

ACCEPTED
03-12-00552-CV
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THIRD COURT OF APPEALS
AUSTIN, TEXAS
13 August 6 P2:44
Jeffrey D. Kyle
CLERK

No. 03-12-00552-CV

IN THE COURT OF APPEALS
FOR THE THIRD DISTRICT OF TEXAS
AUSTIN, TEXAS

FILED IN
3rd COURT OF APPEALS
AUSTIN, TEXAS
8/6/2013 2:44:15 PM
JEFFREY D. KYLE
Clerk

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY and
LAS BRISAS ENERGY CENTER, LLC,
Appellants/Cross-Appellees,

v.

ENVIRONMENTAL DEFENSE FUND, INC. and
TEXAS CLEAN AIR CITIES COALITION,
Appellees/Cross-Appellants,

and

SIERRA CLUB and CLEAN ECONOMY COALITION,
Appellees.

TCEQ'S MOTION TO DISMISS AS MOOT

TO THE HONORABLE THIRD COURT OF APPEALS:

Appellant Texas Commission on Environmental Quality (TCEQ) moves to dismiss this case as moot pursuant to Texas Rule of Appellate Procedure 42.3(a).

This case is an administrative appeal challenging a TCEQ order issuing air emission permits to Las Brisas Energy Center, LLC (Las Brisas) for a new power plant. The district court found error in the TCEQ's order and set it aside. The TCEQ and Las Brisas appealed from the district court's judgment. After all parties to this

judicial appeal had filed initial briefs with this Court, it began to appear that Las Brisas's power plant project might not go forward. Then, on July 26, 2013, Las Brisas moved to dismiss its appeal, saying its parent company had resolved to liquidate its assets, including Las Brisas, and was engaged in the orderly windup of its affairs. Las Brisas indicated there was a low and diminishing likelihood that the Las Brisas power plant project—for which the permit was issued—could be sustained.

The final nail was put in the coffin on July 29—when Las Brisas submitted a letter to the TCEQ asking the agency to void the air permits for the power plant project.¹ The TCEQ promptly voided the permits.²

Since Las Brisas no longer has the challenged permits and the power plant will not be built, no live case or controversy remains. The TCEQ asks that the appeal be dismissed as moot and the lower court judgment be vacated and set aside.

ARGUMENT

Dismissal under TRAP 42.3(a) is appropriate when an appeal is subject to dismissal for want of jurisdiction. For a court to have subject-matter jurisdiction,

¹ The permits were State Air Quality Permit No. 85013, Hazardous Air Pollutant Major Source Permit No. HAP48, and Prevention of Significant Deterioration Permit No. PSD-TX-1138. Las Brisas's request for the permits to be voided is Exhibit A hereto.

² The TCEQ's July 29, 2013 letter saying the permits had been voided is Exhibit B hereto.

there must be a live controversy between the parties.³ The controversy must be present not only at the inception of the suit, but at every stage thereafter, including appeal.⁴ If a justiciable controversy between the parties ceases to exist either because the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome, the case is moot.⁵

Appellate courts are prohibited from deciding moot controversies or issuing abstract advisory opinions.⁶ Case law is unequivocal that when a case becomes moot on appeal, an appellate court must vacate any trial court order or judgment and dismiss the case.⁷ “To dismiss the appeal only would have the effect of affirming the judgment of the lower court without considering any assignments of error thereto.”⁸

Las Brisas’s request for TCEQ to void the permits and the TCEQ’s ministerial voiding of the permits thereafter ended the controversy and caused this case to

³ *Valley Baptist Med. Ctr. v. Gonzales*, 33 S.W. 3d 821, 822 (Tex. 2000).

⁴ *Williams v. Lara*, 52 S.W.3d 171, 184 (Tex. 2001).

⁵ *Id.*

⁶ *Texas Ass’n of Bus. v. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993); *Texas Parks & Wildlife Dep’t v. Texas Ass’n of Bass Clubs*, 622 S.W.2d 594, 596 (Tex. App.—Austin 1981, writ ref’d n.r.e.).

⁷ *Texas Foundries, Inc. v. Int’l Moulders & Foundry Workers’ Union*, 151 Tex. 239, 248 S.W. 2d 460, 461 (Tex. 1952); *see also Univ. Interscholastic League v. Buchanan*, 848 S.W.2d 298, 304 (Tex. App.—Austin 1993, no writ); *Texas Dep’t of Transp. v. Texas Weekly Advocate, et al.*, 2010 WL 323075 at *2 (Tex. App.—Austin 2010, no pet.) (mem. op.).

⁸ *Texas Weekly Advocate*, 2010 WL 323075 at *2 (quoting *Texas Foundries*).

become moot. Thus, any judgment in this case could not have a practical legal effect.

CONCLUSION

Since this case no longer presents a live case or controversy and is moot, the lower court's judgment should be vacated and this appeal dismissed as moot.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant Attorney General

JOHN B SCOTT
Deputy Attorney General for Civil Litigation

JON NIERMANN
Chief, Environmental Protection Division

/s/ Cynthia Woelk _____

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ATTORNEYS FOR TEXAS COMMISSION
ON ENVIRONMENTAL QUALITY

CERTIFICATE OF CONFERENCE

Pursuant to TRAP 10.1(a)(5), the undersigned conferred or attempted to confer with counsel for all other parties by e-mail sent July 30, 2013. Counsel for Las Brisas Energy Center, LLC responded and said he does not oppose this motion. Counsel for Sierra Club responded that he does not oppose dismissal but “disagree[s] with the rest of [the] motion and brief.” Counsel for Texas Clean Air Cities Coalition and Environmental Defense Fund said that they do not join the motion or endorse its specific language but do not oppose the motion to dismiss. Counsel for Clean Economy Coalition did not respond.

/s/ Cynthia Woelk

CYNTHIA WOELK

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing motion to dismiss as moot has been served on the persons listed below via certified mail, return receipt requested, on August 6, 2013. In addition, courtesy copies will be sent by e-mail to counsel on the same day.

/s/ Cynthia Woelk

CYNTHIA WOELK

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July 29, 2013

By E-mail and U.S. First Class Mail

Mr. Mike Wilson, P.E.
Director
Air Permits Division
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, TX 78711-3087

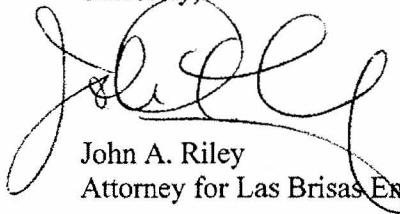
Re: Las Brisas Energy Center LLC, CN603358771
Las Brisas Energy Center, RN105520779
State Air Quality Permit No. 85013, Hazardous Air Pollutant Major Source
Permit No. HAP48, and Prevention of Significant Deterioration Permit No.
PSD-TX-1138

Dear Mr. Wilson:

The Texas Commission on Environmental Quality ("TCEQ") issued the above-referenced permits to Las Brisas Energy Center LLC ("Las Brisas"). For a number of reasons, Las Brisas has determined that plans to go forward with construction of the Las Brisas Energy Center are no longer viable. Consequently, Las Brisas respectfully requests that the TCEQ void the above-referenced permits.

If you have any questions or require additional information, please do not hesitate to contact me at (512) 542-2108.

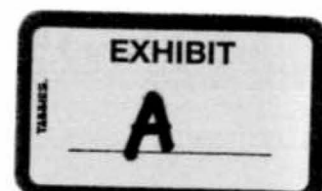
Sincerely,



John A. Riley
Attorney for Las Brisas Energy Center LLC

c: Booker Harrison, Senior Air Attorney [by E-mail]

#4343302.1



Bryan W. Shaw, Ph.D., *Chairman*
Carlos Rubinstein, *Commissioner*
Toby Baker, *Commissioner*
Zak Covar, *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

July 29, 2013

MR JOHN A RILEY
ATTORNEY FOR LAS BRISAS ENERGY CENTER LLC
BRACEWELL & GIULIANI LLP
111 CONGRESS AVE STE 2300
AUSTIN TX 78701

Re: Cancellation of Air Quality Permit Numbers: 85013, PSDTX1138, HAP48
Customer Number: CN603358771
Regulated Entity Number: RN105520779

Dear Mr. Riley:

We are in receipt of your letter received July 29, 2013, regarding the facility listed above. We understand that construction of the Las Brisas Energy Center has been permanently discontinued. Accordingly, Permit Numbers 85013, PSDTX1138, HAP48 have been voided and our records have been updated to reflect these changes.

Permit Number: 85013, PSDTX1138, HAP48
County: Nueces
Permittee/Registrant: Las Brisas Energy Center LLC

Thank you for informing us of the cancellation. If you have any questions regarding this letter, please feel free to contact me at (512) 239-1311.

Sincerely,

A handwritten signature in cursive script that reads "Toni Oyler".

Toni Oyler
Air Permits Initial Review Team (MC-161)
Air Permits Division

cc: Air Section Manager, Region 14 - Corpus Christi
TCEQ Central Records (MC-198)

