

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 EXCEPTIONS TO THE PROPOSAL FOR DECISION

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

I. INTRODUCTION

The PFD includes an analysis of the evidence and parties’ arguments for many but not all of the disputed issues in this matter. The Administrative Law Judges Larson and Ramos found that the testimony and evidence presented by Tenaska and the Executive Director (“ED”) “failed to demonstrate that the emission limits proposed in...[the]...Draft Permit will meet the requirements of Best Available Control Technology (BACT) and Maximum Achievable Control Technology (MACT).”¹ In light of this failure, the ALJs recommend that the Commission adopt more stringent emission limits, or in the alternative that the Commission deny or remand the Application for consideration of further evidence regarding BACT and MACT.²

Sierra Club believes that the ALJs’ finding that Tenaska failed to carry its burden with respect to BACT and MACT is well-supported and correct. However, as argued below, adoption

¹ PFD at 1.

² *Id.*

of the more stringent limits recommended by the ALJs is not sufficient to ensure that emissions from the proposed Tenaska facility will comply with all applicable laws and regulations, including BACT and MACT. Therefore, the permit should be denied or remanded.

The ALJs declined to offer a recommendation regarding Sierra Club's arguments: (i) that Tenaska has failed to demonstrate compliance with the 1-hour National Ambient Air Quality Standard ("NAAQS") for SO₂; and (ii) that PM CEMS should be required to demonstrate compliance with filterable particulate matter ("PM") emission limits.

Sierra Club will focus on these issues and specific concerns about proposed BACT and MACT limits in its Exceptions below. Sierra Club reserves the right to address all exceptions filed by Tenaska and the Executive Director. Sierra Club incorporates by reference herein the arguments set forth in Sierra Club's Closing Arguments and Response to Closing Arguments previously filed in these dockets. We also adopt and incorporate by reference any exceptions submitted by the Multi-County Coalition in this matter that do not contradict the exceptions below. Furthermore, the exceptions 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.

This briefing shall be divided into two parts. The first part presents legal briefing regarding issues of particular concern. The second part identifies specific findings of facts and conclusions of law in the ALJs' Proposed Order to which Sierra Club excepts.

II. AIR QUALITY IMPACTS MODELING

A. SO₂ 1-Hour National Ambient Air Quality Standards (NAAQS)

Applicant failed to demonstrate compliance with SO₂ 1-hour National Ambient Air Quality Standards as required by Texas and federal law. Before a PSD permit may issue for a

proposed major source like the Trailblazer facility, an applicant must “demonstrate that allowable emission increases from the proposed source, in conjunction with all other applicable emissions increases...would not cause or contribute to air pollution in violation of...[a]ny national ambient air quality standard[.]”³ On June 22, 2010, EPA published a final rule containing a NAAQS for SO₂ based on a 1-hour averaging time.⁴ The new 1-hour NAAQS for SO₂ became effective on August 23, 2010.⁵ The new SO₂ 1-hour is a NAAQS for which Tenaska must make a compliance demonstration.

The ALJs write with respect to MACT:

Memoranda in the record from EPA explain EPA’s policy that a BACT determination for a major new source is not considered to be set until the final permit is issued. The same reasoning applies equally to determinations of MACT, which are intended to be based on the most current information available in order to best mitigate emissions of the most potentially harmful pollutants. Accordingly, to the extent that new potentially relevant information is made available concerning MACT, it is the responsibility of the source to investigate that information to the extent possible and to determine whether any changes in the MACT permit limits should result. This obligation is ongoing and continues until the date of approval of the MACT determination by the TCEQ.⁶

³ 40 CFR § 52.21(k). Texas has incorporated 40 CFR § 52.21(k) at 30 Tex. Admin. Code § 116.160(c)(2). *See also* 30 TAC § 101.21 (“The National Primary and Secondary Ambient Air Quality Standards as promulgated pursuant to section 109 of the Federal Clean Air Act, as amended, will be enforced throughout all parts of Texas.”)

⁴ 75 Fed. Reg. 35520.

⁵ *Id.*

⁶ PFD at 19 (internal citations omitted).

The same reasoning applies equally to NAAQS demonstrations, and supports a finding that Tenaska must demonstrate compliance with NAAQS in effect at the time its final permit issues. This is consistent with the text of the SO₂ rule, according to which “[t]he owner or operator of any major stationary source or major modification obtaining a final PSD permit on or after effective date of the new 1-hour SO₂ NAAQS will be required, as a prerequisite for the PSD permit, to demonstrate that the emissions increases from the new or modified source will not cause or contribute to a violation of that new NAAQS.”⁷ Because the record does not contain a demonstration that emissions from the proposed Trailblazer facility will comply with the new 1-hour SO₂ standard, Tenaska’s application must be denied or remanded to the ED.

III. MAXIMUM ACHIEVABLE CONTROL TECHNOLOGY

A. Generally

The case-by-case MACT analysis submitted in support of Tenaska’s Application is legally deficient and fails to identify sufficiently stringent limits for any of the hazardous air pollutants (“HAPs”) (or HAP surrogates) identified in the Draft Permit.⁸ Because both the analysis and the results of the analysis submitted by Tenaska dramatically fail to satisfy federal and state requirements, Tenaska’s Application should be denied or remanded. Sierra Club and OPIC presented evidence identifying lower final permit limits for similar facilities. Because Tenaska failed to show why these lower limits are not achievable or that collateral impacts render these limits unreasonable, this evidence demonstrates that the MACT limits proposed in the Draft Permit are not sufficiently stringent. However, lowering limits in the Draft Permit to match the lowest limits identified by Sierra Club and OPIC is not sufficient to cure the glaring

⁷ 75 Fed. Reg. 35520, 35578 (June 22, 2010).

⁸ PFD at 80; Proposed Order FOF 82-86, 96-99, 112-118, 126-130.

deficiencies in Tenaska's MACT analysis. According to Texas rules, an applicant must demonstrate that emissions from a proposed facility will comply with MACT before a preconstruction permit may issue.⁹ Tenaska has failed to make this demonstration and therefore its permit may not issue. While Sierra Club and OPIC have identified lower limits, neither party conducted its own MACT analysis for the Tenaska Application. Neither Sierra Club nor OPIC is in a position to conduct such an analysis, nor is it our burden to do so. Perhaps, if the record evinced an otherwise thorough MACT analysis that failed to take into account one or two recently issued permits, lowering limits to match these permits would be an acceptable remedy. However, the record does not support a finding that the Tenaska analysis was at all thorough. Thus, lowering limits to match those in the most stringent permits identified by OPIC and the Sierra Club is not sufficient to ensure that MACT is satisfied.

The defects in Tenaska's MACT demonstration extend beyond its failure to consider limits in a couple of recently issued recent permits. Some of the key deficiencies, which are discussed in more detail below, include: failure to conduct a beyond-the-floor analysis for filterable PM (which serves as a surrogate for non-mercury metallic HAPS)¹⁰, and the failure to submit evidence sufficient to determine the proper MACT Floor for mercury.¹¹ These specific problems reflect more general defects in Tenaska's analysis. MACT analyses must be well documented and take into account "available information." Tenaska's expert, Mr. Greywall, testified that "available information" includes "proposed permit limits, current permit limits, stack test data, and CEMS data as well as RBLC data."¹² Mr. Greywall further testified that

⁹ 30 TAC § 116.404; 30 TAC § 116.110; 30 TAC § 116.111(a)(2)(F).

¹⁰ FOF 91.

¹¹ PFD at 26.

¹² 1 Tr. 142:7-11.

“stack testing or emission limitations that are more stringent” than proposed must be evaluated.¹³ Mr. Greywall also testified that MACT case-by-case analyses require more than a mere consideration of permit limits for similar facilities.¹⁴ However, the only justification Tenaska’s Application provides for its proposed MACT limits are permit limits.¹⁵ Thus, even according to the testimony of its own witness, the record does not contain evidence sufficient to support an adequate MACT analysis. While it may be the case that Tenaska conducted analyses and considered information that were not submitted with its Application, the Commission must decide whether Tenaska has undertaken an adequate MACT analysis on the basis of the record before it. Because the record does not contain evidence sufficient to demonstrate that Tenaska conducted an adequate MACT analysis or that emissions from the proposed Trailblazer facility will comply with stringent MACT case-by-case requirements, Tenaska’s Application should be denied or remanded.

B. *Stack Testing, Performance Data, and “Available Information”*

The ALJs fault Sierra Club’s argument that MACT floor limits must take performance data into account, because we presume: (i) that such data is readily available; and (ii) rates achieved during stack tests are indicative of emissions rates that can be met continuously over time by the tested source.¹⁶ Sierra Club agrees that it has made these presumptions, but we contend that they are reasonable and well-founded. Thus, these presumptions do not provide a basis for rejecting Sierra Club’s arguments.

¹³ 1 Tr. 144:5-8.

¹⁴ 1 Tr. 145:1-6.

¹⁵ 1 Tr. 145:7-12.

¹⁶ PFD at 17.

First, Sierra Club’s presumption that emission data is readily available is based upon requirements of federal law. Sierra Club did not brief this issue, because Tenaska’s own witness admitted that stack tests and performance data are “available information” for purposes of MACT.¹⁷ According to 42 U.S.C. § 7414(c), emission data must be made available to the public, even if the data otherwise qualifies as trade secret information. Thus, this information must be made available by permitting agencies including the TCEQ upon request.¹⁸ The availability of emission data is an important precondition for public participation in the enforcement of permit limits as provided under the Citizen Suit Provision of the Clean Air Act.¹⁹ Furthermore, Sierra Club has been unable to locate any testimony by any Applicant witness that Tenaska tried to—but in light of undue burdens—was unable to procure any particular performance data. In the absence of such testimony, it should be presumed that emission data is available to members of the public, including applicants, just as federal law requires.

Next, MACT regulations require that the MACT floor for a proposed facility “shall not be less stringent than the emission control which is achieved in practice by the best controlled similar source.”²⁰ If this is what the law requires, certainly then MACT floor determinations should take into account information about the level of performance actually achieved by the best performing similar source. Permit limits are relevant, but as the ED has testified facilities regularly outperform their permit limits by a significant margin.²¹ Thus, permit limits alone are not a reliable indicator of the level of performance achieved in practice by the best performing similar source. While there may be concerns about the representativeness of stack testing conducted under optimal conditions, if stack tests are all that a permit requires to establish

¹⁷ .1 Tr. 142:7-16 (Greywall).

¹⁸ Tex. Atty. Gen. Op. OR2010-00590, 2010 WL 175571 at 2. (**Appendix A**).

¹⁹ 42 U.S.C. § 7604.

²⁰ 40 C.F.R. § 63.43.

²¹ ED Ex. 13 at 30, 37.

compliance with regulatory limits, it should be presumed that stack test data reliably indicates the emission control achieved by a particular facility.²² An applicant may certainly present evidence that specific tests results are inaccurate, but no such evidence has been presented here.

C. *Mercury*

The ALJs find that Tenaska's mercury limit should be lowered to match the MACT limit in the Plant Washington final permit.²³ Sierra Club agrees with the ALJs that Tenaska failed to prove that the mercury limit in the Draft Permit represents MACT (or BACT), but we have two concerns about the ALJs' proposal: (i) the proposed limit in the PFD is based upon the mercury limit in the Plant Washington *draft permit*. The mercury limit in the Plant Washington *final permit* is significantly lower; and (ii) given the inadequacy of the Tenaska MACT analysis for mercury, the Application should be denied or remanded.

The Proposed Mercury Limit is Based Upon Plant Washington's Draft Permit

The ALJs find that the Plant Washington mercury limit establishes MACT for Tenaska.²⁴ However, relying on Tenaska's closing arguments, the ALJs erroneously list the final Plant Washington mercury limit as 1.46×10^{-6} lb/MMBtu.²⁵ The 1.46×10^{-6} lb/MMBtu (which is equivalent to 13×10^{-6} lb/MW hr) is the Plant Washington draft permit limit.²⁶ The *final* Plant

²² Applicant and ED argument on this point is not substantially different than their claims regarding the impact of wear and tear upon emission limits: "Some experts testified that a BACT limit must be set higher to account for diminishment in the effectiveness of control technology over time. If wear and tear has such an impact, the record does not demonstrate how much emissions should be expected to increase due to age and use. Thus, the ALJs are left with an assumption that may be logical but is not demonstrated. Reasoned expert opinions based on credible facts about Tenaska's ability or lack thereof to achieve lower limits would support the Application. For some limits, the experts provided this type of evidence. For others, they did not." PFD at 50. In the absence of expert evidence, it should not be presumed that stack testing conducted to establish compliance with regulatory limits is an unreliable indicator of emission control levels achieved in practice.

²³ PFD at 26-27.

²⁴ PFD at 26-27, FOF 77-86.

²⁵ PFD at 23 n60, 26-27, FOF 86.

²⁶ SC Cross Ex. 5 at 112.

Washington mercury limit (while burning sub-bituminous coal) is significantly lower, at 7.64 lb/MW-hr.²⁷ Accordingly, if the ALJs find that remand or denial of Tenaska’s permit is not required, the PFD and FOF 79 and 86 should be corrected to reflect the final Plant Washington mercury limit (or its lb/MMBtu equivalent).

Tenaska’s Application Should be Denied or Remanded

Every MACT case-by-case analysis must include two determinations:

- (i) That proposed MACT limits are at least as stringent as the emission control achieved in practice by the best performing similar source. The limit achieved in practice by the best performing similar source is the “MACT floor”; and
- (ii) Based upon available information, the MACT emission limitation and control technology recommended by the applicant and approved by the permitting authority shall achieve the maximum degree of reduction in emissions of HAP which can be achieved by utilizing those control technologies that can be identified from the available information, taking 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.²⁸

Sierra Club identified five final permits for PC boilers burning PRB coal with mercury limits lower than Tenaska’s proposed limit.²⁹ The ALJs focus on the Plant Washington limit,

²⁷ SC Cross Ex. 4 at 9; SC Cross Ex. 5 at 142 (“Upon further review and based on this new information obtained by the Division, as well as comments received during the comment period, EPD has lowered the sub-bituminous (i.e. PRB) coal limit from 13×10^{-6} lb/MW hr to 7.64×10^{-6} lb/MW-hr....”).

²⁸ 40 CFR § 63.43; PFD at 10.

²⁹ PFD at 22.

because as Sierra Club argued, it was based upon stack testing conducted at the Walter Scott and Santee Cooper Cross Unit 3 plants.³⁰ The ALJs find

[T]o the extent that Plant Washington's permit limit is based on reliable data demonstrating that lower emissions rates have been achieved in practice by other operating sources, that the permit limit would constitute the MACT floor for Tenaska. Alternatively, absent evidence that the Plant Washington limit has been achieved in practice, that limit nonetheless constitutes a beyond-the-floor MACT limit for Tenaska in the absence of any evidence that it is not feasible for Tenaska because of economic or other appropriate reasons. Accordingly, the ALJs recommend that the Commission adopt Plant Washington's mercury limit....³¹

It is the Applicant's obligation to conduct a MACT analysis that correctly identifies the MACT floor and includes a beyond-the-floor analysis. Because the record is insufficient to determine whether the Plant Washington limit is properly required as the MACT floor or as a beyond-the-floor limit, Tenaska's application should be denied or remanded so that further evidence may be considered.

If the ALJs find that record evidence is sufficient to establish that the Plant Washington limit is the MACT floor for Tenaska, then Tenaska must conduct additional analysis to determine whether beyond-the-floor reductions are achievable. The Plant Washington PRB mercury limit is based upon 90% control efficiency by the ACI system, which Tenaska's Application indicates is achievable control efficiency for ACI. Tenaska has proposed to use an ACI system in conjunction with wet FGD, SCR, and a baghouse to control mercury emissions,

³⁰ *Id.* Sierra Club Closing Arguments at 64-65.

³¹ PFD at 26.

so Tenaska should be able to achieve mercury control efficiencies even greater than 90%. For these reasons, the ALJs should recommend that the Tenaska permit be denied or remanded to the ED for further review.

D. *Filterable Particulate Matter*

Sierra Club agrees with the ALJs' finding that the 0.010 lb/MMbtu limit in the Plant Washington permit is achievable. However, Sierra Club disagrees that the Tenaska permit may issue if the filterable PM limit is lowered to 0.010 lb/MMBtu. The ALJs find that "Tenaska did not conduct a beyond-the-floor MACT analysis for filterable PM."³² Tenaska was required to conduct a beyond-the-floor analysis as part of its Application. It did not, and thus its permit may not issue.

E. *Acid Gases (HCl and HF)*

The PFD states that Tenaska's consideration of only wet FGD sources for its MACT analysis of acid gases was proper, because a preponderance of the evidence demonstrates that: (i) dry FGD can better control HF than wet FGD; and (ii) wet FGD was selected based upon its ability to better control for SO₂ emissions as well as its effectiveness in removing a form of water soluble mercury.³³ Sierra Club respectfully disagrees. First, the evidence in the record does not support a finding that dry FGD can better control HF (or HCl) better than wet FGD.³⁴ According to Tenaska's BACT analysis, "engineering estimate[s]" indicate that wet FGD affords greater control potential for acid gases than dry FGD.³⁵ While, Tenaska's MACT analysis states

³² Tenaska Proposed Order, FOF 91.

³³ PFD at 35.

³⁴ Sierra Club Closing Arguments at 69.

³⁵ Tenaska Ex. 2B at APP-0150 (Table 11-1) note g.

that the lowest limits for facilities use dry lime sprayers³⁶, the record does not demonstrate that a well-designed wet FGD could not achieve greater control than required by these permits. Thus, the record does not support a finding that lower limits for dry scrubber facilities cannot be achieved by Tenaska's wet-scrubber. Second, and more importantly, for purposes of establishing the MACT floor for HCl and HF, none of this matters. Tenaska must demonstrate that its HCl and HF limits are as stringent as the emission control achieved in practice by the best performing similar source. For purposes of MACT case-by-case analyses, "similar source" is defined to mean:

...[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 technology.³⁷

Thus, the very definition of "similar source" draws a distinction between a source (in this case the boiler) and the control technology used to reduce emissions from the source (in this case, the scrubber). There is no question in this case that Tenaska *could* use either a dry scrubber or a wet scrubber to control emissions from its boiler. Thus, the fact that Tenaska has chosen to use wet FGD instead of a dry FGD is not a basis for finding that dry FGD units are not similar sources for purposes of Tenaska's MACT case-by-case analysis.

Thus, Tenaska's MACT analysis should have considered emission control achieved in practice by dry FGD facilities. Because it failed to consider dry FGD facilities, Tenaska did not conduct an adequate MACT analysis and its Application must be denied or remanded.

³⁶ *Id.* at APP-0401.

³⁷ 40 CFR § 63.41.

F. Carbon Monoxide (CO)

The ALJs find that “Tenaska was required, but failed, to evaluate lower permit limits issued for similar sources, even if those sources were not yet operational, to determine whether such limits were applicable to Tenaska.”³⁸ Such an evaluation is necessary as part of a beyond-the-floor evaluation.³⁹ Accordingly, the ALJs recommend a limit of 0.10 lb/MMBtu (30-day and annual average) for Tenaska.⁴⁰ Sierra Club believes that Tenaska’s application should be denied or remanded in light of its myriad deficiencies. However, if the ALJs find that the permit may issue with lower limits, Sierra Club recommends that the ALJs find an annual CO limit of 0.093 lb/MMBtu is MACT, based upon the limit in the final Desert Rock permit.⁴¹ Though the Desert Rock permit has been remanded, the remand is for further consideration of issues unrelated to MACT. There has been no argument by any party that the EPA’s voluntary remand of the Desert Rock permit reflects any uncertainty about the achievability of the CO limits in that permit. And while the ALJs found that an “out clause” in the Desert Rock permit is evidence that the EPA has doubts about the achievability of its NO_x limits, the “out clause” does not affect the CO limit. If ALJs find the permit may issue, the Desert Rock CO limit, which is the lowest identified in this proceeding, should be required as MACT.

³⁸ PFD at 39.

³⁹ *Id.* at 40.

⁴⁰ *Id.*

⁴¹ ED Ex. 13 at 43; Sierra Club Cross Ex. 1 (The annual permit limit is 631 lb/hr. As indicated in the RTC, this limit is equivalent to 0.093 lb/MMBtu. The Desert Rock facility has an input limit of 6,810 MMBtu/hr. *Id.* at 4. 6,810 MMBtu/hr times 0.09265 lb/MMBtu(or .093)=631 lb/hr).

IV. Best Available Control Technology

A. Neither the ED nor Tenaska Performed a Tier I BACT Evaluation

The PFD states Mr. Hughes performed a Tier I BACT analysis of Tenaska's Application.⁴² According to the PFD, Mr. Hughes gave "particular weight to facilities that are operating and to the Coletto Creek and NRG permits."⁴³ Sierra Club contends that Mr. Hughes did not conduct a Tier I analysis. Had Mr. Hughes actually conducted a Tier I analysis, the BACT limits in the Draft Permit would have been lower across the board or the ED would have set BACT limits pursuant to a Tier II or III evaluation. As Sierra Club pointed out in its closing briefs, both Tenaska and the ED identified many final permits for similar facilities with lower limits than proposed by the Applicant. According to RG-383, BACT limits may be set pursuant to a Tier I evaluation only if the performance level proposed in the application is as stringent as that required in recent permit reviews for similar sources.⁴⁴ In cases where an applicant proposes a performance level that is less stringent than required in recent permit reviews for similar sources, then the applicant must either (i) show that compelling technical differences prevent it from achieving the same level of control accepted in recent permit reviews or (ii) lower its proposed limit.⁴⁵ If an applicant can demonstrate that technical difficulties prevent it from achieving lower limits accepted in recent permit reviews, then a BACT evaluation must proceed to Tier II.⁴⁶ As the ALJs find: (i) For nearly every BACT pollutant, Tenaska failed to propose performance levels as stringent as those accepted by permitting agencies in recent reviews for similar facilities; (ii) Tenaska did not amend its Application to sufficiently lower its limits; and (iii) Tenaska did not demonstrate that compelling technical differences would prevent the

⁴² PFD at 44.

⁴³ *Id.*

⁴⁴ ED Ex. 3 at Draft Pages 5, 15-19.

⁴⁵ *Id.* at 18-19.

⁴⁶ *Id.* at 18.

Trailblazer facility from achieving a performance level consistent with these lower limits. Given these findings, it simply cannot be said that Tenaska or the ED conducted a Tier I evaluation. Furthermore, even though Applicant claims it conducted both a Tier I and a Tier III evaluation, the record does not support a finding that the limits it proposed are as stringent as those that would have been set pursuant to a proper Tier I evaluation. Thus, it cannot be found that Tenaska and the ED conducted a BACT analysis consistent with state BACT guidance.

B. Neither Tenaska nor the ED Conducted an Adequate BACT Evaluation

The ALJs correctly find that RG-383 is not a rule.⁴⁷ However, the ALJs seem to believe that Sierra Club has argued that RG-383 is a rule or that it gives rise to rule-like burdens beyond those demonstrations required under federal and state BACT regulations. This is not Sierra Club's position. Each BACT determination requires a complicated case-by-case analysis to be undertaken to balance technological, economic, and environmental considerations. The TCEQ is charged with establishing policies regarding the minimum requirements of BACT analyses, and developing methods for balancing various considerations relevant to BACT determinations in Texas. RG-383 reflects the TCEQ's general policy for balancing technological, economic, and environmental concerns.⁴⁸ According to testimony by the ED, EPA granted Texas authority to issue PSD permits based upon its determination that Texas' 3-tiered approach properly balances considerations relevant to BACT and produces limits that are sufficiently stringent. For the purposes of this hearing, Sierra Club has presumed that RG-383 constitutes a reasonable methodology for making BACT determinations consistent with federal and Texas BACT regulations. It is not a protestant's place or burden in a contested case hearing to articulate an

⁴⁷ PFD at 49.

⁴⁸ ED Ex. 3 at 1-3.

alternative methodology for implementing state and federal BACT regulations. In this case, Sierra Club properly relied upon TCEQ's guidance document to determine whether Tenaska presented an adequate demonstration that emissions from the Trailblazer facility satisfy federal and state BACT regulations. Tenaska and the ED's failure to follow the RG-383 methodology is not improper because RG-383 is a rule, but rather because the document lays out the TCEQ's policy regarding the kind of analysis required under BACT rules. Tenaska and the ED failed to conduct a BACT evaluation as stringent as the 3-tiered approach laid out in RG-383. This is evidence that the Tenaska BACT analysis does not ensure that emissions from the Trailblazer facility will satisfy federal and state BACT regulations.

C. Nitrogen Oxide (NO_x) 12-Month Average Limit

The ALJs find that the annual limit of 0.03 lb/MMBtu in the Plant Washington permit is not BACT for Tenaska based upon Mr. Bailey's testimony that: (i) the Plant Washington "out clause" is evidence that the limit may not be achievable; (ii) no facility in 2009 achieved 0.030 lb/MMBtu NO_x performance levels; and (iii) the limit is the lowest limit Mr. Bailey has ever seen.⁴⁹

Mr. Bailey's testimony on the first two points is based upon his review of the Final Determination document issued by the Georgia permitting authority with the Plant Washington permit.⁵⁰ Unfortunately, the Final Determination document does not actually say what Mr. Bailey believes it says. First, the Plant Washington annual NO_x limit does not contain an "out clause." While it is true that the Georgia permitting authority will allow the Plant Washington facility to operate for six months before it must come into compliance with the annual NO_x limit,

⁴⁹ PFD 59-60.

⁵⁰ 7 Tr. 976:16-977:11.

there is no indication in the Final Determination document that this delay is motivated by doubts that the annual limit is achievable. Rather, the six month period allows the facility an optimization period to fine-tune boiler operation.⁵¹ There is no so-called “out clause” for the annual NO_x limit in the Plant Washington permit. Thus, the Plant Washington annual NO_x permit limit is clearly distinguishable from the limit in the Desert Rock permit, which *does* contain a clause indicating that the permit limits may be adjusted if the applicant determines that they are not feasible.⁵²

Next, Mr. Bailey relies on the Plant Washington Final Determination document to testify that the 0.03 lb/MMBtu limit had not been achieved anywhere in 2009.⁵³ However, the Georgia Final Determination document that Mr. Bailey relies upon does not say that no facility has met the 0.03 lb/MMBtu limit. What it actually says is “in 2009 not a single coal-fired unit emitted less than 0.030 lb/MMBtu.”⁵⁴ Thus, the Final Determination document does *not* indicate that no facility has met the 0.030 lb/MMBtu annual limit.

Finally, the fact that the 0.030 limit is the lowest Mr. Bailey has ever seen should not be taken as evidence that the limit is unachievable. BACT is an evolving technology-driven (and technology-driving) standard. BACT evaluations should result in a continual ratcheting down of emission limits as pollution control technology advances. Thus, it should be expected—and not at all surprising—that the most recently issued permit for a pulverized coal boiler power plant identified in the record should have the lowest BACT limits.

⁵¹ Sierra Club Cross Ex. 5 at 38 (“The limit will become effective 6 months after initial startup of the coal boiler, thus allowing the facility an optimization period of six months for the boiler.”)

⁵² Sierra Club Cross Ex 1 at 9 (“If, during the NO_x Optimization Period, the Permittee determines that any of the NO_x limits...are not feasible, the Permittee shall submit an application to EPA for an adjustment of those limits.”)

⁵³ 7 Tr. 977:9-11.

⁵⁴ Sierra Club Cross Ex. 5 at 38.

For these reasons and others discussed in Sierra Club's Arguments⁵⁵, if the ALJs decline to recommend denial or remand in this matter, the proposed annual NO_x limit should be lowered to 0.030 lb/MMBtu. This is the lowest annual NO_x limit in a final permit for a similar source and Tenaska has not presented evidence that the limit is unachievable or otherwise unreasonable.

D. Sulfur Dioxide (SO₂)

The Plant Washington final permit contains the following condition:

The Permittee shall maintain a minimum Sulfur Dioxide (SO₂) removal efficiency of 97.5 percent on a 30-day rolling average for the Wet Limestone Scrubber."⁵⁶

The Plant Washington permit also contains a 0.052 lb/MMBtu (12-month rolling average) and a 0.069 lb/MMBtu (30-day rolling average) for SO₂.⁵⁷

This permit condition unquestionably imposes an SO₂ emission limit that is more stringent than both the lb/MMBtu limit in the Plant Washington permit (when the facility is burning PRB coal), and the lb/MMBtu limits in Tenaska's Draft Permit.

The PFD states:

while Tenaska's WFGD will remove more than 90% of the SO₂, it is not clear what Trailblazer's precise removal rate will be, and Plant Washington's limit is based on a precise removal efficiency. Thus, the record in this case does not support a different SO₂ emissions limit based on expected removal efficiency.⁵⁸

⁵⁵ Sierra Club's Closing Arguments at 34-35.

⁵⁶ Sierra Club Cross Ex. 4 at 10.

⁵⁷ Sierra Club Cross Ex. 4 at 9.

⁵⁸ PFD at 63.

Sierra Club respectfully disagrees. The 97.5 percent minimum efficiency limit in the Plant Washington permit is not an “efficiency *based* limit”, i.e., a limit that is based upon a particular efficiency at which the scrubber will likely operate. Rather, it *is* an efficiency limit that *requires* the scrubber to operate at a particular minimum efficiency. Moreover, this efficiency limit *is* a BACT limit.⁵⁹ When burning PRB coal, the Georgia permitting authority has acknowledged that this efficiency limit is equivalent or nearly equivalent to 0.019 lb/MMBtu.⁶⁰ The fact that the most stringent SO₂ BACT permit limit for a similar source burning PRB coal is expressed as an efficiency limit rather than a lb/MMBtu limit is not a reason for that limit to be disregarded.

Mr. Hughes testified that while BACT is often expressed as an emission rate in terms of mass units per heat input rate “it can be expressed in different ways.”⁶¹ As Sierra Club pointed out in its closing briefs, RG-383 requires the ED to consider a facility’s proposed control performance across five “performance variables,” including reduction efficiency. RG-383 states:

With five performance elements, a comparison of overall performance is done in a qualitative and quantitative manner. For individual elements, there will be situations where one or more of the proposed levels of performance vary (higher or lower) from those previously proposed and accepted as BACT. Assess the performance level based on the *overall* ability of the proposal to reduce or eliminate emissions from the facility....

⁵⁹ *Id.* (limit is established pursuant to 40 CFR § 52.21(j), which requires BACT for each NSR regulated pollutant.)

⁶⁰ Sierra Club Cross Ex. 5 at 42. (“SO₂ emissions in the range of 0.019 lbs/mmBtu is expected from Plant Washington when burning PRB coal and maintaining compliance with the minimum removal efficiency of 97.5 percent per Condition 2.14. *Maintaining compliance with the minimum removal efficiency value is essentially the same as establishing a specific lb/mmBtu permit limit for PRB coal when utilizing the average design basis PRB coal.*” {emphasis added}).

⁶¹ ED Ex. 1 at 9:1-7.

Specific proposals may be different than those accepted as BACT in recent permit reviews. However, proposals must at least be equivalent overall in meeting BACT to be accepted in a current application.⁶²

Thus, even according to TCEQ's own guidance it is immaterial that the Plant Washington efficiency limit requires a minimum scrubber efficiency rather than a specific lb/MMBtu emission limit. What matters for purposes of the BACT evaluation is whether the *overall performance* proposed in Tenaska's application is at least as stringent as that accepted as BACT in other recent permit reviews for similar facilities. This is consistent with the federal definition of BACT, which is incorporated by reference into the TCEQ's SIP approved PSD rules:

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 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.⁶³

A commenter pointed out to the Georgia permitting authority that the lbs/MMBtu SO₂ limits in the Plant Washington permit were far less stringent than the efficiency limit when the plant burns PRB coal:

⁶² ED Ex. 3 at 16.

⁶³ 40 CFR 52.21(b)(12) (emphasis added) incorporated by reference at 30 TAC § 116.160(c)(1)(A).

For these conditions, the annual limit of 0.052 lb/MMBtu implies a SO₂ removal rate in the scrubber of 93.1% and the 30-day average limit of 0.069 lb/MMBtu implies a SO₂ removal rate in the scrubber of 90.8% in the wet FGD. *Clearly, the controlling condition is the need to maintain 97.5% removal via condition 2.14.* Since this requirement is to be maintained for a 30-day average, it will also be maintained on an annual basis. Using the boiler out emissions level of 0.75 lb/MMBtu and a 97.5% removal rate in the wet scrubber, the outlet emission limit 0.019 lb/MMBtu. *Thus, the permit condition for SO₂ should explicitly state that the SO₂ limit is 0.19 lb/MMBtu for the 30-day and annual averaging time periods. This is equivalent to the current permit conditions, when burning the main fuel, i.e., PRB coals in the proposed boiler.*⁶⁴

The Georgia permitting authority responded that:

SO₂ emissions in the range of 0.019 lbs/mmBtu is [sic] expected from Plant Washington when burning PRB coal and maintaining compliance with the minimum removal efficiency of 97.5 percent per Condition 2.14. *Maintaining compliance with the minimum removal efficiency value is essentially the same as establishing a specific lb/mmBtu permit limit for PRB coal when utilizing the average design basis PRB coal. For PRB coal, minimum removal efficiency limit will be more stringent than the lbs/mmBtu limit and thus an additional lbs/mmBtu limit is not needed.*⁶⁵

⁶⁴ Sierra Club Cross Ex. 5 at 41 (emphasis added).

⁶⁵ *Id.* at 42 (emphasis added).

Sierra Club does not take a position on whether a separate efficiency limit must be added to Tenaska's permit. However, it is clear that Tenaska has failed to demonstrate that the SO₂ reduction performance required by the Plant Washington permit is not technically feasible or that it is economically unreasonable for Tenaska. Thus, Tenaska has not carried its burden with respect to the proposed BACT limits for SO₂. Because the ALJs have expressed doubt as to whether the record contains sufficient evidence to establish an alternative BACT limit for SO₂, Sierra Club recommends that Tenaska's Application be remanded to the ED, so that a permit limit that is at least as stringent as the SO₂ efficiency limit in the Plant Washington permit may be identified. In the alternative, Sierra Club requests that the ALJs recommend the Draft Permit be amended to include a limit requiring Tenaska's scrubber to maintain a minimum sulfur dioxide removal efficiency of 97.5 percent on a 30-day rolling average (or lower the SO₂ 30-day and annual limit to 0.019 lb/MMBtu, which is approximately equivalent to this efficiency limit).⁶⁶

E. *Volatile Organic Compounds (VOC)*

There appears to be a typographical error in the PFD concerning the ALJs' proposed BACT limit for VOC. The ALJs find that Tenaska's VOC limit should be adjusted to match the Plant Washington limit, which is 0.0024 lb/MMBtu (3-hour average) ⁶⁷ However, The ALJs recommend a 0.024 lb/MMBtu limit for Tenaska.⁶⁸ This error should be corrected.

⁶⁶ Sierra Club Cross Ex. 5 at 42.

⁶⁷ PFD at 67.

⁶⁸ PFD at 41, 67, 80.

F. Lead

The ALJs correctly find that Tenaska did not meet its burden of proving 30 lb/TBtu is the appropriate BACT emission limit for lead.⁶⁹ Sierra Club argued in its closing briefs that the BACT limit for lead should be at least as stringent as the 8.4 lb/TBtu (annual avg.) limit found in the J.K. Spruce Unit 2 permit.⁷⁰ J.K. Spruce is a similar source (PC boiler, burning PRB coal) that has received a final preconstruction permit from the TCEQ. There is no evidence in the record suggesting that this limit is not achievable or that achieving the limit would be economically unreasonable in this case. Thus, Tenaska's lead limit should be no less stringent than the 8.4 lb/TBtu J.K. Spruce 2 limit.

G. Monitoring

The Draft Permit's 1-hour BACT/MACT limit for filterable PM is not practically enforceable. A PSD permit must include conditions and limitations that are practically enforceable.⁷¹ This means that permit limits must allow an enforcement authority to show

⁶⁹ PFD at 72.

⁷⁰ Sierra Club Reply to Closing Arguments at 24 n88; Sierra Club Cross Ex. 3 at Tenaska/Trinity 038364 (Table IX.C-1 "BACT Summary for the New Generating Unit"); App Ex. 2b at APP-0251.

⁷¹ *In re Steel Dynamics*, 9 E.A.D. 165, 231 n72 (EAB 2000) ("[W]e generally agree that permit emissions limits must be enforceable..."); *In re Genesee Power Station*, 4 E.A.D. 832, 856-58 (EAB 1993) ("On remand, [MDNR] must consider whether fuel cleaning in combination with the add-on controls already in the permit is BACT for controlling lead emissions. The fuel cleaning alternatives considered by MDNR must at least include options that would make Genesee ultimately responsible for ensuring that, to the extent feasible, wood coated or treated with lead-bearing substances is not burned at the facility. In addition, these options must include some means of determining Genesee's compliance with them."); *In Re ConocoPhillips Co.*, 13 E.A.D. 768, 796 (EAB 2008) ("Turning, then, to the issue of the enforceability of the BACT requirements, the NSR Manual provides that a PSD permit must, among other things, provide for adequate reporting and recordkeeping so that the permitting agency can determine the compliance status of the source. NSR Manual at B.56; Petition at 21; see also *In re Shell Offshore, Inc.*, 13 E.A.D. 357, 394 n.54 (EAB 2007) ("In addition to requiring conditions and limitations [that are] directly enforceable by regulators at both the federal and the state level (see 40 C.F.R. § 52.21(b)(17)), the term "federal enforceability" has been interpreted as requiring practical enforceability as well. That is, the permit must include conditions allowing the applicable enforcement authority to show continual compliance (or non-compliance) such as adequate testing, monitoring, and record keeping requirements.") (citing, e.g., NSR Manual at A.5-6). IEPA

continual compliance (or non-compliance) such as adequate testing, monitoring, and record keeping requirements.⁷² As noted in RG-383, the enforceability of BACT limits is an important part of the BACT analysis:

Consistent with 30 TAC Section 116.111(a)(2)(B) and (G), the applicant must propose a performance demonstration to ensure that the emission reduction proposal will perform as represented on an ongoing basis. Without a method to demonstrate that the proposed facility will achieve the performance represented in the BACT proposal, an emission reduction proposal may not be enforceable and may not be acceptable. Include the agreed-upon performance demonstration method in a permit condition to ensure the BACT performance levels will be achieved on an ongoing basis.⁷³

Applicant contends that the ALJs need not be concerned about the enforceability of Tenaska's short-term filterable PM limit, because the monitoring that it has proposed is consistent with that required in other recent permits and because "measurement techniques, such as the choice of a PM CEMS or COMS, is [*sic*] not integral to the BACT process, which is an emissions limit setting determination."⁷⁴

The fact that permits have issued for similar facilities with similar monitoring provisions cannot be taken as a reason to allow Tenaska's permit to issue with 1-hour filterable limits that

does not dispute that the flare minimization conditions must be practically enforceable and met on a continuous basis, and in fact asserts that they are.").

⁷² *In Re ConocoPhillips Co.*, 13 E.A.D. 768, 796 (EAB 2008); *In re Shell Offshore, Inc.*, 13 E.A.D. 357, 394 n.54 (EAB 2007).

⁷³ ED Ex. 3 at 13.

⁷⁴ Applicant's Response to Closing Arguments at 29.

are not practically enforceable. Such an argument is all the more unconvincing given that there is now an affordable technology available that is capable of providing accurate, continuous, and direct measurement of filterable PM emissions. Tenaska's second argument, that monitoring is not integral to BACT is simply mistaken as a matter of law.

The Draft Permit Does Not Contain Monitoring Requirements Sufficient to Establish Ongoing Compliance with Filterable PM 1-hour Limits

The Tenaska Draft Permit “requires that the Trailblazer Plant utilize a Continuous Opacity Monitoring System (“COMS”) along with a fabric filter baghouse leak detection system, and annual stack testing of PM to monitor PM.”⁷⁵ As Mr. Hughes testified, COMS do not directly measure PM emissions.⁷⁶ An opacity violation detected by the COMS does not necessarily indicate that the PM limit has been violated.⁷⁷ When asked how COMS will be used to monitor compliance with PM permit limits, Mr. Hughes explained:

As to how the process would work, say, with the COMS, is that if they continually were busting the opacity limit, which would be a violation in itself [of opacity limits], the region would almost—well, I’m not going to say almost certainly, but the region would probably require them to do a stack test for PMs—I mean for PM just to show that they were meeting it.⁷⁸

Thus, Mr. Hughes essentially concedes the point. COMS cannot be used to establish compliance with any PM limit. Rather, repeated violation of opacity limits detected by the

⁷⁵ Applicant Response to Closing Arguments at 28-29; Applicant Ex. 1J (Draft Permit), Special Condition 28, 32, 32.E, at 14-15, 17.

⁷⁶ Sierra Club Cross Ex. 15 at 70:5-8 (“Q: Does the COMS...System, tell you—give you a direct measure of particulate matter? A: No, it doesn’t.”).

⁷⁷ *Id.* at 75:2-6.

⁷⁸ *Id.* at 75:16-23.

COMS system may, but need not, cause the Commission to order additional stack testing to determine whether the Trailblazer facility is complying with its PM limits. In this scenario, it is stack testing and not COMS that provides the basis for finding a PM violation. Furthermore, because stack testing will only be ordered after an opacity violation has occurred, the stack testing will not confirm or disconfirm the fact that the opacity violation was also a PM violation. Thus, it cannot be said that COMS demonstrates continuous compliance with 1-hour filterable PM limits.

The baghouse detection system is also inadequate to ensure that the Trailblazer facility continuously complies with its short-term PM limits. In this permit, the leak detector is a pressure gauge designed to detect tears or other defects in the fabric filter.⁷⁹ According to Mr. Hughes, the baghouse leak detection system can alert operators and regulators to baghouse malfunctions. However, a pressure drop identified by the baghouse leak detector does not indicate compliance or noncompliance with PM limits at the time of the malfunction.⁸⁰ Thus, it cannot be said that a baghouse detection system demonstrates continuous compliance with 1-hour filterable PM limits.

Annual stack testing is also an inadequate method for determining whether the Trailblazer Plant continuously complies with its 1-hour filterable PM limit. As Mr. Hughes testified, additional stack testing beyond the required annual tests would be required to determine whether high opacity emissions measured by COMS were indicative of PM violations. Moreover, Tenaska's argument that stack testing is adequate to establish compliance with 1-hour filterable PM limits is highly disingenuous in light of its contention that stack tests are unreliable

⁷⁹ *Id.* at 76:3-12.

⁸⁰ *Id.* at 76:15-20.

indicators of the level of performance achieved by a facility over time, in light of variable operating conditions and fuel variability.⁸¹ If this is the case, then annual stack-testing is unreliable to determine ongoing compliance with Tenaska’s 1-hour filterable PM limit across all operating conditions and in light of fuel variability. Finally, even if annual stack-tests are taken to be a reliable indication of a facility’s typical performance, it does not follow that deviations from typical performance do not occasionally occur. In order to ensure continual compliance with 1-hour filterable PM limits, monitoring sufficient to establish compliance with these limits should be required when it is technically feasible.

Stack testing has been an acceptable method for determining compliance with short-term filterable PM limits until recently, because there was no technically demonstrated alternative. Today, however, PM Continuous Emissions Monitoring systems (“PM CEMS”) are technically demonstrated and commercially available.⁸² PM CEMS is the only monitoring method that allows for direct, continuous monitoring of a facility’s filterable PM emissions.⁸³ In Texas, PM CEMS is currently being used to determine compliance with filterable PM limits at the Sandow (units 5A and 5B), and Oak Grove (Unit 1) facilities.⁸⁴ PM CEMS will be required for Oak Grove Unit 2 when it begins operation.⁸⁵ Thus, it cannot be said that past TCEQ decisions support a policy determination that PM CEMS is not a technically viable method for monitoring filterable PM emissions. In fact, Mr. Hughes testified that the TCEQ agrees that PM CEMS is preferable to COMS.⁸⁶ This finding is consistent with the EPA’s Portland Cement NESHAP, which was finalized in September of this year. This rule requires new Portland cement facilities

⁸¹ Applicant Response to Closing Arguments at 44.

⁸² Sierra Club Cross Ex. 12.

⁸³ *Id.*

⁸⁴ Sierra Club Cross Ex. 15 at 77; Sierra Club Closing Arguments at 38.

⁸⁵ *Id.*

⁸⁶ ED Ex. 13 at 21.

to install PM CEMS to monitor filterable PM emissions.⁸⁷ In that final rule, EPA also stated “performance specifications for PM CEMS are now available, and continuous monitors give a far better measure of sources’ performance over time than periodic stack tests.”⁸⁸

Enforceability of Permit Limits is an Integral Consideration

The very definition of “emission limitation” in the Clean Air Act states that the term includes “any requirement relating to the operation or maintenance of a source to assure continuous emission reduction.”⁸⁹ Thus, by definition the enforceability of emission limitations is integral to the limit setting process. According to 30 TAC § 116.111(a), no permit may issue if an application fails to include information demonstrating that emissions from the facility will satisfy (among other requirements) BACT and MACT.⁹⁰ This same rule also requires an application to include provisions for measuring the emission of significant air contaminants and a demonstration that the proposed facility will achieve the performance specified in the permit application.⁹¹ A filterable PM limit that is not practically enforceable fails to require maximum achievable reductions (in light of permissible considerations) and therefore is neither BACT nor MACT. Contrary to Mr. Hughes’ testimony, RG-383 recognizes this reality and states that monitoring sufficient to ensure continuing compliance with BACT limits is required:

⁸⁷ 75 Fed. Reg. 54970, 54997 (September 9, 2010) (“To demonstrate compliance with the PM emission limits, we are amending the monitoring requirements to require installation and operation of a PM CEMS.”).

⁸⁸ *Id.* at 54988 (internal citations omitted).

⁸⁹ 42 U.S.C. § 7602(k).

⁹⁰ 30 TAC §§ 116.111(a)(2)(C) and (F).

⁹¹ 30 TAC §§ 116.111(a)(2)(B) and (G).

Consistent with 30 TAC Section 116.111(a)(2)(B) and (G), the applicant must propose a performance demonstration to ensure that the emission reduction proposal will perform as represented on an ongoing basis.⁹²

The claim that the enforceability of limits is an integral part of BACT is also consistent with EPA's Draft NSR Manual, which serves as the basis for BACT reviews conducted by EPA and many states. According to the NSR Manual, "[t]o complete the BACT process, the reviewing agency must establish an *enforceable* limit for each subject emission unit at the source...."⁹³ These limits "must be met on a continual basis at all levels of operation...and be enforceable as a practical matter."⁹⁴ While EPA has not required Texas to follow the "top-down" approach to BACT outlined in the NSR Manual, Texas' PSD program was approved based upon a finding that its 3-Tiered approach to BACT results in permit limits that are as stringent as those established through a top-down review.⁹⁵ A permit limit that is not practically enforceable is less stringent than a limit that is practically enforceable. Accordingly, in order to ensure that permit limits established pursuant to a 3-Tier BACT analysis are sufficiently stringent, reasonable steps should be taken to ensure that Texas permit limits are practically enforceable. Because PM CEMS is the only method available to ensure ongoing compliance with Tenaska's 1-hour filterable PM limit, and because no party has articulated a credible reason why PM CEMS should not be required, the ALJs should find that PM CEMS is required.

⁹² ED Ex. 3 at 13.

⁹³ ED Ex. 4 at B.56.

⁹⁴ *Id.*

⁹⁵ 4 Tr. 523:9-13. *See also*, ED Ex. 1 at 11:38-41; ED Ex. 13 at 26 (Citing 54 Fed. Reg. 52823).

H. CFB Boilers

The PFD states: “[t]he ALJs find that Tenaska, as part of its BACT analysis, was not required to consider CFBs as similar sources because regulations do not require an applicant to redefine the source of its own emissions.”⁹⁶ Sierra Club does not contend that Tenaska should be required to build a CFB facility in place of its proposed SCPC boiler plant.⁹⁷ Rather, Sierra Club argues that permit limits and emissions data from coal-fired CFB facilities provide evidence of the kind of emission limits that are achievable by PC boiler facilities. Specifically, we argue that because evidence—including permit limits for coal-fired CFB boilers—indicates that greater performance than proposed by Tenaska is achievable, Draft Permit limits fail to require BACT. The proper remedy is a remand to the ED so that this evidence may be considered and new, lower limits may be proposed. To meet these new limits, Applicant may use the same SCPC boiler and control train that it has proposed. Thus, the relevance of the source redefinition doctrine in this context is not apparent to us.

For example, filterable PM is a BACT pollutant. Tenaska’s Application states “all coal-fired boilers are capable of achieving essentially the same emission rate regardless of combustion type or fuel type.”⁹⁸ In light of this evidence, the ALJs properly find that CFB and PC boilers are similar sources for purposes of MACT.⁹⁹ CFB and PC boilers are also similar sources, at least with respect to filterable PM, for purposes of BACT. Thus, it cannot be said as a matter of

⁹⁶ PFD at 53.

⁹⁷ By way of contrast, Sierra Club believes that there is evidence supporting a finding that IGCC is BACT for the Tenaska facility. Thus, it would be proper to find that Tenaska is required to build an IGCC plant rather than a SCPC boiler plant. If Tenaska had presented sufficient evidence to demonstrate that requiring IGCC would redefine the proposed source according to the source redefinition test articulated in *In re Prairie State*, then the source redefinition argument would be applicable. Because no party has suggested that Tenaska should be required to a CFB boiler, the source redefinition doctrine has no bearing.

⁹⁸ Tenaska Ex. 2B, Volume I, Tab A, p. 11-7.

⁹⁹ PFD at 30.

general policy, that merely requiring an Applicant proposing a PC boiler power plant to consider BACT limits established for CFB facilities is an impermissible redefinition of the source.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW THAT SHOULD BE REVISED OR DELETED:

25-26: Tenaska's Application was incomplete, and its BACT analysis clearly failed to comply with existing TCEQ guidance.

45, 61: Tenaska's MACT analysis was incomplete and failed to include information necessary for ED to render a case-by-case MACT determination for Tenaska's main boiler. For example, Tenaska failed to conduct a beyond-the-floor analysis for filterable PM¹⁰⁰. Also, Tenaska failed to submit evidence regarding stack testing and performance data from best performing similar sources that establish the MACT floor for each HAP (or HAP surrogate) regulated under Tenaska's permit. The MACT floor for each pollutant must be at least as stringent as the emission control achieved in practice by the best performing similar source. Thus, for each HAP pollutant or surrogate, Tenaska was required to, but failed to offer evidence establishing the emission control achieved in practice by the best performing similar source (i.e. performance data). Without this evidence, the record does not support a finding that proposed limits are as stringent as the MACT floor. Furthermore, federal law requires emission data be made public and it should be presumed that such data was available to Applicant. Because stack testing or CEMS data is all that has traditionally been required to establish compliance with emission limits for many pollutants, it should be presumed that stack test data or CEMS data submitted to demonstrate compliance with regulatory limits is a reliable indicator of emission control levels that have been achieved in practice.

¹⁰⁰ See FOF 91.

58: Permit limits are based upon agency determinations regarding the level of performance that is achievable over the life of a facility. However, facilities often outperform permit limits. For this reason, performance data must be considered to determine the level of performance achieved in practice by the best performing similar source.

79, 86: 1.46×10^{-6} is the Plant Washington *draft* permit limit. The Plant Washington final permit limit while burning PRB coal is lower. Tenaska was required to conduct further analysis to determine whether a limit more stringent than the Plant Washington final permit limit is MACT.

99: While Tenaska's MACT limit must be no less stringent than 0.010 lb/MMBtu, Tenaska must conduct a beyond-the-floor analysis to determine whether a more stringent limit is MACT.

110: "Similar Source" as defined by MACT case-by-case rules does not allow for sub-categorization based upon pollution control device. Thus, dry scrubber facilities should have been considered.

117, 118: Further analysis is required to determine whether more stringent limits were MACT.

130: The lowest CO limit for a coal-fired PC boiler is Desert Rock limit of 0.093 lb/MMBtu. Tenaska was required to, but failed to demonstrate why this limit is not MACT. Moreover, further analysis was required to determine whether a more stringent limit is MACT.

133: *Blue Skies Alliance v. Tex. Comm'n on Env'tl Quality* only holds that IGCC need not be considered if requiring IGCC would amount to a redefinition of the source. Whether or not

IGCC constitutes a redefinition of any proposed source is a question of fact that must be determined on a case-by-case basis.

135: Tenaska's BACT analysis and the ED's review were not performed in accordance with RG-383, TCEQ's BACT guidance document.

170: An annual NO_x limit no less stringent than 0.03 lb/MMBtu is BACT for Trailblazer based upon the Plant Washington final permit limit. The Plant Washington limit does provide that the 0.03 annual limit will not become effective until the plant has been in operation for six months, but the permit does not contain an "out clause" (like the Desert Rock permit) indicating agency doubt about the achievability of the limit.

171, 173: When burning PRB coal, the Plant Washington efficiency limit is more stringent than the limit in Tenaska's Draft Permit over all averaging times. The Plant Washington limit is a BACT limit and may not be disregarded because it is expressed as an efficiency requirement rather than a lb/MMBtu limit.

182: While Tenaska's filterable PM limit may be no less stringent than 0.010 lb/MMBtu, further analysis was required to determine whether an even more stringent limit is BACT.

238: SO₂ NAAQS also exist for a 1-hour averaging period.

245: "Tenaska nevertheless" language in this FOF implies that Tenaska was not required to demonstrate compliance with the 1-hour NO₂ NAAQS.

264, 357: The record contains no demonstration that emissions from the Trailblazer facility will not cause or contribute to a exceedance of the 1-hour SO₂ NAAQS.

352, 371: The Draft Permit fails to require monitoring sufficient to demonstrate ongoing compliance with filterable PM limits. PM CEMS should be required.

For reasons summarized here, and briefed more fully above (or in briefing incorporated above), the following Conclusions of Law are in error and should be deleted or amended: 7, 10, 11, 13, 19, 20, 30, 31, 34, 43, 45, 48-53.

VI. CONCLUSION

As confirmed by the PFD, Tenaska has failed to carry its burden with respect to BACT and MACT. In light of this failure and for additional reasons described above and in Sierra Club's Closing Brief and Response Brief previously filed in this matter, Sierra Club respectfully requests that the Application be denied or remanded to the ED for further consideration. In addition, Sierra Club respectfully requests that the Commission grant such other and further relief for which Sierra Club and other Protestants show themselves justly entitled.

Respectfully Submitted,

ENVIRONMENTAL INTEGRITY PROJECT

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**ATTORNEY FOR PROTESTANT
SIERRA CLUB**

APPENDIX A

Tex. Atty. Gen. Op. OR2010-00590, 2010 WL 175571 (Tex.A.G.)

Office of the Attorney General
State of Texas

Informal Letter Ruling No.

OR2010

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00590

January 12, 2010

Mr. Robert Martinez
Environmental Law Division

Dear Mr. Martinez:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 367043 (TCEQ PIR No. 09.10.19.08).

The Texas Commission on Environmental Quality ("TCEQ") received a request for all confidential information regarding four specified permit numbers. You claim that the submitted information is excepted from disclosure under [section 552.101 of the Government Code](#). [FN1] You also explain that the submitted information may implicate the proprietary interests of a third party. Accordingly, you inform us, and provide documentation showing, that pursuant to [section 552.305 of the Government Code](#), TCEQ has notified Exxon Mobile Corporation ("Exxon") of the request and of its right to submit arguments to this office explaining why its information should not be released. See [Gov't Code § 552.305\(d\)](#); Open Records Decision No. 542 (1990) (statutory predecessor to [section 552.305](#) permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We have considered the exception you claim and reviewed the submitted representative sample of information. [FN2] We have also considered comments submitted by Exxon.

[Section 552.101 of the Government Code](#) excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." [Gov't Code § 552.101](#). This exception encompasses information made confidential by other statutes, including [section 382.041 of the Health and Safety Code](#), which provides in part that "a member, employee, or agent of [TCEQ] may not disclose information submitted to [TCEQ] relating to secret processes or methods of manufacture or production that is identified as confidential when submitted." [Health & Safety Code § 382.041\(a\)](#). This office has concluded that [section 382.041](#) protects information that is submitted to TCEQ if a *prima facie* case is established that the information constitutes a trade secret under the definition set forth in the Restatement of Torts and if the submitting party identified the information as being confidential when submitting it to TCEQ. See Open Records Decision No. 652 (1997). TCEQ and Exxon both state that Exxon marked the submitted documents as confidential when it provided them to TCEQ. [FN3] Thus, the submitted information is confidential under [section 382.041](#) to the extent that this information constitutes a trade secret. Because [section 552.110\(a\) of the Government Code](#) also protects trade secrets from disclosure, we will consider the submitted arguments under [section 382.041](#) together with the arguments under [section 552.110\(a\)](#).

*2 [Section 552.110 of the Government Code](#) protects the proprietary interests of private parties with respect to two types of information: (1) “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision” and (2) “commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.” [Gov’t Code § 552.110\(a\)-\(b\)](#).

The Texas Supreme Court has adopted the definition of a “trade secret” from section 757 of the Restatement of Torts, which holds a “trade secret” to be

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business... in that it is not simply information as to a single or ephemeral event in the conduct of the business.... A trade secret is a process or device for continuous use in the operation of the business.... [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

[Restatement of Torts § 757](#) cmt. b (1939); *see also* [Hyde Corp. v. Huffines](#), 314 S.W.2d 763, 776 (Tex. 1958). This office will accept a private person's claim for exception as valid under [section 552.110\(a\)](#) if the person establishes a *prima facie* case for the exception and no one submits an argument that rebuts the claim as a matter of law. [FN4] Open Records Decision No. 552 at 5-6 (1990). However, we cannot conclude that [section 552.110\(a\)](#) is applicable unless the party claiming this exception has shown that the information at issue meets the definition of a trade secret and has demonstrated the necessary factors to establish a trade secret claim. *See* Open Records Decision No. 402 (1983).

[Section 552.110\(b\)](#) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *See* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Based on Exxon's representations and our review of the information at issue, we agree that Exxon has established a *prima facie* case that the information we have marked constitutes trade secrets. However, Exxon has not established a *prima facie* case that any of the remaining submitted information constitutes a trade secret. *See* ORD 402. Furthermore, we find that Exxon has made only conclusory allegations that release of the remaining information at issue would cause the company substantial competitive injury, and has provided no specific factual or evidentiary showing to support such allegations. Accordingly, TCEQ must generally withhold the information we have marked under [section 382.041 of the Health & Safety Code](#) and [section 552.110 of the Government Code](#), but may not withhold any of the remaining information on the basis of these sections. We note, however, that, under the federal Clean Air Act, emission data must be made available to the public, even if the data otherwise qualifies as trade secret information. *See* [42 U.S.C. § 7414\(c\)](#). Thus, to the extent that any of the marked information constitutes emission data for the purposes of [section 7414\(c\) of title 42 of the United States Code](#), TCEQ must release such information in accordance with federal law.

*3 [Section 552.137 of the Government Code](#) excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). [FN5] *See* [Gov’t Code § 552.137\(a\)-\(c\)](#). TCEQ does not inform us that it has received consent to release the e-mail address at issue, and it does not appear that this e-mail address is of a type specifically excluded by [section 552.137\(c\)](#). Accordingly, TCEQ

must withhold the e-mail address we have marked under [section 552.137](#).

In summary, TCEQ must withhold the information we have marked under [section 382.041 of the Health & Safety Code](#) and [section 552.110\(a\) of the Government Code](#), but must release any such information that constitutes emission data for the purposes of [section 7414\(c\) of title 42 of the United States Code](#). TCEQ must also withhold the e-mail address we have marked under [section 552.137 of the Government Code](#). The remaining information must be released.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,
Sarah Casterline
Assistant Attorney General
Open Records Division

[FN1]. Although TCEQ also claims that the requested information is excepted from disclosure under section 552.305, we note that [section 552.305](#) is not an exception to disclosure; instead, it permits a governmental body to decline to release information for the purpose of requesting an attorney general decision if it believes that a person's privacy or property interests may be involved. See [Gov't Code § 552.305\(a\)](#); Open Records Decision No. 542 at 1-3 (1990) (discussing statutory predecessor).

[FN2]. We assume that the “representative sample” of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

[FN3]. We note that information is ordinarily not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. See [Indus. Found. v. Tex. Indus. Accident Bd., 540 S.W.2d 668, 677 \(Tex. 1976\)](#). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. See [Attorney General Opinion JM-672 \(1987\)](#); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the Act] cannot be compromised simply by its decision to enter into a contract.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to [Gov't Code § 552.110](#)).

[FN4]. The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

[Restatement of Torts § 757](#) cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

[\[FN5\]](#). The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987). We also note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under [section 552.137 of the Government Code](#), without the necessity of requesting an attorney general decision.

Tex. Atty. Gen. Op. OR2010-00590, 2010 WL 175571 (Tex.A.G.)
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