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February 24, 2014

Administrator Gina McCarthy  
U.S. Environmental Protection Agency  
Ariel Rios Building, Mail Code 1101A  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460  
Fax number (202) 501-1450

*via Federal Express*

**Re: Petition for Objection to Texas Title V Permit No. O53 for the Operation of the Martin Lake Steam Electric Station in Rusk County, Texas**

Dear Administrator McCarthy:

Enclosed is a petition requesting that the U.S. Environmental Protection Agency object to the Title V Permit No. O53 issued to Luminant Generation Company for operation of the Martin Lake Steam Electric Station. This petition is timely submitted by the Environmental Integrity Project and Sierra Club. As required by law, petitioners are filing this petition with the EPA Administrator, with copies to EPA Region VI, the Texas Commission on Environmental Quality, and Luminant.

Thank you for your attention to this matter.

Sincerely,

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**Enclosures**

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

IN THE MATTER OF	§	PETITION FOR OBJECTION
	§	
Clean Air Act Title V Permit (Federal	§	
Operating Permit) No. O53	§	Permit No. O53
	§	
Issued to Luminant Generation Company,	§	
LLC, Martin Lake Steam Electric Station	§	
	§	
Issued by the Texas Commission on	§	
Environmental Quality	§	
	§	

**PETITION REQUESTING THAT THE ADMINISTRATOR OBJECT TO  
ISSUANCE OF THE PROPOSED TITLE V OPERATING PERMIT FOR THE MARTIN  
LAKE STEAM ELECTRIC STATION, PERMIT NO. O53**

Pursuant to Clean Air Act § 505(b)(2), 42 U.S.C. § 7661d(b)(2), and 40 CFR § 70.8(d), Sierra Club and the Environmental Integrity Project (“Petitioners”) petition the Administrator of the United States Environmental Protection Agency (“EPA”) to object to Federal Operating Permit No. O53 (“Proposed Permit”) for Luminant Generation Company, LLC’s (“Luminant”) Martin Lake Steam Electric Station (“Martin Lake”), in Rusk County, Texas.<sup>1</sup>

As set forth below, Petitioners respectfully request that the Administrator object to the Proposed Permit for the following reasons:

- The Compliance Assurance Monitoring provision for the Martin Lake main boilers fails to assure ongoing compliance with the Texas State Implementation Plan (“SIP”) particulate matter (“PM”) limit of 0.3 lb/MMBtu; and
- The Proposed Permit fails to include a schedule for correcting Luminant’s ongoing non-compliance with Title V reporting requirements.

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<sup>1</sup> Exhibit A (“Proposed Permit”); Exhibit B (Draft Statement of Basis).

The first defect was raised in Petitioners' timely filed public comments. The second defect arose after the close of the public comment period and is timely raised for the first time in this Petition.<sup>2</sup>

## **I. THE MARTIN LAKE PLANT**

The Martin Lake Plant is a three-unit coal-fired power plant in Rusk County, Texas. The three main boiler units became operational in 1977, 1978, and 1979 respectively. Each of the units is capable of generating approximately 780 megawatts (net). The units fire lignite and subbituminous coal.

## **II. PETITIONERS**

Environmental Integrity Project is a nonprofit, non-partisan organization dedicated to strict and effective implementation and enforcement of state and federal air quality laws. Environmental Integrity Project has offices and staff in Austin, Texas.

Sierra Club, founded in 1892 by John Muir, is one of the oldest and largest grassroots environmental organizations in the country. Sierra Club is dedicated to exploring, enjoying, and protecting natural resources and wild places. Sierra Club has the specific goal of improving outdoor air quality.

Sierra Club's members and EIP's staff live, work, and recreate in areas that are directly impacted by the emissions from the Martin Lake power plant.

## **III. PROCEDURAL BACKGROUND**

### **A. Texas Title V Permit No. O53**

Martin Lake's Texas Federal Operating ("Title V") Permit No. O53 was initially issued on May 19, 1999 and was renewed in 2005. On May 3, 2010, Luminant filed an application to renew Permit No. O53. The TCEQ's Executive Director subsequently issued a draft renewal permit ("Draft Permit"), notice of which was published by Luminant on August 24, 2011. The public comment period for the Draft Permit ended on September 23, 2011. Petitioners timely filed public comments on the Draft Permit with the TCEQ on September 23, 2011.<sup>3</sup> More than two years later, the TCEQ's issued a response to public comments declining to make any

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<sup>2</sup> 40 C.F.R. § 70.8(d) (explaining that public petitions regarding Title V permits must be based on objections raised during the public comment period, unless the petitioner demonstrates that it was impracticable to raise such objections during the comment period or the grounds for such objection arose after the comment period).

<sup>3</sup> Exhibit C (Public Comments submitted by Environmental Integrity Project, Sierra Club, and the Caddo Lake Institute regarding Draft Renewal Permit No. O53) ("Public Comments").

changes to the Draft Permit.<sup>4</sup> However, the TCEQ did add issuance dates for case-by-case NSR permits incorporated by the Draft Permit to the Proposed Permit. EPA's review period for the Proposed Permit began on November 12, 2013 and ended on December 27, 2013. EPA did not object to the Proposed Permit during its review period and Petitioners are timely filing this Petition within the 60-day public petition period, which ends on February 26, 2014.<sup>5</sup>

### **B. Amendment of Texas Air Quality Permit No. 933 after the Draft Permit comment period**

Permit No. 933, as issued on June 18, 2008, is incorporated by reference into the Proposed Permit and covers the three Martin Lake Plant main boilers as well as two start-up boilers and other support equipment.<sup>6</sup> On December 16, 2011, after the close of the Draft Permit comment period, the TCEQ amended Permit No. 933 to authorize emissions from planned maintenance, startup, and shutdown activities (the "MSS Amendment").<sup>7</sup> The amended permit is deficient and violates federal requirements for a number of reasons, including, but not limited to a lack of public notice, weakening SIP limits, as well as SIP and Title V reporting requirements. For example, the MSS Amendment allows unlimited opacity levels and establishes exceedingly high particulate matter limits during undefined periods of "planned MSS" activity, based on a broad and non-exhaustive list of so-called "planned activities" that leaves much to Luminant's interpretation. In addition, to the extent that the MSS Amendment may be read to allow opacity levels greater than 20 percent and PM emissions exceeding 0.3 lb/MMBtu/hr, it conflicts with, and is less stringent than Texas SIP requirements incorporated into the Proposed Permit.<sup>8</sup>

On December 12, 2011, Luminant filed a minor revision application with the TCEQ to incorporate the MSS Amendment into its Title V Permit.<sup>9</sup> That application is still pending. However, Luminant has stated in federal court pleadings that the MSS Amendment was automatically incorporated into its Title V permit upon the filing of its application for a minor revision.<sup>10</sup> Relying on this legal position, Luminant stopped reporting deviations from the 20

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<sup>4</sup> Exhibit D (The TCEQ's Response to Public Comments filed by Environmental Integrity Project, Sierra Club, and the Caddo Lake Institute) ("Response to Comments").

<sup>5</sup> *Id.* at cover letter ("The 60-day public petition period begins on December 28, 2013 and ends on February 26, 2014.").

<sup>6</sup> Proposed Permit at 63 (New Source Review Authorization References table).

<sup>7</sup> Exhibit E (Permit No. 933, as amended on December 16, 2011) ("MSS Amendment").

<sup>8</sup> *Id.* (Special Condition 9E provides "[f]or periods of maintenance, startup, and shutdown other than those subject to Paragraphs A-C of this condition, 30 TAC § 111.111 [opacity], 111.153 [particulate matter], Chapter 101, Subchapter F [requirements for MSS activities] apply."); Proposed Permit at 36-37 (listing Texas SIP opacity and PM limits as applicable requirements).

<sup>9</sup> Exhibit F (Application for a Minor Revision to Permit No. O53 incorporating the MSS Amendment to Permit No. 933).

<sup>10</sup> Exhibit G (Defendants' Limited Objections to the Report and Recommendation of the United States Magistrate Judge, *Sierra Club v. Energy Future Holdings Corp.*, Case No. 5:10-cv-00156-DF-CMC, filed March 15, 2013) at 25 ("[T]he Magistrate Judge overlooked the federal-law effect of Luminant's pending application to amend to (sic) Martin Lake's federal Title V permit (Permit No. O53). Pursuant to federally enforceable regulations, Luminant's

percent Texas SIP opacity limit at its Martin Lake main boilers during periods of planned boiler maintenance, startup, and shutdown.<sup>11</sup>

Petitioners appreciate that the TCEQ has added an “Issuance Date” column to the Proposed Permit’s New Source Review Authorization References table clarifying that the TCEQ elected not to incorporate the MSS Amendment minor revision into the Proposed Permit. We also note that Luminant’s contention that the Proposed Permit was automatically updated to include the MSS Amendment is contrary to 30 Tex. Admin. Code § 122.217(b), which states that “[i]n every case, the applicable requirements [like the 30 Tex. Admin. Code, Chapter 111 PM and opacity limits<sup>12</sup>] are always enforceable” while an application for a final permit is pending. Because the meaning of this rule is self-evident and because the Texas SIP PM and opacity limits remain part of the Proposed Permit, we are not petitioning EPA to require the TCEQ to make the applicability of these limits more obvious on the face of the Proposed Permit.

#### IV. PROCEDURAL REQUIREMENTS FOR SUBMISSION AND EPA REVIEW OF PETITIONS

Stationary sources subject to Title V permitting requirements must obtain an operating permit that “assures compliance by the source with all applicable requirements.”<sup>13</sup> Applicable requirements include, among others, any standard or other requirement in a state’s federally-approved SIP and preconstruction permit limits and conditions.<sup>14</sup> Title V permit applications must disclose all applicable requirements and any violations of those requirements at the source.<sup>15</sup>

Where a state permitting authority issues a Title V operating permit, EPA will object to the permit if it is not in compliance with applicable requirements under 40 C.F.R. Part 70.<sup>16</sup> If the EPA does not object, any person may petition the Administrator to object within 60 days after the expiration of the Administrator’s 45-day review period.<sup>17</sup> 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].”<sup>18</sup> The Administrator must grant

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pending application authorizes and requires it to operate pursuant to the revised MSS terms pending TCEQ’s issuance of the final Title V permit amendment. *See* 30 Tex. Admin. Code § 122.217(a”).

<sup>11</sup> Exhibit H (Excerpts from the Oral Deposition of Lucy Fraiser, *Sierra Club v. Energy Future Holdings Corp. and Luminant Generation Co. LLC*, Case No. 5:10-cv-00156-DF-CMC at 156-158 (Luminant’s witness explains that opacity events that occur during planned MSS activities are no longer considered violations or reported in Luminant’s Title V deviation reports).

<sup>12</sup> 30 Tex. Admin. Code § 122.10(2)(A) (listing all requirements of Chapter 111 as “applicable requirements”).

<sup>13</sup> 40 C.F.R. § 70.1(b); 30 Tex. Admin. Code § 122.142(c).

<sup>14</sup> 40 C.F.R. § 70.2; 30 Tex. Admin. Code § 122.10(2).

<sup>15</sup> 42 U.S.C. § 7661b(b); 40 C.F.R. §§ 70.5(c)(4)(i), (5), and (8); Tex. Admin. Code § 122.132.

<sup>16</sup> 40 C.F.R. § 70.8(c).

<sup>17</sup> 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d); 30 Tex. Admin. Code § 122.360.

<sup>18</sup> 42 U.S.C. § 7661d(b)(2); *see also* 40 C.F.R. § 70.8(c)(1).

or deny a petition to object within 60 days of its filing.<sup>19</sup> While the burden is on the 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.<sup>20</sup>

## V. OBJECTIONS

### A. The TCEQ Must Revise the Proposed Permit to Assure Compliance with the Applicable Texas SIP Particulate Matter Limit of 0.3 lb/MMBtu at All Times<sup>21</sup>

EPA's Part 70 monitoring rules are designed to satisfy the statutory requirement that "[e]ach permit issued under [Title V] shall set forth . . . monitoring . . . requirements to assure compliance."<sup>22</sup> The TCEQ must take three steps to assure that a Title V permit complies with EPA's monitoring rules:

- Pursuant to 40 C.F.R. § 70.6(a)(3)(i)(A), the TCEQ must ensure that monitoring requirements contained in applicable requirements are properly incorporated into Texas Title V permits;
- Pursuant to 40 C.F.R. § 70.6(a)(3)(i)(B), if an applicable requirement contains no periodic monitoring, the TCEQ must add periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit; and
- Pursuant to 40 C.F.R. § 70.6(c)(1), if periodic monitoring in the applicable requirement is not sufficient to assure compliance with permit terms and conditions, the TCEQ must supplement monitoring to assure such compliance.

The TCEQ must also provide a clear account of its rationale for selecting the monitoring requirements in each Title V permit it issues in the permitting record.<sup>23</sup>

30 Tex. Admin. Code § 111.153(b) establishes a particulate matter limit for solid fossil fuel-fired steam generators of 0.3 lb/MMBtu, averaged over a two-hour period.<sup>24</sup> This limit,

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<sup>19</sup> 42 U.S.C. § 7661d(b)(2).

<sup>20</sup> *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's 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").

<sup>21</sup> Public Comments at 9-10.

<sup>22</sup> 42 U.S.C. § 7661c(c); see also 40 C.F.R. §§ 70.6(a)(3)(i)(A) and (B) and 70.6(c)(1).

<sup>23</sup> 40 C.F.R. § 70.7(a)(5) ("The permitting authority shall provide a statement that sets forth the legal and factual basis for the draft permit conditions (including references to the applicable statutory or regulatory provisions). The permitting authority shall send this statement to EPA and to any other person who requests it.").

<sup>24</sup> 30 Tex. Admin. Code § 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 matter per

which is referenced in the Proposed Permit's Applicable Requirements Summary,<sup>25</sup> and is also separately enforceable as a SIP limit,<sup>26</sup> applies to the three Martin Lake Plant main boilers *at all times* for at least three independent reasons. First, the limit is clear on its face and contains no qualifying language or exemptions. Second, this is a *SIP* limit and SIP limits are not subject to exemptions during maintenance, startup, shutdown, and malfunction activities.<sup>27</sup> Third, EPA has spent the better part of the last decade working with the TCEQ to end the historic (and illegal) practice of allowing blanket exemptions from compliance with SIP limits, and EPA has approved only a limited affirmative defense to *penalties* for violations of SIP limits.<sup>28</sup>

Martin Lake's main boilers are subject to Compliance Assurance Monitoring ("CAM") requirements and the Proposed Permit must include a CAM provision that assures compliance with the Texas SIP PM limit. The CAM rule requires the collection of data *at all times*, including periods of startup, shutdown, and malfunction to demonstrate continuous compliance with applicable limits.<sup>29</sup> The purpose of CAM "is to require, as part of the issuance of a permit under Title V of the Act, improved or new monitoring at those emissions units where monitoring requirements do not exist or are inadequate to meet the requirements of this part."<sup>30</sup> In addition, a CAM provision cannot "[e]xcuse the owner or operator of a source from compliance with any existing emission limitation or standard . . . that may apply under federal, state, or local law, or any other applicable requirements under the Act."<sup>31</sup> CAM provisions do not relax applicable limits or establish new limits. Rather, CAM provisions establish improved monitoring methods as part of the Title V permitting process when necessary to assure compliance with applicable limits.

The Proposed Permit includes a CAM provision for the Texas SIP PM as it applies to the Martin Lake main boilers. The CAM provision identifies opacity as the compliance indicator, but also contains the following vague and confusing text:

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million Btu heat input, averaged over a two-hour period."). The rule does not include an exception for emissions resulting from planned MSS activities.

<sup>25</sup> Proposed Permit at 37 (Applicable Requirements Summary).

<sup>26</sup> 40 C.F.R. § 52.2270(c); 64 Fed Reg. 57983, 57985, *Approval and Promulgation of Implementation Plans; Revisions to Particulate Matter Regulations* (October 28, 1999) (approving 111.153(b) into the Texas SIP).

<sup>27</sup> 75 Fed. Reg. 68989, 68992, *Approval and Promulgation of Implementation Plans; Texas; Excess Emissions During Startup, Shutdown, Maintenance, and Malfunction Activities* (November 10, 2010) ("Although one might argue that it is appropriate to account for . . . variability [of emissions under all operating conditions] in technology-based standards, EPA's longstanding position has been that it is not appropriate to provide exemptions from compliance with emission limits in SIPs that are developed for the purpose of demonstrating how to attain and maintain the public health-based NAAQS.").

<sup>28</sup> *Id.* ("For purposes of demonstrating attainment and maintenance, States assume source compliance with emission limitations at all times. Thus, broad provisions that would exempt compliance during periods of startup, shutdown, malfunction and/or maintenance would undermine the integrity of the SIP.").

<sup>29</sup> 40 C.F.R. § 64.7(c) ("Except for, as applicable, monitoring malfunctions, associated repairs, and required quality assurance or control activities . . . , the owner or operator shall conduct all monitoring in continuous operation . . . at all times the pollutant-specific emissions unit is operating.").

<sup>30</sup> 40 C.F.R. § 64.10(a)(1).

<sup>31</sup> *Id.*

For each valid 2-hour block that does not include boiler startup, shutdown, maintenance, or malfunction activities, if the opacity exceeds 20% averaged over the 2 hour block period, it shall be considered and reported as a deviation.<sup>32</sup>

Petitioners' public comments explained that this CAM provision is inadequate, because Luminant failed to justify the correlation of the opacity limit selected with particulate matter levels.<sup>33</sup> The TCEQ disagreed, stating that the Proposed Permit "includes monitoring sufficient to yield reliable data from the relevant time period that is representative of compliance with the permit; and monitoring sufficient to assure compliance with the terms and conditions of the permit."<sup>34</sup> In support of this contention, the TCEQ provided the following information:

The company has performed numerous stack tests on the Martin Lake main boilers (Units 1, 2, & 3) and the results have always indicated that total suspended particulate fell well below 0.1 lb/MMBtu with corresponding opacity also indicating less than 20% in all cases[.]

Opacity may be monitored as an indicator that Martin Lake Unit 1, 2, and 3 (ML123) are in compliance with the 0.1 lb/MMBtu PM emission rate limitation in 40 CFR § 60.42(a)(1). This is confirmed by the attached graph which shows the one-hour average PM emission rates determined by stack sampling tests versus the average of opacity readings recorded during the stack sampling tests. The graph shows that PM emission rates are 50% or less of the NSPS D limitation when the average opacity is 20% or less. . . .

The attached graph of ML123 data shows total PM (i.e., front-half and back-half) emission rates and corresponding opacity data. The graph shows that when average opacity is 20% or less the corresponding total PM emission rates are less than 50% of the NSPS D limitation, which applies to only front-half PM emissions.

Considering that (1) three units (ML123) achieve relatively low total PM emission rates at 20% stack exit opacity, (2) and, that front-half PM rates are less than total PM rates, the deviation limit of 20% provides sufficient continuous assurance that Martin Lake Units 1, 2, and 3 emissions comply with the NSPS D emission rate limitation.

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<sup>32</sup> Proposed Permit at 42.

<sup>33</sup> Public Comments at 10.

<sup>34</sup> Response to Comments at Response E.

Based on our assessment of this data, the TCEQ also believes that the continuous opacity monitoring remains adequate for ensuring compliance with PM emission limits of 30 TAC § 1115.153(b) [0.3 lb/MMBtu] since the 40 CFR §60.42(a)(1) requirement is the more lenient of the two PM emission requirements in question.<sup>35</sup>

The TCEQ's response is deficient because Luminant's stack test reports (none of which are publicly available) cannot demonstrate that maintaining opacity levels below 20 percent during periods of "normal" or "steady state" (as defined by Luminant) operation assures compliance with the Texas SIP PM limit during boiler startup, shutdown, maintenance, upsets, and malfunctions. *The SIP limit applies at all times.* As EPA emphasized in its recent Hayden Station Title V objection, a CAM provision that excludes data generated during upset, maintenance, startup, and shutdown activities—when emissions are at their highest—does not assure ongoing compliance with a SIP limit.<sup>36</sup> Thus, the TCEQ failed to demonstrate that maintenance of opacity levels below 20 percent during normal operations, as specified in the Proposed Permit's CAM provision, correlates with compliance with the PM SIP limit during boiler startup, shutdown, maintenance, or malfunction activities.

The deficiency of the CAM provision is highlighted by a recent order issued by the United States District Court for the Western District of Texas interpreting a substantially identical CAM provision in Luminant's Title V permit No. O65 for the Big Brown power plant. According to the Order, undisputed evidence that Luminant's main boilers exceeded the Texas SIP PM of 0.3 lb/MMBtu limit could not be used to demonstrate non-compliance with the limit, because the exceedences occurred during malfunction, maintenance, startup, and shutdown activities and thus fell outside of the CAM provision's reporting requirement.<sup>37</sup> This is so, the Court held, because "a concerned citizen is limited to the compliance requirements, as defined in the Title V permit, when pursuing a civil lawsuit for CAA violations."<sup>38</sup> The Order states that if EPA believes the CAM provision improperly modifies or relaxes an applicable requirement, "the appropriate procedure would be for the EPA . . . to reopen the permit and add an omitted

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<sup>35</sup> *Id.*

<sup>36</sup> Order Granting in Part and Denying in Part Petition for Objection to Permit, *In the Matter of Public Service Company of Colorado, Hayden Station*, Petition VIII-2009-01 at 8 (March 24, 2010) ("Section III.c of Appendix G of the permit says periods of startup, shutdown, and malfunction may be excluded from the 24-hour average opacity for reporting CAM excursions. However, the CAM rule at 40 CFR 64.7(c) requires the collection of data at all times the process is operating, *which includes periods such as startup, shutdown, or malfunctions*. . . . CDPIIE must remove from the permit this exclusion for collecting data during periods of startup, shutdown, and malfunction.") (emphasis added).

<sup>37</sup> Exhibit I (Order Granting Motion for Partial Summary Judgment, *Sierra Club v. Energy Future Holdings Corp.*, No. W-12-CV-108 (W.D. Tex. February 10, 2014)) at 3 ("Defendants do not contest the fact that there were instances between January 2008 and July 2011, when emissions exceeded 0.3 lb/mmBtu. Instead, Defendants argue that it is entitled to summary judgment because those PM exceedences still complied with the PM limits in Big Brown Plant's Title V permit[.]").

<sup>38</sup> *Id.* at 16.

‘applicable requirement,’ or amend any defect in the permit approving process.”<sup>39</sup> As the above-cited Order clearly demonstrates, the Proposed Permit’s CAM provision thwarts enforcement of the Texas SIP PM limit and does not assure compliance with it.<sup>40</sup> The TCEQ’s position that the CAM provision assures compliance is completely undermined by the Order and the TCEQ’s explanation regarding the sufficiency of the CAM provision is implausible on its face.

**Requested Revision to the Proposed Permit:**

To assure ongoing compliance with the Texas PM SIP limit and to confirm that the limit applies at all times, the Administrator should object to the Proposed Permit and require the TCEQ to remove the CAM exclusion for periods of malfunction, maintenance, startup, and shutdown.

**B. The TCEQ Must Revise the Proposed Permit to Establish a Schedule of Compliance that Requires Luminant to Report all Deviations from the 20 Percent Texas SIP Opacity Limit**

As part of the Title V renewal process, the TCEQ must develop a “schedule of compliance for sources that are not in compliance with all applicable requirements at the time of permit issuance.”<sup>41</sup> The Martin Lake main boilers regularly exceed the 20 percent Texas SIP opacity limit. Luminant must report each exceedence of the Texas SIP opacity limit as a deviation in its Title V excess emissions reports.<sup>42</sup> Luminant no longer reports exceedences of the Texas SIP opacity limit that occur during planned MSS activities as deviations. This is a violation of applicable Title V reporting requirements that the TCEQ must address through a compliance schedule in the Proposed Permit.<sup>43</sup> Petitioners were unable to raise this issue during

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<sup>39</sup> *Id.* at 12-13 (“Once approved, a plaintiff is foreclosed from collaterally attacking the Title V permit that is issued to a power plant. Such is the case even if the deficiencies are overlooked and remain undiscovered until after the permit is issued. Should a permit deficiency go unnoticed for a period of time, the appropriate procedure would be for the EPA or the states to reopen the permit and add an omitted “applicable requirement,” or amend any defect in the permit approving process.” (internal citations omitted)).

<sup>40</sup> Petitioners disagree with the Court that a CAM provision inserted into Luminant’s Title V Permit through a minor revision may be read to relax the applicable Texas SIP PM limit or to create an exemption to the limit during periods of malfunction, maintenance, startup, and shutdown. For this reason, and others, Sierra Club will carefully consider its right to appeal the Court’s Order.

<sup>41</sup> 40 C.F.R. § 70.5(c)(8)(iii)(C); 30 Tex. Admin. Code § 122.142(e).

<sup>42</sup> 75 Fed. Reg. 68994 (“All emissions in excess of the applicable emission limits are considered violations”); 30 Tex. Admin. Code § 122.145(2)(A) (“The permit holder shall report, in writing, to the executive director all instances of deviations, the probable cause of the deviations, and any corrective actions or preventative measures taken for each emission unit addressed in the permit.”).

<sup>43</sup> *Title V Deviation Reporting and Permit Compliance Certification*, TCEQ Field Operations Guidance (2012) at 12 n3 (“The permit holder is required by the TV permit to comply with the requirement to report a deviation. Noncompliance with that requirement is a separate deviation.”). This document is available electronically at: [http://www.tceq.texas.gov/assets/public/compliance/field\\_ops/guidance/Title\\_V\\_Guidance\\_2012\\_November.pdf](http://www.tceq.texas.gov/assets/public/compliance/field_ops/guidance/Title_V_Guidance_2012_November.pdf) (last accessed on January 17, 2014).

the Draft Permit comment period, because Luminant did not cease reporting opacity exceedences during startup, shutdown, and maintenance until 2012, after the comment period closed.

*1. Emissions from the Martin Lake Plant have exceeded and continue to exceed applicable opacity limits<sup>44</sup>*

The three Martin Lake Plant main boilers must comply with the opacity limit of 20 percent (averaged over a six minute period) established by 30 Tex. Admin. Code § 111.111(a)(1)(B), subject to a limited exemption allowing no more than one 6-minute exceedence per hour.<sup>45</sup> This limit is incorporated into the Proposed Permit.<sup>46</sup> According to Luminant's excess emissions reports, emissions from the Martin Lake main boilers exceeded the Texas SIP opacity limit on more than 20,000 occasions between 2006 and 2011.<sup>47</sup> Many of these ongoing opacity events resulted in opacity levels at or above 90 percent, more than quadruple the applicable limit.<sup>48</sup>

The TCEQ contends that the Proposed Permit need not contain a compliance schedule addressing Luminant's chronic non-compliance with the Texas SIP opacity limit, because the TCEQ's Executive Director has determined that many of Luminant's self-reported opacity deviations qualify for the Commission's affirmative defense, listed at 30 Tex. Admin. Code § 101.222.<sup>49</sup> This response fails to address Petitioners' issue. As EPA has repeatedly made clear, if the criteria are met, Texas's affirmative defense may be used to avoid penalties, but it does not change the underlying requirements.<sup>50</sup> That the TCEQ has exercised enforcement discretion, has chosen to take no action, or is satisfied that the reported deviations qualify for the affirmative defense is not evidence that Luminant is complying with the Texas SIP opacity limit and the TCEQ cannot exempt Luminant from having to report any deviations from that limit.

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<sup>44</sup> Public Comments at 2.

<sup>45</sup> 30 Tex. Admin. Code § 111.111(a)(1)(E) ("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 consecutive 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 Emissions Limits)").

<sup>46</sup> Proposed Permit at 36.

<sup>47</sup> Public Comments at 2 and Attachment A; Exhibit J (Quarterly Excess Emission Reports submitted for Permit No. O53 from 2010 1Q-2012 4Q).

<sup>48</sup> *Id.*

<sup>49</sup> Response to Comments at Response A.

<sup>50</sup> 75 Fed. Reg. 68994 ("We note that portions of the January 23, 2006 SIP submittal we are approving do not modify any applicable emission limitation, nor do they authorize violations of applicable emission limitations. All emissions in excess of the applicable emission limits are considered violations.").

***2. Luminant no longer reports deviations from the Texas SIP opacity limit that occur during MSS activities***

The TCEQ's Title V rules require permit holders to "report, in writing, to the executive director all instances of deviation, the probable cause of the deviations, and any corrective actions or preventative measures taken for each emission unit addressed in the permit."<sup>51</sup> Luminant has stopped reporting deviations from the Texas SIP opacity limit at its Martin Lake main boilers during maintenance, startups, and shutdowns based on its mistaken legal position that the MSS Amendment to Permit No. 933 effectively creates an exception to the SIP limit. Luminant's legal position is mistaken for several reasons. First, the MSS Amendment has not been incorporated into the Proposed Permit and changes made to Permit No. 933 in 2011 are not part of the Proposed Permit.<sup>52</sup> Second, the Proposed Permit still lists the Texas SIP opacity limit as an applicable requirement, and Luminant has not requested that the TCEQ remove that requirement from the permit. Third, even if the MSS Amendment had been incorporated into the Proposed Permit, the TCEQ's rules provide that, to the extent that the MSS Amendment establishes limits less stringent than the SIP, Luminant must continue to demonstrate compliance with the SIP limits.<sup>53</sup> Finally, as a matter of law, the TCEQ cannot modify SIP requirements through the Title V or NSR permitting process.<sup>54</sup>

Though Luminant has not made any changes to the Martin Lake main boilers that could significantly reduce—let alone eliminate—excess opacity during planned MSS activities,<sup>55</sup> it ceased reporting deviations from the Texas SIP opacity limit during startup, shutdown, and maintenance after the MSS Amendment to Permit No. 933 was issued in December 2011.<sup>56</sup> Luminant's Title V deviation reports provide clear evidence that Luminant has omitted deviations from Texas SIP opacity limit from its Title V deviation reports since the first quarter of 2012. The Martin Lake Plant main boilers are subject to a 20 percent opacity limit under Texas's SIP-approved 30 Tex. Admin. Code § 111.111(a)(2)(B) and EPA's New Source Performance Standards ("NSPS") at 40 CFR § 60.42(a)(2). Both of these standards allow Luminant to exceed the 20 percent opacity limit for one six minute period per hour. Luminant's

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<sup>51</sup> 30 Tex. Admin. Code § 122.142(2)(A).

<sup>52</sup> Proposed Permit at 63 (indicating that Permit No. 933 as issued on June 18, 2008 is incorporated into the Proposed Permit).

<sup>53</sup> 30 Tex. Admin. Code § 116.115(b)(2)(H)(ii) ("Holders of permits . . . shall comply with the following: If more than one state or federal rule or regulation or permit condition are applicable, the most stringent limit or condition shall govern and be the standard by which compliance shall be demonstrated.").

<sup>54</sup> 42 U.S.C. § 7410(i) (With limited inapplicable exceptions, "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.").

<sup>55</sup> Exhibit J. The TCEQ's Title V rules require information about corrective actions and preventative measures taken to address non-compliance with applicable requirements to be included in Title V excess emissions reports. 30 Tex. Admin. Code § 122.145(2)(A). Luminant's excess emissions reports do not identify any changes to the Martin Lake main boilers that would significantly reduce, let alone completely eliminate, exceedences of the Texas SIP opacity limit during planned MSS activities.

<sup>56</sup> Exhibit J.

Title V deviation reports must separately list deviations from the NSPS and SIP opacity limits. While the Texas SIP opacity limit applies at all times, the NSPS limit does not apply during periods of startup, shutdown, and malfunction.<sup>57</sup> Thus, deviations from the NSPS opacity limit are also reportable deviations from the SIP opacity limit, though a deviation from the Texas SIP opacity limit will not necessarily be a deviation from the NSPS limit. Because this is so, the duration of opacity deviations from the Texas SIP opacity standard reported by Luminant should always be equal to or greater than the duration of deviations from the NSPS limit. This is exactly what we see reflected in Martin Lake’s deviation reports until the first quarter of 2012:

2011 1 <sup>st</sup> Quarter	111.111 20% Deviation Duration (Minutes)	60.42(a)(2) 20% Deviation Duration (Minutes)
Unit 1	2160	1710
Unit 2	1674	1446
Unit 3	2094	1764

2011 2 <sup>nd</sup> Quarter	111.111 20% Deviation Duration (Minutes)	60.42(a)(2) 20% Deviation Duration (Minutes)
Unit 1	174	54
Unit 2	30	0
Unit 3	1014	918

2011 3 <sup>rd</sup> Quarter	111.111 20% Deviation Duration (Minutes)	60.42(a)(2) 20% Deviation Duration (Minutes)
Unit 1	156	42
Unit 2	672	588
Unit 3	18	6

2011 4 <sup>th</sup> Quarter	111.111 20% Deviation Duration (Minutes)	60.42(a)(2) 20% Deviation Duration (Minutes)
Unit 1	1434	1356
Unit 2	1302	1230
Unit 3	960	894

Beginning in the first quarter of 2012, after Luminant obtained its MSS Amendment to Permit No. 933, (with one exception) the duration of reported NSPS deviations far exceeds the duration of reported SIP opacity limit deviations:

<sup>57</sup> 40 C.F.R. § 60.11(c) (“The opacity standards set forth in this part shall apply at all times except during periods of startup, shutdown, malfunction, and as otherwise provided in the applicable standard.”).

2012 1 <sup>st</sup> Quarter	111.111 20% Deviation Duration (Minutes)	60.42(a)(2) 20% Deviation Duration (Minutes)
Unit 1	1020	3156
Unit 2	36	1410
Unit 3	156	1110

2012 2 <sup>nd</sup> Quarter	111.111 20% Deviation Duration (Minutes)	60.42(a)(2) 20% Deviation Duration (Minutes)
Unit 1	552	1434
Unit 2	12	330
Unit 3	0	2088

2012 3 <sup>rd</sup> Quarter	111.111 20% Deviation Duration (Minutes)	60.42(a)(2) 20% Deviation Duration (Minutes)
Unit 1	1314	3054
Unit 2	384	1254
Unit 3	936	966

2012 4 <sup>th</sup> Quarter	111.111 20% Deviation Duration (Minutes)	60.42(a)(2) 20% Deviation Duration (Minutes)
Unit 1	438	2232
Unit 2	0	0
Unit 3	150	60

Though Luminant no longer reports exceedences of the Texas SIP limit that occur during maintenance, startup, and shutdown activities, nothing has changed at Martin Lake. The power plant operates as it has for decades, which is to say that the particulate matter and opacity pollution controls simply do not work during periods when PM emissions are at their highest. Rather than trying to remedy this problem, Luminant is hiding behind a permit that does not—and cannot—supersede the Texas SIP opacity limit. Luminant’s ongoing failure to include planned MSS opacity events in its deviation reports is a violation of Title V reporting requirements. And as explained above, even if Texas’s affirmative defense rule applies, it does not change underlying standards, and any exceedence of those standards remains a reportable deviation under Title V.

**Requested Revision to the Proposed Permit:**

The Administrator should object to the Proposed Permit and require the TCEQ to revise the Proposed Permit to include a schedule for Luminant to supplement its incomplete quarterly excess emissions reports for 2012 and 2013 by reporting all deviations from the 20 percent opacity limit, including those that occurred during startup, shutdown, and maintenance.

**VII. CONCLUSION**

For the foregoing reasons, the Proposed Permit is deficient and the Administrator should object to it.

Sincerely,



Ilan Levin  
Gabriel Clark-Leach  
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Austin, TX 78701  
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ATTORNEYS FOR PETITIONERS

**CERTIFICATE OF SERVICE**

I declare under penalty of perjury under the laws of the United States that I have provided copies of the foregoing Petition to persons or entities below via Federal Express.

Texas Commission on Environmental Quality  
Office of Permitting & Registration  
Air Permits Division  
Technical Program Support Section, MC-163  
P.O. Box 13087  
Austin, Texas 78711-3087

U.S Environmental Protection Agency  
Attn: Air Permit Section Chief  
Region 6  
1445 Ross Avenue, Suite 1200  
Dallas, Texas 75202-2733

U.S. Environmental Protection Agency  
Administrator Gina McCarthy  
Ariel Rios Building (AR 1101A)  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460

Mr. Stephen G. Horn  
Senior Vice President  
Luminant Generation Company LLC  
1601 Bryan Street  
Dallas, Texas 75201-3430



Gabriel Clark-Leach

## MARTIN LAKE PETITION EXHIBITS (DVD-ROM)

- Exhibit A** (“**Proposed Permit**”) Title V Permit No. O53 for Luminant Generation Company’s Martin Lake Steam Electric Station
- Exhibit B** Draft Statement of Basis for Renewal of Permit No. O53
- Exhibit C** (“**Public Comments**”) Public Comments submitted by Environmental Integrity Project, Sierra Club, and the Caddo Lake Institute regarding Draft Renewal Permit No. O53
- Exhibit D** (“**Response to Comments**”) The TCEQ’s Response to Public Comments filed by Environmental Integrity Project, Sierra Club, and the Caddo Lake Institute
- Exhibit E** (“**MSS Amendment**”) Texas Air Quality Permit No. 933, as amended on December 16, 2011
- Exhibit F** Application for a Minor Revision to Permit No. O53 incorporating the MSS Amendment to Permit No. 933
- Exhibit G** Defendants’ Limited Objections to the Report and Recommendation of the United States Magistrate Judge, *Sierra Club v. Energy Future Holdings Corp.*, Case No. 5:10-cv-00156-DF-CMC, filed March 15, 2013
- Exhibit H** Excerpts, Oral Deposition of Lucy Fraiser, *Sierra Club v. Energy Future Holdings Corp. and Luminant Generation Co. LLC*, Case No. 5:10-cv-00156-DF-CMC
- Exhibit I** Order Granting Motion for Partial Summary Judgment, *Sierra Club v. Energy Future Holdings Corp.*, No. W-12-CV-108 (W.D. Tex. February 10, 2014)
- Exhibit J** Quarterly Excess Emission Reports submitted for Permit No. O53 from 2010 1Q-2012 4Q