

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

July 1, 2014

Anne Idsal, General Counsel
Texas Commission on Environmental Quality
P.O. Box 13087
Austin Texas 78711-3087

VIA FACSIMILE NO. (512) 239-5533

Re: SOAH Docket No. 582-13-5205; TCEQ Docket No. 2013-1191-AIR; Application of Corpus Christi Liquefaction, LLC for Air Quality Permit Nos. 105710 and PSD-TX-1306 for the Construction of a New Natural Gas Liquefaction and Export Terminal with Regasification Capabilities

Dear Ms. Idsal:

On May 15, 2014, the Administrative Law Judges (ALJs) in this case issued their Proposal for Decision (PFD) and Proposed Order. On June 4, 2014, Corpus Christi Liquefaction (CCL), Sierra Club, and the Executive Director (ED) filed exceptions to the PFD, and CCL and the ED filed responses on June 16, 2014. The ALJs have reviewed the exceptions and responses and have set out their recommendations in this letter.

Exceptions Regarding Sierra Club's Party Status

Both CCL and the ED except to the ALJs' recommendations on whether Sierra Club had associational standing. Regarding Peter Davidson's status, the ED argues that there is no evidence in the record showing that Mr. Davidson meets the test for an affected person. Both the ED and CCL also contend that the PFD contains several findings of fact (FOF) and conclusions of law (COL) that are based on information that is outside of the record.¹ In addition, CCL characterizes the ALJs' analysis as erroneously creating a standard that standing is permanently established at the preliminary hearing.² Regarding Alvin Baker, CCL asserts that Sierra Club failed to show that he would be adversely affected by emissions from the proposed facility.³ Both CCL and the ED except to the findings and conclusions that allegedly indicate a hearing requestor could have a personal justiciable interest solely because he lives within the Radius of Impact (ROI) or because emissions from a project would exceed the Significant Impact Levels (SILs).⁴

¹ CCL Exceptions at 3; ED Exceptions at 1.

² CCL Exceptions at 3.

³ CCL Exceptions at 5.

⁴ CCL Exceptions at 6-7; ED Exceptions at 2.

The ED contends that there is no evidence in the record demonstrating that Mr. Davidson is an affected person.⁵ However, the reason there is no evidence regarding Mr. Davidson is because neither CCL nor the ED objected at the August 15, 2013 preliminary hearing to Sierra Club's admission as a party based on Mr. Davidson's membership in the association.⁶ Even though Mr. Davidson was present at the August 15, 2013 preliminary hearing, no one challenged his affected person status or required Sierra Club to prove standing through the admission of evidence. Thus, CCL and the ED waived their right to challenge Mr. Davidson's status at the preliminary hearing and may not now complain about a lack of evidence regarding standing.

Furthermore, there is no evidence regarding any change in Mr. Davidson's affected person status since the preliminary hearing.⁷ In its exceptions, CCL listed several examples of changed circumstances that could impact whether an association continues to enjoy standing during the pendency of a proceeding. CCL also stated that "*as here, circumstances change[d] after the preliminary hearing.*"⁸ The only circumstance that could arguably have changed was that Mr. Davidson did not want to testify at the hearing on the merits, but the ALJs pointed out in the PFD that his testimony was not expected.⁹ Also, CCL did not cite to any evidence showing that changed circumstances had occurred to divest Mr. Davidson of his affected person status. There is no evidence that Mr. Davidson died, cancelled his Sierra Club membership, sold his property, moved out of town, or now supports the CCL Project. The ALJs pointed out in the PFD that Mr. Davidson's affected person status remained unchanged from the preliminary hearing,¹⁰ not that the issue was conclusively and irrevocably determined at that time, as CCL characterizes the ALJs' conclusions.¹¹ The ALJs agree that standing can be challenged after the preliminary hearing, but such challenges should be based on either changed circumstances or newly-discovered facts. Here, neither exists.

⁵ ED Exceptions at 1 ("There is no evidence in the record regarding whether Mr. Davidson is an affected person.").

⁶ Preliminary Hearing Tr. at 13-14.

⁷ PFD at 12, n.23 ("[T]here is no evidence in the record that Mr. Davidson is no longer a Sierra Club member or is no longer an affected person, as he was on August 15, 2013.").

⁸ CCL Exceptions at 3 (emphasis added).

⁹ PFD at 12.

¹⁰ The ALJs noted that Mr. Davidson was not a party and his participation at the evidentiary hearing was not required. PFD at 12. Then, "[t]he ALJs conclude[d] that because Mr. Davidson *remained a member of Sierra Club* and CCL acquiesced at the preliminary hearing that he was affected, Sierra Club did not lose its associational standing simply because Mr. Davidson did not wish to testify at the hearing on the merits." PFD at 13 (emphasis added).

¹¹ According to CCL, the "ALJs' assertion that standing is permanently established at the preliminary hearing is error." CCL also claims that COL Nos. 10 and 11 "suggest that associational standing is always conclusively and permanently established at the preliminary hearing." Further, CCL attributes a "once in, always in" quote to the ALJs. CCL Exceptions at 3. However, the ALJs did not make such a statement in the PFD or advocate that an affected person determination could not be revisited. Such a standard would be contrary to well-settled law regarding standing. *Texas Ass'n of Business v. Texas Air Control Bd.*, 852 S.W.2d 440, 445 (Tex. 1993) (Because standing is a component of subject matter jurisdiction, the issue can be raised at any time.); *see generally Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 263 Fed. App. 348 (4th Cir. 2008) (In federal Clean Water Act citizen suit, the association was required to show during the appeal of a district court judgment that it continued to meet the test for associational standing when a member of the association had died.).

Both the ED and CCL also complain that Mr. Davidson's affidavit should not form the basis for any FOFs because it is not in the evidentiary record.¹² The affidavit is a sworn document and is part of the pleadings filed in this case, but CCL and the ED are correct that the affidavit was not admitted into the evidentiary record. However, FOF No. 27 simply acknowledges the statements contained in a pleading filed in the case and does not make factual determinations regarding those statements. For this reason, the ALJs do not recommend the deletion of FOF No. 27 because it accurately summarizes the pleadings on file in the case and their content.

However, the ALJs do recommend that the Commission delete FOF Nos. 33 and 35 because these findings are based on inferences from CCL's and the ED's acquiescence to Sierra Club's party status based on Mr. Davidson's membership in the group, and not on evidence in the record. In the ALJs' opinion, FOF No. 25 is sufficient to show that Sierra Club was granted party status at the preliminary hearing because no party objected.

Regarding Mr. Baker's status as an affected person, the ALJs recommend that the Commission overrule CCL's and the ED's exceptions on that issue. CCL urges the application of the standards from *Sierra Club v. Texas Commission on Environmental Quality (Waste Control Specialists I)*¹³ and *Texas Commission on Environmental Quality v. Sierra Club (Waste Control Specialists II)*.¹⁴ CCL argues that *Waste Control Specialists I and II* require Sierra Club to produce evidence showing that the licensed facility would have more than a "minimal effect on [its member's] health, safety, use of property, and use of natural resources."¹⁵ As an initial matter, motions for rehearing are pending in both cases, and the court has yet to rule on the motions. The court will lose plenary power over the two cases 30 days after the court overrules the motions for rehearing.¹⁶ Therefore, as of the date of this letter, these two cases are currently subject to change by the court.

In addition, the court of appeals did not decide the *Waste Control Specialists I and II* cases until April 2014, after the evidentiary hearing ended on February 11, 2014, and after the evidentiary record closed on March 21, 2014. Therefore, if *Waste Control Specialists I and II* impose a new evidentiary burden on Sierra Club, Sierra Club has not had the opportunity to meet that new burden.

¹² CCL Exceptions at 3 (FOF Nos. 25, 27, 32, 35); ED Exceptions at 2 (FOF Nos. 32, 33, and 35).

¹³ No. 03-11-00102-CV, 2014 Tex. App. LEXIS 3661 (Tex. App.—Austin Apr. 4, 2014, n.w.h.). CCL refers to this case as *Sierra Club I*. Because the ALJs referred to other cases involving Sierra Club in the PFD's BACT analysis, the ALJs chose to refer to the two recent Texas cases in their PFD as *Waste Control Specialists I and II*, in reference to another party to those cases.

¹⁴ No. 03-12-00335-CV, 2014 Tex. App. LEXIS 4232 (Tex. App.—Austin Apr. 18, 2014, n.w.h.). CCL refers to this case as *Sierra Club II*.

¹⁵ CCL Exceptions at 5-6.

¹⁶ Tex. Rule App. P. 19.1(b).

CCL and the ED also except to the use of the ROI and the SILs to determine whether Mr. Baker is an affected person. The ALJs recommend that the Commission overrule those exceptions.¹⁷ Neither CCL nor the ED objected at the preliminary hearing when Sierra Club relied on the SIL exceedance as one factor to consider when determining whether Mr. Davidson was an affected person. At the preliminary hearing, Sierra Club stated that the modeling showed "a greater than de minimus impact from nitrogen oxide emissions at a distance as great, as almost eight miles from the site."¹⁸ Now, both the ED and CCL object to the ALJs' consideration of the same or similar SIL exceedance regarding Mr. Baker, although they did not object at the preliminary hearing when Sierra Club asserted that the SIL exceedance was a factor to consider regarding Mr. Davidson.¹⁹

Furthermore, the ALJs considered the ROI and the SIL as part of their analysis but did not base their recommendation solely on the fact that Mr. Baker lived and worked within the ROI or the fact that modeling indicated that the emissions from the project would exceed the SIL for nitrogen dioxide.²⁰ The ALJs recognized that exceeding an SIL only triggers a full impacts analysis, but considered the exceedance as just one factor in the affected person analysis.²¹

In sum, the ALJs recommend that the Commission delete FOF Nos. 33 and 35 and overrule CCL's and the ED's remaining exceptions regarding Mr. Davidson's and Mr. Baker's status as affected persons. CCL's and the ED's exceptions have not changed the ALJs' opinion that the PFD applied the correct standards to the affected person determination.²² If the Commission agrees with CCL that *Waste Control Specialists I and II* impose a new evidentiary burden on Sierra Club, then the ALJs recommend that the Commission remand the case to the State Office of Administrative Hearings to provide Sierra Club with the opportunity to present such evidence because it has not had the opportunity to meet this new burden.

¹⁷ CCL claims that "contrary to the PFD's suggestions, simply living or working within the [ROI] of a facility's NO₂ emissions *does not automatically confer* affected person status." CCL Exceptions at 6 (emphasis added). The ALJs did not suggest such an automatic standard in the PFD. In their analysis, the ALJs pointed out that Mr. Baker's affected person status is similar to Mr. Davidson's and that neither CCL nor the ED objected to Sierra Club's admission as a party based on Mr. Davidson's membership. The ALJs also distinguished Mr. Baker's interests from those of the general public and discussed how his "daily activities . . . elevate his interests from 'common' to 'personal.'" PFD at 13-14. The ALJs did not base their analysis solely on Mr. Baker's living and working within the ROI, as CCL suggests.

¹⁸ Preliminary Hearing Tr. at 13-14.

¹⁹ Sierra Club referred to the exceedance of the SIL for nitrogen oxide regarding Mr. Davidson. Preliminary Hearing Tr. at 13-14. Regarding Mr. Baker, Sierra Club referred to the SIL exceedance for nitrogen dioxide. Sierra Club Closing at 5.

²⁰ PFD at 13-14.

²¹ PFD at 13.

²² PFD at 14-18, relying on *United Copper Indus., Inc. v. Grissom*, 17 S.W.3d 797 (Tex. App.—Austin 2000, pet. dismissed) and *Heat Energy Advanced Tech. v. West Dallas Coalition for Env'tl. Justice*, 962 S.W.2d 288 (Tex. App.—Austin 1998, pet. denied).

Exceptions Regarding Best Available Control Technology (BACT)

Sierra Club excepted to the ALJs' BACT analysis for three reasons: (1) the exclusion of electrically-driven compression from the BACT analysis; (2) the conclusion that all evidence regarding electrically-driven compression was not relevant; and (3) the BACT for fugitive emissions should be 28LAER. The ALJs addressed Sierra Club's arguments in their PFD and will not restate that discussion here. The ALJs recommend that the Commission overrule those exceptions.

ED's and CCL's Exceptions

CCL and the ED suggested minor changes to the FOFs and COLs to make technical or grammatical corrections.²³ The ALJs agree with those suggested revisions and recommend that the Commission make those changes to the Proposed Order.

Summary

In response to the parties' exceptions, the ALJs recommend deletion of FOF Nos. 33 and 35. The ALJs also recommend the non-substantive changes proposed by CCL and the ED. Finally, the ALJs recommend that the FOFs be renumbered accordingly.

Sincerely,



Kerrie Jo Qualtrough
Administrative Law Judge

Tommy Broyles
Administrative Law Judge

KJQ/TB/vg
cc: Service List

²³ CCL Exceptions at 8-9 (changes to COL No. 30 and deletion of Ordering Provision No. 10); ED Exceptions at 2-4 (changes to FOF Nos. 43, 52, 54, 66, 100).

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REFERRING AGENCY CASE: 2013-1191-AIR

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