

**BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

IN THE MATTER OF:

Clean Air Act Title V Permit (Federal
Operating Permit) No. O26

Issued by the Texas Commission on
Environmental Quality

for Operation of the Welsh Power Plant
located in Titus County, Texas

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PETITION FOR OBJECTION
Permit No. O26

**PETITION REQUESTING THAT THE ADMINISTRATOR OBJECT TO
PROPOSED TITLE V OPERATING PERMIT NO.O26**

Pursuant to Clean Air Act Section 505(b)(2), 42 U.S.C. § 7661d(b)(2), and 40 CFR § 70.8(d), the Environmental Integrity Project and Sierra Club (“Petitioners”) hereby petition the Administrator of the U.S. Environmental Protection Agency to object to the Federal Operating Permit No. O26 (the proposed Title V Permit) issued by the Texas Commission on Environmental Quality (“TCEQ”) for the Welsh power plant. The Welsh plant is operated by Southwestern Electric Power Company (“SWEPCO”), a subsidiary of American Electric Power Company (“AEP”).

I. INTRODUCTION

SWEPCO has applied to the TCEQ for renewal of its federal Title V Permit No. O26, authorizing operation of the Welsh power plant. The plant, located in Titus County, Texas, utilizes three coal-fired boilers and associated equipment to generate approximately 1,580 megawatts of electricity. The three main generating units, designated as Units 1, 2 and 3, became operational in 1977, 1980 and 1982 respectively.

As set forth below, the Administrator should object to the proposed Permit because it violates the Clean Air Act's Title V requirements, fails to assure the enforceability of applicable federal requirements, and violates the Clean Air Act's requirements for revising a State Implementation Plan ("SIP").

II. PETITIONERS

Environmental Integrity Project ("EIP") is a non-profit, non-partisan organization with a mission to improve enforcement of anti-pollution laws.

Sierra Club, founded in 1892 by John Muir, is the oldest and largest grassroots environmental organization in the United States, with over 600,000 members nationwide. Sierra Club is a non-profit corporation with offices, programs and members in Texas. Sierra Club has a specific goal of improving outdoor air quality.

III. PROCEDURAL BACKGROUND

On March 3, 2009, Southwestern Electric Power Company applied to the TCEQ for renewal of its Title V permit (also called a Federal Operating Permit under Texas rules) for its Welsh power plant.

Five years later, on April 3, 2014, the TCEQ published notice of the draft Permit. The public comment period ended on May 5, 2014. Environmental Integrity Project timely filed comments on the draft renewal permit on May 5, 2014. Exhibit 1. In a letter dated July 19, 2016, TCEQ issued a Notice of Proposed Permit and Executive Director's Response to Public Comment ("RTC"); and finalized the proposed Permit and Statement of Basis. Exhibits 2, 3, and 4.

According to the TCEQ's Notice of Proposed Permit and RTC, the EPA's statutory 45-day review period started on July 26, 2016 and ended on September 9, 2016. TCEQ's notice states

that the 60-day statutory period during which the public may petition EPA to object to the permit ends on November 8, 2016.

IV. LEGAL BACKGROUND

A. Title V Permits Must Include all Applicable Requirements, and Must Assure Compliance with Those Requirements

The Clean Air Act requires each major stationary source of air pollution to apply for and comply with the terms of a federal operating permit issued under Title V of the Act. 42 U.S.C. § 7661a(a). Congress created the Title V permit program to “enable . . . source[s], States, EPA, and the public to understand better the requirements to which the source is subject, and whether the source is meeting those requirements.” *Operating Permit Program*, 57 Fed. Reg. 32250, 32251 (July 21, 1992). Title V permits accomplish this goal by compiling, in a single document, all the applicable requirements for each major source. 42 U.S.C. § 7661c(a).¹ A Title V permit “assures compliance with all applicable requirements.” 40 C.F.R. § 70.1(b); 30 Tex. Admin. Code § 122.142(c). Applicable requirements include, among others, any standard or other requirement in a state’s federally approved SIP and preconstruction permit limits and conditions. 40 C.F.R. § 70.2; 30 Tex. Admin. Code § 122.10(2).

Sources subject to Title V must disclose in their permit applications all applicable requirements and any violations of those requirements. 42 U.S.C. § 7661b(b); 40 C.F.R. §§ 70.5(c)(4)(i), (5), and (8); Tex. Admin. Code § 122.132. In addition, Title V permits must include monitoring, recordkeeping, and reporting methods that assure ongoing compliance with each

¹ See, *Virginia v. Browner*, 80 F.3d 869, 873 (4th Cir. 1996) (“The permit is crucial to implementation of the Act: it contains, in a single, comprehensive set of documents, all CAA requirements relevant to the particular source.”).

requirement and may not restrict the right of regulators or the public to rely on any credible evidence to demonstrate non-compliance with applicable requirements.²

Title V permits are the primary method for enforcing and assuring compliance with State Implementation Plan requirements for major sources. 57 Fed. Reg. 32,258. Because federal courts may be reluctant to enforce applicable requirements that have been mistakenly omitted from, displaced by, or made ambiguous by conditions in a Title V permit, state permitting agencies and EPA should ensure that each Title V permit accurately and clearly reflect all applicable requirements.³

Where a state permitting authority issues a Title V operating permit, EPA must object to the permit if it is not in compliance with all applicable requirements. 40 C.F.R. § 70.8(c). If EPA does not object, “any person may petition the Administrator within 60 days after the expiration of the Administrator’s 45-day review period to make such objection.” 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d); 30 Tex. Admin. Code § 122.360. The Administrator “shall issue an objection . . . if the petitioner demonstrates to the Administrator that the permit is not in compliance with the requirements of the . . . [Clean Air Act].” 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(c)(1). The Administrator must grant or deny a petition to object within 60 days of its filing. 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d); 30 Tex. Admin. Code § 122.360. While the burden is on the

² *Sierra Club v. EPA*, 536 F.3d 673, 674-75 (D.C. Cir. 2008) (“But Title V did more than require the compilation in a single document of existing applicable emission limits It also mandated that each permit . . . shall set forth monitoring requirements to assure compliance with the permit terms and conditions.”); *In the Matter of Southwestern Electric Power Company*, Order on Petition No. VI-2014-01 (“Pirkey Order”) (February 3, 2016), at p. 13 (“[A] title V permit may not preclude any entity, including the EPA, citizens or the state, from using any credible evidence to enforce emissions standards, limitations, conditions, or any other provision of a title V permit.”).

³ *See, Sierra Club v. Otter Tail*, 615 F.3d 1008 (8th Cir. 2008) (holding that enforcement of New Source Performance Standard omitted from a source’s Title V permit was barred by 42 U.S.C. § 7607(b)(2)).

petitioner to demonstrate to EPA that a Title V operating permit is deficient, once such a burden is met, EPA is required to object to the permit.⁴

B. Texas’s Rules for Permitting Emissions During Planned Maintenance, Startup, and Shutdown May Not Weaken Approved SIP Limits

Between 2005 and 2010, Texas phased out an affirmative defense for excess emissions from so-called “Planned maintenance, startups, and shutdowns” (“MSS”), and replaced it with a permitting program that is supposed to lawfully authorize the emissions from these foreseeable, or planned, events. *Approval and Promulgation of Implementation Plans; Texas; Excess Emissions During Startup, Shutdown, Maintenance, and Malfunction Activities*, 75 Fed. Reg. 68989 (November 10, 2010). The rules that Texas submitted for EPA review as a SIP revision included provisions in 30 Tex. Admin. Code Chapter 101, Subchapter A (General Rules) and Subchapter F (Emissions Events and Scheduled Maintenance, Startup, and Shutdown Activities). The proposed rules established a schedule for sources to submit permit applications seeking authorization for these higher-than-normal emissions from planned MSS, and the proposed rules also provided that the affirmative defense would no longer be available to sources with permits authorizing planned MSS activities. *Id.* at 68994.

EPA ultimately rejected the portion of the TCEQ’s proposed rule that would have allowed a temporary affirmative defense, but EPA approved Texas’s proposal to issue permits authorizing Planned MSS emissions, because these reasonably foreseeable emissions are part of a source’s potential to emit, and they must be duly accounted for and authorized through the Clean Air Act.

⁴ *New York Public Interest Group v. Whitman*, 321 F.3d 316, 332-34, n12 (2nd Cir. 2003) (“Although there is no need in this case to resort to legislative history to divine Congress’ intent, the conference report accompanying the final version of the bill that became Title V emphatically confirms Congress’ intent that the EPA’s duty to object to non-compliant permits is nondiscretionary”).

But, in approving Texas’s plan to issue permits authorizing emissions from Planned MSS activities, EPA stated clearly that TCEQ could not remove or weaken emission limits established in the State Implementation Plan (which defines important federal Clean Air Act standards that apply in Texas) without the review and approval required by Section 116⁵ of the Act:

“[W]e note that the State cannot issue any NSR SIP permit that has a less stringent emission limit than already is contained in the approved SIP. For example, the State cannot issue a NSR SIP permit that has less stringent Volatile Organic Compounds limits than those in Chapter 115 as approved into the Texas SIP, or less stringent Oxides of Nitrogen (NO_x) limits in Chapter 117 as approved into the Texas SIP. The State must issue a NSR SIP permit that meets all applicable requirements of the Texas SIP. If the State wishes to issue a NSR SIP permit that does not meet the applicable requirements of the Texas SIP, then any such alternative limits would need to be submitted to EPA for approval as a source-specific revision to the SIP, before they would modify the federally applicable emission limits in the approved SIP.”

75 Fed. Reg. 68995 (emphasis added).

This clear statement of black letter law did not come out of the blue; it was intended to resolve a concern that EPA had clearly expressed in the years preceding its approval, and it reflected TCEQ’s promise that sources could not use the new Planned MSS permitting process to improperly relax federally-enforceable SIP requirements.

Before taking final action on Texas’s SIP revision, EPA asked the TCEQ to clarify whether the new rules could be applied to relax SIP requirements. *Proposed Approval and Promulgation of Implementation Plans; Texas; Excess Emissions During Startup, Shutdown, Maintenance, and Malfunction Activities* 75 Fed. Reg. 26892, 26894 (May 13, 2010). The TCEQ addressed EPA’s concern in a letter written by John Steib, Jr., Deputy Director of the TCEQ’s Office of Compliance and Enforcement, which was included in the SIP revision rulemaking docket, stating:

⁵ 42 U.S.C. § 7416 (“...if an emission standard or limitation is in effect under an applicable implementation plan..., such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than [the SIP].”)

The TCEQ agrees that this rule cannot be used by the agency to grant any requested relief from compliance with any State Implementation Plan (SIP) requirements, such as, for example, SIP approved rules in 30 Tex. Admin. Code Chapters 115 and 117, or in approved area-specific plans. Any such relief would be limited to state-only requirements for controlling air contaminants. Further, as stated in the last sentence, the commission will not exempt sources from compliance with any federal requirements.⁶

Based on the TCEQ's response and the clear language in the rule stating that it may not be used to create exemptions to "any" federal requirements, EPA approved the proposed rule. EPA offered the following response to two commenters seeking additional clarification on the rule:

Comments: One commenter asserts that the exemption provision of section 101.221(d)... should be interpreted to apply to the opacity requirements of 30 TAC section 111.111, while another commenter requests clarification that the exemption provision in section 101.221(d)... be interpreted to exclude federally approved SIP requirements. The commenter claims that TCEQ's and EPA's interpretation of that section is incorrect.

Response: 30 TAC section 111.111 entitled "Requirements for Specified Sources" was adopted by TACB on June 18, 1993, and approved by EPA as a revision to the Texas SIP on May 8, 1996 (61 FR 20734). At that time, it became federally enforceable. Therefore, the requirements in the SIP rule found at 30 TAC section 111.111 are "federal requirements." Section 101.221(d) plainly states that TCEQ will not exempt sources from complying with any "federal requirements." This position is also consistent with the April 17, 2007 letter from John Steib, Deputy Director, TCEQ Office of Compliance and Enforcement to EPA Region 6, in which the State confirmed that the term "federal requirements" in 30 TAC 101.221(d) includes any requirement in the federally-approved SIP. In section D of our May 13, 2010 proposal, we stated that new section 101.221 (Operational Requirements) requires that no exemptions can be authorized by the TCEQ for any federal requirements to maintain air pollution control equipment, including requirements such as NSPS or National Emissions Standards for Hazardous Air Pollutants (NESHAP) or requirements approved into the SIP. Texas confirmed this interpretation and, therefore, the State may not exempt a source from complying with any requirement of the federally-approved SIP. Any action to modify a state-adopted requirement of the SIP would not modify the federally enforceable obligation under the SIP unless and until it is approved by EPA as a SIP revision.

75 Fed. Reg. 68998.

⁶ Exhibit 5, Letter from John Steib, Jr., TCEQ, Deputy Director, Office of Compliance and Enforcement, to John Blevins, EPA Region 6, Director, Compliance Assurance and Enforcement Division, Re: EPA Approval of the TCEQ Emission Events Rule (April 17, 2007) at 3.

Thus, EPA approved Texas's plan to issue permits to properly authorize emissions that result from Planned MSS. But EPA did so only after it was clear to the Agency Texas, and the regulated community that TCEQ would not issue permits that relaxed or exempted sources from federal requirements, including Texas SIP requirements.

V. GROUNDS FOR OBJECTION

A. Permit No. O26 Fails to Assure Compliance with the Texas State Implementation Plan Opacity Limit, in Violation of 42 U.S.C. §§ 7410(i) and (l), § 7416, and § 7661c.

The Texas SIP prohibits coal-fired generators from exceeding an opacity limit of either 20 percent or 30 percent (depending on the unit's date of construction) subject to no more than one six-minute exception per hour or six hours within a 10 day period. 30 TAC § 111.111(a)(1)(A),(B),(E). Continuous opacity monitors are used to measure compliance with this standard, and generators are required to take prompt action to bring opacity levels back down if the standard is exceeded. 30 TAC § 111.111(a)(1)(C). This opacity rule (the SIP opacity limit) was approved by EPA into the Texas State Implementation Plan in 1996. 40 C.F.R. § 52.2270(c); 61 Fed. Reg. 20,732, 20,734 (May 8, 1996).

That this SIP limit is an applicable requirement for the Welsh power plant's three coal-fired units is not in dispute, and this applicable requirement is reflected in several sections of the proposed Permit, including but not limited to Special Condition 3, the Unit Summary table, and the Applicable Requirements Summary table, which states:

30 TAC Chapter 111, Visible Emissions, § 111.111(a)(1)(B), § 111.111(a)(1)(C), § 111.111(a)(1)(E) – Visible emissions from any stationary vent shall not exceed an opacity of 20% averaged over a six minute period for any source on which construction was begun after January 31, 1972.

This SIP opacity limit includes within it a narrow and time-limited exception for startups, cleaning of electrostatic precipitators, and other activities:

Visible emissions during the cleaning of a firebox or the building of a new fire, soot blowing, equipment changes, ash removal, and rapping of precipitators may exceed the limits set forth in this section for a period aggregating not more than six minutes in any 60 minutes, nor more than six hours in any 10-day period. This exemption shall not apply to the emissions mass rate standard, as outlined in § 111.151(a) of this title (relating to Allowable Emission Limits.)

30 Tex. Admin. Code § 111.111(a)(1)(E).

1. Specific Grounds for Objection, Including Citation to Permit Term

The specific grounds for objection arises by virtue of the incorporation of the Welsh plant's major new source review permit – Permit No. 4381/PSDTX3. That permit is incorporated by reference into the Title V Permit, Permit No. O26. See, New Source Review Authorization References by Emissions Unit table, listing Permit 4381 and PSDTX3 as applicable requirements. Permit 4381/PSDTX3 was altered in 2012, purportedly to authorize the Welsh power plant's planned maintenance, startup, and shutdown ("planned MSS") emissions. It is these planned MSS provisions that illegally alter, weaken, and eliminate the SIP opacity limit during periods of planned MSS, which is exactly what TCEQ promised it would *not* do. 75 Fed. Reg. 68998.

The specific language in Permit No. 4381/PSDTX3 that is objectionable is found at Special Condition 32, which states:

Opacity greater than 20 percent from the boilers is authorized when the permit holder complies with the planned MSS duration limitations in Special Condition No. 35 and the applicable work practices identified below.

Special Condition 32.D goes on to state that:

D. For periods of planned MSS other than those that are subject to Paragraph A of this condition, 30 TAC §§ 111.111 and 111.153, and Chapter 101, Subchapter F apply.

In addition, Special Condition 5 of Permit No. 4381/PSDTX3 states:

Opacity of emissions from the Unit 1 Boiler stack (EPN Boiler 1), Unit 2 Boiler stack (EPN Boiler 2), and Unit 3 Boiler stack (EPN Boiler 3) must not exceed 20 percent averaged over a six-minute period, except during periods of authorized planned maintenance, start-up, or shutdown (MSS) in accordance with Special Condition No. 32 or as otherwise allowed by law.

EPA should object to the Welsh plant's proposed Title V Permit because inclusion of the so-called Planned MSS provisions fails to assure compliance with the SIP opacity limit, in violation of 42 U.S.C. § 7661c(a) and 40 C.F.R. § 70.1(b).

In addition, EPA should object to the Welsh plant's Title V permit, because incorporation of the Planned MSS provisions impermissibly weaken and eliminate the SIP opacity limit, in violation of 42 U.S.C. §§ 7410(i) and (l), and § 7416, which specify that SIP limits may only be changed through the Clean Air Act's SIP revision process, which requires rulemakings and EPA review and approval. But, the Planned MSS provisions that are now being incorporated in the Welsh plant's Title V permit were never submitted to EPA as SIP revisions as required by law.⁷

In addition, the substantive and procedural prerequisites for changing the Texas SIP opacity limit is set forth in 30 TAC § 111.113, which requires an "adjudicative public hearing" before the SIP opacity limits found at 30 TAC § 111.111(a) can be altered, and authorizes a higher limit only for units that continue to meet "...all applicable concentration and mass based limits..." for

⁷ See, 75 Fed. Reg. 68,989, 68,995 (November 10, 2010) ("...any such alternative limits would need to be submitted to EPA for approval as a source-specific revision to the SIP, before they would modify the federally applicable emission limits in the approved SIP.").

particulate matter and other pollutants.” This rule allowing an alternate opacity limit to be established under certain circumstances, was approved by EPA as part of the Texas SIP in 1996. 61 Fed. Reg. 20,732 (May 8, 1996). Thus, while the State is free to establish alternate opacity limits for the Welsh plant, it can only do so under the approved SIP process.

Instead of following the SIP process, TCEQ removed the SIP opacity limit from the underlying PSD permit without any opportunity for an adjudicative public hearing required by 30 TAC § 111.113.

The table below compares the stringent SIP requirements of 30 TAC § 111.113 with the Planned MSS provisions in the Welsh plant’s PSD permit (4381/PSDTX3) that are being incorporated into the proposed Title V Permit:

30 TAC § 111.113	4381/PSDTX3 Planned MSS Conditions
Authorizes “alternate opacity limit” in lieu of opacity requirements of § 111.111 based on specific criteria.	Eliminates opacity requirements of 111.111 during planned MSS events.
Requires “adjudicative public hearing” with hearing record.	No adjudicative hearing prior to approval.
Alternate opacity limit approved only if “all applicable concentration and mass limitations” are met.	Eliminates PM concentration based standard (0.3 lb/MMBtu) applicable to all power plants at all times under § 111.153. This is discussed in Section B, below.

EPA must object to the Welsh plant’s Title V permit for three independent reasons. First and foremost, the Permit fails to assure compliance with the Texas SIP opacity limit, in violation of 42 U.S.C 7661c(a). Second, EPA must object to the Welsh plant’s Title V permit because failing to do so would weaken the SIP opacity limit without going through the approved SIP process, in violation of 42 U.S.C. § 7410(l) (“Each revision to an implementation plan submitted by a State under this chapter shall be adopted by such State after reasonable notice and public hearing. The Administrator shall not approve a revision of a plan if the revision would interfere

with any applicable requirement concerning attainment and reasonable further progress . . . , or any other applicable requirement of the chapter.”); and 40 C.F.R. § 51.105 (“Revisions of a plan, or any portion thereof, will not be considered part of an applicable plan until such revisions have been approved by the Administrator in accordance with this part.”). Third, EPA must object on the grounds that the TCEQ’s attempted incorporation of the PSD permit’s Planned MSS provisions into the Title V permit would violate 42 U.S.C. § 7416 (“...if an emission standard or limitation is in effect under an applicable implementation plan..., such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than [the SIP].”)

2. Applicable Requirement Not Met

The applicable requirement that is not met in the proposed Permit No. O26 is 30 TAC § 111.111(a)(1), as approved by EPA into the Texas State Implementation Plan. 40 C.F.R. § 52.2270(c); 61 Fed. Reg. 20,732, 20,734 (May 8, 1996).

3. Inadequacy of the Permit Term

The Planned MSS permit conditions that were added to the Welsh plant’s PSD permit in 2012, cannot lawfully be incorporated into the plant’s Title V permit. Doing so would violate the Clean Air Act, which clearly forbids states from issuing permits, even pursuant to a SIP-approved permitting program, that modify or weaken SIP requirements with respect to any stationary source without approval of the EPA.⁸ Emissions standards and limitations established as part of a state’s

⁸ 42 U.S.C. § 7410(i) (“Except for a primary nonferrous smelter order under section 7419 of this title, a suspension under subsection (f) or (g) of this section (relating to emergency suspensions), an exemption under section 7418 of this title (relating to certain Federal facilities), an order under section 7413(d) of this title (relating to compliance orders), a plan promulgation under subsection (c) of this section, or a plan revision under subsection (a)(3) of this section, no order, suspension, plan revision, or other action modifying any requirement of an applicable implementation plan may be taken with respect to any stationary source by the State or by the Administrator.”); *Approval and Promulgation of Implementation Plans; Excess Emissions During Startup Shutdown*,

SIP remain federally enforceable until EPA approves revisions to the SIP.⁹ Texas cannot simply alter SIP emission limits “unless and until the EPA approve[s] any changes.”¹⁰ Texas lacks the authority to unilaterally amend its SIP or weaken SIP limits, because doing so would render the federal approval process meaningless.¹¹

But, TCEQ did just that when it added the so called Planned Maintenance, Startup, and Shutdown provisions to the Welsh plant’s major new source review permit. And now, with the renewal of the plant’s Title V permit incorporating the planned MSS provisions, Texas is illegally eliminating the SIP opacity limit during periods of planned startup, shutdown, and maintenance. Texas may only do this as a source-specific SIP revision that requires EPA approval.¹² Texas may not eliminate or weaken a SIP limit through the Title V permitting process.

4. The Issue Was Raised in Public Comments

This issue was raised with specificity in the public comments. Commenters stated that:

Maintenance, and Malfunction Activities, 75 Fed Reg. 68,989, 68,995 (November 10, 2010) (“However, we note that the State cannot issue any NSR SIP permit that has a less stringent emission limit than already is contained in the approved SIP.”).

⁹ See *General Motors Corp. v. U.S.*, 496 U.S. 530, 540 (1990) (citing 42 U.S.C. § 7410(a)) (“There can be little or no doubt that the existing SIP remains the ‘applicable implementation plan’ even after the State has submitted a proposed revision.”); 40 C.F.R. § 51.105.

¹⁰ *Safe Air for Everyone v. EPA*, 488 F.3d 1088, 1097 (9th Cir. 2007).

¹¹ *United States v. Murphy Oil*, 143 F. Supp. 2d 1054, 1100-01 (W.D. Wis. 2001); See *Sierra Club v. Tenn. Valley Auth.*, 430 F.3d 1337, 1346-51 (11th Cir. 2005).

¹² See, e.g., *U.S. v. Ford Motor Co.*, 814 F.2d 1099, 1102 (6th Cir. 1987) (“Because the proposed Order reflects limits that are different than those in the currently approved Michigan SIP, the order must be submitted to EPA as a revision to the SIP.”); *Tenn. Valley Auth.*, 430 F.3d at 1346-47 (“The 2% de minimis rule [which provided a safe harbor from 20% opacity limit if excess emissions do not exceed 2% of source’s quarterly operating hours] effectively revises the opacity limitation contained in the SIP—a revision by any other name is still a revision—and an unapproved revision of any part of a SIP is invalid under § 110(i) of the Clean Air Act.”); *United States v. General Dynamics Corp.*, 755 F. Supp. 720, 722-24 (N.D. Tex. 1991) (“Because the effect of the agreed board order is to raise the emissions limitations set by the Texas SIP, the order requires approval by . . . [EPA] to be effective. Unless and until such approval is given, defendant must abide by the limitations of the Texas SIP.”).

“The Texas SIP provides that opacity from SWEPCO’s main boilers may not exceed 20 percent averaged over any six minute period. The Draft Permit is deficient, because it incorporates by reference Texas Permit No. 4381/PSDTX3, which purports to exempt the Welsh Power Plant boilers from the 20 percent Texas SIP opacity limit during periods of planned maintenance, startup, and shutdown (“MSS”). ... The TCEQ may not issue permits that modify, relax, or create an exemption to any SIP requirement. ... Because the Draft Permit incorporates by reference Special Condition 32 in Permit No. 4381/PSDTX3, which purports to create an exemption to the Texas SIP opacity limit of 20 percent, the Draft Permit fails to unambiguously include the Texas SIP opacity limit as a requirement that applies during periods of planned MSS and fails to assure compliance with it.”

Comments of the Environmental Integrity Project, May 5, 2014, at page 2 (footnotes and legal citations omitted).

B. Permit No. O26 Fails to Assure Compliance with the Texas State Implementation Plan Particulate Matter Limit, in Violation of 42 U.S.C. §§ 7410(i) and (l), § 7416, and § 7661c.

Coal-fired generators in Texas may not emit particulate matter in concentrations greater than 0.3 pounds per million British thermal units (lbs/MMBtu) averaged over a two-hour period. 30 TAC § 111.153(b). This limit applies at all times and has been incorporated into the Texas State Implementation Plan, making it an applicable requirement for Title V purposes. 40 C.F.R. § 52.2270(c) and 74 Fed. Reg. 19,144 (Apr. 28, 2009).

That this SIP limit is an applicable requirement for the Welsh power plant’s three coal-fired units is not in dispute, and this applicable requirement is listed in proposed Permit’s Compliance Assurance Monitoring section, as well as in the Applicable Requirements Summary table, which contains the text of the rule:

§ 111.153(b) No person may cause, suffer, allow, or permit emissions of particulate matter from any solid fossil fuel-fired steam generator to exceed 0.3 pound of total suspended particulate per million Btu heat input, averaged over a two-hour period.

1. Specific Grounds for Objection, Including Citation to Permit Term

As explained in section A above (relating to the failure to assure compliance with the SIP opacity limit) the specific ground for objection is the incorporation of the Welsh plant's major new source review permit – Permit No. 4381/PSDTX3. Permit 4381/PSDTX3 was altered in 2012, to incorporate “Planned Maintenance, Startup, and Shutdown” provisions. These provisions illegally alter, weaken, and eliminate the SIP particulate matter limit during periods of planned MSS.

The specific language in Permit No. 4381/PSDTX3 that is objectionable is Special Condition 32, which states:

D. For periods of planned MSS other than those that are subject to Paragraph A of this condition, 30 TAC §§ 111.111 and 111.153, and Chapter 101, Subchapter F apply.

EPA should object to the Welsh plant's proposed Title V Permit because inclusion of the so-called Planned MSS provisions fails to assure compliance with the SIP PM limit, in violation of 42 U.S.C. § 7661c(a) and 40 C.F.R. § 70.1(b).

In addition, EPA should object to the Welsh plant's Title V permit, because incorporation of the Planned MSS provisions weakens and eliminates the SIP PM limit, in violation of 42 U.S.C. §§ 7410(i) and (l), and § 7416, which specify that SIP limits can only be changed through the Clean Air Act's SIP revision process, which requires rulemakings and EPA review and approval.

TCEQ never submitted the change to EPA for review and approval as required by law.¹³ Instead of following the SIP process, TCEQ is impermissibly eliminating the SIP PM limit for periods of planned MSS through the Title V permitting process.

¹³ 42 U.S.C. §§ 7410(i),(l); 7416. *See also*, 75 Fed. Reg. 68,989, 68,995 (November 10, 2010) (“...any such alternative limits would need to be submitted to EPA for approval as a source-

EPA must object for three independent reasons. First and foremost, the Permit fails to include and assure compliance with the Texas SIP particulate matter limit, in violation of 42 U.S.C. 7661c(a). Second, EPA must object because failing to do so would violate 42 U.S.C. § 7410(l) (“Each revision to an implementation plan submitted by a State under this chapter shall be adopted by such State after reasonable notice and public hearing. The Administrator shall not approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress . . . , or any other applicable requirement of the chapter.”); and 40 C.F.R. § 51.105 (“Revisions of a plan, or any portion thereof, will not be considered part of an applicable plan until such revisions have been approved by the Administrator in accordance with this part.”). Third, EPA must object on the grounds that the TCEQ’s attempted incorporation of the PSD permit’s “Planned MSS” provisions into the Title V permit would violate 42 U.S.C. § 7416 (“...if an emission standard or limitation is in effect under an applicable implementation plan..., such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than [the SIP].”)

2. Applicable Requirement Not Met

The applicable requirement that is not met in the proposed Permit No. O26 is 30 TAC § 111.153(b), which is an applicable requirement because it is incorporated into the Texas SIP, 40 C.F.R. § 52.2270(c) and 74 Fed. Reg. 19,144 (Apr. 28, 2009).

specific revision to the SIP, before they would modify the federally applicable emission limits in the approved SIP.”).

3. Inadequacy of the Permit Term

The “Planned MSS” permit conditions that were added to the Welsh plant’s PSD permit in 2012, cannot lawfully be incorporated into the plant’s Title V permit. Doing so would violate the Clean Air Act’s prohibition on states issuing permits that modify or weaken SIP requirements without approval of the EPA.¹⁴ Emissions standards and limitations established as part of a state implementation plan remain federally enforceable until EPA approves revisions to the SIP.¹⁵ Texas cannot simply alter SIP emission limits “unless and until the EPA approve[s] any changes.”¹⁶ Texas lacks the authority to unilaterally amend its SIP or weaken SIP limits, because doing so would render the federal approval process meaningless.¹⁷

But, TCEQ did just that when it added the Planned MSS provisions to the Welsh plant’s major new source review permit. And now, with the renewal of the plant’s Title V permit incorporating these planned MSS provisions, Texas is illegally eliminating the SIP PM limit during periods of startup, shutdown, and maintenance. Texas may only do this as a source-specific SIP

¹⁴ 42 U.S.C. § 7410(i) (“Except for a primary nonferrous smelter order under section 7419 of this title, a suspension under subsection (f) or (g) of this section (relating to emergency suspensions), an exemption under section 7418 of this title (relating to certain Federal facilities), an order under section 7413(d) of this title (relating to compliance orders), a plan promulgation under subsection (c) of this section, or a plan revision under subsection (a)(3) of this section, no order, suspension, plan revision, or other action modifying any requirement of an applicable implementation plan may be taken with respect to any stationary source by the State or by the Administrator.”); *Approval and Promulgation of Implementation Plans; Excess Emissions During Startup Shutdown, Maintenance, and Malfunction Activities*, 75 Fed. Reg. 68,989, 68,995 (November 10, 2010) (“However, we note that the State cannot issue any NSR SIP permit that has a less stringent emission limit than already is contained in the approved SIP.”).

¹⁵ See *General Motors Corp. v. U.S.*, 496 U.S. 530, 540 (1990) (citing 42 U.S.C. § 7410(a)) (“There can be little or no doubt that the existing SIP remains the ‘applicable implementation plan’ even after the State has submitted a proposed revision.”); 40 C.F.R. § 51.105.

¹⁶ *Safe Air for Everyone v. EPA*, 488 F.3d 1088, 1097 (9th Cir. 2007).

¹⁷ *United States v. Murphy Oil*, 143 F. Supp. 2d 1054, 1100-01 (W.D. Wis. 2001); See *Sierra Club v. Tenn. Valley Auth.*, 430 F.3d 1337, 1346-51 (11th Cir. 2005).

revision that requires EPA approval.¹⁸ Texas may not eliminate or weaken a SIP limit through the Title V permitting process.

4. The Issue Was Raised in Public Comments

This issue was raised with specificity in the public comments. Commenters stated that:

The Texas SIP provides that particulate matter emissions from SWEPCO's main boilers may not exceed 0.3 lb/MMBtu, averaged over a two hour period. The Draft Permit incorporates by reference hourly PM limitations and Special Condition 32 D in Permit No. 4381/PSDTX3 that are inconsistent with and less stringent than the applicable Texas SIP PM limit during planned MSS activities. Because the Draft Permit incorporates provisions that purport to relax or create an exemption to the Texas SIP PM limit during periods of planned MSS, it fails to clearly include the Texas SIP PM limit as a requirement that applies during planned MSS activities and therefore fails to assure compliance with applicable limits.

Comments of the Environmental Integrity Project, May 5, 2014, at page 2 (footnote and legal citation omitted).

C. The State's Response to Comments Fails to Address the Deficiencies and Lacks Merit

In its Response to Comments, the State argues that the question of whether the SIP opacity and the SIP particulate matter limits apply during periods of Planned MSS requires an "interpretation" of state law, and that the Commenters misinterpret the opacity and PM limits at

¹⁸ See, e.g., *U.S. v. Ford Motor Co.*, 814 F.2d 1099, 1102 (6th Cir. 1987) ("Because the proposed Order reflects limits that are different than those in the currently approved Michigan SIP, the order must be submitted to EPA as a revision to the SIP."); *Tenn. Valley Auth.*, 430 F.3d at 1346-47 ("The 2% de minimis rule [which provided a safe harbor from 20% opacity limit if excess emissions do not exceed 2% of source's quarterly operating hours] effectively revises the opacity limitation contained in the SIP—a revision by any other name is still a revision—and an unapproved revision of any part of a SIP is invalid under § 110(i) of the Clean Air Act."); *United States v. General Dynamics Corp.*, 755 F. Supp. 720, 722-24 (N.D. Tex. 1991) ("Because the effect of the agreed board order is to raise the emissions limitations set by the Texas SIP, the order requires approval by . . . [EPA] to be effective. Unless and until such approval is given, defendant must abide by the limitations of the Texas SIP.").

issue. (RTC at Response 1 and 2) TCEQ's position is that the SIP opacity and PM limits were never intended to apply to coal-fired electric generating units equipped with electrostatic precipitators ("ESP") during periods of maintenance, startup, and shutdown. But, this issue is not a question of interpreting a state rule, because a State Implementation Plan is *federal law*, enforceable by the state, EPA, and citizens.¹⁹ While the Clean Air Act recognizes that states will often need to revise their SIPs, such revisions may not be effected without EPA's approval.²⁰

Moreover, both the SIP opacity and the PM limits are clear on their face, and require no re-interpretation by the State. The Executive Director's argument is clearly inconsistent with the rule's unambiguous language forbidding "visible emissions from any source" that exceeds "20% averaged over a six-minute period" (subject to the express, time-limited exemptions for certain activities) (30 Tex. Admin. Code § 111.111(a)(1)(B), (E)), and forbidding PM emissions in excess of 0.3 lbs/MMBTu averaged over a 2-hour period (30 Tex. Admin. Code § 111.153(b)).

When it adopted the opacity rule, the TCEQ's predecessor agency certainly knew how to – and, in fact, did – carve out exceptions for certain activities, *including activities at sources using an ESP to control particulate matter emissions*:

Visible emissions during the cleaning of a firebox or the building of a new fire, soot blowing, equipment changes, ash removal, and *rapping of precipitators* may exceed the limits set forth in this section for a period aggregating not more than six minutes in any 60 minutes, nor more than six hours in any 10-day period. This exemption shall not apply to

¹⁹ *Union Elec. Co. v. EPA*, 515 F.2d 206, 211 (8th Cir. 1975) ("Upon approval or promulgation of a state implementation plan, the requirements thereof have the force and effect of federal law and may be enforced by the Administrator in federal courts.").

²⁰ 42 U.S.C. § 7410(l) ("Each revision to an implementation plan submitted by a State under this chapter shall be adopted by such State after reasonable notice and public hearing. The Administrator shall not approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress . . . , or any other applicable requirement of the chapter."); 40 C.F.R. § 51.105 ("Revisions of a plan, or any portion thereof, will not be considered part of an applicable plan until such revisions have been approved by the Administrator in accordance with this part.").

the emissions mass rate standard, as outlined in § 111.151(a) of this title (relating to Allowable Emission Limits.)
30 Tex. Admin. Code § 111.111(a)(1)(E) (emphasis added).

In addition, the Texas SIP spells out the procedure that sources must undertake if they are unable to comply with the opacity limit using available and economically reasonable controls. The Texas SIP establishes a process by which sources may apply for and receive alternative opacity limits after a public adjudicatory hearing if certain demonstrations are made. 30 Tex. Admin. Code § 111.113. This process is rendered meaningless under the TCEQ's argument that the opacity limit was never meant to apply to coal-fired units equipped with ESPs during planned MSS.

The TCEQ Executive Director's interpretation of the Texas SIP opacity limit as inapplicable to units equipped with ESPs during non-routine operations is inconsistent with the unambiguous language of the rule itself. *Christensen v. Harris County*, 529 U.S. 576, 588 (2000); *Exportal v. U.S.*, 902 F.2d 45, 50-51 (D.C. Cir. 1990) (holding that agency interpretation inconsistent with the unambiguous language of its rule that could not have been foreseen at the time the rule went through the APA notice and comment process could not be upheld without violating the APA).

The TCEQ's position makes no sense given the fact that the approved Texas SIP provides an express exemption in the opacity limit itself, allowing for certain activities (such as "soot-blowing" and "rapping of [electrostatic] precipitators"), and also provides a SIP-approved process for sources that need to apply for and obtain an alternative limit.

EPA has already decided this issue in another Title V matter in favor of Petitioners. On February 3, 2016, the Administrator objected to SWEPCO's Pirkey power plant Title V Permit No. O31, because it incorporated the very same illegal Planned MSS exemption at issue here. EPA objected to the incorporation of the Planned MSS conditions in the Pirkey permit on the grounds

that the Planned MSS permit terms created an illegal exemption to opacity (and particulate matter) limits in Texas's federally-approved SIP. *In the Matter of Southwestern Electric Power Co. H.W. Pirkey Plant*, Order on Petition No. VI-2014-01 ("Pirkey Order").

The TCEQ Executive Director came up with the re-interpretation of the SIP opacity and particulate matter limits now found at 30 Tex. Admin. Code §§ 111.111(a)(1)(B) and 111.153(b) in response to EPA's objection to the Pirkey Title V permit. To make this argument, the TCEQ Executive Director cannot rely on the plain language of the rules, which cut against his claim, nor does he identify any TCEQ policy memorandum or guidance document containing evidence of the State's intent. Instead, the Executive Director relies entirely on a technical note authored by the Radian Corporation in 1971, which the Executive Director claims—but does not demonstrate—provided the basis for the TCEQ's opacity and particulate matter regulations.²¹ Interpretive Letter at 1-4.

The Radian report does not address the question of whether and how Texas should regulate non-routine operations from any source. It does not discuss whether power plants equipped with ESPs (or any other kind of power plant) should be exempt from opacity and particulate matter limits during non-routine operations. The Radian report has little, if any, direct relevance to the disputed question in this case. According to the Executive Director, the report matters—not because of what it does say—but because it does not evaluate emissions from coal-fired power plants using ESPs to control particulate emissions during operational phases when the ESPs cannot function at their optimal level. The Executive Director says this omission is significant, because

²¹ While the Executive Director contends that the Radian report provided the basis for the Commission's promulgation rules establishing limits on opacity and particulate emissions, he does not identify any records showing whether and how the Commission relied on the report when promulgating its rules.

it suggests that the Commission did not ask Radian to evaluate non-routine emissions from coal-fired plants equipped with ESPs. The Commission's decision not to ask Radian to consider non-routine emissions from EGUs with ESPs is significant, because the TCEQ Executive Director believes it demonstrates the Commission's intent to regulate such emissions under different rules:

The Radian report excludes an evaluation of emissions from startups and shutdowns during which the emissions controls do not work effectively, and therefore it is reasonable to assume that Radian would not be asked to evaluate emissions for which the agency was regulating in a different fashion on a concurrent rulemaking schedule.

There are two problems with this argument. First, and most obviously, the mere fact that this particular report fails to evaluate the performance of a particular class of sources during certain operational phases is exceedingly weak support for the conclusions the TCEQ Executive Director draws from it. If these conclusions were true, the Executive Director should be able to produce at least one piece of direct evidence showing the Commission's intent. The fact that the best support the Executive Director can find for his new interpretation of the Texas SIP is an unremarkable omission from a report authored by a non-governmental entity in 1971 suggests that it was not sufficiently well-developed at the time Texas's opacity and particulate matter regulations were promulgated and approved into the SIP to control their meaning at this late date.

Furthermore, the TCEQ Executive Director may not rely on a reading of the rules that was not presented in the record for those rules' approval into the Texas SIP in order to establish that the rules mean something other than what they say. Doing so would violate the federal Administrative Procedures Act and would deprive the public of its right to comment on and challenge proposed rules based on the record. *Safe Air for Everyone v. EPA*, 488 F.3d 1088, 1097-1098 (9th Cir. 2007).

Another flaw with the TCEQ Executive Director's new interpretation of the SIP opacity and particulate matter limits is that the rules, which were originally adopted in 1972, gave the

Executive Director discretion to create case-by-case exemptions for properly reported exceedances of presumptively applicable limits. This is significant because it was this discretion – which has been removed from the Texas SIP – was the method by which sources unable to comply with the limits used to get exempted. The original rules state:

Rule 7, Notification Requirements for Major Upset

The Executive Secretary and the appropriate local air pollution control agency shall be notified as soon as possible of any major upset condition which causes or may cause an excessive emission that contravenes the intent of the Texas Clean Air Act and/or the regulations of the Board.

Rule 8, Notification Requirements for Maintenance

The Executive Secretary and the appropriate local air pollution control agency shall be notified in writing at least ten days prior to any planned maintenance, start-up, or shut-down which will or may cause an excessive emission that contravenes the intent of the Texas Clean Air Act and/or the Regulations of the Board. If ten days notice cannot be given due to an unplanned occurrence, notice shall be given as soon as practical prior to the shut-down.

Rule 12.1

Emissions occurring during major upsets may not be required to meet the allowable emission levels set by the Rules and Regulations upon proper notification, as set forth in Rule 7 of these General Rules, if a determination is made by the Executive Secretary after consultation with appropriate local agencies and with appropriate officials of the subject source that the upset conditions were unavoidable and that a shut-down or other corrective actions were taken as soon as practicable.

Rule 12.2

Emissions occurring during start-up or shut-down of processes or during periods of maintenance may not be required to meet the allowable emission levels set by the Rules and Regulations if so determined by the Executive Secretary upon proper notification as set forth in Rule 8 of these General Rules. The Executive Secretary may specify the amount, time, and duration of emissions that will be allowed during start-up and shut-down and during periods of maintenance.

Texas Air Control Board Regulations Adopted January 26, 1972; *see* Interpretive Letter at 2 n13 (citing these rules as alternative requirements for non-routine emissions from coal-fired EGUs with ESPs).

Thus, the SIP opacity and PM limits always presumptively applied at all times (except for the narrow and time-limited express exemption for opacity found at § 111.111(a)(1)(E)), and the TCEQ Executive Director retained discretion under the original rules to excuse non-compliance with the limits, so long as it was properly reported.

Texas power plants have historically reported exceedances of opacity and particulate matter SIP limits. If, as the TCEQ Executive Director now claims, the Texas SIP limits never applied during non-routine operations, there would have been no reason for Texas plants to report exceedances of the limits during MSS activities. Historically, exceedances of SIP opacity and particulate matter limits at coal-fired power plants equipped with ESPs have always been subject to enforcement, unless they were properly reported. (Exhibit 6, Agreed Order, In the Matter of an Enforcement Action Concerning San Miguel Electric Cooperative, Inc., Docket No. 2000-0283-AIR-E (October 20, 2000) at Section II. Allegations, ¶¶ 1 and 2.) The San Miguel power plant is a coal-fired EGU that uses an ESP to control particulate matter emissions. TCEQ assessed penalties based on San Miguel's unreported violations of the § 111.111(a)(1)(B) opacity limit. This Agreed Order contradicts the TCEQ Executive Director's position that the SIP opacity and PM limits were inapplicable during non-routine operations including startups and shutdowns.

The TCEQ's new re-interpretation of the SIP limits also contradicts the TCEQ's July 2000 response to comments concerning revisions to its upset and maintenance exemption rules:

Unauthorized or excess emissions are, by definition, violations of permit conditions or applicable emission limits. *Without the ability to exempt these emissions due to unavoidable circumstances, all cases of unauthorized emissions would be*

automatically subject to enforcement. The exemption has no base without a demonstration from the owner or operators that unavoidable circumstances existed.

General Air Quality Rules, 25 Tex. Reg. 6,727 (July 14, 2000) (emphasis added).

Thus, whatever TCEQ's intentions may have been when it promulgated its opacity and particulate matter limits in 1972, the Executive Director's discretion to excuse non-compliance with those limits arose from the State's (historic) upset and maintenance exemption rules. Nothing in those rules prevented the TCEQ from granting exemption requests for all properly reported excess emissions during non-routine operations. However, the TCEQ revoked the exemption rules and the Executive Director lost his discretion to grant exemptions when Texas abandoned its exemption rules.

Texas abandoned these rules because EPA determined that Texas's discretionary exemption practice was inconsistent with the Clean Air Act:

The EPA interprets the Act such that all emissions in excess of limits established in a SIP, including among other things, state control strategies and New Source Review SIP permits, are violations of the applicable emission limitation because excess emissions have the potential to interfere with attainment and maintenance of the National Ambient Air Quality Standards (NAAQS), reasonable further progress, state control strategies, or with the protection of Prevention of Significant Deterioration (PSD) increments. However, EPA recognizes that imposition of a penalty for sudden and unavoidable malfunctions, startups or shutdowns caused by circumstances entirely beyond the control of the owner or operator may not be appropriate. The EPA has provided guidance on two approaches States may use in addressing such excess emissions: enforcement discretion and affirmative defense to civil penalties. Under an enforcement discretion approach, the State (or another entity, such as EPA, seeking to enforce a violation of the SIP) may consider the circumstances surrounding the event in determining whether to pursue enforcement. Under the affirmative defense approach, the State may establish an affirmative defense that may be raised in the context of an enforcement proceeding. In an enforcement action, the defendant may raise a response or defense in an action for civil penalties, regarding which the defendant has the burden to prove that certain criteria have been met. See page 2 of the attachment to the 1999 Policy.

Proposed Partial Approval of Texas’s Implementation Plan for Excess Emissions During Startup, Shutdown, Maintenance, and Malfunction Activities, 75 Fed. Reg. 26,892, 26,894 (May 13, 2010).

In place of the former exemptions, Texas established affirmative defenses shielding operators from penalties for violations of applicable regulatory limits during upset events and planned MSS activities (until sources obtained their “Planned MSS” permits). 30 Tex. Admin. Code § 101.222.

The Executive Director confirmed this reading of Texas’s affirmative defense rules in his response to comments demanding that the Commission establish a schedule for Luminant to correct ongoing violations of the State’s opacity limits at § 111.111(a)(1)(A) and (B) at its Monticello power plant, a coal-fired plant equipped with ESP, before renewing that plant’s Title V permit. (Exhibit 7, The Executive Director’s Response to Public Comment, Draft Renewal Permit No. O64, Authorizing Operation of Luminant’s Monticello Power Plant.) The Executive Director did not claim, as he does now, that the SIP opacity limits did not apply during non-routine operations. Instead, he explained:

Stationary source opacity limits are codified in 30 TAC Chapter 111, section 111.111(a)(1)(A-C). Title V permit holders subject to this requirement are required to report deviations from indications of noncompliance with those standards. Deviations are reviewed by TCEQ investigators to determine if a violation took place, and if it did, review any claims for an affirmative defense made by the permit holder as outlined in 30 TAC Chapter 101, section 101.222. If the permit holder is able to satisfy the demonstration criteria for an affirmative defense for each alleged violation, the investigator ordinarily closes the investigation without further pursuing enforcement action.

...[T]he vast majority of reported deviations are associated with startup, shutdown and malfunctions and thus may qualify for consideration under affirmative defense criteria.

Id. at Response A.

If, as the Executive Director now argues, SIP opacity and particulate matter limits never applied to non-routine emissions from coal-fired EGUs with ESPs, the affirmative defenses at § 101.222 could not apply to Luminant's reported deviations during startup, shutdown, and malfunctions, because the affirmative defenses only apply to violations of *applicable limits*.

Thus, even if the Commission believed that coal-fired EGUs with ESPs could not meet SIP opacity and particulate matter limits during non-routine operations when it promulgated those limits in 1972, it is not true that the Commission never intended those limits to apply to sources like the Welsh power plant during non-routine operations. Instead, the history and the plain language of the rules demonstrate that the TCEQ intended to retain discretion to exempt sources from presumptively applicable SIP-limits on a case-by-case basis.

When EPA determined that Texas's practice of granting *ad hoc* exemptions to SIP limits was contrary to the Clean Air Act, the TCEQ abandoned those rules that gave it discretion to excuse non-compliance. But, TCEQ never revised its SIP to include alternative requirements for controlling opacity and particulate matter during non-routine operations at coal-fired power plants equipped with ESPs, and so the SIP opacity and particulate matter limits mean exactly what they say. These limits apply at all times, subject to the limited express exemption for opacity at 30 Tex. Admin. Code § 111.111(a)(1)(E). Nothing in the TCEQ's December 2015 Interpretive Letter nor the Radian Corporation's 1971 support the TCEQ Executive Director's re-interpretation of the rules.

D. The Statement of Basis was Changed in Response to Public Comments, Resulting in a New Ground for Objection

A Statement of Basis sets forth the legal and factual basis for a Title V permit's conditions in accordance with 40 CFR 70.7(a)(5) and 30 TAC §122.201(a)(4).

The TCEQ's misguided interpretation of the SIP opacity and PM limits is contained in a December 2, 2015 letter and a 1971 report from the Radian Corporation, which has now been attached to the Welsh plant's Statement of Basis.

In its Response to Comments, the TCEQ states:

Because this comment concerns, in part, interpretation of Texas law, TCEQ provided EPA a letter to provide the history and context of Chapter 111 SIP requirements in response to a similar claim regarding the AEP/SWEPCO Pirkey plant's operating permit. As TCEQ explained, the opacity and PM SIP limits in Chapter 111 do not apply during specific periods of planned MSS. The TCEQ has attached the December 2, 2015 letter to the Statement of Basis in order to clearly and completely explain the intent of the SIP rules, and its permit conditions as they apply to the Welsh Power Plant.

As discussed in greater detail in the December 2, 2015 letter, the opacity and PM limits established by § 111.111 and § 111.153(b) that are referenced in the SWEPCO Welsh FOP condition apply to coal-fired Electric Generating Units (EGU) with ESPs only during periods of routine operation, and do not apply during periods where the operation is below a minimum temperature, such as periods of startup or shutdown.

The inclusion of this December 2, 2015 letter into the Welsh plant's Title V Permit Statement of Basis raises a new and independent ground for objection that could not have been raised during the (spring 2014) public comment period.²²

EPA should object because failing to do so could be misconstrued by a federal court as effectively approving the TCEQ's incorrect interpretation of the SIP opacity and PM limits, making enforcement of these applicable requirements difficult or impossible.²³

²² 42 U.S.C. § 7661d(b)(2) (A Title V petition "shall be based only on objections to the permit that were raised with reasonable specificity during the public comment period provided by the permitting agency (unless the petitioner demonstrates in the petition to the Administrator that it was impracticable to raise such objections within such period or unless the grounds for such objection arose after such period)").

²³ See, *United States v. EME Homer City Generation*, 727 F.3d 274, 300 (3d Cir. 2013) (explaining that the Court lacks jurisdiction to enforce a requirement omitted from a Title V permit).

In addition, allowing the TCEQ to effectively amend EPA-approved SIP limits by incorporating an “interpretive letter” into the Statement of Basis, is an impermissible end run around the lawful process for amending a SIP, in violation of 42 U.S.C. § 7410(l) (“Each revision to an implementation plan submitted by a State under this chapter shall be adopted by such State after reasonable notice and public hearing. The Administrator shall not approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress . . . , or any other applicable requirement of the chapter.”); 40 C.F.R. § 51.105 (“Revisions of a plan, or any portion thereof, will not be considered part of an applicable plan until such revisions have been approved by the Administrator in accordance with this part.”); and 42 U.S.C. § 7416 (“...if an emission standard or limitation is in effect under an applicable implementation plan..., such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than [the SIP].”)

VI. CONCLUSION

For the foregoing reasons, and as explained in Petitioners’ timely-filed public comments, the proposed Title V Permit, Permit No. O26, is deficient. The Executive Director’s Response to Comments fails to address the deficiencies. Accordingly, the Clean Air Act and EPA’s 40 C.F.R. Part 70 rules require that the Administrator object to the Proposed Permit.

Respectfully submitted, on this 8th day of November 2016, by:



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ATTACHMENTS

- Exhibit 1 Petitioners' Comments ("Public Comments")
- Exhibit 2 Notice of Proposed Permit and Executive Director's Response to Public Comment ("Response to Comments").
- Exhibit 3 Proposed Title V Permit No. O26, for the Welsh power plant
- Exhibit 4 Statement of Basis for proposed Title V Permit No. O26, for the Welsh power plant
- Exhibit 5 Letter from John Steib, Jr., TCEQ, Deputy Director, Office of Compliance and Enforcement, to John Blevins, EPA Region 6, Director, Compliance Assurance and Enforcement Division, Re: EPA Approval of the TCEQ Emission Events Rule (April 17, 2007)
- Exhibit 6 Agreed Order, In the Matter of an Enforcement Action Concerning San Miguel Electric Cooperative, Inc., Docket No. 2000-0283-AIR-E (October 20, 2000)
- Exhibit 7 TCEQ Executive Director's Response to Public Comment, Draft Renewal Permit No. O64, Authorizing Operation of Luminant's Monticello Power Plant.