

What Turk Taught Us

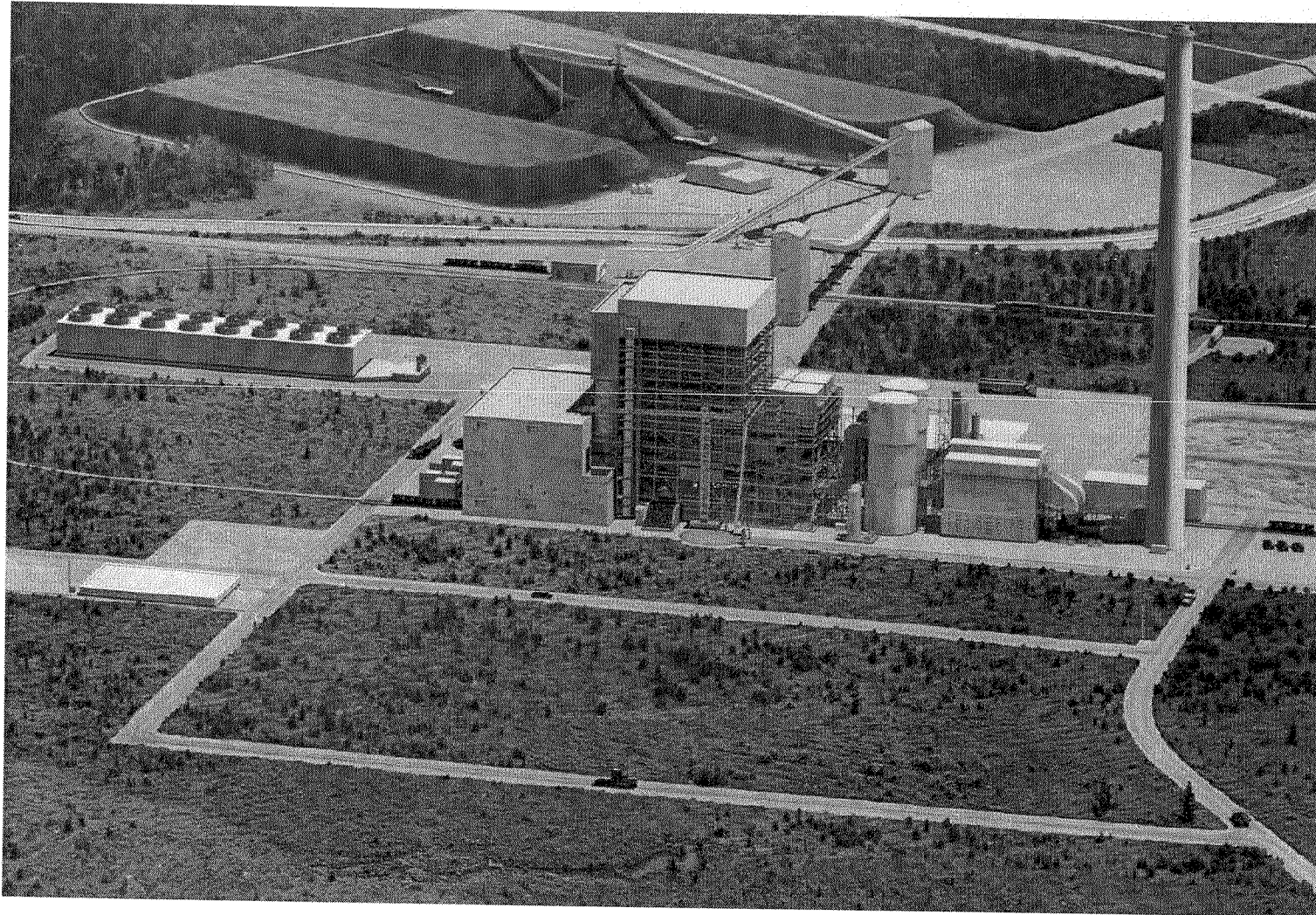
# A Retrospective on the Turk Plant Permit Appeals & Litigation

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# John W. Turk, Jr. Power Plant



# John W. Turk, Jr. Power Plant

“The last coal plant”

- Located near Fulton in Hempstead County, Arkansas
- SWEPCO owns 73%; several co-owners including AECC
- Approximately \$1.7 Billion
- Commenced construction in late 2008; Expect commercial operation in late 2012
  
- Baseload electric generating facility
- Nominally rated 600 megawatt (“MW”) net
- Ultra-supercritical pulverized coal boiler and related facilities
- Powering a single steam turbine
- Sub-bituminous coal from the Powder River Basin
  
- First ultra-supercritical facility in the U.S.

# Turk Major Environmental Permits

- **Air Permits:**
  - PSD / Title V Air / MACT Permit
  - Acid Rain Permit
  - CAIR Permit
- **Landfill Permit**
- **Water Permits:**
  - 401 Water Quality Certification from ADEQ
  - NDPES discharge Permit from ADEQ
  - Section 404 / Section 10 from Corps of Engineers
  - Construction & Industrial Activity Stormwater Permits
  - Wastewater State Construction Permit from ADEQ
  - Short Term Activity Authorizations

# Additional Approvals

- **“Major Utility Facility” (APSC):**
  - Plant - Certificate of Environmental Compatibility & Public Need (“CECPN”) or exemption
  - Transmission Lines (3) – CECPNs
- **Other APSC Approvals:**
  - Transmission Line Approval (smaller line) – Certificate of Public Need (“CCN”)
  - Substation CCN
- Levee Crossings
- Riparian water use registration
- Cultural resources review (as part of Corps permit)
- Hydrostatic Test water discharge permit
- State agency reviews of CECPN EIS
- County & State highway redesign approvals
- FAA Permit (Tall Structures)
- Texas & Louisiana approvals

# Turk's ACQS

- **NO<sub>x</sub> Control:**
  - low-NO<sub>x</sub> burners ("LNB")
  - over-fire air ("OFA")
  - selective catalytic reduction ("SCR")
- **Particulate Control:**
  - Pulse-jet fabric filter ("PJFF" or "baghouse")
  - Controls PM (filterable), PM10 (total), lead, and particulate hazardous air pollutants ("HAPs")
- **SO<sub>2</sub>:**
  - Dry Flue Gas Desulfurization ("Dry FGD")
  - Spray dryer absorber ("SDA") in combination with the PJFF
  - Designed to also remove sulfuric acid mist ("SAM"), hydrogen chloride ("HCl"), hydrogen fluoride, ("HF"), and mercury
- **Mercury:**
  - powdered halogenated activated carbon injection system ("ACI")
  - Combination with the PJFF
- **CO and VOCs:**
  - Proper design, operation and good combustion practices

# Turk Timeline

January 26, 2006	Request for declaration of need for additional power supply
June 6, 2006	APSC finds Need (06-024-U)
August 10, 2006	Clean Air Act - PSD Application submitted
December 6, 2006	Corps Permit Application submitted
December 8, 2006	CECPN Application submitted (06-154-U)
January 5, 2007	Landfill Pre-Application filed with ADEQ (Class 3N)
February 6, 2007	HCHC files "Initial Comments" in CECPN docket
March 19, 2007	HCHC files comments on 401 Certification application
May 25, 2007	ADEQ issues Draft Air Permit
Aug. 20 – Sept. 13, 2007	CECPN Hearing before APSC
September 7, 2007	HCHC, et al files Petition to Object to air permit with EPA
November 21, 2007	APSC grants CECPN (Order No. 11)
December 31, 2007	APSC amends CECPN (Order No. 13)

# Turk Timeline

February 4, 2008	HCHC, et al. file (amended) Notice of Appeal of CECPN
February 8, 2008	CAMR vacated by DC Court of Appeals
April 23, 2008	Programmatic Agreement (NHPA) executed
May 9, 2008	Preconstruction review case filed
July 10, 2008	Federal Judge denies TRO / PI in preconstruction case
July 28, 2008	Case by case MACT Application (final submittal)
September 19, 2008	Landfill Permit Application
November 5, 2008	ADEQ issues Permit No. 2123-AOP-RO; Turk Plant Construction commences
November 24, 2008	Sierra Club files Petition to Object with EPA
December 1 & 3, 2008	HCHC & Sierra Club file air permit appeals with PCE
December 5, 2008	PCE lifts automatic stay on Air Permit
January 12, 2009	HCHC requests Disclosure of PCE's Financial Interests
February 20, 2009	ADEQ issues 401 Water Quality Certification

# Turk Timeline Con't

March 6, 2009	Corps provides SWEPCO proposed 404 Permit
March 9, 2009	SWEPCO informs Corps of potential unpermitted impacts to jurisdictional waters
March 12, 2009	8th Circuit dismisses appeal of denial of TRO / PI in preconstruction review case
May 13, 2009	Oral Argument before Court of Appeals on CECPN appeal
June 1, 2009	Sierra Club (EIP) files suit against EPA for failure to act on Petition to Object
June 9 -18, 2009	Hearing before AHO O'Malley
June 24, 2009	Court of Appeals reverses CECPN
June 29, 2009	Petitions for Supreme Court review of COA CECPN decision
November 18, 2009	NPDES Permit application submitted to ADEQ
December 9, 2009	Recommended Decision affirming Air Permit
December 15, 2009	EPA objects to Air Permit re: IGCC

# Turk Timeline Con't

December 17, 2009	Corps Issues Section 404 / 10 permit
January 22, 2010	PCE adopts Recommended Decision affirming Air Permit
February 11, 2010	Sierra Club files appeal of Corps permit
February 17 & 19, 2010	Appeals of PCE decision filed with Hempstead County Circuit Court
March 12, 2010	ADEQ responds to EPA's objection
March 15, 2010	SWEPCO allowed to intervene in Corps permit appeal case
April 15, 2010	Oral Argument before Ark. Sup. Ct. (CECPN)
May 13, 2010	Ark. Supreme Court reverses & remands CECPN
May 24, 2010	SWEPCO files notice of exemption to CECPN
May 25, 2010	Corps permit appeal reassigned to J. Wilson
July 14, 2010	HCHC files appeal of Corps permit & state law claims
October 21, 2010	J. Wilson certifies questions to Ark. Supreme Court
October 27, 2010	J. Wilson issues Preliminary Injunction of Corps permit activities
October 28, 2010	Notice of appeal of PI filed with 8 <sup>th</sup> Circuit

# Turk Timeline Con't

November 11, 2010	Ark. Supreme Court accepts Certified Questions
November 19, 2010	Draft Landfill Permit issued
November 24, 2010	8 <sup>th</sup> Circuit grants motion for stay of PI
December 7, 2010	J. Wilson recuses citing 8 <sup>th</sup> Circuit stay of PI
December 20, 2010	Circuit Court affirms PCE on air permit 8 <sup>th</sup> Circuit reinstates PI of Corps permit
December 29, 2010	Judge Richard Kopf assigned to Corps permit appeal
January 11, 2011	Revised Landfill Permit submitted to ADEQ
January 13, 2011	Appeals of Circuit Court decision (air permit) filed with Court of Appeals
March 10, 2011	General Assembly passes HB 1895 (Act 910 of 2011)
March 15, 2011	Oral Argument before 8 <sup>th</sup> Circuit on PI
April 1, 2011	Act 910 of 2011 becomes law
April 20, 2011	Second Draft Landfill Permit issued

# Turk Timeline Con't

May 19, 2011	Oral Argument before Supreme Court on Certified Questions
May 26, 2011	Supreme Court answers Certified Questions
July 14, 2011	8 <sup>th</sup> Circuit affirms PI of Corps permit
July 15, 2011	Landfill Final Permit Issued
July 20, 2011	HCHC & SWEPCO settle
August 16, 2011	HCHC withdraws appeal (COA)
October 24, 2011	Final NPDES permit issued
October 25, 2011	Sierra Club files Petition to Require CECPN with APSC ("Dec Action')
November 22, 2011	Sierra Club files appeal of NPDES permit
December 22, 2011	Sierra Club & SWEPCO settle

## Just in case you weren't counting – that was\*:

- 18 Appeals
- 8 Dockets before the APSC
- 8 Public Comment periods
- 5 Appeals to the PCE
- 3 Federal Judges (in one case)
- 3 (or was it 4?) Ark. appellate Court decisions
- 2 8<sup>th</sup> Circuit Court decisions
- 2 Petitions to the EPA to Object to the air permit
- 1 PI granted (and 1 denied)
- 1 Piece of legislation

\* - not counting matters originating in Texas or Louisiana

# Unique Circumstances

- Needs docket v. CECPN case
- CAMR vacated = one of first ever case-by-case EGU MACT analysis / determinations
- Strong interest by national environmental organizations and local opponents
- Petitions to Object filed with EPA – and granted in part
- CWA enforcement action
- Preconstruction activities subject of suit in Federal court
- Relief from automatic stay of air & NPDES permits
- Certified Question case
- Dec Action at APSC

# Just How Long Did it Take?

## **Air Permit:**

- Permit Prep Process: 14 months
  - Permit Process: 27 months
  - PCE Appeal: 14 months
  - Circuit Court Appeal: 11 months
  - Court of Appeals-Appeal: 12 months (and appellees' briefs had not yet been filed so add another 6 months at least)
- Grand Total: 78 months (84 months)**

# Just How Long Did it Take?

## Corps Permit:

- Permit Prep Process: 12 months
- Permit Process: 36 months
- Appeal: 23 months (and had not hearing yet on SJ so add another 6 months at least)

**Grand Total: 71 months (77 months)**

## Landfill Permit:

- Pre-application Process: 20 months
- Permit Process: 35.5 months

**Grand Total: 55.5 months**

# Just How Long Did it Take?

## **CECPN/ Exemption:**

- Prep Process: 14 months
- Certification Process: 12 months
- Appeal to COA: 17 months
- Review by Sup. Ct. 11.5 months
- State Law / CQ Case: 10.5 months
- Dec Action at PSC: 2 months

**Grand Total: 67 months**

## **Claims in Air Permit Appeal to PCE (claims that made it to RD)**

### **Class I Modeling:**

- Whether it was properly undertaken
- Welsh Plant Condition

### **Class II Modeling:**

- Use of 5 years of airport data v. one year of on-site
- Whether Shreveport was “adequately representative”
- How to handle low wind Speeds and Missing Hours
- Those pesky fugitive emissions

### **BACT:**

- Top Down Analysis
- Draft NSR Manual
- Similar Source determination

## **Permit Appeal Claims Con't (claims that made it to RD)**

### **BACT Con't:**

- PM10 – it's not a BACT limit
- SAM
- SO2 limit & use of dry FGD
- Collateral impacts & site specific impacts in the BACT analysis

### **MACT:**

- Similar Source determination
- What does “achieved in practice” and “achievable” mean?
- Use of stack tests to set limits
- Mercury limit
- Lead limit
- HCl and HF
- Use of surrogates (filterable PM & VOC)

**What to do about PM2.5?**

**Also addressed: CO2 (in order on motion)**

# Lessons Learned

- #1 Know Thy Neighbor
- #2 PSD Permits (& just about everything else) take forever
- #3 You cannot handicap your case by how well oral argument went
- #4 Sometimes Courts make political decisions – but only when you lose
- #5 Build a Record – you'll need it
- #6 Judge Barnes does not issue ex parte TROs on a Friday afternoon
- #7 Watch what you say – it will come back to you
- #8 When there is a will – there is a way.

Questions?

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