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June 4, 2014

Via E-Filing

Ms. Bridget Bohac
Chief Clerk (MC 105)
Texas Commission on Environmental Quality
P.O. Box 13087
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Re: TCEQ Docket No. 2013-1191-AIR; SOAH Docket No. 582-13-5205;
*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. Bohac:

Enclosed for filing in the above-referenced and numbered proceeding is Applicant
Corpus Christi Liquefaction, LLC's Brief and Exceptions to the Proposal for Decision and Order
of the State Office of Administrative Hearings.

If you have any questions concerning this filing, please do not hesitate to call.

Sincerely,



Derek R. McDonald

Enclosure

cc: Honorable Tommy L. Broyles (*Via E-Filing*)
Lisa Serrano (*Microsoft Word version via Email*)
David Frederick (*Via Email and U.S. mail*)
Nathan Matthews (*Via Email and U.S. mail*)
Booker Harrison (*Via Email and U.S. mail*)
Garrett Arthur (*Via Email*)

**SOAH DOCKET NO. 582-13-5205
TCEQ DOCKET NO. 2013-1191-AIR**

APPLICATION OF CORPUS CHRISTI	§	BEFORE THE STATE OFFICE
LIQUEFACTION, LLC FOR AIR	§	
QUALITY PERMIT NOS. 105710 AND	§	
PSD-TX-1306 FOR THE	§	
CONSTRUCTION OF A NEW	§	OF
NATURAL GAS LIQUEFACTION	§	
AND EXPORT TERMINAL WITH	§	
REGASIFICATION CAPABILITIES	§	
	§	ADMINISTRATIVE HEARINGS

**APPLICANT CORPUS CHRISTI LIQUEFACTION, LLC’S BRIEF AND EXCEPTIONS
TO THE PROPOSAL FOR DECISION AND ORDER
OF THE STATE OFFICE OF ADMINISTRATIVE HEARINGS**

TO THE HONORABLE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

Applicant Corpus Christi Liquefaction, LLC (“CCL”) respectfully urges the Commission to adopt the Proposed Order recommended by the Administrative Law Judges (“ALJs”) Tommy L. Broyles and Kerrie Jo Qualtrough subject to those few changes set forth in this brief and exceptions.

I. Introduction

This proceeding involves CCL’s application for a preconstruction air quality permit to construct a new natural gas liquefaction and export terminal, with regasification capabilities, near Gregory, Texas (the “CCL Project”). LNG export terminals, like the CCL Project, are considered critical to maintaining the United States’ competitive position against other LNG-exporting nations. The CCL Project enjoys significant support in the State and the local Coastal Bend community. Only the Sierra Club leadership, based out of San Francisco,

opposed the CCL Project based on its national Beyond Natural Gas campaign and general opposition to all LNG export facilities.

CCL appreciates the careful evaluation of the evidence and law in this case and welcomes the ALJs' favorable review and recommendation on those few disputed technical issues necessary for the approval of the application. The ALJs correctly determined by their proposed findings and conclusions that CCL's application complies with all applicable statutory and regulatory requirements and Permit Nos. 105710 and PSD-TX-1306 should be issued.

While CCL strongly supports the ALJs' recommendation on those issues required for approval of the application, CCL respectfully files this brief and exceptions to identify changes to the proposed findings and conclusions that CCL nevertheless believes are warranted. The ALJs' findings and conclusions on Sierra Club's party status in the hearing are incorrect in light of the last-minute withdrawal of Sierra Club's purportedly affected member and the recent rejection by the Third Court of Appeals of Sierra Club's liberal view of standing in contested cases. It is important that the Final Order of the Commission correctly articulate the evidence and law on Sierra Club's party status in light of these changed circumstances. In addition, CCL proposes two changes to correct minor typographical errors in the Proposed Order.

II. CCL Expects to Proposed Findings of Fact Nos. 25-36 and Conclusions of Law Nos. 6-13 relating to Sierra Club's Party Status.

The ALJs are correct that CCL did not contest Sierra Club's standing at the time of the preliminary hearing. That decision was made based on the anticipated testimony of one of Sierra Club's purported members, Peter Davidson, and on then unsettled law regarding standing in contested case hearings. As discussed below, following the preliminary hearing, both of these circumstances changed.

A. Sierra Club’s Affected Person Status Cannot Be Established through Facts Outside of the Evidentiary Record

“Findings of fact may be based only on the evidence and on matters that are officially noticed.” Tex. Gov’t Code § 2001.141(c). Here, however, Findings of Fact Nos. 25, 27, 32, 33, and 35 unquestionably rely on information outside of the record. Indeed, the ALJs openly acknowledge that most of what we know about Mr. Davidson is based on an affidavit that “is not part of the evidentiary record in this case.” PFD pg. 12 fn. 23. Yet, Findings of Fact Nos. 25, 27, 32, 33, and 35 still improperly rely on it. Because the ALJs did not properly apply Section 2001.141(c), these findings should be stricken from the Final Order. *See* Tex. Gov’t Code § 2001.058. At a minimum, if not stricken from the record, Finding of Fact No. 25 should be modified to reflect that Mr. Davidson’s purported membership in Sierra Club is based solely upon representations of counsel made at the preliminary hearing and not on evidence in the record.

B. ALJs’ assertion that standing is permanently established at preliminary hearing is error.

Proposed Conclusions of Law 10-11 suggest that associational standing is always conclusively and permanently established at the preliminary hearing. This runs counter to the fundamental principle that a party’s standing can be challenged at any time. *See Tex. Ass’n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 445-46 (Tex. 1993) (holding that “[s]tanding is implicit in the concept of subject matter jurisdiction [and] [s]ubject matter jurisdiction is never presumed and cannot be waived”).

The ALJ’s “once in, always in” standard also is not supported as a matter of sound policy. Such standard would deny a party the ability to challenge standing at the evidentiary hearing where, as here, circumstances change after the preliminary hearing. For

instance, if an association's witnesses admitted at an evidentiary hearing that they support the project and the project would have no adverse effects on them or the association's members, such admission would be fatal to that association's standing in the case. Likewise, if a group's party status was premised on a single member who subsequently moved out of state, and no other affected member could be substituted in that member's place, that group's party status would fail.

In addition, that the preliminary hearing is the sole opportunity to establish or contest standing runs contrary to SOAH's own orders in this case. The ALJs specifically acknowledged that CCL's challenge to Sierra Club's standing "may be re-urged at a later date if CCL is so moved after discovery and review of additional information about Sierra Club's additional witness(es)."¹ CCL timely did so.

Finally, Sierra Club itself disagrees with the ALJs' recommendation that standing need only be shown at the preliminary hearing. In this case, as in every contested case CCL's counsel has been involved in with Sierra Club, Sierra Club recognized that it was its burden to show standing at the evidentiary hearing. *See* 30 Tex. Admin. Code §§ 80.109(5) and 55.203(c). In this case, it designated multiple witnesses to testify on its standing and admitted that Mr. Davidson's withdrawal would have defeated Sierra Club's standing but for the last-minute addition of Mr. Baker. PFD at fn 19. By its actions, Sierra Club recognizes what Texas law supports: (1) standing is not permanent and can be lost if facts change; and (2) standing must be proven by evidence in the record.

¹ SOAH Order No. 5.

C. Sierra Club failed to show that Mr. Baker would be adversely affected by emissions from the proposed facility.

As shown by CCL's closing and reply briefs, Sierra Club never demonstrated that Mr. Baker would be adversely affected by emissions from the CCL Project, and thus, it failed to demonstrate that Mr. Baker was an "affected person" sufficient to confer standing.² See 30 Tex. Admin. Code § 55.203(c) (requiring a showing of a "reasonable relationship . . . between the interest claimed and the activity regulated"). Sierra Club adduced no evidence linking Mr. Baker's hay fever or fears of increased sneezing to any air emissions associated with the CCL Project. Sierra Club neither provided its own toxicologist nor established through the toxicologists for CCL or the ED that Mr. Baker's sneezing could be exacerbated by the emissions from the CCL Project. There is also no evidence that emissions of NO₂ are in any way linked with hay fever or sneezing.

Sierra Club's position in this case is akin to the position that it asserted in its recent cases seeking to overturn the decisions of the TCEQ denying its requests for party status in the licensing of the Waste Control Specialists facility: a mere showing of potential for harm without more is sufficient to confer party status. *Sierra Club v. TCEQ*, 2014 WL 1349014, No. 03-11-000102-CV at *2 (Apr. 14, 2014) ("*Sierra Club I*") (noting that Sierra Club claimed that radioactive material "will potentially affect [its member's] business and health" and that its member's water well was "potentially" connected to groundwater resources); see also *Sierra Club v. TCEQ*, 2014 WL 1584511, No. 03-12-00335-CV (Apr. 18, 2014) ("*Sierra Club II*") (holding same). Contrary to proposed Conclusions of Law No. 8 and 9, Sierra Club must show more than the mere potential for harm but must adduce information and evidence that the licensed facility will have more than a "minimal effect on [its member's] health, safety, use of

² CCL also reasserts its Motion to Strike Sierra Club's Party Status (Jan. 17, 2014) here to preserve error.

property, and use of natural resources.” *Sierra Club I* at *8 (citing to 30 Tex. Admin. Code § 55.256(c), which cites to the same factors as 30 Tex. Admin Code § 55.203(c), applicable in this case).³

In addition, contrary to the PFD’s suggestions, simply living or working within the Radius of Impact (“ROI”) of a facility’s NO₂ emissions does not automatically confer affected person status. *See* PFD 13, 17. Here, Sierra Club failed to provide sufficient evidence linking Mr. Baker’s purported harm to the NO₂ emissions from the CCL Project, as is required. Rather, Sierra Club’s theory regarding adverse impacts from NO₂ is based on its citation of a single page in a *Federal Register* notice. In that notice, however, EPA set the NO₂ National Ambient Air Quality Standards (“NAAQS”) at the level required “to protect the public health with an adequate margin of safety.” 75 Fed. Reg. 6474, 6495 (Feb. 9, 2010) (emphasis added). In fact, projected emissions from the CCL Project are below the applicable NAAQS and “would be in the category of air pollutants that would not be expected to cause *any* adverse health or welfare effects.” Applicant’s Ex. 700 at 2:6-8 (T. Dydek); 1 Tr. 100:23-25 (T. Dydek) (emphasis added). Therefore, CCL specifically objects to the PFD’s references to the lack of a threshold, or lack of evidence for a threshold, below which there are no adverse health effects for NO₂. PFD at 9, 13, 17.

³ Contrary to Conclusion of Law No. 8, this case is distinguishable from *Heat*. In *Heat*, the court looked at evidence that suggested that the facility had the potential to emit odors, evidence of the neighbor detecting odors from the facility, and evidence of the neighbor’s odor-related health problems to conclude that a neighbor could be affected. *Heat Energy Advanced Technology v. West Dallas Coal. for Env’tl. Justice*, 962 S.W.2d 288, 295 (Tex. App.—Austin, pet. denied). Sierra Club has provided no such evidence here. Conclusion of Law 8 should be stricken to the extent that it suggests that Sierra Club satisfied the standard in *Heat*. Conclusion of Law 9 should also be stricken to the extent it suggests Sierra Club satisfied the standard in *United Copper*. *United Copper Indus. Inc. v. Grissom*, 17 S.W.3d 797, 803 (Tex. App.—Austin 2000, pet. dism’d). The new standard, following *Sierra Club I and II*, controls here.

CCL similarly objects to Sierra Club’s justification for affected person status, adopted in the PFD, that “NO₂ concentrations will exceed the respective *de minimis* concentrations.” PFD at 9, 13, and 17. By extension, CCL objects to Finding of Fact Nos. 31, and 33 through 36 to the extent they imply that the modeled NO₂ concentrations correlate to the potential for adverse health impacts within the ROI. Significant Impact Levels (“SILs”) are not set at health-based levels. They are screening levels used for modeling. If projected emissions are greater than the applicable SILs, the applicant conducts full impacts modeling—which CCL did—to demonstrate that the NAAQS will not be exceeded.⁴ Executive Director’s Ex. ED-18 at 10 (Preliminary Determination Summary). In other words, the SILs and the full impacts analysis that CCL performed for NO₂ lead inevitably to the same conclusion: that the projected emissions of NO₂ will not exceed the NAAQS, which were set to protect the public health with an adequate margin of safety. *See* Applicant’s Ex. 500 at 26:18-24, 27:11-13 (M. Meister). Thus, it is inappropriate to cite the SILs as an apparent threshold for harm or to use the SILs to confer affected person status.

For the forgoing reasons, Findings of Fact Nos. 31 and 33 through 36, as well as Conclusions of Law Nos. 8, 9, 12, and 13 should be stricken in accordance with Texas Government Code § 2001.058.

D. CCL proposes substitute findings and conclusions in accordance with Texas Government Code Section 2001.058.

Instead of the findings identified above, CCL respectfully requests the addition of the following Findings of Fact, which were previously submitted with CCL’s Closing Brief, under the “Affected Person Status” section:

⁴ The ALJs acknowledge this distinction in the PFD but nonetheless seem to conclude that the ROI indicates an effect substantial enough to confer affected person status. PFD at 13.

25. The record contains no evidence of Mr. Davidson's affected person status.
26. Mr. Alvin Baker asserted that he lives 4.5 miles from the proposed facility. Mr. Baker claims that his property will be impacted if the facility is allowed to operate. 1 Tr. 117:24-118:1 (A. Baker).
27. Sierra Club failed to prove that Mr. Baker's property would be impacted by the operation of the CCL Project.
28. Mr. Baker asserted that he works one quarter mile from the proposed facility. He asserts that he suffers from hay fever and is afraid that, if the terminal is allowed to operate, his sneezing will worsen. Sierra Club's Ex. 100 at 1:18-20, 4:3-4 (A. Baker).
29. Sierra Club did not offer or elicit testimony from any witness showing how the operation of the CCL Project would affect Mr. Baker's hay fever or sneezing.
30. Mr. Baker would not be adversely affected by the CCL Project in a way not common to a member of the general public.

CCL also respectfully requests the addition of the following Conclusions of Law:

8. *Sierra Club I and II* recognize that Sierra Club must show more than the mere potential for harm but must adduce information and evidence that the licensed facility will have more than a "minimal effect on [its member's] health, safety, use of property, and use of natural resources." *Sierra Club I* at *8.
9. Based on Finding of Fact Nos. 25-30, Sierra Club failed to meet its burden of proof to show that Mr. Baker will be adversely affected by the CCL Project in a manner that is not "common to members of the general public." 30 TEX. ADMIN. CODE § 55.203(a).
10. Because Sierra Club failed to prove that Mr. Baker was an affected person, Mr. Baker lacks standing to challenge CCL's permit. *See* 30 TEX. ADMIN. CODE § 55.203(a). Further, because Sierra Club's standing depends upon proof of an affected member, Sierra Club also lacks standing.

III. CCL requests certain other technical modifications to the order

As noted in the PFD, the Order contains findings and conclusions that are supported by the evidence in the record and clearly demonstrate that CCL's application complies with applicable legal standards. PFD at 43. CCL, however, respectfully urges that the following technical corrections be made to the Order, in accordance with Texas Government Code § 2001.058(e)(3):

1. In Conclusion on Law 30, change “may” to “should be able to” to track the language in EPA’s 1990 Draft NSR Guidance, cited by the ED in its Exhibit ED-5 at B-11.
2. Delete Ordering Provision No. 6 as duplicative of Ordering Provision No. 10.

IV. Conclusion

Applicant Corpus Christi Liquefaction, LLC respectfully requests that the Commission approve its application for the CCL Project, issue Permit Nos. 105710 and PSD-TX-1306 with the changes proposed by the ALJs, and make those few changes to the proposed Order for the reasons described above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing Applicant Corpus Christi Liquefaction, LLC's Brief and Exceptions to the Proposal for Decision and Order of the State Office of Administrative Hearings on the following via email, hand delivery, and/or U.S. mail on this 4th day of June, 2014.

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