

D-1-GN-22-002478

CAUSE NO. _____

SIERRA CLUB,)	IN THE DISTRICT COURT
Plaintiff,)	
)	
v.)	250TH, DISTRICT COURT
)	___ JUDICIAL DISTRICT
TEXAS COMMISSION ON)	
ENVIRONMENTAL QUALITY,)	
TOBY BAKER, in his official)	
capacity as Executive Director,)	
Defendants.)	TRAVIS COUNTY, TEXAS

PLAINTIFF’S ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES, NOW, Sierra Club and files this appeal of the Texas Commission on Environmental Quality’s (“TCEQ” or “Commission”) and/or the Executive Director’s Extension of Start of Construction issued on April 26, 2022 in reference to Permit Nos. 139479, PSDTX1496, and GHGPSDTX157. (Hereinafter referred to as the “Commission Decision”.) This order, decision, or other act of the Defendants authorized applicant Corpus Christi Liquefaction Stage III, LLC (“Corpus Christi Stage III”) to commence construction under its prevention of significant deterioration permit on December 28, 2023 rather than the previously authorized construction deadline of June 28, 2022. In taking this action, Defendants did not provide public notice or the opportunity for comment or any administrative remedy. Accordingly, this action is final and appealable under Texas Health & Safety Code section 382.032(a). Plaintiff now timely files this petition.

SUMMARY OF THE CASE

1. On April 26, 2022, Defendants improperly extended Corpus Christi Stage III's deadline to commence construction under its prevention of significant deterioration air permit. The issues with the decision are myriad. While the Commission's rules and regulations require a substantive analysis of whether the facility that is the subject to construction extension request would comply with all applicable air permitting requirements, Defendants performed no such analysis here. Additionally, the Commission's rules and regulations only allow third extensions to a permit's construction deadline in limited circumstances. But here, Defendants decided to extend the permit at issue for the third time but failed to satisfy the conditions under which third extensions are proper. Accordingly, Defendants' action here was invalid, arbitrary, and/or unreasonable.

DISCOVERY

2. This case is an appeal of an action of an administrative agency. But unlike most such appeals, this case does not include a formal record developed through a contested case hearing. The case should be controlled by a Level 3 discovery order tailored to the unique circumstances of the case.

JURISDICTION AND VENUE

3. Jurisdiction of this action lies in this district court pursuant to section 382.032(a) of the Texas Health & Safety Code. This case is an appeal from a ruling, order, or other act of the Executive Director and an appeal to the Commission was

not provided. Therefore, persons, such as Plaintiff, that are affected by the ruling, order, or other act are entitled to judicial review under the Texas Clean Air Act.¹ Venue is proper under section 382.032 of the Texas Health & Safety Code.

STANDARD OF REVIEW

4. The standard of review is whether the action is invalid, arbitrary, or unreasonable. Tex. Health & Safety Code § 382.032(e).

PARTIES

5. The Sierra Club is a national non-profit environmental membership organization with thousands of members in the State of Texas. In addition to protecting every person's right to get outdoors and access the healing power of nature, the Sierra Club works to promote clean energy, safeguard the health of communities, and protect public lands, air, water and wildlife through grassroots activism, public education, lobbying, and legal action. This includes Sierra Club's Beyond Dirty Fuels Campaign, which *inter alia* seeks to halt or minimize the adverse impacts of LNG liquefaction plants and export terminals on the climate, surrounding communities, and the environment.

6. Sierra Club has members that are or will be impacted by the action under review. They experience adverse impacts from the existing Cheniere Corpus Christi facility and will experience injury in fact from Stage III's construction and operation, including increased air emissions; and their injuries will be redressed by

¹ Out of an abundance of caution, pursuant to 30 Tex. Admin Code §55.201 Plaintiff filed a Request for Reconsideration or Contested Case Hearing on the April 26, 2022 decision with TCEQ on May 26, 2022, before this Petition.

the relief sought herein. Sierra Club members are also adversely impacted by the lack of public notice and opportunity for comment and public participation described herein.

7. Defendant Texas Commission on Environmental Quality is an agency of the State of Texas responsible for, among other things, implementation of certain laws in Texas, including the Texas Clean Air Act, Ch. 382 of the Texas Health & Safety Code. Service on TCEQ may be obtained via service with citation on its Executive Director at 12100 Park 35 Circle Building F, Austin, Texas 78753.

8. Defendant Toby Baker is the Executive Director of TCEQ. The April 26, 2022 extension of the permit was taken under authority delegated by the Executive Director of the TCEQ. Service on Toby Baker may also be obtained via service with citation at 1200 Park 35 Circle Building F, Austin, Texas 78753.

LEGAL BACKGROUND

Requirements for Extending Prevention of Significant Deterioration

Permits

9. Texas Prevention of Significant Deterioration (“PSD”) Permits are one of several kinds of air permits issued in Texas. They require that permit holders commence construction of permitted activities within 18 months of issuance. 30 TAC § 116.120(a)(1). If the permit holder fails to do so, the permit is automatically void. 30 TAC § 116.120(a).

10. This deadline to commence construction can be extended for the first time for a period of 18 months “solely at the request of the permit holder.” 30 TAC §

116.120(b). Then “[o]ne additional extension of up to 18 months may be granted if the permit holder demonstrates that emissions from the facility will comply with all rules and regulations of the commission and the intent of the TCAA, including protection of the public’s health and physical property” and one of two circumstances exist: “(1) the permit holder is a party to litigation not of the permit holder’s initiation regarding the issuance of the permit: or (2) the permit holder has spent, or committed to spend, at least 10% of the estimated total cost of the project up to a maximum of \$5 million.” *Id.* Where a permit holder is granted a second extension due to litigation, the permit holder can receive a third extension if it satisfies the conditions of the second ground—the permit holder has spent, or committed to spend, at least 10% of the estimated total cost of the project up to a maximum of \$5 million. 30 TAC § 116.120(c).

Rules, Regulations, and the Intent of the Texas Clean Air Act

11. At the threshold, the Texas Clean Air Act incorporates federal Clean Air Act requirements for the permitting of major sources of air pollution in Texas. *See e.g.*, 30 TAC §§ 101.21, 116.160(c)(1)(A), 116.160(c)(2). Accordingly, the applicable law here is comprised of both Texas and federal requirements and standards.

12. The project at issue here is subject to numerous such requirements and standards. For example, the Commission’s rules and regulations require permit holders to demonstrate that the operations of a facility will not cause or contribute to an exceedance of the National Ambient Air Quality Standards (“NAAQS”) or PSD

Increments established by the Environmental Protection Agency (“EPA”).² See 30 TAC §§ 101.21, 116.160(c)(2) (Texas Clean Air Act incorporating the federal Clean Air Act’s NAAQS and EPA’s PSD air quality regulations, including the NAAQS and PSD Increments). Additionally, permit holders must demonstrate that Best Available Control Technology (“BACT”) is implemented pursuant to the federal Clean Air Act.³ See 30 TAC §§ 116.111(a)(2)(c), 116.160(c)(1)(A); 40 C.F.R. § 52.21(b)(12).

13. To demonstrate that operations will not cause or contribute to an exceedance of the applicable NAAQS or PSD Increments, an air quality analysis must be performed. Permit holders must show:

that allowable emission increases from the proposed source or modification, in conjunction with all other applicable emissions increases or reductions, including secondary emissions, would not cause or contribute to air pollution in violation of:

- i. any national ambient air quality standard in any air quality control region; or
- ii. any applicable maximum allowable increase over the baseline concentration in any area.

42 U.S.C. § 7475(a)(3).

14. BACT is defined as:

² NAAQS are standards promulgated by EPA for six types of air pollutants, commonly called criteria pollutants. NAAQS concern the amount of these criteria pollutants in the ambient air in a certain area. PSD Increments are limits on individual facilities so that facilities in areas that are in compliance with the NAAQS do not improperly push the amount of criteria pollutants to close to or over the applicable NAAQS.

³ BACT standards are technologically based emissions limits that are placed on each emission unit at a facility. In essence, each emission unit at a facility (e.g. a flare) must only emit pollutants at a level commensurate with the emissions of that unit fitted with the best available pollution control technology.

An air pollution method for a new or modified facility that through experience and research, has proven to be operational, obtainable, and capable of reducing or eliminating emissions from the facility, and is considered technically practical and economically reasonable for the facility. The emissions reduction can be achieved through technology such as the use of add-on control equipment or by enforceable changes in production processes, systems, methods, or work practice.

30 TAC § 116.10(1). Because the BACT method is based, *inter alia*, on the existence of pollution control technologies, their feasibility, and their cost, BACT changes over time as new technology is invented and as existing technologies become feasible and less costly.

15. In Texas, BACT is evaluated under the state’s “three-tiered” BACT evaluation approach. The methodology promulgated by the EPA is known as the “top-down” approach.⁴ However, because the EPA must approve the states’ plans to implement the provisions of the Federal Clean Air Act, TCEQ’s three-tiered BACT methodology has received approval from the EPA, based in part on the expectation that BACT analysis under the three-tiered approach would reach the same conclusions as would be reached using the top-down approach.

16. Under the three-tiered analysis, each analysis starts at Tier I and progresses to Tiers II and III only if necessary. However, each tier requires what TCEQ terms a “step-by-step progression” in order to identify BACT. Even if a BACT analysis

⁴ EPA’s expectation and TCEQ’s assertion is that both of these methods will reach the same conclusion, *i.e.*, point the applicant to the same emissions control standards. EPA’s approach is a five-step process: (1) all potential control options for an emissions source are identified; (2) technically infeasible options are thrown out; (3) the remaining options are ranked; (4) the list is culled again to eliminate control options that present significant collateral impacts; and (5) select the remaining best available control technology—whichever control occupies the number one spot on the rankings list.

never progresses past Tier I, the BACT evaluation should have progressed through the following three steps: (1) a review of proposed emission reduction options; (2) a review of five performance elements for whichever BACT is selected at step 1; and (3) a case-by-case Tier I BACT analysis, which includes comparing “the overall emission reduction performance level of a BACT proposal [to] the emission reduction performance levels that have been previously accepted as BACT in recent reviews for the same industry.” See TCEQ’s Air Permit Reviewer Reference Guide, APDG 6110, *How to Conduct a Pollution Control Evaluation*. A BACT analysis is “incomplete” if the permit holder or permit reviewer fails “to consider all potentially applicable control alternatives.” *Id.*

FACTUAL BACKGROUND

Improper Decision to Extend Deadline to Commence Construction

17. The Commission first issued a permit for stage 3 in 2017; and under that permit construction of the project had to be commenced within 18 months, i.e., by August 14, 2018. However, the permit holder failed to commence construction by this date and requested an extension. The Commission issued an extension on February 28, 2018, requiring the developer to commence construction by February 14, 2020 (The “First Extension.”). The developer, then applied for an amendment to the permit, which was issued on June 28, 2019, further extending the deadline to commence construction until December 28, 2020 (The “Second Extension.”) The developer also failed to meet that deadline to commence construction and instead

requested yet another extension, which the Commission once again granted, this time extending the deadline to June 28, 2022 (The “Third Extension.”).

18. On April 26, 2022 the Director extended the deadline to December 28, 2023. (The “Fourth Extension.”) However, 30 Tex. Admin. Code § 116.120 only provides for three extensions, and then only under limited circumstances. The April 26, 2022 Decision is without statutory or regulatory authority and was *ultra vires*.

19. Defendants issued no public notices and did not provide any opportunities to comment or any recourse through any administrative remedies related to the April 26, 2022 extension approval.

20. In considering Corpus Christi Stage III’s 2022 request for an extension, Defendants issued a Permit Alternative Source Analysis and Technical Review dated April 18, 2022 (hereafter the “technical review”.) The only relevant air permitting consideration referenced in the technical review is the BACT requirements. However, Defendants did not perform a substantive BACT analysis. Instead, Defendants merely included the following conclusory statement, “[t]here have been no new control techniques developed since issuance of the associated amendment on June 28, 2019,” and summarized the previously determined BACT. On this basis, Defendants decided to extend Corpus Christi Stage III’s deadline to commence construction. This statement, however, did not constitute the requisite BACT analysis.

21. In addition, to the extent Defendants suggested that Corpus Christi Stage III BACT is proper, it is substantively wrong. The BACT summary in the technical

review does not accurately reflect BACT in numerous respects, including for hot-oil furnaces, thermal oxidizers, flares, and fugitive components.

22. Defendants also did not include any reference or analysis related to whether Corpus Christi Stage III would comply with the NAAQS and/or PSD Increment requirements.

CAUSES OF ACTION

COUNT ONE

23. Paragraphs 1-22 are incorporated by reference herein.

24. Defendants' April 26, 2022 Extension of Start of Construction was invalid, arbitrary, or unreasonable because it violated the requirements of 30 TAC § 116.120(b), 30 TAC § 116.120(c), the Commission's rules and regulations implementing the Texas Clean Air Act and federal Clean Air Act, and the intent of the Texas Clean Air Act. These violations include, *inter alia*, a lack of BACT analysis or deficient BACT analysis, a failure to consider any other application requirement (*e.g.* a failure to analyze whether the project would violated any NAAQS or PSD Increments), and improperly extending the construction start date for the permit.

25. The Technical Review and April 26, 2022 Commission Decision are deficient for several reasons. First, Defendants did not actually perform any substantive analysis and, instead, only provided a conclusory statement. Second, even if the conclusory statement were sufficient (it is not), Defendants' statement ignores the possibility that pollution control technology already in existence became less costly,

feasible, or otherwise practicable. Third, Defendants' BACT determinations are substantively incorrect.

26. The omission of all applicable non-BACT analyses of other PSD permitting considerations violates 30 TAC § 116.120(b).

27. The April 26, 2022 extension was further unlawful because:

- a) It constituted a fourth extension, contrary to 30 TAC § 116.120; and/or
- b) If considered a third extension, it does not satisfy the criteria of 30 TAC § 116.120(c), as the previous extension was not issued under 30 TAC § 116.120(b)(1).
- c) If considered a second extension, it does not satisfy the criteria of 30 TAC § 116.120(b) because the permit holder did not demonstrate that emissions from the facility will comply with all rules and regulations of the commission, the intent of the Texas Clean Air Act, and that they are protective of the public's health and physical property.

PRAYER

THEREFORE, for the reasons stated above, Plaintiff requests:

- a) the Court find that Defendants' April 26, 2022 Extension of Start of Construction was invalid, arbitrary, and/or unreasonable; in violation of statutory provisions; the result of unlawful procedure; based on errors of law; or supported by insubstantial evidence of material facts; and

- b) that the Court vacate, void, reverse or otherwise invalidate Defendants' April 26, 2022 Extension of Start of Construction and remand for further proceedings; and
- c) the Court provide any additional relief to which Plaintiff is entitled.

Respectfully Submitted,

/s/ Thomas Gosselin

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