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Mark R. Vickery, P.G., *Executive Director*



## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

October 21, 2010

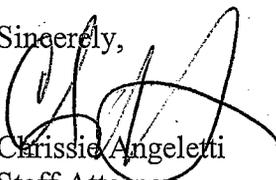
LaDonna Castañuela  
Office of the Chief Clerk  
Texas Commission on Environmental Quality  
Office of the Chief Clerk, MC-105  
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Austin, Texas 78711-3087

Re: Executive Director's Exceptions to the Administrative Law Judges' Proposal for Decision; Air Permit Nos. 84167, PSD-TX-1123, and HAP13; SOAH Docket No. 582-09-6185; TCEQ Docket No. 2009-1093-AIR

Dear Ms. Castañuela:

Please find enclosed the Executive Director's Exceptions to the Administrative Law Judges' Proposal for Decision, for the above referenced matter.

Sincerely,



Chrissie Angeletti  
Staff Attorney  
Environmental Law Division

Enclosures

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

<b>APPLICATION OF TENASKA TRAILBLAZER PARTNERS, LLC</b>	§	<b>BEFORE THE STATE OFFICE</b>
	§	
	§	<b>OF</b>
	§	
<b>FOR STATE AIR QUALITY PERMIT NOS. 84167, HAP 13, AND PSD-TX-1123</b>	§	<b>ADMINISTRATIVE HEARINGS</b>

**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/Background**

On February 19, 2008, Tenaska Trailblazer Partners, LLC (Tenaska), submitted a new source review application to the Texas Commission on Environmental Quality (TCEQ) for a State Air Quality Permit No. 84167, a Prevention of Significant Deterioration (PSD) Air Quality Permit No. PSD-TX-1123, and a federal Hazardous Air Pollutant (HAP) Permit No. HAP13. These permits will authorize the construction and operation of a new coal-fired electric generating unit at Tenaska Trailblazer Energy Center, located on County Road 109 approximately 1.5 miles west of Stink Creek Road (County Road 126 heading north of Interstate 20 from Exit 256) near Trent, Nolan County.<sup>1</sup>

TCEQ staff from the Air Permits Division, Air Dispersion Modeling Team, and Toxicology Section reviewed the documentation submitted by Tenaska. Upon completing the

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<sup>1</sup> Ex. ED-13 p. 2; Bates p. 467

review, the Executive Director issued the Notice of Application and Preliminary Decision, which includes the Preliminary Determination Summary and Draft Permit. The NAPD was published on February 1, 2009. In issuing the Draft Permit, the ED concluded that: 1) Tenaska's proposed controls constitute best available control technology (BACT) for criteria pollutants and maximum achievable control technology (MACT) for hazardous air pollutants; and 2) the modeling analysis demonstrates that the proposed project will not cause or contribute to a violation of the National Ambient Air Quality Standards (NAAQS) or PSD increments, 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 July 14, 2009. A preliminary hearing on the matter was held on October 14, 2009 in Sweetwater. The hearing on the merits was held June 2, 2010 through June 10, 2010 in Austin.

On October 1, 2010, the ALJs issued their Proposal for Decision (PFD) to the Commission. In their proposal, the ALJs concluded that Tenaska failed to meet its burden of proof to demonstrate the emissions limits proposed in the Draft Permit will meet the requirements for Best Available Control Technology (BACT) and Maximum Achievable Control Technology (MACT).<sup>2</sup> The ALJ's recommend the Commission adopt more stringent emissions limits and special conditions. Specifically, the ALJs recommend changes to the limits for: carbon monoxide (CO), nitrous oxides (NO<sub>x</sub>), volatile organic compounds (VOCs), filterable particulate matter, total particulate matter, including particulate matter with a diameter of less than 2.5 microns (PM/PM<sub>2.5</sub>), lead, mercury, organic HAPs, non-mercury HAP metals, hydrogen

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<sup>2</sup> Tenaska Proposal For Decision ("PFD") at p. 1

fluoride (HF), and hydrogen chloride (HCl).<sup>3</sup> Alternatively, the ALJs recommend that that Commission deny the Application or remand the matter for further evidence regarding BACT and MACT.<sup>4</sup>

## II. TCEQ Policy Issues Regarding MACT and BACT Review

The ALJs conclusions that Tenaska did not meet its burden regarding BACT and MACT are based on assumptions that TCEQ practices regarding the BACT and MACT analysis does not properly address the issues. As discussed in the Executive Director's Response to Closing Arguments, the TCEQ is afforded deference in the interpretation and application of its guidance documents when conducting its BACT and MACT analysis.<sup>5</sup> First, the evidence reflects the TCEQ's PSD program, including the technical review for BACT, is SIP approved.<sup>6</sup> Second, the record also reflects that TCEQ follows the standards in the Federal Clean Air Act and TCEQ rules to evaluate MACT.<sup>7</sup> In the recent PFD issued by SOAH in *Coletto Creek*, the ALJs discussed the difference between "(1) legal requirements and (2) methodologies that experts use to reach an opinion offered to assist the ALJs and the Commission in determining whether a legal standard has been met."<sup>8</sup> In reaching their conclusion, the ALJs in *Coletto Creek* acknowledged that "SOAH is not a reviewing court with jurisdiction to determine whether a state agency's rules comply with federal law..." and that "...an agency's interpretations of its own rules is entitled to deference."<sup>9</sup> Thus, the ALJ's analysis should have followed the TCEQ's

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<sup>3</sup> *Id.* at p.80-1.

<sup>4</sup> *Id.* at p.1.

<sup>5</sup> ED Response to Closing, p. 3 citing *Alaska Dept. of Environmental Conservation v. EPA*, 540 U.S. 461 (2004), 124. S. Ct. 983 at p. 987.

<sup>6</sup> Ex. ED-6 p. 28096, at bates p. 398.

<sup>7</sup> Ex. ED-1, pp. 28:8-32:39; Ex. ED-11, P. 8-17 at bates p. 424-433.

<sup>8</sup> Proposal for Decision in *IPA Coletto Creek*, SOAH Docket No. 582-09-2045, TCEQ Docket No. 2009-0032-AIR p.

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<sup>9</sup> *Id.*

policies and practices in administering its MACT and BACT analysis consistent with the evidence offered by the parties in this case.

**A. Use of Non-Operational Facilities to Establish BACT and MACT**

The ALJs concluded that the use of actual emissions data (versus permitted emissions limitations) may not be readily available, and may not be indicative of an emission rate that can be continuously met over time.<sup>10</sup> Therefore, the ALJs determined the MACT limit, "...should be based only on emissions test data that is deemed to be a reliable indicator of emissions rates that can be achieved by the permitted source on an ongoing basis and under the gamut of expected operating conditions."<sup>11</sup>

The ALJs also concluded that the ED should consider non-operational permit limitations based on emission rates that have been achieved in practice by other operating facilities since those emission rates were deemed reliable enough by another permitting authority to form the basis for its [MACT] determination.<sup>12</sup> Throughout the PFD the ALJ's state that "it can reasonably be assumed that the permitted limits issued by the [other state's] permitting authority, are achievable in absence of any specific evidence... to the contrary."<sup>13</sup>

While the ED agrees with the conclusion that the ED should only use information that is available and that the TCEQ staff determines reliable, the ED does not agree with the assumption that another permitting authority's conclusions regarding emission limitations can alone establish BACT and MACT. The ALJs' assumption dramatically shifts the burden required by the TCEQ for a MACT and BACT analysis and therefore, the ED disagrees with this conclusion.

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<sup>10</sup> *Id* at p. 17.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at p. 17.

<sup>13</sup> *Id.* at p. 26.

During the BACT review of an application, actual emission data from existing units is used when evaluating technical feasibility of a proposed emission rate and the applicability of technologies to determine whether a proposed control can achieve and operate at BACT emission rates continuously over time.<sup>14</sup> However, if a control technology has not been applied or an emission limit has not been demonstrated to be achieved in practice, a necessary condition of its selection as BACT requires technically qualified individuals to provide reasoned assurances that the technology or emission limit is achievable.<sup>15</sup> TCEQ staff does not consider non-operational facilities to be “achieved in practice.” Regarding MACT, the TCEQ staff considers “best controlled similar source,” to be those sources that have been operating for a significant amount of time in order to prove that this lower level is achievable in practiced over the long term.<sup>16</sup>

#### **B. Use of Another State’s Permitting Decisions to Establish BACT and MACT**

The ED does not concur with the proposition that another permitting authority’s conclusions regarding permitted emission limits establishes MACT or BACT without any additional review.<sup>17</sup> The ED finds a distinction between reviewing what other facilities in the United States are accomplishing in terms of technical feasibility and substituting another agency’s decision-making process for that of the TCEQ. The ALJ’s conclusion not only dramatically increases the burden on applicants; it also significantly increases the resources necessary for the TCEQ to perform its review.

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<sup>14</sup> Ex ED-13 p. 28, bates p. 493. See also ED’s Response to Closing Arguments p. 7 citing *In RE: Newmont Nevada Energy Investment, L.L.C.* 12 E.A.D. 429 (EAB 2005)(order denying review).

<sup>15</sup> *Id.*

<sup>16</sup> Ex. ED-13 p. 37 bates p. 502.

<sup>17</sup> PFD p. 17.

The conclusion that another state agency's permitting authority can replace the judgment and reasoning of that of the TCEQ assumes that every permitting authority in the United States would conduct a similar technical review, have similar enforcement policies, similar monitoring requirements, and even that the permit would undergo similar evidentiary review.

Thus, as the evidence reflects, the emission limitations established for non-operational facilities in other states may be considered in the MACT and BACT analysis, however, these limits are not considered "achievable in practice" and therefore cannot be considered presumptive BACT and MACT limits simply because they have been permitted. Regarding previous permit limitations established by the TCEQ, information regarding the decision making process is more accessible, and therefore TCEQ staff is often more confident that the conclusions reached in those instances adheres to TCEQ permitting and enforcement policies and procedures.

### **C. Technical Review**

The ALJs also conclude that to the extent potentially relevant information concerning emissions data or permit limits was provided by the Protestants to the Applicant and the ED before or during the hearing, the ALJs believe that the ED was obligated to consider and evaluate that information to determine the degree, if any, of its applicability to Tenaksa.<sup>18</sup> The ED's position has been that for purposes of judicial efficiency the BACT analysis ends at the conclusion of the technical review, however this does not relieve the Commission of its power to make changes to the permit after hearing evidence presented on the record.<sup>19</sup>

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<sup>18</sup> PFD p. 18.

<sup>19</sup> Texas Health and Safety Code Chapter 382 .011 (c); 382.023(a), 382.0513; and Texas Water Code Chapter 5 §102.

TCEQ's practice regarding the close of the administrative record for BACT and MACT has been discussed in the order for *Mirant Parker*. Before the contested *Mirant* permit was issued the Commission issued non-contested permits for gas turbines with lower NO<sub>x</sub> BACT limits. The Commission held that the limit for the *Mirant* permit could remain at the originally reviewed BACT limit. The Commission stated that "[t]he Commission's staff has consistently followed a practice of not revisiting BACT after the initial determination has been made," and that "[i]f BACT were always changing, it would be difficult to complete a review of an application [because] that situation would be costly not only to the applicants, but to the Commission's staff, which would have to re-review applications."<sup>20</sup> The Commission also stated that "Determining the BACT level early, and adhering to that determination, has the benefit of treating similar facilities equally," and that "[t]he staff's [practice of not revisiting BACT is a reasonable one."<sup>21</sup> For the same reasons, the ED supports the original emissions limitations established during the technical review for the Tenaska draft permit.

### III. MACT and BACT Analysis

#### A. MACT for Mercury (Hg)

The ALJs recommend the new limit be set at that of Plant Washington, "... to the extent...that permit limit is based on reliable data demonstrating that lower emissions rates have been achieved in practice by other operating sources."<sup>22</sup> The ALJs then cite in a footnote that "there is no evidence in the record, however, from which a determination can be made about the reliability of that data as a demonstration of rates [that] can be achieved in practice over time

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<sup>20</sup> TNRCC's January 7, 2002, Order issuing permit numbers 40619 and PSD-Texas-933 to Mirant Parker, LLC; TNRCC Docket NO. 2000-0346-AIR; SOAH Docket NO. 582-00-1045.

<sup>21</sup> *Id.*

<sup>22</sup> PFD p. 26

under varied conditions.<sup>23</sup> These findings appear inconsistent. Therefore, for reasons discussed above the ED does not consider Plant Washington's permit limits appropriate for establishing MACT or BACT. Thus, the ED concludes that the limit of  $1.7 \times 10^{-6}$  lb/MMBtu contained in the Tenaska permit establishes MACT.

#### **B. MACT for Non-mercury Metallic HAPS (Filterable PM as surrogate)**

The ALJ's recommend a permit limit of .010 lb/MMBtu filterable PM as a surrogate for non-mercury metallic HAPs to establish MACT, based on the emission limit found in the Plant Washington permit.<sup>24</sup> For reasons discussed above the ED does not consider Plant Washington's permit limits appropriate for establishing MACT or BACT. Thus, the ED concludes that the limit of .012 lb/MMBtu over a 12-month averaging period contained in the Tenaska permit establishes MACT.

#### **C. Acid Gases (HCL and HF)**

The ALJ's recommend a permit limit of .00014 lb/MMBtu as HF MACT and .000322 lb/MMBtu as the HCl MACT, based on the emission limit found in the Plant Washington permit.<sup>25</sup> For reasons discussed above, the ED does not consider Plant Washington's permit limits appropriate for establishing MACT or BACT. As explained in the ED's RTC, the limits established in the Tenaska permit are based on using a wet scrubber.<sup>26</sup> Thus, the ED concludes that the limit of 0.00054 lb/MMBtu for HF and 0.00063 lb/MMBtu for HCl contained in the Tenaska permit establishes MACT.

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<sup>23</sup> PFD p. 26.

<sup>24</sup> *Id.* p. 80

<sup>25</sup> *Id.*

<sup>26</sup> Ex ED-13 p. 43, bates p. 508.

#### **D. MACT for Organic HAPs (CO as surrogate)**

The ALJ's recommend a permit limit of .10 lb/MMBtu CO over 30-day and 12-month averaging periods as a surrogate for Organic HAPs to establish MACT. The ALJs recommendations are based on the emission limits that have not been demonstrate in practice.<sup>27</sup> For reasons discussed above the ED does not consider Plant Washington's permit limits appropriate for establishing MACT or BACT. Thus, the ED concludes that the limit of 0.15 lb/MMBTu for a 30-day averaging period contained in the Tenaska permit establishes MACT.

#### **E. BACT for Nox**

The ALJ's recommend a permit limit of .067 lb/MMBtu over a 24-hour average and .05 lb/MMBtu over a 30-day rolling average to establish BACT. The ALJs 24-hour average is based on the emission limits found in the Newmont Nevada Energy and SWEPCO Turk permits. The 30 day-average is based on the Plant Washington permit.<sup>28</sup> For reasons discussed above the ED does not consider Plant Washington's and SWEPCO Turk permit limits appropriate for establishing MACT or BACT. Thus, the ED concludes that the limit of 0.07 lb/MMBTu for a 24-hour average, .06 lb/MMBtu for a 30-day rolling average, and .05 lb/MMBtu for an annual average contained in the Tenaska permit establishes BACT.

#### **F. CO**

As discussed above a 30-day rolling average for CO was established for MACT purposes. Regarding BACT the ALJ's recommend .10 lb/MMBtu over a 12-month rolling average based on Plant Washington.<sup>29</sup> For reasons discussed above the ED does not consider Plant

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<sup>27</sup> PFD at p. 39

<sup>28</sup> *Id.* at p. 60

<sup>29</sup> *Id.* at p. 65

Washington's permit limits appropriate for establishing MACT or BACT. Thus, the ED concludes that the limit of 0.15 lb/MMBTu for a 12-month rolling average contained in the Tenaska permit establishes BACT.

#### **G. VOC**

The ALJ's recommend a permit limit of .0024 lb/MMBTu for both a 30-day and 12-month rolling average to establish BACT, based on the Plant Washington permit.<sup>30</sup> For reasons discussed above the ED does not consider Plant Washington's permit limits appropriate for establishing MACT or BACT. Operating facilities which had been demonstrated to meet their permit limits before the close of the comment period have the same limit. Thus, the ED concludes that the limit of 0.0036 lb/MMBTu for a 12-month rolling average contained in the Tenaska permit establishes BACT. A 30-day average is not required for BACT.

#### **H. Filterable PM and Total PM/PM2.5**

As discussed above, filterable PM is used as a surrogate for non-mercury metallic HAPs for MACT purposes. Regarding BACT the ALJ's recommend an .018 annual and .018 1-hour limit for Total PM/PM<sub>2.5</sub> based on Omaha, Whelan Energy, and Plant Washington.<sup>31</sup> For reasons discussed above the ED does not consider Omaha, Whelan Energy, or Plant Washington's permit limits appropriate for establishing MACT or BACT. Thus, the ED concludes that the limit of 0.030 lb/MMBTu 30-day and annual average contained in the Tenaska permit establishes BACT. A 1-hour average is not required for BACT.

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<sup>30</sup> *Id.* at p. 67.

<sup>31</sup> *Id.* at p. 70.

### **I. Lead (Pb)**

The ALJ's recommend a permit limit of .000016 lb/MMBtu annual limit to establish BACT, Tenaska could not prove that the lower limits in the RBLC were set for MACT or LAER purposes or that the facilities were distinguishable and not appropriate as BACT for Tenaska.<sup>32</sup> Lead emissions are based on the lead content present in the coal as well as the removal efficiency of the baghouse. As described in Mr. Hughes testimony BACT is not a set emission limit it is a range.<sup>33</sup> Tenaska represented they could meet the .000030 limit after consulting a technical specialist.<sup>34</sup> After considering various operating conditions, Mr. Hughes determined that .000030 limit fell within the BACT range.

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<sup>32</sup> *Id.* at p. 72.

<sup>33</sup> PFD p. 55-57.

<sup>34</sup> Ex. ED-13 p. 44, bates p. 509.

#### IV. Conclusion

As outlined above, the ALJs have identified MACT and BACT limits that should either be lowered or preserved as issues to be remanded. These are all issues within the Commission's discretion for consideration and ultimate determination. The ED has offered his exceptions to those conclusions and recommends that the draft permit be issued.

Respectfully submitted,

Texas Commission on Environmental Quality

Mark R. Vickery, P.G., Executive Director

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REPRESENTING THE  
EXECUTIVE DIRECTOR OF THE  
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**CERTIFICATE OF SERVICE**

I hereby certify that on this the 21<sup>st</sup> day of October, 2010, a true and correct copy of the foregoing has been served on all attorneys of record by the undersigned via hand delivery, sent by U.S. mail, facsimile, and/or e-mail to the attached Service List.

A handwritten signature in black ink, appearing to read 'Chrissie Angeletti', is written over a horizontal line. The signature is cursive and stylized.

Chrissie Angeletti

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**FOR THE CHIEF CLERK**

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