

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, HAP13, AND	§	
PSD-TX-1123	§	ADMINISTRATIVE HEARINGS

**SIERRA CLUB'S REPLY TO EXCEPTIONS TO THE PROPOSAL FOR DECISION**

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COMES NOW Protestant Sierra Club and files this Reply to Exceptions to the Proposal for Decision (“PFD”) submitted by the Administrative Law Judges (“ALJs”) in the referenced dockets.

**I. INTRODUCTION**

As summarized in the ALJs’ PFD and argued by Sierra Club in its closing briefs, Tenaska has failed to meet its burden of proof on numerous key issues, including BACT and MACT. Neither Tenaska’s nor the Executive Director’s (“ED”) exceptions change the fact that Tenaska’s Application and the ED’s review of this Application fail to satisfy the minimum requirements of Texas and federal law. Therefore, Sierra Club respectfully requests that the Commission either deny or remand the Application to the ED for further review consistent with the ALJs’ PFD and Protestants’ briefs.

**II. SOAH’S JURISDICTION TO CONSIDER TCEQ RULES**

In its exceptions, the ED raises an argument about the proper limits of SOAH’s jurisdiction to consider TCEQ rules and practices that warrants a brief response:

[T]he 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 interpretation of its own rules is entitled to deference.” Thus, the ALJ’s analysis should have followed the TCEQ’s policies and practices in administering its MACT and BACT analysis consistent with the evidence offered by the parties in this case.<sup>1</sup>

We are not aware that we have made any arguments that require a finding that the TCEQ’s rules fail to comply with federal law. Rather, we argue that the review conducted in this case fails to satisfy the minimum requirements of the review required under Texas’ PSD rules, which incorporate by reference many federal regulations and requirements. The ED’s real concern is that the ALJs have failed to grant TCEQ policies and practices sufficient deference. This argument is without merit. While it is the case that an agency’s interpretation of its own rules is often entitled to deference by a reviewing court, the same deferential standard does not apply to the *de novo* hearing conducted by SOAH that precedes and instructs the Commission’s resolution of a pending matter. Moreover, the question of whether an agency’s interpretation of its regulations that were promulgated to implement federal law, as well as its interpretation of federal regulations is entitled to deference by a reviewing court remains open.<sup>2</sup> Putting these concerns aside, the ED’s appeal for deference in this case is problematic for two additional reasons. First, in many cases the policies and practices asserted by the ED are plainly inconsistent with the requirements Texas statutes and regulations. An agency interpretation of its

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<sup>1</sup> ED Exceptions at 3.

<sup>2</sup> *Public Utility Commission of Texas v. Gulf States Utilities Co.*, 809 S.W.2d 201 at 207, n10 (Tex. 1991). The PFD in *Coletto Creek*, which cites this case as support fails to appreciate this caveat. See Proposal for Decision in *IPA Coletto Creek*, SOAH Docket No. 582-09-2045, TCEQ Docket No. 2009-0032-AIR p. 9. (“Coletto PFD”)

own rule that plainly contradicts that rule is entitled to no deference.<sup>3</sup> Second, the ED has failed to prove that the practices and policies it claims are entitled to deference are actually policies and practices that are consistently implemented by the TCEQ. Unless the ED and Tenaska have offered sufficient evidence to prove that those policies and practices they wish to foist upon the TCEQ are consistent with the TCEQ's rules, and that they are actually practices and policies followed by the Commission, then no deference is required. Post hoc appeals to agency policies and practices, especially in the absence of evidence that these practices and policies are regularly implemented by the TCEQ, cannot justify an applicant's failure to fulfill the rigorous application requirements mandated by the Clean Air ACT and Texas PSD rules.

### **III. BEST AVAILABLE CONTROL TECHNOLOGY**

Most of the claims raised by Tenaska and the ED regarding BACT in their exceptions have already been adequately addressed by Sierra Club's closing briefs and the ALJs' PFD. Therefore, we will not burden the record with further argument rebutting these claims. However, Sierra Club must address the novel claim, raised for the first time by Tenaska and the ED in their exceptions to the PFD, that Tenaska was not required to consider permits issued after the completion of the ED's technical review.

#### **A. Mirant Parker**

Suddenly, after multiple depositions, a week-long evidentiary hearing, and weeks of post-hearing briefing, Tenaska and the ED have discovered the nearly decade old Mirant Parker Order. According to Tenaska's Exceptions, this order, that was apparently unknown to the three BACT experts that testified in this matter (including Mr. Hughes, who was asked on multiple

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<sup>3</sup> *Id.* ("However, if the Commission has failed to follow the clear, unambiguous language of its own regulation, we must reverse its action as arbitrary and capricious.")

occasions about the TCEQ's policy for considering information submitted after the conclusion of the ED's technical review was complete<sup>4</sup>), the Mirant Parker Order establishes a "controlling precedent and provides that BACT and MACT reviews are complete at the close of technical review."<sup>5</sup> The fact that no witness in the case had heard of this "precedent" or was aware of any practice establishing a hard BACT cutoff date is good reason to think that the Mirant Parker Order is not a controlling precedent, and that it does not reflect current agency practice.

Sierra Club has been unable to find any SOAH PFDs that refer to the Mirant Parker Order, nor has the Mirant Parker Order ever been cited in any Texas state or federal court case. While the Mirant Parker Order was appealed, Mirant went bankrupt before briefs were submitted and the case was dropped. The proposed facility was never constructed. The Mirant Parker Order came to nothing. Efforts by Tenaska and the ED to resuscitate this Order as "controlling precedent" come too late, are unsupported by expert testimony, and should be afforded no weight. Moreover, testimony offered by experts in this case, and the TCEQ's Order in the recent Coleto Creek Unit 2 case suggest that the Mirant Parker precedent is in fact dead.

*It is too Late for the Executive Director to Raise Mirant Parker*

When the State Office of Administrative Hearings ("SOAH") conducts a hearing in a matter pending before a state agency, Texas Government Code § 2001.058 requires the referring agency to provide administrative law judges ("ALJ") with a written statement of applicable rules of policies.<sup>6</sup> Presumably, this written statement is required so that ALJs may consider applicable agency rules and policies in conducting a hearing, as required by law.<sup>7</sup> This practice also ensures

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<sup>4</sup> Sierra Club Cross Ex. 15 at 88:15-21, .110:24-111:10, .111:11-23, 182:8-23.

<sup>5</sup> Tenaska Exceptions at 5.

<sup>6</sup> Tex. Gov't Code § 2001.058(c).

<sup>7</sup> Tex. Gov't Code § 2001.058(b).

that parties are provided an opportunity to fully develop a case taking these policies into account, as is their right.<sup>8</sup> Sierra Club is unaware that any party in this matter asserted that BACT reviews ended with the technical review prior to the arguments presented in Tenaska's and the ED's exceptions to the PFD. Thus, ALJs were unable to consider the Mirant Parker Order as they conducted the hearing and drafted their PFD, and Protestants were unable to present evidence and elicit testimony for the purpose of demonstrating: (i) that the Mirant Parker Order is inconsistent with current agency practice; and (ii) that the Mirant Parker Order is inconsistent with federal and state BACT requirements. Though, as we explain below, there is evidence in the record sufficient to establish both (i) and (ii), Protestants were not afforded an adequate opportunity to present evidence, cross-examine agency and Applicant witnesses, and brief this late contested issue.

*The Mirant Parker Order is Inconsistent with the ED's BACT Review in this Case and the TCEQ's Order in the Coletto Creek Unit 2 Matter*

Mirant Parker is inconsistent with the BACT reviews conducted in this case and the recent Coletto Creek Unit 2 matter. The technical review for the Trailblazer Application ended upon issuance of the Draft Permit on January 30, 2009.<sup>9</sup> The Draft Permit issued with the ED's Technical Review summary does not contain a 24-hour BACT limit for NO<sub>x</sub> and lists the 30-day NO<sub>x</sub> limit as 0.07 lb/MMBtu.<sup>10</sup> Nonetheless, Tenaska's proposed BACT permit limits have since been revised to include a 24-hour NO<sub>x</sub> limit and a lower 30-day limit. During his deposition, Mr. Hughes was asked why a 24-hour NO<sub>x</sub> limit was added to the permit. He responded:

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<sup>8</sup> 30 TAC § 80.115.

<sup>9</sup> *Id.* at 4.

<sup>10</sup> Tenaska Ex. 2D at (Technical Completeness Determination) at Draft Permit pg. 4, Condition 8A.

I believe we put that on because EPA asked us to. In the original draft, we did not have it, and EPA asked us to do it. And I went back and looked at the RBLC and there were on the order of five or six plants that had it in there, that they had 24 hours. So it seemed a reasonable thing to do.<sup>11</sup>

The 30-day NO<sub>x</sub> limit was changed after the technical review was completed, because “[t]he TCEQ determined the Applicant’s BACT proposal of 0.07 lb/MMBtu (30-day rolling average) was not the most stringent, and thus was changed to 0.06 lb/MMBtu (30-day rolling average) by the Applicant.”<sup>12</sup> Thus, in this very case the ED’s BACT review continued after its technical review was complete.

Mr. Hughes also testified that Tenaska’s carbon monoxide (“CO”) limit should be revised to match the CO limit in the final permit for the NRG Limestone 3 facility, which was issued on December 11, 2009 (nearly a year after the ED’s technical review in this case was complete).<sup>13</sup> Such a recommendation is clearly inconsistent with the reading of *Mirant Parker* offered by Tenaska and the ED.

In the recent permitting matter concerning the Coletto Creek Unit 2 facility, two administrative law judges recommended that the total PM limit in Coletto Creek’s draft permit should be lowered from 0.030 lb/MMBtu to 0.025 lb/MMBtu in light of the total PM limit in NRG Limestone Unit 3 final permit.<sup>14</sup> The technical review for Coletto Creek ended on

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<sup>11</sup> Sierra Club Cross Ex. 15 at 64:2-10.

<sup>12</sup> ED Ex. 13 at 34.

<sup>13</sup> Regarding the date of the NRG Limestone 3 permit, *see* OPIC Cross Ex. 2. With respect to Mr. Hughes’ testimony regarding the NRG permit’s relevance to the current proceeding, *see* Sierra Club Cross Ex. 15 at 88:15-21 (“Q: Is it your belief that because the lower Limestone 3 limit was established after the hearing process and this matter had begun that it shouldn’t be considered by the agency in this matter? A: No. Actually, since that is what the Commission has decided, then that’s—then that limit probably should be what would be in this permit.”)

<sup>14</sup> Coletto PFD at 31.

November 25, 2008.<sup>15</sup> The NRG Order was issued more than a year later.<sup>16</sup> Based upon the recommendation of the ALJs in the Coletto Creek matter, the Commission issued a final Coletto Creek Unit 2 permit with a total limit of 0.025 lb/MMBtu.<sup>17</sup>

Tenaska's attempt to harmonize the ED's adjustment of proposed permit limits in response to comments with the Mirant Parker Order also falls flat. In a footnote, Tenaska contends:

Of course, this precedent does not prevent the ED from considering issues raised by commenters during the comment period on an application and draft permit. The ED is required to respond to comments, properly raised during the comment period. Nevertheless, to the extent comments raise issues that concern new standards promulgated after the close of technical review, this precedent would control.<sup>18</sup>

The problem here is that this precedent has not controlled the ED's review in this case and in the recent Coletto Creek Unit 2 matter. In this case, Mr. Hughes has testified that Tenaska's CO limit should be lowered to reflect the limit in the final NRG Limestone Unit 3 permit, which was issued after technical review in this case was completed. Likewise, in the Coletto Creek Unit 2 matter, the Commission approved a final total PM limit based upon the NRG Limestone Unit 3 final limit, which was issued after the technical review in that case was completed.

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<sup>15</sup> Coletto PFD at 3.

<sup>16</sup> OPIC Cross Ex. 2.

<sup>17</sup> OPIC Cross Ex. 1.

<sup>18</sup> Tenaska Exceptions at 6, n16.

Moreover, Mr. Hughes' testimony decisively discredits the claim that the ED's position has been that the BACT analysis ends at the conclusion of the technical review. ED counsel asked the permit writer in this matter, Mr. Hughes, whether BACT analyses end at the conclusion of the technical review. While Mr. Hughes' answer was less than clear on the question of when a BACT review ends, his answer was clear that BACT reviews do not end at the conclusion of the ED's technical review:

Q: Okay. Is there—would it be accurate to say that when the permit is determined administratively or technically complete that that is a definite point at which you—that across the board the agency would consider a stopping point for doing a BACT review? There's no debate about that being sort of a --

A: The clear stopping point would be in the response to comments—

Q: Okay.

A:--because we can change the permit. In general, we don't change unless it's in response to a comment. After the second public notice where the permit is published for everybody to see, we can change it in response to comments. After that, as I said, I'm unaware of what the process would be once we've issued the response to comments.<sup>19</sup>

Thus, it is clear that whatever the established agency practice concerning the cutoff period for BACT was in 2001 when the Mirant Parker Order was issued, the record evidence supports a finding that TCEQ consideration of BACT limits can and does extend beyond the conclusion of the ED's technical review. As explained in Sierra Club Cross Exhibit 18 and 19,

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<sup>19</sup> Sierra Club Cross Ex. 15 at 182:8-23.

extending BACT consideration past the end of the agency's technical review helps to ensure that limits are established consistent with the minimum requirements of BACT. Moreover, there is no evidence in the record supporting a finding that requiring applicants to consider permit limits established after the end of the ED's technical review would cause a serious delay during the permitting process.<sup>20</sup> It is the responsibility of an applicant to thoroughly investigate all pending control technologies thoroughly and to propose limits based upon those achievable by a well-designed state of the art control train.<sup>21</sup> If an applicant has conducted a thorough BACT investigation, a change in the permit conditions between the proposed and final permit should have been anticipated by the source.<sup>22</sup>

*The Facts of Mirant Parker are Distinguishable from the Present Case*

In *Mirant Parker*, the Commission found that in order to meet the lower NO<sub>x</sub> limit proposed by Protestants, the applicant would have had to use a different control technology than it had proposed.<sup>23</sup> This alternative control technology would have involved different costs, emissions, and modeling. Here, there is no argument that Tenaska will be required to use control technologies different from those it has proposed to meet the ALJs' lower recommended limits. Thus, requiring Tenaska to consider information indicating that the control technology it has proposed is capable of better performance than proposed is not an unreasonable burden.

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<sup>20</sup> See *Sierra Cross Ex.* 18.

<sup>21</sup> *Id.*; ED Ex. 3 at Draft Page 10 ("Ensure that the proposed emission reduction efficiency or resulting emission level is consistent with the following: (i) recently approved BACT, and (ii) a properly designed and operated system.").

<sup>22</sup> *Sierra Club Cross Ex.* 18

<sup>23</sup> *Mirant Parker Order* at 6, FOF 27.

*The ED's Exceptions are Inconsistent with the Mirant Parker Order*

In its Exceptions, the ED writes:

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>24</sup>

This statement completely undercuts Tenaska's argument that the Commission should not consider permit limits in permits issued after the end of the ED's technical review when it makes its BACT determination. Granting, for the sake of argument, that the ED's position in recent cases has been that BACT analyses end at the conclusion of the technical review, if the Commission may consider evidence on the record indicating that lower BACT limits are achievable, then the ALJs should make their recommendations based upon this evidence. The evidence in the record, including the Plant Washington permit, clearly supports the ALJs' finding that Tenaska has failed to carry its burden to demonstrate that its proposed limits reflect the maximum achievable reductions that are technically practicable and economically reasonable. Neither the ED nor Tenaska objected when the Sierra Club offered the Plant Washington permit into evidence. Though Mr. Bailey was offered an opportunity to rebut previous testimony regarding the Plant Washington permit, he did not claim the permit was irrelevant because it was issued too late. Thus, ALJs should make their recommendations--and the Commission should make its decisions--based upon the totality of the evidence in the record, including the Plant Washington permit.

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<sup>24</sup> ED Exceptions at 6.

*If Mirant Parker is Controlling Precedent, the Permit Must be Denied*

According to the Mirant Parker PFD:

...the Executive Director observed that using the new BACT would have essentially begun the review process over, as opposed to quick reviews to ensure that the re-modeling was performed correctly. The Executive Director also pointed out that the Protestant's witness, Mr. Wilkerson, agreed that BACT should be determined before the final modeling can take place.<sup>25</sup>

According to the Mirant Parker Order:

30. BACT must be determined before the application's modeling and other representations can be finally reviewed.<sup>26</sup>

Even if Mirant Parker applies and Tenaska was not required to consider permit limits issued after the conclusion of the ED's technical review, Tenaska has failed to show that its proposed limits satisfy BACT. For nearly every BACT pollutant, Sierra Club identified final permits for similar facilities with lower BACT limits that were issued before the close of the ED's technical review in this case.<sup>27</sup> Tenaska failed to carry its burden to demonstrate that these lower limits are not achievable or that they would be economically unreasonable for Tenaska to meet. Thus, Tenaska failed to carry its burden of proof with respect to BACT, regardless of when the cutoff date is. According to the Mirant Parker Order, BACT levels must be determined before the ED may finally review an application's modeling and other representations.

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<sup>25</sup> Proposal for Decision in *Mirant Parker*, SOAH Docket No. 582-00-1045, TCEQ Docket No. 2000-0346-AIR, p. 12.

<sup>26</sup> *Mirant Parker Order* at 6.

<sup>27</sup> Lead: *see* Sierra Club Closing Arguments 42-43 (citing Tenaska Ex. 2b at APP-0250-252 (Vol. 1), Appendix C; Carbon Monoxide: *see* ED Ex. 13 at 43; Total PM: *See* ED Ex. 13 at 39 and Sierra Club Cross Ex. 2 at 085185; Filterable PM: ED Ex. 13 at 36.

Therefore, if *Mirant Parker* is controlling precedent, then Tenaska must amend its application and include new modeling for the ED to review. Thus, Tenaska's Application is currently incomplete and its permit may not issue. On the other hand, if it is not the case that Tenaska would not be required to substantially overhaul its Application if lower BACT limits are required, then the equities should not weigh against consideration of limits in permits issued after the conclusion of the ED's technical review.

**B. The ALJs' BACT Recommendations are Consistent with Texas Law and do not Impose New Burdens Upon the Applicant**

*Proving a Negative*

Tenaska complains that the ALJs' BACT recommendations "side steps" the requirement that BACT be achievable, and improperly requires the applicant to "prove a negative."<sup>28</sup> Applicant's obligation to "prove a negative" is not the creation of the Sierra Club or the ALJs. Rather, the requirement that an applicant demonstrate that lower limits are not achievable for the proposed facility is spelled out in TCEQ guidance and the RTC, which identifies two core BACT principles.

According to RG-383:

When the proposed performance is not greater than or equal to that accepted as BACT in recent permit reviews for the same industry, the applicant must demonstrate that its facilities cannot achieve that performance because of compelling technical differences.<sup>29</sup>

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<sup>28</sup> Tenaska Exceptions at 24-25.

<sup>29</sup> ED Ex. 3 at Draft Page 18.

and:

In cases where there are no compelling technical differences...an applicant must...propose a performance greater than or equal to that accepted in recent permits for the same industry.<sup>30</sup>

As Sierra Club explained in its Closing Arguments, RG-383 provides specific guidance as to which permit reviews are to be considered “recent.”<sup>31</sup> According to this guidance, “[p]roposed BACT levels for the same or similar industries as seen in present-day permitting actions should be evaluated.”<sup>32</sup> Because Tenaska’s proposed BACT limits are not as stringent as those accepted as BACT in recent permit reviews for facilities in the same industry, Tenaska was required to prove that compelling technical differences between its proposed facility and those with lower limits will prevent Tenaska from achieving the lower limits.

As the ED’s RTC document explains, this requirement is consistent with the two core principles of BACT:

First, the most stringent available control technology (and associated emission limitation) must be evaluated. Second, if BACT proposed that is less than the most stringent available, there must be a case-specific demonstration why the most stringent control is not selected. The TCEQ three-tiered approach captures these fundamental concepts.<sup>33</sup>

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<sup>30</sup> *Id.* at Draft Page 19.

<sup>31</sup> Sierra Club Closing Arguments at 8-9.

<sup>32</sup> ED Ex. 3, Appendix C-2.

<sup>33</sup> ED Ex. 13 at 26-27.

Thus, the idea that an applicant must make a showing of why lower limits are not achievable for its proposed facility is not new. It is explicitly endorsed in the TCEQ's BACT guidance and constitutes a core tenant of BACT.

*Tenaska was Required to Address Lower Permit Limits*

Tenaska complains that:

The ALJs incorrectly create a new requirement that whenever an applicant proposes anything other than the absolute lowest permit limit identified in the BACT analysis, the applicant must make a formal demonstration as to why it cannot meet the lowest limit.<sup>34</sup>

The ALJs' finding that Tenaska must at least consider and address evidence that lower limits than proposed have been required by recent permits for similar facilities is consistent with RG-383<sup>35</sup>, the testimony and evidence offered by ED and Tenaska expert witnesses<sup>36</sup>, and the very definition of BACT itself.

According to EPA's definition of BACT (incorporated by reference by Texas' PSD regulations):

Best available control technology means an emissions limitation (including a visible emission standard) based on the maximum degree of reduction for each pollutant subject to regulation under Act which would be emitted from any proposed major stationary source or major modification which the Administrator, on a case-by-case basis, taking into account energy, environmental, and economic

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<sup>34</sup> Tenaska Exceptions at 27.

<sup>35</sup> ED Ex. 3 at Draft Page 15, Step 6.

<sup>36</sup> ED Ex. 13 at 26-27; 4 Tr. 612:22-613:1. See Sierra Club's Response to Closing Arguments at 8-9.

impacts and other costs, determines is achievable for such source or modification through application of production processes or available methods, systems, and techniques, including fuel cleaning or treatment or innovative fuel combustion techniques for control of such pollutant.<sup>37</sup>

As Mr. Hughes testifies, BACT limits in final permits reflect the judgment of the permitting authority that the limit is achievable.<sup>38</sup> Thus, BACT limits in final permits for similar facilities are clearly evidence that performance greater than proposed as BACT by Tenaska is achievable. If the limits proposed by Tenaska do not reflect the maximum degree of reduction for each pollutant and no justification is provided as to why lesser reductions are acceptable in light of cost or other collateral impacts, then the limits are not BACT.

#### **IV. MAXIMUM ACHIEVABLE CONTROL TECHNOLOGY (“MACT”)**

Tenaska and the ED continue to cling to the argument that an applicant need not consider permit limits for facilities that are not currently operational as part of its MACT analysis. As we pointed out in our closing briefs, this argument is contradicted by the straightforward reading of MACT rules, and the uncontested testimony of Tenaska and ED expert witnesses. Sierra Club will not revisit this argument, but we must address several related claims in the exceptions submitted by Tenaska.

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<sup>37</sup> 40 CFR § 52.21(b)(12) incorporated by reference at 30 TAC § 116.160(c)(1)(A).

<sup>38</sup> 4 Tr. 612:22-613:1. *See also* 1 Tr. 145:21-24 and SC Cross Ex. 15 at 31:24-32:6.

**A. Tenaska was Required to Consider Available Information Indicating that Lower Limits were Achievable Using its Proposed Control Technology**

With respect to beyond the floor MACT analyses, Tenaska argues:

[T]he ALJs misconstrue the manner in which TCEQ conducts BTF MACT determinations. After establishing a MACT floor, TCEQ essentially conducts a technology assessment to determine if there have been advances in control technologies and if other or additional technology or methods may reduce emissions to a greater degree to determine whether a BTF MACT limit is appropriate.<sup>39</sup>

In other words, Tenaska believes that BTF analyses in Texas need not consider whether reductions beyond those proposed by an applicant are achievable using the same control technology proposed by the applicant.

This claim is contrary to the clear requirement that MACT limits reflect the maximum degree of emission reduction achievable taking into available information.<sup>40</sup> If available information indicates that better performance than proposed can be achieved using the control technology proposed by the applicant, there is no reason it should not be considered. Thus, in the recent NRG Limestone 3 permit, a BTF filterable PM limit was established based upon information that the baghouse proposed by the applicant was

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<sup>39</sup> Tenaska Exceptions at 9.

<sup>40</sup> 40 CFR 63.41 (incorporated by reference at 30 TAC § 116.160(c)(1)(A).

capable of achieving BTF reductions.<sup>41</sup> In fact, the ED identifies the filterable PM limit in Tenaska's Draft Permit as a BTF limit.<sup>42</sup>

**B. The ALJs Properly Found that CFB and PC Boiler Facilities were Similar Sources for Purposes of Establishing Tenaska's Filterable PM MACT Limit**

Tenaska complains that the ALJs misconstrued language in its Application indicating that CFB and PC boilers should be able to achieve the same filterable PM limits:

To add further confusion to the ALJs' determination, they base their conclusion on a statement from the Trailblazer Application that relates to PM *BACT* evaluation, not the case-by-case MACT analysis. The statement is contained in a paragraph describing the differences between filterable and condensable particulate matter. This quote, used by the ALJs is taken out of context and appears to relate to conventional boiler types, which CFBs are not.<sup>43</sup>

First, Tenaska's attempt to argue that its BACT evaluation has no bearing upon its MACT analysis is amazing given the statement in Tenaska's MACT analysis that "Tenaska's exhaustive review of BACT limits for PM was presented in its PSD application. This BACT review resulted in a proposed PM filterable limit of 0.015 lb/MMBtu. Since no lower emission rate has been achieved in practice, *and since BACT is equivalent to beyond the floor MACT*, Tenaska's MACT determination is 0.015 lb/MMBtu."<sup>44</sup> Thus, Tenaska's MACT analysis clearly

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<sup>41</sup> ED Ex. 11 at 11-12.

<sup>42</sup> *Id.* This claim is entirely consistent with ALJs' finding that Tenaska did not conduct a beyond the floor analysis for filterable PM. Based upon its mistaken belief that BTF is equivalent to BACT, Tenaska admits that it did not conduct any BTF analysis beyond what was presented in its BACT analysis. Tenaska Ex. 2B at APP-0401. As Mr. Hughes testified MACT is more stringent than BACT. ED Ex. 1 at 18:13-15. Thus Tenaska's BACT analysis does not satisfy MACT case-by-case requirements and Tenaska did not conduct a BTF analysis.

<sup>43</sup> Tenaska Exceptions at 16.

<sup>44</sup> Tenaska Ex. 2B at APP-0401 (emphasis added).

relies upon its BACT evaluation. Accordingly, the ALJs properly found that the statement that all boilers are capable of achieving the same filterable PM limit was relevant to the proposed filterable PM MACT limit.

Second, Tenaska's claim that the language in its Application was taken out of context and "appears to relate only to conventional boiler types" is without support. The Application in its entirety is an exhibit in the record. Even though this is the case, Tenaska is unable to identify the context which suggests that the statement that all boilers are capable of achieving essentially the same filterable PM limit refers only to "conventional boilers." Thus, there is no reason to think that the statement referenced by the ALJs only relates to conventional boiler types.

Finally, the range of limits for CFB and PC boilers in the ED's Response to Comments supports the statement in Tenaska's BACT evaluation that all boiler types are capable of achieving essentially the same filterable PM limit. As Sierra Club pointed out in its Response to Closing Arguments, the ED identified both CFB and PC boilers with a filterable PM limit of 0.010 lb/MMBtu.<sup>45</sup> Thus, the ED's Response to Comments and Tenaska's own Application support the ALJs' finding that CFB facilities are similar sources for the purposes of Tenaska's filterable PM MACT analysis.

While the Commission has recently issued orders concerning power plants that contain findings that PC boilers and CFB boilers were not similar sources for purposes of the MACT analyses in those cases, these case-specific findings of fact are not binding precedent. MACT analyses must be conducted on a case-by-case basis, and MACT determinations in each case must be made upon specific evidence in the record before the Commission. Here, Tenaska has essentially conceded the point that for purposes of its filterable PM analysis, all boilers are

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<sup>45</sup> Sierra Club's Response to Closing Arguments at 20.

similar sources. This same evidence may not have been available in the previous matters cited by Tenaska. Given Tenaska's concession and other evidence discussed above, there is no question but that the preponderance of the evidence in this matter supports a finding that CFB and PC boiler facilities are "similar sources" as that term is defined by MACT regulations,<sup>46</sup> at least with respect to filterable PM.

Even if the ALJs find that CFB boiler and PC boilers are not similar sources for purposes of Tenaska's filterable PM MACT analysis, it does not follow that lower permit limits for CFB boilers should not be considered. According to 40 CFR § 63.41:

Maximum achievable control technology (MACT) emission limitation for new sources means the emission limitation which is not less stringent than [sic] the emission limitation achieved in practice by the best controlled similar source, and which reflects the maximum degree of deduction in emissions that the permitting authority, taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements, determines is achievable by the constructed or reconstructed major source.\

Thus, according to the definition of MACT, while the MACT floor is established consistent with the limitation achieved in practice by the best performing similar source, there is no indication that BTF evaluations should be limited to evidence concerning similar sources. Even if CFB and PC boilers are not similar sources for purposes of establishing Tenaska's

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<sup>46</sup> 40 CFR § 63.41 ("Similar source means a stationary source or process that has comparable emissions and is structurally similar in design and capacity to a constructed or reconstructed major source *such that the source could be controlled using the same control technology.*" (emphasis added.) See also Sierra Club Closing Argument at 53-55, Sierra Club's Response to Closing Arguments at 20-21.

MACT floor, because Tenaska has admitted that all boilers are capable of achieving essentially the same filterable PM limits, evidence that CFB boilers are capable of achieving lower limits than proposed is evidence that lower limits are achievable.

## V. AIR QUALITY IMPACTS MODELING

Tenaska and the ED will likely appeal to the Mirant-Parker Order to argue that Tenaska was not required to demonstrate that emissions from the Trailblazer facility will not cause or contribute to a violation of 1-hour SO<sub>2</sub> National Ambient Air Quality Standards (“NAAQS”), because the 1-hour SO<sub>2</sub> NAAQS only became final after the ED had completed its technical review. As Sierra Club explained above, Mirant Parker does not establish a controlling precedent for BACT in this case. If Mirant Parker does not establish a controlling precedent with respect to BACT, it certainly cannot be extended to apply to NAAQS demonstrations. However, should the ALJs and Commission disagree, the Mirant Parker Order cannot override the requirements of federal and Texas state Clean Air law and Texas’ obligations under its PSD State Implementation Plan (“SIP”).

Texas’ PSD SIP incorporates a letter from a TCEQ predecessor agency that expresses Texas’ commitment to “implement EPA program requirements...as effectively as possible,” and “to the implementation of the EPA decisions regarding PSD program requirements.”<sup>47</sup> As Mr. Hughes testified, one method by which the EPA announces its decisions regarding PSD program requirements is through regulations printed in the Federal Register.<sup>48</sup> According to the Federal Register passage for the final 1-hour SO<sub>2</sub> NAAQS rule, “[t]he owner or operator of any major stationary source or major modification obtaining a final PSD permit on or after the effective

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<sup>47</sup> SC Cross Ex. 14. This letter is incorporated into Texas’ PSD SIP. See ED Ex. 6 at 28098.

<sup>48</sup> 4 Tr. 537:24-538:7.

date of the new 1-hour SO<sub>2</sub> NAAQS will be required, as a prerequisite for the PSD permit, to demonstrate that the emission increases from the new or modified source will not cause or contribute to a violation of that new NAAQS.”<sup>49</sup> This is a clear EPA decision regarding PSD program requirements. TCEQ’s failure to require Tenaska to demonstrate compliance with the new 1-hour NAAQS is contrary to its obligations under the PSD SIP.

Moreover, there is a clear difference in the way that the Mirant Parker Order would apply to BACT and its application to the 1-hour SO<sub>2</sub> NAAQS. In the case of BACT, Tenaska and the ED conducted a BACT analysis. For many reasons, including the failure to consider Plant Washington limits, Protestants contend that Tenaska’s BACT analysis was deficient. Tenaska and the ED argue that Mirant Parker relieves Tenaska of its responsibility to consider the Plant Washington permit. Sierra Club’s argument regarding the 1-hour SO<sub>2</sub> NAAQS issue is different. Here, it is not the case that Tenaska’s demonstration that it will comply with 1-hour SO<sub>2</sub> NAAQS failed to take account of relevant evidence. Rather, the problem is that Tenaska did not make *any* demonstration with respect to the 1-hour SO<sub>2</sub> NAAQS. Because Tenaska was required to make a demonstration that emissions from the Trailblazer facility will not cause or contribute to a violation of the 1-hour SO<sub>2</sub> NAAQS, and it failed to do so, its permit may not issue.<sup>50</sup>

## VI. CONCLUSION

Tenaska’s Application and the limits in the Draft Permit fail to satisfy the stringent requirements of BACT and MACT. Moreover, the Draft Permit fails to require adequate monitoring to ensure ongoing compliance with permit limits. Tenaska has also failed to demonstrate as required by Texas and federal law that emissions from the Trailblazer facility will

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<sup>49</sup>75 Fed. Reg. 35520, 35578 (June 22, 2010).

<sup>50</sup> Sierra Club’s Exceptions at 5-6.

not cause or contribute to a violation of the 1-hour SO<sub>2</sub> NAAQS. Therefore, in accordance with the PFD and for each of the additional reasons described above and in Sierra Club's *Closing Arguments*, *Response to Closing Arguments*, and *Exceptions* previously filed in this matter, Sierra Club respectfully requests that the Application be denied. In the alternative, if the Commission determines remand is appropriate, then Sierra Club requests that, pursuant to the Texas Health & Safety Code, the Applicant should be required to re-file and re-notice its Application. If the Commission disagrees and finds that Tenaska's permit may properly issue, Sierra Club requests that the BACT and MACT limits should be established consistent with those recommended by the Sierra Club in *Response to Closing Arguments*. In addition, Sierra Club respectfully requests that the Commission grant such other and further relief for which Sierra Club and the other Protestants show themselves justly entitled.

Respectfully Submitted,

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