidance, or testimony – expert or otherwise – to establish what constitutes a “thorough” review. MCC's statements are mere generalizations and conclusory, without fact or substance. That should not be surprising because the record contains no evidence to support MCC.

Chapter 116 notice rules into Chapter 39: “The application availability requirements under §116.131(b) are adopted to be *incorporated* into §39.411(b)(8) and *revised to reflect the new requirements under TCAA*, §382.056(d) which requires the applicant to make a copy of the application available for review by the public in the county where the facility is or will be located, and revised to reflect that this is also in §39.411(c)(5).” 24 Tex. Reg. 8222 at 8298 (September 24, 1999) (emphasis added). Thus, EPA's use of the word “also” appears to be a typographical error. Further, in proposing to approve the “application availability” portions of the rules (72 Fed. Reg. at 72004), EPA noted that the changes “strengthen the SIP” (*Id.* at 72007).

¹²⁷ MCC's Exceptions at pp. 13-14.

¹²⁸ Citing testimony by the ED's expert, Mr. Hughes, Tenaska's expert, Mr. Greywall, and Tenaska's witness, Mr. Kunkel, concerning their numerous inquiries into, and evaluation of, carbon capture technology using amine systems.

VII. IGCC

In its exceptions, MCC argues that the ALJs' PFD incorrectly concludes that Tenaska was not required to analyze IGCC as part of its BACT analysis.¹²⁹ MCC also disagrees with the ALJs' determination that the preponderance of the evidence in the record establishes that the use of IGCC would be contrary to the fundamental business purpose and design of Trailblazer and that the evidence in the record supports the finding that IGCC is not BACT for Trailblazer.¹³⁰ MCC misconstrues the law and evidence on each of these three bases, any one of which is sufficient to constitute an affirmative finding for the Applicant on this issue.

First, MCC argues that reliance on the decision by the Amarillo Court of Appeals in *Blue Skies Alliance v. TCEQ*, 283 SW2d 525 (Tex. App. – Amarillo 2009, no pet.), is misplaced, because the Court concluded that the protestant, Environmental Defense, offered no evidence that IGCC is a process that could be applied to Sandy Creek's proposed plant. MCC, however, ignores Commission precedent embodied by the Sandy Creek TCEQ Interim Order¹³¹ on this issue and the recently-issued Coletto Creek and the NRG Commission Orders issuing permits in those cases.¹³² All three Commission Orders find that consideration of IGCC would redefine the source in the case of a PC boiler permit application.¹³³

Following its attempt to discredit the Sandy Creek precedent and ignoring any subsequent Commission precedent, MCC catalogues a series of EPA decisions on various permits that it alleges are controlling as it relates to consideration of IGCC technology and BACT analyses in

¹²⁹ MCC's Exceptions at p. 6.

¹³⁰ MCC's Exceptions at p. 6.

¹³¹ Tenaska Exhibit 2I (Sandy Creek TCEQ Interim Order).

¹³² OPIC Cross Exhibit 1 (Coletto Creek Permit), finding of fact no. 201, p. 33, conclusion of law 28, p. 49; OPIC Cross Exhibit 2 (NRG Permit), conclusion of law 27, p. 44.

¹³³ Tenaska Exhibit 2I (Sandy Creek TCEQ Interim Order); OPIC Cross Exhibit 1 (Coletto Creek Permit), finding of fact no. 201, p. 33, conclusion of law 28, p. 49; OPIC Cross Exhibit 2 (NRG Permit), conclusion of law 27, p. 44.

this case.¹³⁴ None of these decisions or determinations are applicable or controlling in Texas. As the ALJs in the Coletto Creek PFD noted in several important points regarding federal law supremacy in the context of PSD permitting in Texas: (1) SOAH is not a reviewing court with jurisdiction to determine whether a state agency's rules comply with federal law and to strike them down if they do not; (2) ALJs must apply the rules of the state agency for which they are preparing a PFD; (3) to the extent protestants wish to claim the TCEQ is not implementing a state program that is equivalent to the federal program, they need to make those arguments in another forum with jurisdiction to decide them; and (4) the Commission's interpretation of its own rules are entitled to deference.¹³⁵ Accordingly, MCC's reliance on EPA decisions, which are not controlling in Texas, is misplaced.

MCC then argues that the ALJs somehow incorrectly weighed the evidence in determining that IGCC would be contrary to the Trailblazer business purpose.¹³⁶ This issue has been comprehensively briefed in both Tenaska's Closing Argument at pages 13 through 15 and in its Reply to Closing Arguments at pages eight through ten. The overwhelming weight of evidence supports the ALJs' determination on this issue. MCC's summary of contrary evidence adds nothing new to the discussion. The ALJs properly weighed the *credible* evidence on this issue and reached the correct determination. Thus, MCC's recommendations for revisions to any findings of fact or conclusions of law should fail.

Finally, for all of its efforts to argue that IGCC should have been considered in the Trailblazer BACT analysis, it notably fails to contest Tenaska's BACT consideration of IGCC

¹³⁴ MCC's Exceptions at pp. 8-10.

¹³⁵ See Tenaska's Reply to Closing Arguments at p. 11.

¹³⁶ MCC's Exceptions at pp. 10-13.

for Trailblazer.¹³⁷ Again, this was summarized in Tenaska’s Closing Argument at pages 15 through 17. At the hearing, Tenaska provided additional evidence that demonstrated that even if IGCC is considered for Trailblazer in a BACT analysis, it does not represent BACT. Tenaska’s expert, Mr. William Campbell, determined that IGCC could not be considered BACT for several reasons. He reached his opinion based on the facts that (1) IGCC had not been demonstrated in practice for sub-bituminous coal-fired power plants, (2) IGCC has not been used at any stage of power plant development without a government subsidy, (3) IGCC is significantly more expensive, and (4) IGCC has not been demonstrated in practice to result in overall reduced emissions.¹³⁸ Mr. Campbell’s BACT determination on this issue was basically uncontroverted at the evidentiary hearing.¹³⁹ Consequently, even if there should be some concern with Commission precedent on this issue (and there should be none) or whether IGCC is consistent with the Trailblazer business purpose, based on Tenaska’s supplemental BACT analysis on this issue, the Commission should find that IGCC is not BACT for Trailblazer.

VIII. TRANSCRIPT COSTS.

MCC excepts to the ALJs’ proposed assessment of costs because, essentially, the ALJs found in favor of certain issues raised by protestant organizations MCC and Sierra Club, and, therefore, it is inappropriate to “penalize” protestants for challenging Trailblazer’s Application.¹⁴⁰ MCC also contends that it is not usual to assess costs to protesting parties.

Tenaska disagrees, based on the analysis presented in its Closing Argument and Reply to Closing Arguments.¹⁴¹ Further, the basis for MCC’s exception – the ALJs’ “finding” in their favor – is not a criteria the Commission can consider when assessing costs. Those criteria are

¹³⁷ See MCC’s Exceptions at pp. 6-13.

¹³⁸ See Tenaska’s Closing Argument at pp. 15-17.

¹³⁹ *Id.*

¹⁴⁰ MCC’s Exceptions at pp. 14-15.

¹⁴¹ Tenaska’s Closing Argument at pp. 56-57; Tenaska’s Reply to Closing Arguments at pp. 49-51.

listed at 30 TAC § 80.23(d) and the ALJs appropriately considered each relevant factor and proposed a fair assessment of the applicable costs.¹⁴²

Lastly, the Commission does, in fact, distribute transcript costs to both applicants and protestants. Most recently, the Commission did so in the White Stallion Order.¹⁴³

**IX. CHANGES TO THE PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW RECOMMENDED
BY MCC AND SIERRA CLUB SHOULD BE DENIED**

Based on the foregoing arguments, both in this Reply to Exceptions and in Tenaska's Exceptions, Reply to Closing Arguments, and Closing Argument, Tenaska respectfully requests that the Commission deny all proposed or recommended changes by MCC and Sierra Club to the findings of fact and conclusions of law for the Proposed Order in this case.

X. CONCLUSION

In their exceptions, MCC and Sierra Club rely on similar themes they have previously advocated in this case. In this Reply, Tenaska once again addresses Protestants' "issues" in this case and comprehensively and conclusively demonstrates that such issues have no merit. Applicant respectfully requests that the Commission deny all relief sought by Protestants in this case and further requests, in accordance with Tenaska's and the ED's Exceptions to the PFD,

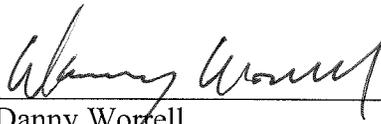
¹⁴² PFD at pp. 78-79.

¹⁴³ Proposal for Decision In the Matter of WSEC Energy Center, L.L.C. Application for Air Quality Permit Nos. 86088, HAP28, PAL26, and PSD-TX-1160, SOAH Docket No. 582-09-3008, TCEQ Docket No. 2009-0283-AIR, at 49 (hereinafter "*White Stallion* PFD").

that the Honorable Commissioners approve the Application, issue the Draft Permit, and grant such other relief Applicant may justly be entitled.

Respectfully submitted,

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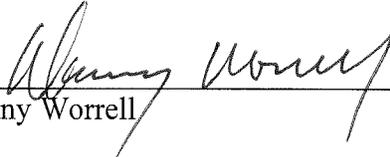
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CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of November, 2010, a copy of Tenaska Trailblazer Partners, LLC's Reply to Exceptions was served on the following parties of record in this case via hand delivery, facsimile, electronic mail, and/or regular mail.

<u>Representative / Address</u>	<u>Parties</u>
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Danny Worrell