

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

**APPLICATION OF TENASKA § BEFORE THE STATE OFFICE OF
TRAILBLAZER PARTNERS, LLC §
FOR STATE AIR QUALITY PERMIT §
NOS. 84167, HAP13 AND PSD-TX-1123 § ADMINISTRATIVE HEARINGS**

**PROTESTANT MULTI-COUNTY COALITION'S
REPLIES TO EXCEPTIONS TO THE PROPOSAL FOR DECISION**

TO THE HONORABLE COMMISSIONERS:

COMES NOW Protestant Multi-County Coalition (MCC or Protestant) and files these exceptions to the Proposal for Decision (“PFD”) submitted by the Administrative Law Judges (“ALJ”) in this matter.

I. INTRODUCTION

Protestant incorporates by reference herein the arguments set forth in Protestant’s Closing Argument, Response to Closing Arguments and Exceptions to the PFD previously filed in these dockets. Protestant also adopts and incorporates by reference any replies to exceptions of the PFD that are submitted by the other protestant in this matter, Sierra Club, and do not contradict the replies below. Furthermore, the replies below are not inclusive of all issues that may be raised in a motion for rehearing, should the Commission issue a final permit for the Trailblazer facility.

II. BACT AND MACT CUTOFF DATES

BACT determination is not final until the final permit is issued. Applicant incorrectly argues to the contrary by relying on the 1990 and 1992 dates of the memoranda provided as Sierra Club Cross Exhibits 18 and 19.¹ Applicant’s argument, however, ignores the EPA explanation within the memos which state that EPA’s interpretive policy has been in place at

¹ Applicant Tenaska Trailblazer Partners, LLC’s Exceptions, p. 4.

least since November 10, 1988 – well before EPA approved Texas’ Prevention of Significant Deterioration (“PSD”) SIP rules on June 24, 1992 (or even proposed approval on December 22, 1989). It is EPA’s long-standing policy interpreting the federal Clean Air Act and applicable regulations. As such, it is the policy to which TCEQ’s administration of its SIP approved PSD program must be measured against.

EPA explained that its action to approve the Texas SIP had the effect of requiring Texas to follow EPA’s current and future interpretations of the Federal Clean Air Act’s (FCAA) prevention of significant deterioration (PSD) provisions and EPA regulations, as well as EPA’s operating policies and guidance (to the extent those policies are intended to guide the implementation of the approved PSD program). Likewise, EPA’s approval also had the effect of negating any interpretations or policies that Texas might otherwise follow to the extent they are at variance with EPA’s interpretation and applicable policies.²

To demonstrate support of this Federal requirement for state PSD approval, the Executive Director stated in a September 5, 1989 letter to EPA that TCEQ³ assures EPA that TCEQ’s position “is, and will continue to be, committed to the implementation of the EPA decisions regarding PSD program requirements.” EPA interpreted this letter as allowing Texas the freedom to follow their own course, provided Texas’ actions are consistent with the letter and spirit of the SIP, when read in conjunction with the applicable federal statutory and regulatory provisions.⁴ Applicant’s argument—that the BACT and MACT cutoff dates occur when the technical review of the application is deemed complete by the Executive Director—is not consistent with the letter and spirit of the SIP.

² 54 Fed.Reg. 52823, 5264 (December 22, 1989).

³ At the time, of the letter, the Commission was previously called the Texas Air Control Board or TACB.

⁴ 57 Fed.Reg. 28093, 28095.

As the EPA memos explain, a BACT/MACT cutoff date prior to the issuance of a final permit would:

- 1) limit public participation and the ability of the public to affect changes in the proposed permit;
- 2) fail to encourage applicants to commence construction as soon as possible and complete construction within a reasonable time; and therefore,
- 3) enable a source to maintain a BACT/MACT determination for an extended period of time until the permit is issued; thus, avoiding more stringent controls.⁵

By allowing the BACT/MACT cutoff times to occur with the completion of the Executive Director's technical review, TCEQ's policy would fail to encourage an applicant to commence construction as soon as possible and complete such construction within a reasonable time of the BACT/MACT determination. Rather, such a TCEQ policy would enable an applicant to maintain an older BACT/MACT determination for an extended period of time while an applicant delays the final issuance of a permit until actual construction of the facility is potentially more feasible. This could be done unilaterally by an applicant, or with cooperation of TCEQ staff, by not issuing public notice or proceeding with the contested case hearing process until an Applicant wishes such actions to take place.

This is not a purely hypothetical case, as this matter exemplifies the problems EPA's policy works to avoid. Both Tenaska and the Executive Director are responsible for unusual delays with the permitting process in this matter. As discussed in the Protestant's Exceptions to the PFD, both the Executive Director and Applicant failed to comply with public notice

⁵ Sierra Club Cross Exhibit 18, p.2

requirements—not once, but three times.⁶ Furthermore, Tenaska’s company representative testified that it did not have enough funding to proceed with the construction during the hearing on the merits and definitely not at the time when its application’s technical review was completed.⁷ In fact, Applicant’s witness testified that construction financing and permit delays are always considered for any project.⁸

Protestant MCC disagrees with not only the precedential value of the *Mirant* order, but also with the overall findings and legal conclusions supporting the *Mirant* decision’s BACT determinations. Reliance on the *Mirant Parker* case by the Executive Director and Applicant is misplaced as *Mirant Parker* does not create any precedential legal interpretations. *See e.g.*, TEX. WATER CODE § 5.121 and TEX. GOV’T CODE §§ 2001.004 and 2001.005. Protestant never had actual knowledge of the *Mirant* order prior to Tenaska’s and the Executive Director’s arguments. It was not raised within the Executive Director’s response to public comments. It is not properly index, cross-indexed to statute or made available to the public in a manner to apprise the public of its applicability as a precedential agency BACT rule interpretation. TCEQ’s current docketing system certainly is not a system that allows regulated entities, the public or even staff to determine what interpretations of law and rules have been made by the Commission in its past statements of policy or prior final orders. Furthermore, BACT policy interpretations contained within the *Mirant* decision have never been subject to public comment and review for general applicability policy making nor has it been SIP approved by EPA.

Even if *Mirant*’s findings and legal conclusions had any precedential value, the *Mirant* case is still distinguishable from the current matter. For example, the basis for *Mirant*’s BACT

⁶ See, NAPD issued January 13, 2009, and again January 30, 2009. TCEQ still had to extend the public comment period again for failures to provide all requisite application documents as required by the Texas SIP – a necessary extension that TCEQ still failed to properly inform the public about.

⁷ TR 06/02/10 at 56:11-17; 113:1-22

⁸ *Id.* at 58-59.

determination centered on specific distinguishable findings – findings that were never established or raised by the Applicant or the Executive Director in this matter – such as: 1) whether the lower BACT emission limit would require applicant to utilize pollution control technology not already proposed by the applicant, or 2) what the typical time period for processing an application is in relation to the processing of this application. For example, *Mirant's* application proposed dry low NO_x burners to achieve its proposed higher 9 ppm BACT level as opposed to the *Mirant* protestants' proposed 5 ppm, which would likely require the use of Selective Catalytic Reduction (SCR) technology.⁹

In contrast to the *Mirant* findings, the same pollution control technology proposed to be used by Tenaska's application can be utilized to achieve both Tenaska's proposed higher BACT/MACT levels and the ALJ's proposed lower BACT/MACT levels. Neither Tenaska nor the Executive Director provided any evidence that the ALJ's proposed lower BACT/MACT levels would involve different costs, different technologies, or require an extensive re-modeling.

Furthermore, there is absolutely no evidence within the *Mirant* order on whether the *Mirant* ALJ's, or even the TCEQ Commissioners, were made aware of EPA's longstanding interpretation which existed prior to Texas' SIP approval. None of the *Mirant* legal conclusions even address compliance or violations of the Texas SIP. For example, *Mirant's* conclusion of law no.12 states that “[i]t is agency policy not to review start-up and shut-down emissions in permit applications. Instead those emissions are regulated through 30 TAC §101.7 and the enforcement process.” This legal conclusion is a clear violation of the Texas SIP, and therefore, federal PSD requirements. EPA had repeatedly informed TCEQ that this legal conclusion is

⁹ See e.g., *Mirant's* Findings of Fact Nos. 26 – 27.

incorrect, and TCEQ has accordingly changed its position.¹⁰ Obviously, the *Mirant* order is outdated, lacks any precedential value and is distinguishable from the current matter.

EPA's longstanding policy regarding the cutoff date is not unduly burdensome for the applicant or the TCEQ. Rather it allows the public to provide the agency with the most up-to-date BACT/MACT levels to be considered after the Applicant and TCEQ staff have completed their initial review. Contrary to Applicant's argument, EPA's cutoff policy ensures that similar facilities will be timely constructed with similar emission limits, and the Commissioners should not be swayed by Applicant's crocodile tears. Applicable standards can change after technical review is complete but before a final permit is issued – with or without a contested case hearing process – and those applicable standards must still be applied by TCEQ. Otherwise, Texas permit applicants would receive benefits contrary to the strictures of the federal Clean Air Act and in violation of the Texas SIP.

Additionally, the ED's argument that BACT/MACT emission limits must be based upon either TCEQ reviewed applications or other nationally operated facilities violates the federal CAA and Texas SIP, and even TCEQ's own guidance documents. TCEQ permit engineer testified that TCEQ's own BACT guidance clarifies that proposed BACT emission reduction limits generally will be based upon emission limits from facilities that are in actual operation, but that the "actual operation" requirement is not absolute.¹¹ If applicants can provide information for agency review that non-operating facilities emission limits should establish BACT/MACT limits, there is no reason why the public cannot provide similar evidence during the public comment period or contested case hearing. In this matter, the ALJ's proposed BACT/MACT

¹⁰ See e.g., Executive Director's Response to Comment, ED Exhibit 13, p. 510 – 511.

¹¹ TR 6/8/10 at 641:16-17.

emission limits would not require an alleged “re-defining of the source” or the utilization of a different pollution technology.

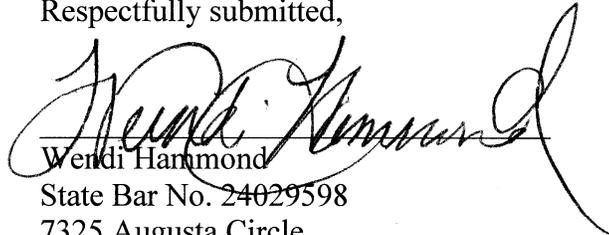
Texans should not be exposed to higher pollution levels than other states require simply because TCEQ did not issued the permit. Instead, the ED inexplicably argues that it would “dramatically shift the burden” and “increase resources necessary” to require TCEQ to thoroughly review BACT emission limits established throughout the nation.¹² TCEQ has the resources and connections to thoroughly determine whether or not permitted emissions for non-operational facilities located outside of Texas are reasonable. Certainly, the local small Texas ranchers and families do not have the same ease of access to this information. Instead of adopting the ED’s lazy attitude to simply dismiss BACT emission limits from non-operational, non-Texas permitted facilities, perhaps the Commissioners should require its staff to look closer at the applications to determine why TCEQ is allowing Texans to be subjected to higher pollution levels than other states. If TCEQ does not think it has the necessary resources to properly administer the PSD program, then TCEQ should give the responsibility back to EPA.

¹² Executive Director’s Exceptions to the PFD, p. 4-5

II. PRAYER

WHEREFORE, based upon the foregoing arguments and previously filed exceptions, Protestant respectfully prays that the Commissioners recommend denial of applicant's permit and assess all transcript costs to the Applicant.

Respectfully submitted,



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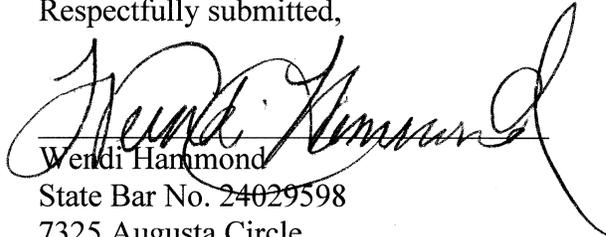
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CERTIFICATE OF SERVICE

I hereby certify that on this the 1st day of November, 2010, a true and correct copy of the foregoing has been sent by U.S. mail, facsimile and/or email (as indicated below) to the following:

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