



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

November 1, 2010

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

Re: Executive Director's Replies to 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 Replies to Exceptions to the Administrative Law Judges' Proposal for Decision, for the above referenced matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Chrissie Angeletti".

Chrissie Angeletti
Staff Attorney
Environmental Law Division

Enclosures

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

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

**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 the Executive Director's Reply to Exceptions to the
Administrative Law Judges' Proposal for Decision (PFD), and in support thereof shows the
following:

I. INTRODUCTION/BACKGROUND

On October 21, 2010, the following parties filed Exceptions to the ALJs' PFD: Tenaska
Trailblazer Partners, L.L.C. ("Tenaska" or "Applicant"); Sierra Club; the Multi-County Coalition
(MCC); and the ED. 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. PROCEDURAL ISSUES

A. Public Notice

MCC claims that the ED and the Applicant falsely informed the public that all requisite
documents were available at the TCEQ's Abilene Regional Office (Region) during the published

comment period, and failed to inform the public of the deadline to submit public comments in the published notice.¹ The ED addresses this issue because it was raised by a party however the issue is not addressed in the ALJs PFD.

On February 1, 2009, Tenaska published the Notice of Application and Preliminary Decision.² In accordance with TCEQ rules and regulations, Tenaska filed with the region all appropriate documentation. However, at the time of transmittal, the TCEQ's regional office was not aware that some of the documents for the Tenaska application were being stored electronically and misinformed Ms. Hammond, counsel for MCC, that they were not available. After correcting the error, notice was mailed on March 16, 2009, to all parties on the mailing list, including MCC, and the public comment period was extended to April 16, 2009, in order to correct any harm that may have occurred and provide ample opportunity for interested persons to review the documentation contained in the file.³

B. SO₂ 1-hour NAAQS

Sierra Club states that Tenaska failed to demonstrate compliance with the 1-hour NAAQS for SO₂.⁴ On August 23, 2010 the new SO₂ 1-hour NAAQS became effective.⁵ The ED's position has been that for purposes of judicial efficiency, the BACT analysis ends at the conclusion of the technical review,⁶ however an analysis of achievable control technologies is distinguishable from a newly issued NAAQS. All owners and operators of new and modified facilities, including Tenaska, will be required to demonstrate that their emissions will not cause or contribute to a violation of the new NAAQS. However, the use of the technical completion

¹ Multi-County Coalition's (MCC) Exceptions to the Proposal For Decision (PFD) p. 2-3

² Ex. ED-13 p. 2; Bates p. 467

³ *Id.*

⁴ Sierra Club's (SC) Exceptions to the PFD, p. 2

⁵ 75 Fed. Reg. 35520, June 22, 2010.

⁶ Executive Director's (ED) Exceptions to Administrative Law Judges (ALJ) PFD p. 6-7.

date to establish BACT does not relieve the Commission of its power to make changes to the permit after hearing evidence presented on the record.⁷

III. EXCEPTIONS TO THE PFD

A. MACT

Sierra Club claims that the record does not contain evidence sufficient to demonstrate Tenaska conducted an adequate MACT analysis since “the only justification Tenaska’s Application provides for its proposed MACT limits are permit limits.”⁸ Sierra Club cites to 42 U.S.C. § 7414 (c) to establish that emission data must be made available even if it qualifies as trade secret information.⁹

While both Mr. Hughes and the Applicant’s expert witness testified that stack testing can be considered in determining MACT, both experts also testified that stack testing may not be reliable.¹⁰ Furthermore, Sierra Club’s reasoning overlooks the point that obtaining that information may be expensive and arduous, and still does not demonstrate that such information would be a reliable indicator of what is achievable in practice over the long term.¹¹ Thus, while stack testing may be considered, emission data from those tests is not the sole or determining factor that the ED uses to establish a permit limit for MACT.

Regarding the review for Tenaksa, Mr. Hughes, in fact relied on stack testing from Council Bluffs Station (Unit 4) when changing the Mercury limit to 1.7 (10⁻⁶) Ib/MMBtu.¹² Mr. Hughes also consistently identified those facilities that had lower permitted limits and explained,

⁷ Texas Health and Safety Code Chapter 382 §§ .011 (c); .023(a), .0513; and Texas Water Code Chapter 5 §102.

⁸ SC Exceptions to the PFD, p.6

⁹ SC Exceptions to the PFD, p. 7

¹⁰ Ex. ED-13 p. 30, “..stack tests are typically performed under optimum conditions and usually are initial compliance determination tests on new units. A combination of factors including wear and tear due to abrasion, etc., will reduce overall particulate control on average over time. These factors are taken into consideration when the permit limit is established.” See also Applicant Response to Closing Arguments p. 44.

¹¹ Ex. ED-13 p. 37, bates p. 502.

¹² Ex. ED-1, p. 29:33-36, bates p. 29.

when appropriate, his reasoning for why the TCEQ did not consider those limits to be “achieved in practice.”¹³

Mr. Hughes’ pre-filed testimony and supporting documents, along with the Preliminary Determination Summary (PDS), illustrate the detail of review Mr. Hughes used when conducting his MACT analysis. Mr. Hughes testified that when identifying and evaluating available control options, emission limits, and averaging periods, he considered BACT determinations made by the TCEQ, entries in the RACT/BACT/LAER Clearinghouse, and control technology determinations and emission limits imposed by air quality permitting authorities outside Texas.¹⁴

1. MACT For Mercury (Hg) and Filterable PM as a surrogate for non-mercury metallic HAPs

Sierra Club claims that Tenaska failed to conduct a beyond-the-floor analysis for filterable PM, as a surrogate for non-mercury metallic HAPs, and failed to determine the proper MACT floor for Mercury.¹⁵ Sierra Club claims that the limits in *Plant Washington’s* final permit should be used for Hg rather than the draft permit levels recommended by the ALJs.¹⁶ Sierra Club also asserts that the limit in *Desert Rock* be used to establish MACT for CO.¹⁷ As stated in the ED’s Exceptions the ALJs PFD, the ED does not consider the permit limits for non-operational facilities to be “achieved in practice” for MACT purposes.¹⁸ Neither *Plant Washington*, nor *Desert Rock* has been constructed. Thus, it would be inappropriate to consider the limits in either permit as BACT or MACT for Tenaska.

¹³ Ex. ED-1, pp. 28:8-32:39; Ex. ED-11, p. 8-17, bates p. 424-433.

¹⁴ *Id.*

¹⁵ SC Exceptions to the PFD p. 5

¹⁶ *Id.* at p. 8, 11.

¹⁷ *Id.* at p. 13.

¹⁸ ED Exceptions to the ALJs PFD p. 5.

2. Wet versus Dry FGD

Sierra Club argues that Tenaska did not consider the emissions from dry FGDs in the MACT analysis for Total PM as a surrogate for HCl and HF.¹⁹ Wet FGD uses a different process to reduce specific emissions than dry FGD. However, Mr. Hughes considered the use of both wet and dry FGD in his review and concluded that wet FGD is more effective at removing SO₂ and Mercury than dry FGD.²⁰ As noted by Tenaska's expert Mr. Bailey, a wet FGD will perform differently than a dry FGD.²¹ For instance, a wet FGD may be more effective at removing SO₂, however, it is less effective than a dry FGD at removing PM/PM₁₀.²² As discussed below, a permit review is done on a case-by-case basis and for MACT it is appropriate for the permit reviewer to take into consideration the costs of achieving such emission reduction and any non-air quality health and environmental impacts and energy requirements associated with the emission reduction.²³ Thus, Mr. Hughes conducted an appropriate MACT analysis because he considered both wet and dry FGD for Total PM and concluded that Tenaska's selection of wet FGD would be appropriate.

3. BACT

Sierra Club claims that the ED did not conduct a Tier I BACT determination based on Sierra Club's interpretation of the TCEQ's guidance document RG-383 and recommends that the permit limits should be set at the "lowest" limits for each pollutant based on stack testing and permit limits for non-operational facilities.

¹⁹ SC Exceptions to the PFD p. 11-12.

²⁰ Ex. ED-13 p. 30-32, bates p. 495-7.

²¹ Tr. 970-971.

²² *Id.*

²³ 40 § C.F.R. 63.43.

As stated 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 permits²⁴ subject to basic agreements between TCEQ and the EPA as specified in the rule-making.²⁵ As part of that rule-making, the EPA also interpreted the Federal Clean Air Act (FCAA) BACT definition as possessing two fundamental concepts.²⁶ First, the most stringent available control technology (and associated emission limitation) must be evaluated.²⁷ 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.²⁸ 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."²⁹ 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.³⁰

Mr. Hughes 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

²⁴ Ex. ED-7, p. 28096, at bates page 416; *see* Ex. ED-1, p. 10:16-34, at bates page 10.

²⁵ Ex. ED-6, p. 52825, at bates page 411.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ Ex. ED-7, p. 28095, at bates page 415.

³⁰ *Id.*

Non-Attainment Area Permitting” Draft, dated October 1990.³¹ Mr. Hughes also testified to the TCEQ’s three-tiered process for conducting BACT analyses,³² the differences between the three-tiered approach and EPA’s Top-Down approach,³³ and that the two processes yield the same result.³⁴ 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 the PSD permitting program.

Furthermore, TCEQ is afforded deference in the interpretation and application of its guidance documents. In *Alaska Dept. of Environmental Conservation v. EPA*, 540 U.S. 461 (2004), the Supreme Court held that, “although an interpretation presented in internal guidance memorandum does not qualify for dispositive force under *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 US 837, 865-866. 104 S. Ct. 2778, 81 L.ED.2d 694, a cogent administrative interpretation nevertheless warrants respect.” When developing its holding, the Court considered the Agency’s “longstanding, consistently maintained interpretation.” The Court further held that, even when an agency explains its decision with less than ideal clarity, a reviewing court will not upset the decision on that account if the agency’s path may reasonably be discerned.”³⁵

The ED’s response to closing arguments and Exceptions to the PFD, explain that the ED does not consider non-operational facilities to be demonstrated in practice for BACT purposes, nor is BACT the lowest emission limit for the most recently issued permits. BACT is established on a case-by-case basis. The TCAA states that the starting point of a permit review, and therefore

³¹ Ex. ED-1, pp. 10:16-40, 11:29-32, at bates page 10-11; Ex. ED-3; Ex. ED-4.

³² Ex. ED-1, pp. 11:37 – 12:2, at bates page 11-12.

³³ Ex. ED-1, p. 12:12-31, at bates page 12.

³⁴ Ex. ED-1 12:33-42, at bates page 12.

³⁵ *Alaska Dept. of Environmental Conservation v. EPA*, 540 U.S. 461 (2004) p. 987.

a BACT evaluation, is the applicant's proposed facility.³⁶ A facility is a "discrete or identifiable device, item, equipment, or enclosure that constitutes or contains a stationary source, including appurtenances other than emissions control equipment."³⁷ Since the starting point is the proposed facility, the applicant proposes the facility to accomplish its objective based upon its business decisions. As the ED's Response to Comments states, "The applicant does not propose that it wishes to do something (i.e., generate electricity) and have the TCEQ tell it how (i.e., Pulverized coal (PC), IGCC, fluidized bed boiler, gas turbine, solar power, etc.). Nor does the applicant expect the TCEQ will dictate to the applicant a different process must be used, redefining the source and usurping the applicant's business decisions."³⁸ Thus, BACT is not always a set emission limit, it can be a range that takes into consideration the technological practicability and the economic reasonableness of reducing or eliminating emissions from the proposed facility.³⁹

The ED's response to Closing also explains the discrepancies present in Sierra Club's misinterpretation of RG-383 which included: the purpose of the guidance document; the difference between performance levels and emissions limitations; the difference between actual and allowable emission limitations; and the role and weight afforded to vendor guarantees along with agency experience and assistance from APD peers and management.⁴⁰

³⁶ TEX. HEALTH & SAFETY CODE § 382.0518(b)(1).

³⁷ TEX. HEALTH & SAFETY CODE § 382.003(6) & 30 TAC §116.10(6).

³⁸ Ex. ED-13 p. 24, bates p.489.

³⁹ PFD p. 55-57.

⁴⁰ ED's Response to Closing Arguments p. 5-8.

4. IGCC and CFB redefining the Source

Sierra Club argues that Circulating Fluidized Beds (CFB) technology should be considered in the BACT and MACT analysis.⁴¹ MCC argues that Integrated Gasification Combined Cycle (IGCC) technology would not redefine the source and should be considered in the MACT and BACT analysis.⁴² Mr. Hughes has testified boiler process and fuel types have a direct impact on resulting emissions.⁴³ Mr. Hughes did not consider CFB's to be similar sources for establishing permit limits in this case.⁴⁴ Furthermore, the TCEQ has consistently maintained that including IGCC in a BACT review would require the Applicant to redefine the source.

The Commission previously decided that IGCC does not need to be evaluated as part of the BACT analysis in the *Sandy Creek* order and later in the *Oak Grove*, *NRG Limestone 3*, and *Coletto Creek* orders.⁴⁵ The Commission determined that applicants intending to use different types of boilers were not required to consider other electric generation technologies such as IGCC in their BACT analysis. The Commission's decision in *Sandy Creek* was challenged and upheld on appeal, by both the trial court and the court of appeals.⁴⁶

MCC argues that EPA Administrator Lisa Jackson and also the EAB have indicated that consideration of IGCC may be appropriate as part of BACT.⁴⁷ As explained in ED's response to Closing, Tenaska's case is distinguishable from the cases used in MCC's argument and reveal that the factors that were at issue in both *Desert Rock* and *SWEP* were appropriately considered

⁴¹ SC Exceptions to the PFD p. 30.

⁴² MCC Exceptions to the PFD p. 6-13.

⁴³ Ex. ED-1 p. 31, bates p. 31.

⁴⁴ Ex. ED-13 p. 25, bates p. 490.

⁴⁵ *NRG Limestone 3*, TCEQ Docket No. 2007-1820-AIR (Dec. 11, 2009) Order at p. 44, *Coletto Creek*, TCEQ Docket No. 2009-0032-AIR (May 3, 2010) Order at p. 33.

⁴⁶ *Blue Skies Alliance, Texans Protecting Our Water, Environment and Natural Resources (TPOWER), and Environmental Defense, Inc. v. Texas Commission on Environmental Quality*, No. 07-07-0306-CV.

⁴⁷ MCC Exceptions to the PFD p. 6-13.

and applied in the TCEQ's three-tiered BACT analysis.⁴⁸ Therefore, the ALJs correctly concluded that consideration of IGCC and CFB technology in this case is not required.

5. Monitoring

Sierra Club claims that PM CEMS should be required to demonstrate compliance with filterable particulate matter ("PM") emission limits. The Executive Director did not require PM CEMS for filterable PM because neither TCEQ nor EPA rules required it.⁴⁹ 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 is appropriate.⁵⁰

⁴⁸ ED Response to Closing Arguments p. 11

⁴⁹ Ex. ED-13 p. 21, bates p. 486

⁵⁰ *Id.*

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. 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.

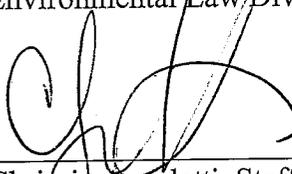
Respectfully submitted,

Texas Commission on Environmental Quality

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REPRESENTING THE
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CERTIFICATE OF SERVICE

I hereby certify that on this the 1st day of November, 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.



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