



**June 6, 2013**

**RE: TDX North Slope Generating, Inc. – Minor Permit AQ022MSS06  
Request for Adjudicatory Hearing under 18 AAC 15.200 and Request for Alternative  
Dispute Resolution per 18 AAC 15.205**

Dear Mr. Hartig:

Pursuant to 18 AAC 15.200, TDX North Slope Generating, Inc. (TNSG) requests an adjudicatory hearing with respect to Air Quality Control Minor Permit AQ0227MSS06 issued on February 13, 2013 the “Permit”. The Permit was the subject of a request for informal review and the Director of Air Quality issued her decision on May 7, 2013. A copy of the request for informal review of AQ0227MSS06 is attached as Exhibit A; a copy of TNSG’s response to the Director’s request for additional information is attached as Exhibit B; a copy of the Directors decision is attached as Exhibit C. TNSG requests an adjudicatory hearing only with respect to issue 3 as identified in Exhibit A.

Rather than process this appeal, TNSG requests that ADEC engage in alternative dispute resolution pursuant to 18 AAC 18.205 to stay the appeal proceedings related to whether TNSG’s North and South Plants are a single stationary source for purposes of minor air quality permitting and PSD review pending resolution of the Summit Petroleum and related litigation. TNSG is amenable to a reasonable duration of an agreement to stay the appeal proceeding.

Alternatively, TNSG seeks revisions to the Permit that authorize the installation of the turbines while reserving issues about aggregation to a later date. As described in more detail below, this was clearly the outcome sought by TNSG in its application. Instead, ADEC staff reiterated its position that the two plants had to be aggregated thus necessitating the Request for Informal Review and this Request for an Adjudicatory Hearing.

The following sections provide the information required by 18 AAC 15.200.

**Requestor's Name, Mailing Address, and Telephone Number - 18 AAC 15.200(a)(1)  
Names and Addresses of All Persons Adversely Affected by the Decision - 18 AAC 15.200(a)(2)**

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**Memorandum in Support of the Request for Adjudicatory Hearing - 18 AAC 15.200(a)(3)**

**Clear and Concise Factual Statement of the Nature and Scope of the Requestor's Interests and How and to What Extent Those Interests are Affected by the Decision.**

TNSG is a wholly owned subsidiary of TDX Power, Inc. which in turn is a wholly owned subsidiary of Tanadgusix Coporation, an Alaska Native Corporation. TNSG is a small utility that generates electricity under a certificate of necessity and public convenience for customers within the service area of Deadhorse, Alaska. TNSG has two facilities at Deadhorse: the North Plant and the South Plant. The North Plant houses two gas-fired combustion turbines and the South Plant houses a bank of gas-fired reciprocating internal combustion engines. The Permit was issued in conjunction with TNSG's plans to install two new combustion turbines at the North Plant. Located 300 miles north of the Arctic Circle, Deadhorse is the transportation and support center for the Prudhoe Bay oilfields and the Trans-Alaska Pipeline.

Whether the North and South Plants are considered a single stationary source of criteria air pollutants, rather than as two separate sources, has significant implications. If considered to be a single source, emissions from both plants are aggregated for comparison against regulatory and permitting thresholds. Such aggregation results in the applicability of current and potentially future air quality construction requirements that would not otherwise apply. These permitting requirements have and would impose restrictions on operations and result in significant additional costs and burdens that would not apply if the two plants were considered separate sources. In particular, the imposition of PSD permit obligations—compared to minor



construction permit obligations—due to aggregation would result in increased project lead times of one or more years. This is critical for planning and executing critical energy development on the North Slope.

These interests are clearly ones that the applicable statutes and regulations were intended to protect, as the Clean Air Act and its Alaska counterparts clearly provide that significant permitting obligations are imposed only on truly major sources, to insure that preservation of clean air is consistent with economic growth. See, Clean Air Act § 160(3), 42 USC § 7470(3).

The department's decision directly and substantively impairs that interest, because 1) TNSG has had to take limitations on its emissions to stay below PSD thresholds that it would otherwise not have to take if the two plants were considered separate stationary sources; and 2) TNSG's ability to add new generation in the future is hindered by the reduced thresholds for PSD permitting that would apply if the plants were together one major stationary source rather than one major stationary source (the North Plant) and a separate minor source (the South Plant).

#### **Statement of Issues of Material Fact and Questions of Law**

- 1. Whether it is reasonable to construe “located on one or more contiguous or adjacent properties” in 40 CFR 51.166(b)(6) (incorporated by reference by AS 46.14.990(26)) as allowing for a functional test for adjacency rather than limiting this phrase solely to physical or geographical parameters;**
- 2. Whether two utility plants 3.1 miles apart must be considered “adjacent;”**
- 3. Whether ADEC was arbitrary and capricious in determining that the North and South Plants were “adjacent.”**

#### **Hearing Time Estimated to be Necessary for the Adjudication;**

TNSG believes that settlement of the issues presented should occur without any hearing. Issue 1 above is a purely legal issue that can be resolved on briefing. If a hearing is required on issues 2 and 3 becomes necessary, one day should be adequate.

#### **This Request for Hearing Should be Granted Because of the Errors in the Permits and Because Informal Review Failed to Adequately Resolve the Issues**



The facts and arguments for disaggregation of the North and South Plants are provided in the Request for Informal Review, Exhibit A, Issue 3 at pages 6-9. In addition to the errors in the Permit described in the Request for Informal Review, there are several errors in the Director's decision on Informal Review that compound the need for an adjudicatory hearing.

For background and information, please understand that:

1. Both the North Plant and South Plant are "major sources" for purposes of the Title V air operating permit program, and thus both plants will have to have an air operating permit;
2. The North Plant is not presently a "major stationary source" for purposes of the PSD program, but with the installation of the two new turbines authorized by the Permit, it will become major for PSD; and
3. The South Plant by itself is not presently a "major stationary source" for purposes of the PSD program, and would not be PSD major but for the aggregation of the North and South Plants.

First, the Director, Ex. C at 3, erroneously asserts that TNSG waived and abandoned its rights to appeal the aggregation issues. The Director cites no legal authority to substantiate the claim of waiver, and relies upon assertions that are factually incorrect. ADEC's November 28, 2012 letter was simply a communication from permitting staff that it was intending to follow EPA guidance. It was not a final agency action on the issue of aggregation nor did it bind ADEC to any particular course of action. Indeed, the letter expressly states that the aggregation issue "will be processed" during the permitting action after consultation with EPA and leaves open the issue in light of possible EPA guidance. Even if this was final agency action that was appealable, TNSG is appealing the aggregation decision in the permit, not the letter. Moreover, if the letter was an appealable final agency action, the permits would have relied upon the letter rather than make a separate finding in the permitting process. AQ0227MSS06 Technical Analysis Report (TAR) at 3, ¶ 16. In no way can the letter be construed to constitute an appealable aggregation decision.

The Director also erroneously relied upon assertions by staff that the language included in section 1.1 of the TAR was specifically requested by TNSG in its comment number 53. The draft TAR included the following:

### **1.1 Stationary Source Description**

The DPP is an existing stationary source, owned and operated by TDX North Slope Generating, Inc. The DPP is located near the Deadhorse, AK Airport. The DPP also includes equipment that is located on property leased from Norgasco, Inc. The Norgasco

site is situated about three miles northeast of the airport site. TDX considers the Norgasco and Deadhorse sites as the DPP “North” and “South” Plants, respectively. The Department previously determined the North and South Plants to be a single stationary source (*i.e.*, the DPP stationary source).

TNSG’s comment was:

53. Page 4 Section 1.1 Stationary Source Description – Please amend the last sentence in this paragraph as indicated below. See comment for Condition 31 for an explanation and for additional language to add to this section of the TAR.

The Department previously determined the North and South Plants to be a single stationary source for Title I permit applicability (*i.e.*, the DPP stationary source). The Department has not made a final determination on whether the North and South Plants are aggregated for HAP applicability.

There is simply no way to construe TNSG’s comment as a request to abandon or waive the aggregation issue with respect to Title I, because the comment and suggested language merely reflects ADEC’s prior decision and clarifies that it was related to Title I only and not to Title III Hazardous Air Pollutant issues. Other contemporaneous statements and requests more specifically and expressly seek reconsideration and reversal of the prior aggregation decision. Staff cannot misconstrue a general comment and ignore a multitude of specific comments.

Second, the assertion that TNSG in its application “elected” to have the permit processed as one stationary source, Ex. C at 3, is directly contradicted by the language in TNSG minor application submitted August 29, 2012 under Section 8 – Project Description, on the face of the application:

In this application, NSG is presenting an analysis that demonstrates that even if the North and South Plants are aggregated a PSD review is not triggered. NSG contends that the North and South Plants are not aggregated for [Title I] applicability based upon the fact that the plants are not adjacent.

Moreover, the application included both Aggregated Emission Calculations in Attachment E (to support expedited permit processing despite the aggregation controversy) as well as emissions calculations for the North Plant only in Attachment F (which would not have been necessary but for the request for disaggregation). Until the Director’s decision on informal review, at no time did ADEC inform TNSG that it would need to submit separate applications in support of a disaggregation decision. Representatives of TNSG had a conference call with John Kuterbach on August 17, 2012 to discuss the exact issue whether one or two applications were necessary. Mr. Kuterbach agreed that TNSG could submit a single application, get the permit process

underway, and still preserve its rights to address the aggregation issue later. It is plain error to find that TNSG waived or abandoned its request for disaggregation.

Staff is correct that the cover letter to TNSG's application states that supplemental materials would be provided. This was simply a statement that TNSG would cooperate with ADEC to provide any additional information needed to disaggregate and was not a promise that such information was forthcoming. It was clearly TNSG's strategy to have ADEC issue a permit approving of the installation of the new turbines without delays due to resolution of the aggregation issue. TNSG's paramount concern was that resolution of the aggregation issue would delay the issuance of the Permit and interfere with timely installation of the new turbines within the short arctic construction window. Attachment F of the application in fact provided information showing that disaggregation would not result in application of major source permitting obligations. The cover letter otherwise provided all information necessary for issuing the permit while deferring the aggregation decision. It would be unfair and unreasonable for ADEC to consider a promise to cooperate as a waiver of significant appeal rights.

Third, the Director, Ex. C at 3, erroneously found that "the North and South plant units each individually reach the threshold for a major stationary source under the Department's regulations." As a result, she determined that no provisions in the permit would change if the North and South Plants remained a single source or were disaggregated into two separate sources for purposes of this permit, and therefore no prejudice occurred. First, the factual assertion is incorrect: considered individually the North plant has potential emissions that would make it a major stationary source for purposes of air quality construction permitting, but the South Plant does not. Moreover, the application itself espouses that no substantive provisions would change if the plants were aggregated or disaggregated, so the Director's statement in that regard is inconsequential. TNSG was willing to accept the PSD avoidance limits in this case regardless of the aggregation/disaggregation outcome.

Moreover, the Director's analysis has no bearing on the issue even if it were true. Even if the North and South Plants were each PSD major on their own, aggregation would still have significant regulatory and operational impacts. For instance, if aggregated, contemporaneous and common physical or operational changes at both plants could be subject to a single 40 ton NO<sub>x</sub> PSD permitting threshold, whereas if disaggregated, each plant would be enabled a 40 ton NO<sub>x</sub> increase for each separate project without triggering PSD. The fact of major source status and the aggregation outcome has significant *future* implications for PSD applicability regardless of whether the plants are major individually.

Lastly, the Director's analysis of the distance between the North and South plants relied upon examples from Illinois and Pennsylvania while ignoring that ADEC has made a contradictory decision with respect to other Alaska sources and in particular an Alaska utility with two plants about 5 miles apart. The Municipal Light and Power (ML&P) Plants One and Two should set precedent for disaggregation of the North and South Plants. The ML&P plants are under common control and have the same SIC code. They are not on contiguous properties. Therefore, ADEC must have made its decision not to aggregate these plants based on their adjacency. If 3.1 miles is adjacent, why is 5 miles not adjacent? TNSG should not be subject to more restrictive permitting requirements because the operation of the plants is small enough in scale to use the same operators at both locations, and because the rule does not allow for aggregation decisions to be made on operational staffing. ADEC is unreasonably and unlawfully imposing more strict and costly permitting requirements on TNSG compared to similarly situated facilities.

For these reasons, we respectfully request an adjudication or settlement of these issues.

Sincerely,



Mark Huber  
CEO Interim & CFO

Cc: Jolene Lekanof, Director of Business Systems  
Sabrina Wilbur, Director of Utility Operations  
Doug Morrison, Environmental Law Northwest  
Ann Mason, SLR  
Alice Edwards, ADEC  
Gary Mendivil, ADEC

Enclosures: Exhibit A: TNSG Request for Informal Review, dated February 2013  
Exhibit B: TNSG Response to Informal Request, dated April 19, 2013  
Exhibit C: ADEC Director Informal Decision, dated May 7, 2013



## Exhibit A



## Exhibit B



## Exhibit C