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November 12, 2012

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VIA E-FILING AND HAND DELIVERY

Ms. Bridget Bohac
Chief Clerk
Texas Commission on Environmental Quality
12100 Park 35 Circle
Building F, 1st Floor
Austin, TX 78753

Re: TCEQ Docket No. 2012-2138-AIR; *In the Matter of the Application of Lower Colorado River Authority for Amendment of Air Permit Nos. 51770 and PSD-TX-486M3*

Dear Ms. Bohac:

Enclosed for filing in the above-referenced proceeding please find an original and seven (7) copies of *Lower Colorado River Authority's Response to Requests for Contested Case Hearing*.

By my signature, I certify that a copy of this filing has been served on the parties to this matter as indicated below.

If you have any questions concerning this filing, please do not hesitate to contact me at the number above.

Sincerely,



Derek R. McDonald

Enclosures

cc: Service List (*with enclosures*)

TCEQ DOCKET NO. 2012-2138-AIR

IN THE MATTER OF THE APPLICATION §
OF LOWER COLORADO RIVER §
AUTHORITY FOR AMENDMENT OF AIR §
PERMIT NOS. 51770 AND PSD-TX-486M3 §

BEFORE THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

**LOWER COLORADO RIVER AUTHORITY'S RESPONSE
TO REQUESTS FOR CONTESTED CASE HEARING**

**TO THE HONORABLE COMMISSIONERS OF THE TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY:**

Applicant Lower Colorado River Authority ("LCRA") submits this Response to Requests for Contested Case Hearing pursuant to 30 Tex. Admin. Code ("TAC") § 55.209(d). For the reasons set forth below, LCRA respectfully requests that the Texas Commission on Environmental Quality ("TCEQ" or "the Commission") deny the hearing requests on LCRA's voluntary "no increase" amendment application converting its existing flexible permit for the Sam Seymour Generating Station (Fayette Power Project), issued under 30 TAC Chapter 116, Subchapter G, to a permit issued under 30 TAC Chapter 116, Subchapter B.

I. Introduction

In 2002 LCRA submitted an application to the TCEQ for a flexible permit for the Fayette Power Project ("FPP") pursuant to 30 TAC Chapter 116, Subchapter G. LCRA's flexible permit demonstrated the significant environmental benefits of TCEQ's flexible permits program. With the TCEQ's issuance of the flexible permit to LCRA, allowable emissions of sulfur dioxide from FPP decreased by over 90 percent, nitrogen oxides decreased by over 50 percent, and particulate matter decreased by over 25 percent. The flexible permit was lauded by Governor Perry, then EPA Region 6 Regional Administrator Gregg Cooke, and representatives of environmental advocacy groups such as the Environmental Defense Fund and

Sierra Club.¹ Emissions reductions required under the LCRA flexible permit came at a cost of over \$400 million. LCRA is proud of the level of environmental performance that its pollution control equipment improvements have achieved under the permit. These improvements have maintained the three coal-fired steam electric generating units at FPP in the leading class of similar units.

Despite the magnitude of these emission reductions, EPA Region 6 raised concerns about the TCEQ's flexible permits program. These concerns culminated on December 6, 2012, when former EPA Regional Administrator Dr. Al Armendariz sent a letter to LCRA urging LCRA to convert its flexible permit into a 30 TAC Chapter 116, Subchapter B permit. LCRA has maintained unequivocally that its flexible permit is, and always has been, a valid federally-enforceable permit. Nevertheless, in order to address the uncertainty created by Region 6's actions with respect to the flexible permits program, LCRA submitted this "de-flex" permit amendment application seeking to convert its existing flexible permit to a permit issued under 30 TAC Chapter 116, Subchapter B. Due to the time and effort already invested in the permitting process and the desire not to disturb other pending permitting actions that are based on receipt of a Subchapter B permit, LCRA has elected to move forward with this amendment application even though the United States District Court for the Southern District of Texas has specifically affirmed the validity of LCRA's flexible permit and despite the United States Court of Appeals for the Fifth Circuit rejecting EPA's disapproval of the flexible permits program.²

¹ See LCRA Press Release (July 10, 2002). [Attachment A].

² See *TCE v. LCRA*, Civil Action No. H-11-791, 2012 WL 1067211, *10 (S.D.Tex. Mar. 28, 2012) (dismissing citizen suit claims alleging that LCRA's flexible permit was invalid); *Texas v. E.P.A.*, 690 F.3d 670, 686 (5th Cir. Aug. 13, 2012) (reversing EPA's disapproval of the Texas flexible permit program).

LCRA submitted its de-flex amendment application to make the changes to its permit necessary to establish unit-specific emission limits as is typical in a Subchapter B permit. *Importantly, LCRA's application to convert its flexible permit to a Subchapter B permit has been submitted as a "no increase amendment" and will not result in an increase in allowable emissions or the emission of an air contaminant not previously emitted by FPP. As such, there is no right to a contested case hearing on this application.*³ In fact, allowable emissions will further *decrease* under the proposed Subchapter B permit because LCRA's amendment application proposes further reductions in allowable emissions of particulate matter at FPP. For these reasons, the application is a "no increase" amendment that is not subject to the hearing process or even the TCEQ's public notice requirements. But for LCRA's interest in transparency and its voluntary agreement to publish notice, no public notice of this amendment application would have been required under the TCEQ's rules.

Rather than applaud LCRA's environmental leadership at FPP, anti-coal groups and individuals have filed adverse comments and hearing requests on this largely ministerial permit action. These comments have no merit, as they have been soundly rejected by the Executive Director in his Response to Comments ("RTC") as well as federal circuit and district judges.⁴ The requests for hearing are without merit because there is no right to a contested case hearing on LCRA's "no increase" amendment application. For these reasons, and because it would be a fundamentally unfair burden on LCRA to refer this application for hearing, LCRA respectfully requests the Commission to deny all hearing requests in this matter and approve LCRA's application for amendment of Air Quality Permit Nos. 51770 and PSD-TX-486M3.

³ TEX. HEALTH & SAFETY CODE § 382.056(g); *see also* 30 TEX. ADMIN. CODE § 55.201(i)(3)(C).

⁴ No commenter has sought reconsideration of the Executive Director's decision or RTC in this proceeding.

II. Factual and Procedural Background

A. “De-flex” amendment application

FPP is a power plant located at 6549 Power Plant Road, seven miles east of La Grange in Fayette County, Texas. LCRA has applied to the TCEQ for a voluntary amendment of Air Quality Permit Nos. 51770 and PSD-TX-486M3 to convert the existing authorization from a permit issued under 30 TAC Chapter 116, Subchapter G, to an air quality permit issued under 30 TAC Chapter 116, Subchapter B. While LCRA has always maintained that its flexible permit is fully federally enforceable, the amendment request was voluntarily made to address concerns (that were later deemed unfounded) by EPA Region 6 regarding the TCEQ’s flexible permits program.⁵

TCEQ received LCRA’s permit amendment application on January 31, 2011, and declared the application administratively complete on April 15, 2011. Although compliance with TCEQ’s public notice requirements in 30 TAC Chapter 39 is not required for this application, LCRA voluntarily elected to publish notice and post signs to notify the public of this application. The Notice of Receipt and Intent to Obtain an Air Quality Permit for this amendment application was published in the *Fayette County Record* on April 22, 2011. The Notice of Application and Preliminary Decision for an Air Quality Permit was published in the *Fayette County Record* on May 15, 2012. A public meeting was held in La Grange, Texas on June 14, 2012, and the comment period ended that same day. The TCEQ’s Office of the Chief Clerk received public comments and requests for contested case hearing from the Environmental Integrity Project

⁵ EPA’s June 30, 2010 disapproval of the Texas flexible permit program was reversed by the U.S. Court of Appeals for the Fifth Circuit on August 13, 2012 as arbitrary and capricious. *See Texas v. E.P.A.*, 690 F.3d at 686 (holding that EPA’s disapproval “does not withstand Administrative Procedure Act review”).

(“EIP”) (on behalf of Texas Campaign for the Environment⁶ and Sierra Club) and nine individuals.

The Executive Director issued his Decision and Response to Comments (“RTC”) on the amendment application on September 20, 2012. The Executive Director recommends approval of LCRA’s amendment application and confirms that the requested amendment will not authorize new construction, any changes to existing equipment, or an increase in emission limits.⁷ In fact, the amendment application proposes emission limits, which, if approved, would result in a further decrease in allowable emissions of particulate matter.⁸

The RTC also noted that a compliance history review of LCRA and FPP was conducted based on the criteria in 30 TAC Chapter 60. A company and site have a “High” or “above-average compliance record” if it has a compliance rating less than 0.10, and an “Average” compliance record or “generally complies with environmental regulations” if the rating is greater than 0.10 but less than 45. FPP and LCRA have admirable site and company ratings of 0.1 and 2.8, respectively.

B. Federal Court Litigation

With its hearing request, EIP is seeking to obtain relief from the TCEQ that it sought and could not obtain in ancillary civil litigation. In March 2011, EIP, on behalf of itself and TCE, asserted claims that mirror many of the assertions made in this proceeding. The United States District Court for the Southern District of Texas rejected and dismissed all but one of the claims asserted in that litigation, which has caused EIP to bring this similarly baseless

⁶ Texas Campaign for the Environment (“TCE”) is the same plaintiff represented by EIP in the federal district court litigation.

⁷ See Executive Director’s Response to Public Comment at 1 (Sept. 20, 2012).

⁸ See De-Flex Permit Amendment Application at Section 5-1.

challenge to this permit action. The remaining claim has been set for trial in February 2013, and LCRA is confident that the Court will ultimately reject that claim as well.

III. Standard for Requesting a Contested Case Hearing

The TCAA and TCEQ regulations provide that there is *no* right to a contested case hearing on air permit amendments that will not result in an increase in allowable emissions or result in the emission of an air contaminant not previously emitted.⁹ TCAA Section 382.056(g) provides:

The commission may not seek further public comment or hold a public hearing under the procedures provided by Subsections (i)-(n) in response to a request for a public hearing on an amendment, modification, or renewal that would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted.¹⁰

Permit renewals and amendment applications made without any corresponding increase in emissions are commonly referred to as “no increase” renewals or amendments. By statute and TCEQ rules, these types of amendments do not allow for contested case hearings. Because there is no right to a contested case hearing on LCRA’s “no increase” amendment application, recent decisions in the Austin Court of Appeals clarifying the applicable standard the Commission should apply in reviewing requests for contested cases by purportedly affected persons do not apply.¹¹

⁹ 30 TEX. ADMIN. CODE § 55.201(i)(3)(C). The rules add that the Commission “may hold a contested case hearing if the application involves a facility for which the applicant's compliance history contains violations which are unresolved and which constitute a recurring pattern of egregious conduct which demonstrates a consistent disregard for the regulatory process, including the failure to make a timely and substantial attempt to correct the violations.” *Id.*; see also TEX. HEALTH & SAFETY CODE § 382.056(o).

¹⁰ TEX. HEALTH & SAFETY CODE § 382.056(g); see also 30 TEX. ADMIN. CODE § 55.201(i)(3)(C).

¹¹ See *City of Waco v. Tex. Comm'n on Env'tl. Quality*, 346 S.W.3d 781 (Tex. App.—Austin 2011, pet. denied); *Bosque River Coal. v. Tex. Comm'n on Env'tl. Quality*, 347 S.W.3d 366 (Tex. App.—Austin 2011, pet. denied). The TCEQ’s motions for rehearing on the denial of petitions in these cases are pending.

Even if Section 386.056(g) did not apply, a request for a contested case hearing by an individual or group can only be granted if it is made by an “affected person.”¹² TCEQ regulations specify factors to be considered in determining whether or not a hearing requestor is an affected person, including “any distance restrictions or other limitations imposed by law.”¹³ Texas law makes it clear that an interest common to the general public cannot support a requestor’s affected person status.¹⁴ Even if there were a right to a hearing on this application, which there is not, the requestors have not demonstrated and cannot demonstrate that they will be adversely affected by the “no increase” amendment sought by LCRA.

IV. The Hearing Requests Should be Denied

The amendment of Air Quality Permit Nos. 51770 and PSD-TX-486M3 is a “no increase” amendment that will not authorize an increase in allowable emissions or cause the emission of an air contaminant not previously emitted. Because Texas statute and TCEQ rules specify that no hearing request is allowed for a “no increase” amendment, and because persons submitting hearing requests do not meet the standard for “affected persons” under the statute and TCEQ rules, the requests for a contested case hearing on the amendment of Air Quality Permit Nos. 51770 and PSD-TX-486M3 should be denied as a matter of law.

Further, although they are not relevant to whether a hearing request should be granted, LCRA strongly disagrees with various comments submitted by EIP and the other commenters. Because neither EIP nor the individual requestors have sought reconsideration of the Executive Director’s Decision, the public comments are not directly at issue at this time.

¹² 30 TEX. ADMIN. CODE § 55.201(b).

¹³ See 30 TEX. ADMIN. CODE § 55.203(c).

¹⁴ TEX. WATER CODE § 5.115(a).

A. The Amendment will not Authorize an Increase in Allowable Emissions or the Emission of an Air Contaminant not Previously Emitted, and in the Case of PM will Actually Decrease Allowable Emissions

The Executive Director states in his RTC that the amendment of Air Quality Permit Nos. 51770 and PSD-TX-486M3 will not result in an increase in allowable emissions of any contaminant or the emission of a contaminant not previously emitted.¹⁵ The RTC explains that the only changes to FPP's permits are to establish individual unit emission limits that are less than or equal to the caps that are in the flexible permit.¹⁶ No change to the emissions authorized by Air Quality Permit Nos. 51770 and PSD-TX-486M3 is being made through the permit amendment process; rather, the TCEQ is simply converting a Subchapter G permit to a Subchapter B permit and making necessary changes to the permit to formalize the amendment. There are no changes to the units or annual emissions increases from those units that are being authorized through the amendment. In fact, LCRA volunteered to reduce actual allowables for particulate matter through the permit amendment based on more recent stack test information showing the better levels of control that were being achieved at FPP.¹⁷ As a result, the amendment is squarely within the provisions of TCAA Section 382.056(g) barring a contested case hearing.

TCEQ rules provide that, even if a renewal would not result in an increase in allowable emissions, the Commission may hold a contested case hearing if “the application involves a facility for which the applicant’s compliance history contains violations which are

¹⁵ Executive Director’s Response to Public Comment at 1.

¹⁶ *Id.*

¹⁷ *See* De-Flex Permit Amendment Application at 5-1. Proposed annual emission limits were downwardly adjusted by using lower emission rates based on stack test data that was unavailable at the time the original emission caps in the flexible permit were established.

unresolved and which constitute a recurring pattern of egregious conduct.”¹⁸ Similarly, the TCAA allows the Commission to hold a hearing for an amendment if the applicant’s compliance history is in the “lowest classification.”¹⁹ That is undoubtedly not the case with LCRA. From the time it filed the amendment applications until today, LCRA has maintained an “average” compliance history at FPP and an “average” compliance history companywide.²⁰ TCEQ rules consider an average performer as one that “generally complies with environmental regulations.”²¹ Thus, it cannot be seriously argued that LCRA’s compliance history, which is on the high side of “average,” demonstrates a recurring pattern of egregious conduct.²²

B. The Requestors Are Not Affected Persons

Even if LCRA had not filed an amendment application for which no right to a hearing exists, no contested case hearing would be warranted in this matter as none of the requestors have demonstrated that they are “affected persons” who may validly demand that a contested case hearing be held on the permit amendment submitted by LCRA for FPP.²³

¹⁸ 30 TEX. ADMIN. CODE § 55.201(i)(3)(C).

¹⁹ TEX. HEALTH & SAFETY CODE § 382.056(o) (“Notwithstanding the other provisions of this chapter, the commission may hold a hearing on a permit amendment, modification, or renewal if the commission determines that the application involves a facility for which the applicant’s compliance history is in the lowest classification under Sections 5.753 and 5.754, Water Code, and rules adopted and procedures developed under those sections.”).

²⁰ Executive Director’s Response to Public Comment at 23.

²¹ 30 TEX. ADMIN. CODE § 60.2(a)(2).

²² Compliance history ratings are grouped in three categories: High, Average, and Poor. 30 TEX. ADMIN. CODE § 60.2(a).

²³ An “affected person” is “one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. An interest common to members of the general public does not qualify as a personal justiciable interest.” 30 TEX. ADMIN. CODE § 55.203(a). The Third Court of Appeals held in *City of Waco* that the ultimate test for whether an individual can demonstrate a “personal justiciable interest”—and thus be an “affected person”—is analogous to the general test for constitutional standing, i.e., that a party must establish (1) “an invasion of a ‘legally protected interest’ that is (a) ‘concrete and particularized’ and (b) ‘actual or imminent, not conjectural or hypothetical;’” (2) that the injury is “‘fairly traceable’ to the issuance of the permit as proposed;” and (3) that the injury will likely “be redressed by a favorable decision on its complaints regarding the proposed permit.” *City of Waco*, 346 S.W.3d at 802.

The requests filed by EIP on behalf of Sierra Club and TCE in this matter fail to establish that the groups are “affected associations.” An association that seeks a contested case hearing must demonstrate that one or more members would otherwise have standing to request a hearing in their own right.²⁴ EIP’s hearing request filed on behalf of these organizations does not identify an individual member of the association who would be considered an affected person with standing to request a contested case hearing with regard to LCRA’s application. On behalf of Sierra Club, EIP lists Carol Daniels of La Grange as a purported member who is “less than 10 miles from the Fayette power plant” and who “has concerns about air quality at her home and in her community.”²⁵ On behalf of TCE, EIP alleges that Maggie Rivers, who lives “roughly six miles north of the Fayette power plant,” “can see the smokestacks from her property” and “has observed smoke coming from the power plant’s smokestacks.”²⁶ Neither Ms. Daniels nor Ms. Rivers’ generic concerns show how they have an interest distinct from “[a]n interest common to members of the general public.” Moreover, neither could possibly establish that their alleged harms would be “fairly traceable’ to the issuance of the permit as proposed”-- *i.e.* the conversion of FPP’s permit from a Subchapter G permit to a Subchapter B permit. Because EIP only alleges generic interests for Sierra Club and TCE members indistinct from the general public and/or too attenuated from the specific permit amendment LCRA seeks in this proceeding, both of the associations cited by EIP fail to satisfy the Commission’s first mandatory criteria for group or association standing.

²⁴ 30 TEX. ADMIN. CODE § 55.205(a)(1).

²⁵ EIP’s Request for Contested Case Hearing is not page numbered, but the two members purportedly affected by FPP are listed on page 2 of its June 14, 2012 request.

²⁶ *Id.* Although EIP suggests that both Ms. Daniels and Ms. Rivers are downwind of FPP, this can not be the case. Ms. Daniels lives nearly 10 miles Southeast of the facility and Ms. Rivers lives nearly 6 miles Northeast of FPP. Both persons cannot be downwind of the facility at the same time.

Nine individuals also submitted timely requests for a contested case hearing on LCRA's application.²⁷ None of the individuals' hearing requests demonstrate that the person filing the request is an "affected person." Of the nine requests, three are from Austin (77 miles away), two are from Bay City (96 miles away) and two are from Houston (93 miles away), and none of these seven individuals make specific allegations regarding the requestor's location in relation to FPP.²⁸ Five of the nine requestors only state, if anything, that they are concerned with general concerns such as "public health."²⁹ Such general allegations, without more specific information, fail to demonstrate that an individual is an "affected person" with a right to a contested case hearing.

The request from Mr. Crunk in Austin spelled out several concerns that mirror the EIP request.³⁰ Mr. Crunk is not only 77 miles away from FPP, but as with the members from Sierra Club and TCE, he also fails to show how his concerns are fairly traceable to the specific permit changes proposed by LCRA in the amendment application or distinct from those specifically rejected by the Executive Director, a federal district court, and the Fifth Circuit. For instance, he notes that the "draft permit does not meet the Clean Air Act's BACT standards." Yet, the Executive Director specifically responded to Mr. Crunk in its RTC that "facilities

²⁷ See requests from Susan Pantell (403 W. Odell St., Austin, TX); Valerie Thatcher (1193 Curve St., Austin, TX); Jeffrey Crunk (9012 Sommerland Way, Austin, TX); Janice Van Dyke Walden (220 W. 34th St., Houston, TX); Jeffrey Cook (712, N. Main St., LaGrange, TX); Allison Silva (Bay City, TX); Paul Bustillo (3909 Aggie Dr., Bay City, TX); John Mikus (8118 Neff St., Houston, TX); and Darelle Robbins (1912 McDuffie St., Houston, TX 77019).

²⁸ The other two requestors, Jeffrey Cook in LaGrange and John Mikus, who is based in Houston but owns land in Fayette, are closer to FPP but still do not allege specific allegations regarding their location in relation to FPP.

²⁹ See requests from Ms. Walden (providing no information); Ms. Thatcher (making general allegations regarding "dirty coal" and "degradation in quality of life"); Ms. Robbins (making only general allegations regarding "state public health needs"); Mr. Cook (providing no information); Mr. Bustillo (making only general allegations regarding coal "causing environmental damage").

³⁰ See request from Jeffrey Crunk (9012 Sommerland Way, Austin, TX).

currently authorized by the flexible permit were . . . subject to BACT reviews at the time they were originally permitted and when the flexible permit was issued in 2002. Reevaluation of previous BACT determinations was not triggered by this amendment to convert the flexible permit to a Subchapter B permit.”³¹ Mr. Crunk also suggests that “[t]he permit should contain lower emissions limits than the inflated figures used in the past.” But the district court in *TCE v. LCRA* specifically concluded that TCE could not collaterally attack permitting decisions made in 2002 in 2011.³² Other concerns by Mr. Crunk related to the costs of coal are simply irrelevant to LCRA’s permitting action here.

One request from a person in Bay City³³ (over 90 miles away) was only generally related to power plant emissions of mercury going beyond “county lines,” but otherwise makes no specific allegations distinct from “[a]n interest common to members of the general public.” A similarly tangential request from someone who owns property in Fayette County, but lives in Houston, noted that coal plants consume a lot of water and that dollars are better spent on alternative fuels.³⁴ This has no relevance to LCRA’s *air* permit amendment application.

As a whole, the individual hearing requests fail to establish that any of the persons requesting a contested case hearing on LCRA’s permit amendment are “affected persons” under TCEQ regulations. As a result, the contested case hearing requests filed by the nine individual requestors should be denied.

³¹ Executive Director’s Response to Public Comment at 4.

³² See 2012 WL 1067211 at *10.

³³ See request from Allison Silva (Bay City, TX).

³⁴ See request from John Mikus (Houston, TX).

C. Allegations by EIP Are Harassing and Factually and Legally Unjustified

LCRA, the Executive Director and a federal district court have repeatedly and specifically rejected allegations made by EIP in its contested case hearing request. Although EIP's assertions in its public comments and hearing request do not affect whether the permit is considered a "no increase" amendment, or whether EIP represents "affected persons" for making a contested case determination, LCRA believes the Commission should be aware of material misstatements made by EIP.

EIP repeats several allegations that were specifically dismissed in the citizen suit it filed against LCRA in federal district court.³⁵ In particular, EIP alleged – both here and in its federal citizen suit – that FPP is "currently operating without a valid PSD permit;" "LCRA has undertaken several major modifications without undergoing NSR/PSD review;" "LCRA misled TCEQ (and EPA) in 2002;" "LCRA knowingly inflated the annual heat input for all three boilers, by 'annualizing' the highest ever reported daily heat input;" "[i]n the PSD permit that existed prior to TCEQ's issuance of the Flex Permit in 2002, [FPP's] boilers were limited to maximum hourly heat inputs;" and "The Draft Permit Should Contain a Heat Input for Unit 3."³⁶ These EIP claims are nearly identical to Cause of Action Nos. 1, 2, and 4 that were dismissed by the federal district court on March 28, 2012, and the TCEQ should disregard them for the same reasons.³⁷

Further, EIP misrepresents what data was available to LCRA at the time the flexible permit application was prepared in July 2002. EIP also misrepresents how LCRA used the then available data to establish emission caps under the flexible permit and subsequently

³⁵ See *TCE v. LCRA*, 2012 WL 1067211 at *10.

³⁶ See *id.* and EIP comments filed on June 14, 2012.

³⁷ See *TCE v. LCRA*, 2012 WL 1067211 at *9-10.

determine compliance with those caps in accordance with the flexible permit issued by TCEQ.³⁸ In particular, EIP suggests that September 2002 stack test data “was available at the time of the original Flex Permit Application[] showing that the power plant can emit at levels well below those incorporated in its Flex Permit.”³⁹ But LCRA submitted its original flexible permit application in July 2002. Clearly data that only became available in *September* 2002 could not have been available months earlier in *July* 2002. Likewise, in *July* 2002, LCRA could not have known how the *October* 2002 permit would require compliance with the emission caps to be determined.⁴⁰ EIP’s claims are simply baseless, and as demonstrated in the attached affidavit of Joe Bentley, LCRA has repeatedly shown that it has maintained continuous compliance with the emission caps in the flexible permit.⁴¹

The Executive Director has also considered EIP’s comments on this issue. Based on his review of the available information, the Executive Director has concluded that “stack test results indicating actual emissions are below permit allowable[s] is an expectation for compliant emission sources”⁴² and “[o]ver the duration of the flexible permit, the Regional Office has not noted any circumstances where actual emissions have exceed[ed] the [emission caps] as the result of a new emission source being added to the plant site or as a result of a physical or operational change to an existing source at the plant.”⁴³ In summary, the FPP units have been tested since July 2002 in accordance with the terms of the flexible permit, and that testing shows

³⁸ See EIP comment and request for contested case.

³⁹ See EIP comment and request for contested case at note 5 and accompanying text.

⁴⁰ For a full response of these issues, please see the Affidavit of Joe Bentley (Sept. 8, 2011) that formed part of LCRA’s response to a motion for partial summary judgment filed by TCE on similar issues in federal court. See Attachment B. TCE’s motion was denied by the court.

⁴¹ *Id.*

⁴² Executive Director’s Response to Public Comment at 10.

⁴³ *Id.* at 6.

that FPP has been in compliance with the emission caps in Air Quality Permit Nos. 51770 and PSD-TX-486M3.

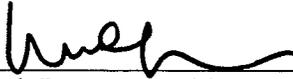
Although EIP's baseless claims do not affect the legal determination of whether the groups it represents can obtain a contested case hearing on LCRA's "no increase" amendment, LCRA wanted to correct these serious misstatements by EIP for the record. These assertions, which have been rejected again and again by LCRA, the Executive Director and a federal district court, are legally and factually unfounded.

V. Conclusion

Because the amendment of Air Quality Permit Nos. 51770 and PSD-TX-486M3 is a "no increase" amendment that will not result in an increase in allowable emissions or the emission of an air contaminant not previously emitted, the requests for contested case hearing should be denied as a matter of law. Further, the hearing requests in this matter have not been filed by affected persons and cannot be the basis for a contested case hearing.

WHEREFORE, PREMISES CONSIDERED, LCRA respectfully requests that the requests for hearing be denied, that LCRA's amendment application and the Executive Director's Response to Public Comment be approved, and that the amendment to Air Quality Permit Nos. 51770 and PSD-TX-486M3 be granted.

Respectfully submitted,

By:  _____

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ATTORNEYS FOR
LOWER COLORADO RIVER AUTHORITY

CERTIFICATE OF SERVICE

By my signature below, I certify that a copy of this response was served on the following individuals via hand delivery, U.S. mail, and/or e-mail on the 12th day of November, 2012, unless otherwise indicated below:

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FOR ALTERNATIVE DISPUTE RESOLUTION

Mr. Kyle Lucas
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[Via e-mail]

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*[Via e-mail on November 12, 2012,
and U.S. Mail on November 13, 2012]*

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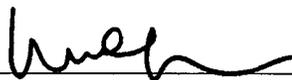
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[Via U.S. Mail on November 13, 2012]



Derek R. McDonald

ATTACHMENT A



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LCRA AND AUSTIN ENERGY ANNOUNCE PLAN TO CUT EMISSIONS AT FAYETTE POWER PROJECT

FOR RELEASE: July 10, 2002
CONTACT: Robbie Searcy, LCRA (512) 473-3200, Ext. 2235
Ed Clark, Austin Energy (512) 322-6514

AUSTIN – LCRA and Austin Energy today announced a plan to spend more than \$130 million to cut emissions at the Fayette Power Project (FPP) in Fayette County and make it one of the cleanest coal-fired power plants in the nation.

The plan hinges on a unique flex permit filed with the Texas Natural Resource Conservation Commission (TNRCC) earlier this month. The flex permit will be the first of its kind for the electric industry in Texas and the United States.

“Today’s announcement demonstrates that with innovative technology, we can balance the economic needs of our growing population with the need all Texans have for cleaner air,” said Texas Gov. Rick Perry.

The 10-year permit, if approved, commits FPP to install “scrubbers” that will reduce sulfur dioxide (SO₂) emissions from two of the plant’s three units by about 90 percent. The third unit already has this flue gas desulfurization (FGD) technology. LCRA and Austin Energy, as co-owners of the plant, also are committing to a 50 percent reduction of nitrogen oxide (NOx) emissions and long-term caps on other pollutants from the plant.

TNRCC worked with LCRA staff to establish emissions caps that are consistent with best available control technology (BACT) for this type of electric generation equipment.

(MORE)

lcra and austin energy – flex permit

“This is the right thing for LCRA to do, both environmentally and economically,” said LCRA General Manager Joe Beal. “This plant is critical to our ability to provide affordable, reliable power to Central Texans, and this plan will help us provide cleaner air while ensuring long-term reliability of this important asset for our customers.”

If approved, the flex permit will enable FPP to proceed with projects that increase efficiency and ensure long-term reliability and safety of the 1,605-megawatt coal-fired power plant, which provides enough power to serve about 800,000 Central Texas homes. LCRA sells its share of power from the plant to its 42 wholesale customers – electric cooperatives and city-owned utilities in Central Texas. Austin Energy sells power to 350,000 Austin area consumers.

“We continue to look for ways Austin can contribute to cleaner air, and this plan fits those goals,” said Austin Mayor Gus Garcia.

TNRCC Executive Director Jeff Saitas lauded the efforts of the plant’s co-owners, saying “Cleaning the air, particularly in and near our larger cities, is a daunting task. Only through commitment and cooperation – like we are seeing today between the LCRA and the City of Austin – will we be able to ensure cleaner air for our citizens.”

Besides reducing releases of SO₂, LCRA staff expects the scrubber installation to cut mercury emissions from the plant by about 25 percent. The scrubbers also should reduce releases of other sulfurous gases by about 60 percent and other acid gases by 90 to 95 percent.

“By enhancing air quality more quickly than current plans require, this plan will mean improved health for the people of Central Texas,” said U.S. Environmental Protection Agency Regional Administrator Gregg Cooke.

These proactive steps by LCRA and Austin Energy to reduce emissions have received support from Environmental Defense, Public Citizen, the Sierra Club and the Clean Air Force of Central Texas.

FPP units 1 and 2 were built between 1975 and 1980 and are co-owned by LCRA and Austin Energy. LCRA also owns a third unit at the plant, which was completed in 1988 and is equipped with FGD scrubbers. FPP also uses low-sulfur coal from the Powder River Basin in Wyoming.

LCRA submitted the permit application early last week, and TNRCC has 30 days to determine if the application is complete. Then, there will be a 30-day period for public input.

ATTACHMENT B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

TEXAS CAMPAIGN
FOR THE ENVIRONMENT,

Plaintiff,

vs.

LOWER COLORADO RIVER
AUTHORITY,

Defendant.

§
§
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§

Civil Action No. 4:11-cv-00791

AFFIDAVIT OF JOE BENTLEY

STATE OF TEXAS §
 §
COUNTY OF TRAVIS §

BEFORE ME, the undersigned authority, on this day personally appeared Joe Bentley, known to me to be the person whose name is ascribed below who being by me first duly sworn, upon his oath, stated as follows:

1. My name is Joe Bentley. I am over the age of 21 years and have never been convicted of a crime. I am under no disability, and I am fully competent to make this affidavit. I have personal knowledge of the facts stated herein, and they are true and correct.

2. I am currently employed by Lower Colorado River Authority ("LCRA"), a Texas conservation and reclamation district. I have been employed by LCRA since September 1980. My current position is that of Environmental Advisor for Wholesale Power Services.

3. I have a Bachelor of Science degree in Mechanical Engineering from the University of Texas at Austin. I have worked in the environmental field since 1979, concentrating primarily in air quality matters.

4. In my position as Environmental Advisor, I am responsible for assisting LCRA's power generating stations in maintaining compliance with applicable federal and state environmental air quality laws and regulations. My responsibilities include ensuring that LCRA has the air quality permits that it must hold to construct and operate LCRA's electric generating units and assisting LCRA in complying with the terms and conditions of those permits, including associated emissions testing, recordkeeping and reporting obligations of the Texas Commission on Environmental Quality ("TCEQ") and the U.S. Environmental Protection Agency ("U.S. EPA"). I have also been responsible for managing the initial certification of over 15 continuous emission monitoring systems ("CEMS") and for directing air emissions stack testing as required under applicable air quality permits. Other responsibilities include coordinating CEMS quality assurance testing for all LCRA coal- and gas-fired boilers and combustion turbines and coordinating LCRA's sulfur dioxide ("SO₂") and nitrogen dioxides ("NO_x") allowance trading and annual reconciliation as part of the federal Acid Rain Program and Clean Air Interstate Rule.

5. One of LCRA's power generating stations is the Sam K. Seymour Generating Station located approximately seven miles east of La Grange, Texas, that is the subject of this litigation. Three coal-fired steam electric generating units known as Fayette Power Project ("FPP") Units 1, 2 and 3 are located at the Sam K. Seymour Generating Station. I regularly visit FPP Units 1, 2 and 3, and I am familiar with the design, operation, air emissions, and applicable air quality requirements of those units based on my environmental permitting and compliance work for LCRA.

6. I have reviewed Plaintiff's Motion for Partial Summary Judgment. This Affidavit responds to certain summary judgment evidence and factual assertions of Plaintiff in that Motion.

7. In its Motion, Plaintiff asserts that emissions of particulate matter ("PM") and particulate matter of less than 10-microns in diameter ("PM₁₀") from FPP Units 1, 2 and 3 exceeded the annual PM emission limit of 5,155.16 tons per year ("tpy") and the annual PM₁₀ emission limit of 5,090.52 tpy that are enforceable under the Title V permit for FPP for 20 12-month periods between March 2006 and January 2010. Motion at VI.B.

8. Plaintiff's allegation that LCRA exceeded the annual PM emission limit and the annual PM₁₀ emission limit applicable to FPP is false. As described in this Affidavit, the annual emissions of PM and PM₁₀ from FPP were lower than the annual PM and PM₁₀ emission limits for FPP that are enforceable under the Title V permit for FPP for the period from March 1, 2006 until January 31, 2010.

9. A Title V permit facilitates compliance by consolidating all of a source's applicable air quality requirements into a single permit document. FPP is a source whose operation is subject to the terms and conditions of Title V Permit No. O21. From March 2006 until September 20, 2009, the operation of FPP was subject to the version of Title V Permit No. O21 that was issued by TCEQ on April 2, 2004 (the "2004 Operating Permit"). A true and correct copy of the 2004 Operating Permit is attached as Exhibit B to LCRA's Response to Plaintiff's Motion for Partial Summary Judgment. EPA had the opportunity to review the 2004 Operating Permit and did not object to its issuance. From September 21, 2009 until January 31, 2010, the operation of FPP was subject to the terms and conditions of the version of Title V Permit No. O21 that was issued by TCEQ on September 21, 2009 (the "2009 Operating Permit").

A true and correct copy of the 2009 Operating Permit is attached as Exhibit A to LCRA's Response to Plaintiff's Motion for Partial Summary Judgment. EPA had the opportunity to review the 2009 Operating Permit and did not object to its issuance.

10. Title V Permit No. O21 sets forth all air quality requirements applicable to FPP. One of the air quality requirements applicable to FPP is the new source review construction authorization found in Construction Permit No. 51770/PSD-TX-486M3. *See* Exhibit A at 88. EPA reviewed and commented on Construction Permit No. 51770/PSD-TX-486M3 and specifically endorsed Construction Permit No. 51770/PSD-TX-486M3 at a press conference in Austin in July 2002. A true and correct copy of the version of Construction Permit No. 51770/PSD-TX-486M3 incorporated by reference in the 2004 Operating Permit is attached as Exhibit C to LCRA's Response to Plaintiff's Motion for Partial Summary Judgment. A true and correct copy of the version of Construction Permit No. 51770/PSD-TX-486M3 incorporated by reference in the 2009 Operating Permit is attached as Exhibit D to LCRA's Response to Plaintiff's Motion for Partial Summary Judgment. The 2004 Operating Permit and the 2009 Operating Permit did not incorporate by reference as an air quality requirement applicable to FPP Permit No. 9233 or any prior version of Permit No. PSD-TX-486M3. Because the versions of Construction Permit No. 51770/PSD-TX-486M3 that were incorporated by reference into the 2004 Operating Permit and the 2009 Operating Permit did not contain a unit-specific hourly emission limit for FPP Unit 3 of 142.1 pounds of PM per hour, there is no unit-specific hourly emission limit for FPP Unit 3 of 142.1 pounds of PM per hour that is incorporated by reference in the 2004 Operating Permit or the 2009 Operating Permit. *See* Exhibit A; Exhibit B. The unit-specific hourly emission limit for FPP Unit 3 of 142.1 pounds of filterable PM that Plaintiff

seeks to enforce was found in a former air quality permit that was determined obsolete by the TCEQ and is not referenced in the 2004 Operating Permit or the 2009 Operating Permit. *Id.*

11. Special Condition No. 1 of Construction Permit No. 51770/PSD-TX-486M3 provides that "This permit covers those sources of emissions listed in the attached table entitled "Emission Sources-Maximum Allowable Emission Rates," and those sources are limited to the emission limits and other conditions specified in the attached table." Exhibit C; Exhibit D. The table, known as the MAERT, attached to the Construction Permit establishes initial, interim, and final emission caps for all sources of air emissions at FPP, including, but not limited to Units 1, 2 and 3. Exhibit C MAERT; Exhibit D MAERT. TCEQ required LCRA's emission caps to become increasingly more stringent over the life of the permit, resulting in substantial decreases in contaminants emitted from FPP. From March 2006 until January 2010, the applicable emission limits are the interim emission cap, as specified in footnote 4 of the MAERT. Exhibit C; Exhibit D. The MAERT establishes sitewide interim annual emission rate or limit for PM of 5,155.16 tpy, and sitewide interim annual emission rate or limit for PM₁₀ of 5,090.52 tpy. Exhibit C MAERT; Exhibit D MAERT.

12. As used in Construction Permit No. 51770/PSD-TX-486M3, the term PM refers to particulate matter, suspended in the atmosphere, including PM₁₀ and the term PM₁₀ refers to particulate matter equal to or less than 10 microns in diameter. Exhibit C; Exhibit D. If the emission of all particulate matter from a source is less than 10 microns, then there would be no difference in the emission of PM and PM₁₀ from a source because PM₁₀ is a subset of PM emissions. Particulate matter in flue gas from a coal-fired steam electric generating unit is found in two forms: filterable and condensable. Filterable refers to particulate matter that is emitted by a source and captured on the filter of a stack test sampling train; condensable refers to particulate

matter that are vapors or gases at stack temperature conditions but form solids or liquids upon cooling when released to the atmosphere. The emission limits in Construction Permit No. 51770/PSD-TX-486M3 that are enforceable by the 2004 and 2009 Operating Permits include both filterable and condensable PM or PM₁₀. Emission limits that include both filterable and condensable PM or PM₁₀ are sometimes referred to as total PM or total PM₁₀ limits.

13. Special Condition No. 20 of Construction Permit No. 51770/PSD-TX-486M3 requires LCRA to establish and maintain recordkeeping programs to demonstrate compliance with all authorized emission caps. Exhibit C; Exhibit D. Special Condition No. 20 further specifies that compliance with annual typ emissions shall be based on a 12-month rolling average, and that emission calculations for verifying compliance with emission caps shall be calculated at least once every month. Finally, Special Condition No. 20(E) states that “The permit holder shall keep records of process parameters necessary to demonstrate compliance with the emission caps for sources not equipped with a CEMS. Emission calculations and emission factors may be changed to reflect newer emission factors or emission factors that are based upon more recent stack sampling.” *Id.*

14. LCRA established and maintained a recordkeeping program as required by Special Condition No. 20 of Construction Permit No. 51770/PSD-TX-486M3. LCRA performed emission calculations once every month from March 2006 until January 2010, to demonstrate compliance with the annual total PM and total PM₁₀ emission limits. Part of my job responsibilities for LCRA included the review and oversight of LCRA’s recordkeeping program. True and correct copies of the contemporaneous compliance records established and maintained by LCRA are attached as Exhibit E. The records attached as Exhibit E are excerpts of records reflecting information compiled by LCRA and kept in the regular course of business of LCRA.

The records were made at or near the time of the act, event or condition recorded, or reasonably soon thereafter, and they were made by persons with knowledge of the information reflected in the records. The method of preparation of the records is trustworthy. The records attached as Exhibit E are the originals or duplicates of the originals of the records.

15. The actual annual emissions of total PM and total PM₁₀ from FPP on a 12-month rolling basis from March 2006 until January 2010 are accurately reflected in the compliance records attached as Exhibit E to LCRA's Response to Plaintiff's Motion for Partial Summary Judgment. As shown in Exhibit E, the actual annual emissions of total PM and total PM₁₀ from FPP are lower than the emission limits for FPP that are enforceable by the Title V permit for the period from March 2006 until January 2010. LCRA determined that all particulate matter emitted by Units 1, 2 and 3 is less than 10 microns in diameter. Therefore, the emission of total PM from Units 1, 2 and 3 is the same as the emission of total PM₁₀ from Units 1, 2 and 3.

16. The actual annual emissions of total PM and total PM₁₀ were determined by performing emission calculations as required under Special Condition No. 20 of Construction Permit No. 51770/PSD-TX-486M3. To perform the emission calculations for total PM and total PM₁₀ for Units 1, 2 and 3, LCRA multiplied the heat input calculated for each of the units for a calendar month by an emission factor for total PM and total PM₁₀ based on stack testing of the Units.

17. The heat input for each unit was calculated and reported by the CEMS installed on each of Units 1, 2 and 3 that are used to measure the emissions of NO_x, SO₂, carbon dioxide ("CO₂") and volumetric flow. The CEMS calculates heat input to the Units based on measurements of CO₂ and volumetric flow using U.S. EPA specified protocols. These CEMS

calculations for heat input were used by LCRA in performing the emission calculations under Special Condition 20.

18. An emission factor is a value that relates the quantity of an air contaminant released to the atmosphere with an activity associated with the release of that contaminant. An emission factor is usually expressed as the weight of an air contaminant divided by a unit weight, volume, or duration of the activity emitting the contaminant (*e.g.*, pounds of PM emitted per heat input of coal burned). An emission factor facilitates the reliable estimation of emissions from various sources of air contaminants.

19. LCRA determined the emission factor for total PM and total PM₁₀ to use in its emission calculations by performing stack tests on the emissions from Unit 1, 2 and 3. A stack test is a procedure for sampling flue gas in the stack by using appropriate access ports and traverse points to obtain representative measurements of contaminant concentrations from a facility, unit, or pollution control equipment. It is used for compliance and to determine a pollutant emission rate, concentration, or parameter while the unit is operating at conditions that result in the measurement of the highest emission values or at other operating conditions approved by TCEQ. A test is typically comprised of three sampling runs for a specified sampling time that are then summed and divided by three to result in an emission rate that reflects the average of the three runs. The testing is performed by an independent source testing company using sampling and analytical procedures approved by TCEQ or the U.S. EPA for the specific contaminant. A stack test is also known as an emission test, compliance test, source test, or performance test.

20. Stack testing of Units 1, 2 or 3 was required under FPP's new source review Construction Permit and Title V Operating Permits. LCRA has contracted with

independent source testing companies to perform stack tests for particulate matter emissions from Units 1, 2 and 3 on several occasions, including testing conducted in August 1985, August 1988, September 2002, September 2010, and January 2011, as accurately summarized in the table below.

Date of Stack Test and Source Testing Company	Unit	Stack Test Results (average of 3 sampling runs)	Contaminant	Exhibit
August 1985 (METCO)	2	0.035 lb/mmBtu	Filterable PM	F-1
August 1988 (Total Source Analysis)	3	0.02 lb/mmBtu	Total PM	F-2
September 2002 (METCO)	1	0.042 lb/mmBtu	Total PM	F-3
September 2010 (Air Sampling Associates)	1	0.019 lb/mmBtu	Total PM	F-4
September 2010 (Air Sampling Associates)	2	0.020 lb/mmBtu	Total PM	F-4
January 2011 (Air Sampling Associates)	3	0.017 lb/mmBtu	Total PM	F-5

True, correct and complete copies of the reports of this stack testing are included as Exhibit F to LCRA's Response to Plaintiff's Motion for Partial Summary Judgment, Exhibits F-1, F-2, F-3, F-4 and F-5 respectively. The data presented in those reports is accurate and reliable based on my education, training and experience and is generally and routinely relied on by environmental professionals in rendering opinions on air emissions.

21. LCRA used the results of stack testing of Units 1, 2 and 3 to determine the appropriate emission factor for total PM and total PM₁₀ from Units 1, 2 and 3. Because all PM

emitted from Units 1, 2 and 3 is reasonably assumed to be less than 10 microns in diameter, the emission factor for total PM and total PM₁₀ from Units 1, 2 and 3 is the same. For the period from March 2006 until January 2010, LCRA used the following stack test results to determine an annual emission factor for total PM/PM₁₀ from Units 1, 2 and 3:

Unit	Contaminant	Stack Test Results (average of 3 1-hour sampling runs)	Date of Most Recent Stack Test Prior to 2006 - 2010	Annual Emission Factor (Total PM/PM ₁₀)
1	PM/PM ₁₀	0.042 lb/mmBtu (Total PM)	September 2002	0.042 lb/mmBtu
2	PM/PM ₁₀	0.035 lb/mmBtu (Filterable PM)	August 1985	0.070 lb/mmBtu
3	PM/PM ₁₀	0.02 lb/mmBtu (Total PM)	August 1988	0.02 lb/mmBtu

The annual emission factors identified above were based on the then most recent stack testing of Units 1, 2 and 3 that occurred prior to the March 2006 to January 2010 period, in accordance with Special Condition 20 of Construction Permit No. 51770/PSD-TX-486M3. Because the stack testing requirements for Unit 2 in August 1985 only required measurement of the filterable PM from that Unit, and not the total PM emissions (which includes filterable and condensable PM emissions), LCRA had to determine from the available testing an appropriate emission factor for total PM/PM₁₀. The results of stack testing of Units 1 and 3 in 1988 and 2002 demonstrated that total PM emissions were approximately two times as much as the filterable PM emissions from those Units. Based on those results and the design and operational similarities between Unit 1 and Unit 2, I determined that the annual emission factor for total PM/PM₁₀ from Unit 2 should be two times the stack test results for filterable PM from Unit 2.

22. Attached to this Affidavit as Exhibit G-1 is a Table that I prepared that identifies the actual total PM/PM₁₀ emissions from Units 1, 2 and 3 that are reflected on the

compliance records attached as Exhibit E to LCRA's Response to Plaintiff's Motion for Partial Summary Judgment for the periods identified by Plaintiff.

23. In 2010 and 2011, LCRA contracted with an independent source testing company for the performance of additional stack testing on Units 1, 2 and 3 to evaluate whether the annual emission factors for PM/PM₁₀ that were used to calculate annual emissions of PM/PM₁₀ from Units 1, 2 and 3 continued to be appropriate. The additional stack testing was voluntary but conducted in accordance with the requirements of the 2009 Operating Permit and Construction Permit No. 51770/PSD-TX-486M3. The results of the additional stack testing and the corresponding annual emissions factors are accurately summarized below:

Unit	Contaminant	Stack Test Results (average of 3 1- hour sampling runs)	Date of Stack Test	Annual Emission Factor (Total PM/PM ₁₀)
1	PM/PM ₁₀	0.019 lb/mmBtu (Total PM)	September 2010	0.019 lb/mmBtu
2	PM/PM ₁₀	0.020 lb/mmBtu (Total PM)	September 2010	0.020 lb/mmBtu
3	PM/PM ₁₀	0.017 lb/mmBtu (Total PM ₁₀)	January 2011	0.017 lb/mmBtu

This additional stack testing indicates that the annual emission factors used by LCRA to determine the actual annual emissions of total PM and total PM₁₀ from Units 1, 2 and 3 were conservative and tended to overestimate the annual emissions of total PM and total PM₁₀ from FPP during the March 2006 to January 2010 period.

24. In its Motion, Plaintiff used emission factors for total PM/PM₁₀ that overstated the annual total PM/PM₁₀ emissions from Units 1, 2 and 3. Plaintiff used the

following annual emission factors to allege an exceedence of the total PM and total PM₁₀ emission limits in Construction Permit No. 51770/PSD-TX-486M3:

Unit	Contaminant	Plaintiff's Annual Emission Factor (Total PM/PM ₁₀)
1	PM/PM ₁₀	0.1 lb/mmBtu
2	PM/PM ₁₀	0.1 lb/mmBtu
3	PM/PM ₁₀	0.03 lb/mmBtu

These emission factors are not based on the most recent stack testing of Units 1, 2 and 3 that occurred prior to the March 2006 to January 2010 period and are not appropriate for determining actual annual emissions of PM and PM₁₀ from Units 1, 2 and 3 during that period. In its Motion, Plaintiff does not identify or consider the results of any stack testing of Units 1, 2 or 3. This failure has caused Plaintiff to use annual emission factors that overstate the actual emissions of total PM and total PM₁₀ from Units 1, 2, and 3. Had the Plaintiff adjusted the annual emission factor that it erroneously used for Unit 1 to a value based on the September 2002 stack testing of Unit 1, that adjustment alone would show that the annual total PM/PM₁₀ emissions from FPP complied with the total PM/PM₁₀ emission limits in Construction Permit No. 51770/PSD-TX-486M3.

25. In its Motion Plaintiff argues that because LCRA had used these annual emission factors in a July 2002 permit application in order to identify total PM/PM₁₀ emissions in 1999 for TCEQ's consideration in setting future emission caps for FPP, LCRA must continue to use these annual emission factors when determining actual annual emissions of PM/PM₁₀ under its permit. Motion at 18. Plaintiff's argument is flawed.

26. The emission factors that Plaintiff has employed are derived from the July 2002 permit application for Construction Permit No. 51770/PSD-TX-486M3. As stated in that 2002 permit application these values "provide the best estimate of current actual front-half and plus back-half PM/PM₁₀ emissions from the FPP boilers" subject to the additional discussion qualifications set forth in the application. These values represent actual emissions in 1999 derived from limited stack test results available at that time. They represent the upper end of the range of actual emissions on an hourly basis, and, thus, account for the uncertainty and variability presented in the stack test results. In establishing an emission cap based on limited stack test results, it was appropriate to consider the variability of these data. At any point in time, TCEQ may call upon LCRA to perform stack testing to demonstrate compliance. As set forth in Construction Permit No. 51770/PSD-TX-486M3, at the request of the TCEQ Executive Director the permit holder "shall perform stack sampling... to establish actual pattern and quantities of air contaminants being emitted... from sources authorized by this permit." Based on results available in July 2002, it was reasonable to assume that any future hourly stack tests could yield results that are at or near the upper range of previous stack tests. Accordingly, if compliance is to be determined based on a "snap shot" in time, it is reasonable to allow for variability of the test results in establishing the emissions cap.

27. To determine compliance with the annual limits, the average results of the most recent representative stack tests were used. Over a lengthy period of time, for example 12-months, it is assumed that the actual emissions will more closely be represented by the average stack test results rather than the high or low hourly end of the variability. In establishing compliance over a significant span of time such as a year, as opposed to any one hour, the average results from the most recent representative stack tests are employed.

28. Plaintiff's argument ignores this rationale as well as the results of all of the stack testing, including that performed on Units 1, 2 and 3 in 2002, 2010 and 2011 that were not available in July 2002. As described in Paragraphs 13-22 of this Affidavit, LCRA established and maintained a recordkeeping program that demonstrates compliance with the total PM and total PM₁₀ emission limits set forth in Construction Permit No. 51770/PSD-TX-486M3.

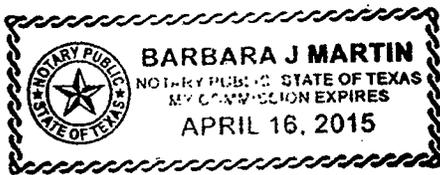
29. Neither TCEQ nor the U.S. EPA has alleged that LCRA has exceeded the total PM or total PM₁₀ emission limits that are enforceable under the 2004 Operating Permit or the 2009 Operating Permit. LCRA has an obligation to identify instances of non-compliance with Title V Permit No. O21 on a semi-annual basis in its Title V deviation reporting. LCRA has not identified any non-compliance with or deviation from the total PM or total PM₁₀ emission limits that are enforceable under the 2004 Operating Permit or the 2009 Operating Permit.

30. Based on my work for LCRA, my training and experience in air quality compliance, and the records and data described in my Affidavit, it is my opinion that LCRA's annual actual emissions of total PM and total PM₁₀ did not exceed the total PM and total PM₁₀ emission limits that are enforceable under the 2004 Operating Permit or the 2009 Operating Permit as alleged by Plaintiff, and that LCRA has at all times from the period March 2006 until January 2010, maintained compliance with the applicable annual total PM emission limit of 5,155.16 tpy and the applicable annual total PM₁₀ emission limit of 5,090.52 tpy.

FURTHER AFFIANT sayeth not.

Affiant Joe Bentley

on this 8th day of September, 2011, to which witness my hand and seal of office. Joe Bentley



Barbara J. Martin
Notary Public in and for the State of Texas

My Commission Expires: April 16, 2015

**Table 1. Comparison of Annual PM Emissions Limit to
Actual Annual PM Emissions from Units 1, 2 and 3**

12-Month Period	Permit Annual Cap (tons per year)	Unit 1 (tons)	Unit 2 (tons)	Unit 3 (tons)	Total (tons)
12/01/2006-11/30/2007	5,155.16	959.12	1,664.26	345.07	2,968.45
01/01/2007-12/31/2007	5,155.16	976.00	1,691.08	348.97	3,016.05
02/01/2007-01/31/2008	5,155.16	990.93	1,718.98	357.22	3,067.13
03/01/2007-02/29/2008	5,155.16	1,002.76	1,733.09	364.54	3,100.39
04/01/2007-03/31/2008	5,155.16	1,008.13	1,577.35	363.37	2,948.85
05/01/2007-04/30/2008	5,155.16	1,010.68	1,490.46	393.11	2,894.25
06/01/2007-05/31/2008	5,155.16	1,009.93	1,510.40	406.70	2,927.03
07/01/2007-06/30/2008	5,155.16	1,015.51	1,518.15	407.80	2,941.46
08/01/2007-07/31/2008	5,155.16	1,013.80	1,514.83	405.26	2,933.89
09/01/2007-08/31/2008	5,155.16	1,010.84	1,511.10	401.54	2,923.48

**Table 2. Comparison of Annual PM₁₀ Emissions Limit to
Actual Annual PM₁₀ Emissions from Units 1, 2 and 3**

12-Month Period	Permit Annual Cap (tons per year)	Unit 1 (tons)	Unit 2 (tons)	Unit 3 (tons)	Total (tons)
12/01/2006-11/30/2007	5,090.52	959.12	1,664.26	345.07	2,968.45
01/01/2007-12/31/2007	5,090.52	976.00	1,691.08	348.97	3,016.05
02/01/2007-01/31/2008	5,090.52	990.93	1,718.98	357.22	3,067.13
03/01/2007-02/29/2008	5,090.52	1,002.76	1,733.09	364.54	3,100.39
04/01/2007-03/31/2008	5,090.52	1,008.13	1,577.35	363.37	2,948.85
05/01/2007-04/30/2008	5,090.52	1,010.68	1,490.46	393.11	2,894.25
06/01/2007-05/31/2008	5,090.52	1,009.93	1,510.40	406.70	2,927.03
07/01/2007-06/30/2008	5,090.52	1,015.51	1,518.15	407.80	2,941.46
08/01/2007-07/31/2008	5,090.52	1,013.80	1,514.83	405.26	2,933.89
09/01/2007-08/31/2008	5,090.52	1,010.84	1,511.10	401.54	2,923.48

ATTACHMENT C

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C

Only the Westlaw citation is currently available.

United States District Court,
S.D. Texas,
Houston Division.
TEXAS CAMPAIGN FOR THE ENVIRONMENT,
Plaintiff,
v.
LOWER COLORADO RIVER AUTHORITY, De-
fendant.

Civil Action No. H-11-791.
March 28, 2012.

Charles William Irvine, James B. Blackburn, Jr.,
Blackburn Carter PC, Houston, TX, Gabriel Clark-
Leach, Ilan Levin, Environmental Integrity Project,
Austin, TX, for Plaintiff.

Joseph R. Knight, Baker Botts LLP, Austin, TX, for
Defendant.

Memorandum and Order.

GRAY H. MILLER, District Judge.

*1 Pending before the court is defendant Lower Colorado River Authority's ("LCRA") motion to dismiss the first amended complaint. Dkt. 18. Intervenor Defendant City of Austin also has filed a motion to dismiss on the same grounds urged by LCRA. Dkt. 28. After review of the motions to dismiss, the responses, the replies, the exhibits, the law, and considering the oral argument presented by the parties, the court finds that plaintiff Texas Campaign for the Environment ("TCE") has standing to assert the claims raised in the amended complaint. The motion to dismiss is, therefore, DENIED in part. However, the motion to dismiss is GRANTED with respect to Counts 1 and 4, and part of Count 2, because those claims are improper collateral attacks on a Title V Operating Permit. The remainder of Count 2 is DISMISSED as having been filed beyond the applicable statute of limitations. Hence, Count 3 is the sole remaining count in

this case.

Also before the court is plaintiff's motion for partial summary judgment. Dkt. 31. The portion of the motion addressed to Count 4 is moot since that count has been dismissed. The remainder of the motion, addressed to Count 3 of the amended complaint, is DENIED as premature without prejudice to TCE reasserting its motion at the close of discovery.

BACKGROUND FACTS

This is a citizen suit filed pursuant to the federal Clean Air Act ("CAA") which permits individuals to bring claims against entities that violate "an emission standard or limitation" imposed under the CAA. 42 U.S.C. § 7604(a)(1). Defendant Lower Colorado River Authority ("LCRA") is a conservation and reclamation district created by the Texas Legislature in 1934. LCRA operates the Fayette Power Project ("FPP"), which has three coal-fired steam electric generating units that are the subject of this lawsuit (hereafter referred to as Unit 1, Unit 2, and Unit 3). The City of Austin co-owns Units 1 and 2, and has intervened in this case.

Plaintiff Texas Campaign for the Environment ("TCE") has filed suit in an organizational capacity on behalf of Maggie Rivers, a TCE member who lives approximately five miles from FPP. Dkt. 14. TCE is a non-profit membership organization dedicated to improving Texans' quality of life and environment. Dkt. 14 ¶ 11. In a declaration attached to the first amended complaint, Ms. Rivers states that she can see smoke coming from the FPP smoke stacks from her property. Dkt. 14-3. Further, she has observed "sooty ash-like deposits" on vehicles on her property, and she is concerned about the effect that emissions from FPP have on her health and on the environment. *Id.* Ms. Rivers was diagnosed with asthma in 2009, which she believes is caused by, or aggravated by, emissions from FPP. *Id.* TCE alleges that Ms. Rivers and other who live near FPP are adversely affected by the "excessive and unlaw-

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ful emissions of air pollutants from the power plant.” Dkt. 14 ¶ 12.

FPP has a decades-long history of regulatory permits, which began as permits addressed to the individual coal-fired boilers, Units 1, 2, and 3. Because the applicable emissions standards and limitations enforceable under the CAA are set forth in construction and operating permits, a brief outline of the applicable permits is necessary to understand the parties' dispute concerning which emission standards limitations are presently applicable. Unit 1 began operation in 1979, and its construction was authorized by Permit No. 3011. Dkt. 14 ¶¶ 4–5. Unit 2 began operation in 1980, and was constructed pursuant to Permit No. 4629. *Id.* Unit 3 began operation in 1988, and its construction was authorized by Permit No. 9233. *Id.* Permit No. 9233 was consolidated with Permit No. PSD–TX–486M3 and, in 1997, Permit Nos. 3011 and 4629 were consolidated into Permit No. 3010. Dkt. 14–1 ¶ 5. In 2002, the Texas Commission on Environmental Quality (“TCEQ”) issued a single, site-wide Flexible Air Permit No. 51770/PSD–TX–486M3 (“Flexible Air Permit”) which set forth site-wide emissions standards and limitations, but does not contain any unit-specific limitations. *Id.*; Dkt. 18–3 at 20. The Flexible Air Permit was then incorporated into the 2004 Operating Permit issued on April 2, 2004. Dkt. 18–6. The 2004 Operating Permit references only the Flexible Air Permit as containing applicable requirements “enforceable under this operating permit.” *Id.* at 32. The parties dispute both the nature of the standards and limitations applicable to the FPP, and specifically contest whether the Flexible Air Permit is effective to override, replace, or make obsolete the unit specific limitations and standards set forth in prior permits. These arguments and the applicable permits at issue will be discussed in more detail below.

*2 TCE sets forth four causes of action in the first amended complaint, and alleges that LCRA violated the CAA in four particulars:

1. LCRA violated and continues to violate heat

input limits, which are emission standards or limitations on the power plant's three main coal-fired boilers, Units 1, 2, and 3. Boilers have a maximum heat input limit, which is essentially a measure of the boiler's size, or capacity. The greater the maximum hourly heat input capacity, the more coal can be burned. LCRA is bound by its represented maximum hourly heat input limits for each of its three boiler units. These limits are enforceable conditions which have been and continue to be routinely violated. LCRA's heat input limits are enforceable through general conditions of the power plant's currently active and previous air pollution preconstruction permits; the Texas State Implementation Plan, 40 CFR 52.2270(c), 68 Fed.Reg. 64,549 (Nov. 14, 2003); and through Defendant's Title V Federal Operating Permit No. O21. These limits were never voided or made obsolete.

2. LCRA violated and continues to violate the Clean Air Act's Prevention of Significant Deterioration (“PSD”) requirements by making major modifications to the power plant's main coal-fired boilers and failing to obtain necessary permits, install best available control technology, reduce emissions, and comply with requirements for monitoring, record-keeping and reporting pursuant to the Clean Air Act's PSD permitting requirements, 42 U.S.C. § 7475, 42 U.S.C. § 7401 et seq.

3. LCRA violated and continues to violate annual particulate matter emission limits contained in the power plant's Flexible Permit No. 51770/PSD–TX486M3, which is incorporated by reference in the power plant's Title V Federal Operating Permit No. O21. Particulate Matter (“PM”) is a mixture of small particles, including organic chemicals, metals, and ash, which can cause health and environmental problems. Fine particles, or “PM10” (particulate matter with a diameter of ten micrometers or less), is a health concern because, once inhaled, fine particles can affect the heart and lungs and cause serious

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health effects. Numerous scientific studies have linked fine particle exposure to increased respiratory symptoms, such as decreased lung function, aggravated asthma, chronic bronchitis, heart attacks, and premature death in people with heart or lung disease. Additionally, PM can be carried long distances to settle over land or water, which may result in pollution of lakes and streams, and damage to farmlands.

2. LCRA violated and continues to violate the Unit 3 hourly particulate matter emission limit of 142.1 lbs/hour contained in in the Fayette power plant's Unit 3 preconstruction permit. This emission limit remains an enforceable operational limit on Unit 3, because it was never voided or made obsolete by any subsequent state permitting action, including the issuance of Flexible Permit No. 9233/PSD-TX-486M3.

Dkt. 14 at 3-4.

*3 LCRA, joined by the City of Austin, moves to dismiss all four counts of the first amended complaint on the basis that TCE lacks standing. Dkts. 18, 28. More specifically, LCRA argues that the alleged harm identified by TCE member Maggie Rivers is not "fairly traceable" to illegal emissions from FPP. Dkt. 18. LCRA also argues that litigation is not "germane" to TCE's purpose as an organization. *Id.* LCRA moves to dismiss Counts 1, 2, and 4 on other bases as well, including that the citizen claims are improper collateral attacks on the Title V Operating Permit issued for FPP, and that the claims were filed beyond the applicable statute of limitations. *Id.*

TCE has responded to the motions to dismiss, LCRA replied, and other supplemental pleadings have been filed. TCE also moves for partial summary judgment seeking a ruling with respect to Count 4 that the hourly particulate matter emission limit for Unit 3 was not voided or made obsolete by the flexible or site-wide emissions cap approved by TCEQ in 2002. Dkt. 31. TCE also seeks summary judgment with respect to liability for the violation

of LCRA's current Operating Permit, i.e., TCE seeks a ruling that LCRA has violated the site-wide emissions cap. LCRA and City of Austin have responded to the motion for partial summary judgment and argue that the first part of the motion will be moot if the court rules in defendants' favor on the pending motions to dismiss, and that there is a material dispute of fact with respect to Count 3, or that a ruling should await further discovery, which has been stayed pending a ruling on the motions to dismiss.

ANALYSIS

1. Standing.

Article III standing is an "irreducible constitutional minimum." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). The plaintiff bears the burden of establishing three things: (1) that she has suffered an actual or threatened injury; (2) the injury is "fairly traceable" to the defendant's actions; and (3) the injury likely will be redressed if TCE prevails in the lawsuit. *Texans United for a Safe Econ. Educ. Fund v. Crown Cent. Pet. Corp.*, 207 F.3d 789, 792 (5th Cir.2000). The Clean Air Act's citizen suit provision authorizes "any person" to "commence a civil action on his own behalf against any person ... who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of (A) an emissions standard or limitation under this chapter..." 42 U.S.C. § 7604(a). A "person" includes corporations, partnerships and associations. 42 U.S.C. § 7602(e). Nonprofit corporations may invoke the Clean Air Act's citizen suit provision. See, e.g., *Texans United*, 207 F.3d at 792. Thus, if TCE has standing to bring this action under Article III of the Constitution, it also has statutory standing under the Clean Air Act. *Middlesex Cty. Sewerage Auth. v. Nat. Sea Clammers Ass'n*, 453 U.S. 1, 16, 101 S.Ct. 2615, 69 L.Ed.2d 435 (1981).

*4 TCE alleges that it has standing to pursue a claim on behalf of its member, Maggie Rivers. An organization has standing to bring a suit on behalf

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of one or more of its members if: (1) its members would have standing to sue in their own right; (2) the interests it seeks to protect are germane to its purpose as an association; and (3) neither the claim it asserts, nor the relief it requests, requires the participation of individual members. *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977); *Texans United*, 207 F.3d at 792. In this case, LCRA and City of Austin dispute whether the first two requirements have been met. It is argued that the alleged pollution is not “fairly traceable” to FPP, thereby defeating Ms. Rivers's standing to sue, and that TCE cannot establish that this litigation is germane to its purpose. Although plaintiff bears the burden of establishing standing, when the standing inquiry arises “[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presum[e] that general allegations embrace those specific facts that are necessary to support the claim.” *Bennett v. Spear*, 520 U.S. 154, 168, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997) (internal quotation marks omitted) (quoting *Lujan*, 504 U.S. at 561, 112 S.Ct. 2130, 119 L.Ed.2d 351).

a. Does Ms. Rivers have a “traceable injury” giving her standing in her own right?

As noted above, TCE bases its standing on the declaration of Maggie Rivers who can see smoke being emitted from the stacks at FPP, and who has witnessed ash on her property consistent with that smoke being carried to her yard by prevailing winds. She believes her asthma is either caused by, or is aggravated by, the pollutants emitted by FPP.

LCRA argues that the ash and other pollution Ms. Rivers witnessed could easily be from a source other than FPP, and that if it is from FPP, it may not have been from an *illegal* release, i.e., it may simply be part of the particulate matter the facility legally releases into the atmosphere. In either case, LCRA argues, TCE has failed to identify an injury “fairly traceable” to LCRA's alleged violation of the CAA. LCRA argues that it is not the only

source of particulate matter pollution in Fayette County, and offers a comparison to *Texans United* where the court found traceability but did so based upon a much more particularized showing than TCE has made here. More specifically, the plaintiffs in *Texans United* were able to attribute particular odors to the specific facility, the defendants themselves confirmed that the smell could indicate noncompliance with conditions of their permits, and the plaintiffs presented expert witnesses to corroborate their statements concerning the alleged release of pollutants. 207 F.3d at 792–93. LCRA notes that Rivers lives approximately five miles from the facility in this case, and that there is no way to specifically trace the ash on her property, or the alleged particulate matter in the air, to FPP or to a specific violation of an applicable permit.

*5 TCE responds that requiring specificity in tracing an alleged injury to an alleged source of pollution “conflates the issue of standing with the issue of actual liability.” *Texans United*, 207 F.3d at 793. And, in any event, standing is being addressed at the pleading stage in this case, and *Texans United* was decided in the context of summary judgment proceedings. Here, in the context of a motion to dismiss, the court accepts as true plaintiff's allegations that LCRA emits particulate matter, that it has exceeded the applicable limitations on particulate matter emissions during the last several years, and that, during that same time period, Ms. Rivers has observed ash deposits on her property that are consistent with emissions from FPP. The court also accepts Ms. Rivers' assertion that her asthma is at least aggravated by the particulate matter in the air, including that which emanated from FPP. The Fifth Circuit has cited with approval to Ninth Circuit precedent to the effect that “breathing and smelling polluted air is sufficient to demonstrate injury-in-fact and thus confer standing under the CAA.” *Id.* at 792. Thus, applying the appropriate pleading standard, TCE has alleged violations of emissions standards applicable to FPP, and has also alleged harm to one of its members consistent with the alleged emissions, which is fairly

traceable to FPP.

The court also rejects LCRA's argument concerning other potential sources of pollution in the area. *Texans United* spoke to this issue as well. A CAA plaintiff "must ultimately establish causation if they are to prevail on the merits" but "need not do so to establish standing." 207 F.3d at 793. In fact, in a prior case, the Fifth Circuit has found it sufficient for the "fairly traceable" standard that the alleged "pollutant causes or contributes to the kinds of injuries alleged by the plaintiffs." *Sierra Club v. Cedar Point Oil Co.*, 73 F.3d 546, 557 (5th Cir.1996). Here, that certainly has been alleged, and TCE has alleged sufficient facts to satisfy the "fairly traceable" standard at the pleading stage.

b. Are the interests the litigation seeks to protect germane to TCE's purpose?

LCRA next asserts that TCE cannot satisfy the "germane" requirement of organizational standing. The germaneness requirement ensures that an association or organization has a sufficient interest in the outcome of litigation to be the defendants' natural adversary. *United Food and Com. Workers Union Loc. 751 v. Brown Group, Inc.*, 517 U.S. 544, 555–56, 116 S.Ct. 1529, 134 L.Ed.2d 758 (1996) ("*Hunt's* second prong is, at the least, complementary to the first, for its demand that an association plaintiff be organized for a purpose germane to the subject of its member's claim raises an assurance that the association's litigators will themselves have a stake in the resolution of the dispute, and thus be in a position to serve as the defendant's natural adversary.").

Here, LCRA makes a rather unique argument—TCE has *itself* defined its purpose as limited to matters other than litigation. TCE's certificate of formation states:

*6 This corporation is organized exclusively for the purpose of protecting and preserving the environment *through educational and charitable means ...*

Dkt. 18–11. LCRA asserts that the court should not condone TCE acting beyond its articles of incorporation, as it has in bringing this case. TCE, hewing to the precise wording of the test from *Hunt*, argues that, regardless of the methodology set forth in TCE's certificate of formation, the "interest it seeks to protect" in this litigation is protection of the environment through enforcement of applicable air quality standards. This interest, TCE asserts, is certainly germane to the purpose of the organization to "protect and preserve the environment." *Hunt*, 432 U.S. at 343 (interests protected in the litigation must be germane to the organization's purpose).

Defendants have not cited, and the court has not located, any case where an organization limited itself to non-litigation means of accomplishing its goals, and that limitation was found to be binding for purposes of the *Hunt* germaneness inquiry. Further, although members of TCE may (or may not) have objections arising from TCE's choice to pursue litigation rather than "education and charitable means" of preserving the environment, as described in *Hunt*, the inquiry is not whether *litigation* is consistent with, or even permitted by, an association's founding documents. The specific inquiry is whether "the *interests it seeks to protect* are germane to its purpose as an association" 432 U.S. at 343 (emphasis added). Here, litigation is not the interest protected—the environment is the interest protected. That interest is certainly germane to TCE's purpose, even if it is arguably inconsistent with the *methods* TCE has represented it will use to pursue its goal.

And, in any event, TCE certainly has a stake in the outcome of this litigation arising from its expressed interest in protecting and preserving the environment such that its lawyers will serve as "defendant's natural adversar [ies]." Indeed, LCRA made no argument that TCE attorneys lack the necessary motivation to serve as LCRA's adversary. In short, LCRA has hypothesized that TCE members may have a complaint because TCE is pursu-

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ing litigation instead of limiting itself to educational and charitable means of protecting and preserving the environment, but this potential complaint by TCE members is simply not probative on the issue of TCE's "stake" in this litigation. The court finds that the interests TCE seeks to protect in this litigation are germane to its purpose. The court finds that TCE has standing and LCRA's motion to dismiss for lack of standing is DENIED.

2. Collateral attack on Title V operating permit.

LCRA also asserts that all of Counts 1 and 4, and that portion of Count 2 asserting violations of "heat input" limitations, are attempts by TCE to "read into" the Title V permit limitations that were not included in the operating permit because they had been rendered obsolete by the 2002 Flexible Air Permit. LCRA argues that TCE was required to make any argument about the inclusion of such limitations during the Title V administrative permitting process in 2004 and again in 2009 when LCRA was issued operating permits for FPP. LCRA cites to *United Steel Workers of America v. Oregon Steel Mills, Inc.*, 322 F.3d 1222, 1225 (10th Cir.2003), where the court refused to consider arguments concerning applicable emissions standards because the claims were "cleverly packaged" as claims seeking to enforce emissions standards, but were, in fact, challenges to the *adequacy* of the emissions standards actually contained in a Title V operating permit. The former is what a citizen's suit under the CAA permits, but the latter is an argument that should have been made during the public comment and approval processes prior to the permit issuing. This is, in LCRA's view, a "use or use it" opportunity to raise concerns about the emissions standards at a facility that cannot be relitigated (or litigated for the first time) in the context of a CAA enforcement action or citizen suit.

*7 In counts 1 and 4 of the amended petition, TCE alleges that defendants have violated emissions standards contained in *prior* construction permits. Specifically, Count 1 contains allegations that "heat input" limits for Units 1, 2, and 3, which were

set forth in construction permits issued between 1979 and 1997, were violated between 2006 and 2009. Dkt. 14 ¶¶ 5, 6, 30–36. Notably, the amended complaint also contains an allegation that these heat input limits "could not have been voided or made obsolete by the issuance, in 2002, of a non-SIP-approved Flexible Air Permit." Dkt. 14 ¶ 34. The 2002 Flexible Air Permit No. 51770/PSD–TX–486–M3 does *not* contain the heat input limitations referenced by TCE. Count 4 is premised upon an hourly particulate matter limitation made applicable to Unit 3 only in Permit No. 9233 issued in 1983. Again, this permit was consolidated into the 2002 Flexible Air Permit No. 51770/PSD–TX–486–M3, which, once again, does not contain any particulate matter limitation applicable to Unit 3 only. The only emissions standards set forth in the Flexible Air Permit are made applicable to "all sources of air contaminants on the applicant's property covered by this permit" and "are the maximum rates allowed for this facility." Dkt. 18–3 at 20 (2003 alteration of Flexible Air Permit). TCEQ altered the Flexible Air Permit in 2003 and expressly agreed with LCRA that it "contains a flexible cap that covers all equipment and hourly and annual emissions for the entire facility making Permit Numbers 3010 and 9233 obsolete." Dkt. 18–3 at 2.

Also, LCRA's 2004 Operating Permit contains a chart listing prior permits that contain applicable emissions limitations. The only prior permit referenced is the Flexible Air Permit No. 51770/PSD–486–M3. Dkt. 18–7 at 32. Prior permits 3010 and 9233 are not listed. Dkt. 18–7 at 32. Thus, the only emissions requirements specifically referenced in the 2004 Operating Permit are the site-wide limitations set forth in the 2002 Flexible Air Permit.

TCE, however, alleges that the heat input limits and the Unit 3-specific hourly particulate matter emissions limitation are each "enforceable" through the 2004 (and later 2009) Title V Operating Permits issued to LCRA. Dkt. 14 ¶¶ 36, 56. TCE concedes

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that these limitations do not appear in either the 2004 or 2009 Operating Permits, but instead argues that the limits are “still in effect” and that they could not have been properly voided or modified by the state agency in the Flexible Air Permit issued in 2002. Dkt. 14 ¶ 34 (“emissions limits are federally-enforceable and could not have been voided or made obsolete by the issuance, in 2002, of a non-SIP-approved Flexible Air Permit.”).

Thus, at first blush, this dispute requires the court to determine whether the 2002 Flexible Air Permit had the effect that TCEQ and LCRA believed it had—establishing a single, site-wide emissions standard, voiding all prior permit provisions. However, what the court must first determine is its subject matter jurisdiction over that dispute. And, in this instance, the relevant inquiry focuses upon TCE's failure to raise its challenge to the terms and effect of the Flexible Air Permit during the administrative review process leading to the issuance of the 2004 Operating Permit.

*8 The statutory scheme for administrative review of EPA actions, and the bar on CAA citizen suits for claims that could have been raised as objections during the Title V permitting process, was recently explained in *Sierra Club v. Otter Tail Power Co.*:

We begin our analysis by examining the interplay between 42 U.S.C. § 7661d and 7607. Section 7661d establishes a comprehensive scheme for EPA review of proposed Title V permits. See *Romoland [School Dist. v. Inland Empire Energy Center, LLC]*, 548 F.3d [738] at 742–43 [(9th Cir.2008)]. It requires state permitting authorities to submit permit applications and proposed permits to EPA for review. § 7661 d(a)(1). “If any permit contains provisions that are determined by the Administrator as not in compliance with the applicable requirements ... the Administrator shall ... object to its issuance” within 45 days. § 7661d(b)(1). If the Administrator does object, the permit may not be issued unless it is revised to meet the objections. §§ 7661d(b)(3),

(c). If EPA does not object to a proposed permit, “any person may petition the Administrator within 60 days after the expiration of the 45–day review period ... to take such action.” § 7661d(b)(2). The Administrator must then grant or deny the petition within 60 days. *Id.* “Any denial of such petition shall be subject to judicial review under” 42 U.S.C. § 7607. *Id.*

Section 7607(b)(1) provides in turn for direct review of the Administrator's decision in the courts of appeals. See *Romoland*, 548 F.3d at 743 . Section 7607(b)(2) further provides that **“[a]ction of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement.”**

615 F.3d 1008, 1020 (5th Cir.2010) (emphasis added). Thus, where a challenge could have been raised to a Title V permit during the permit process, no judicial review can thereafter be obtained through enforcement proceedings. In *Otter Tail*, the court made a distinction between claims that a permit is being violated, and a claim that the permit itself “omitted applicable CAA requirements.” *Id.* Plaintiffs alleging claims that “amount[ing] to an allegation that the permit” is not in compliance with the CAA “could have been pressed during the permitting process’ ” and are barred. *Id.*

In *Otter Tail*, plaintiff Sierra Club brought a CAA enforcement action asserting that New Source Performance Standards (“NSPS”) were triggered by a 2001 modification at the Big Stone site. The state agency approved a modification to the operating permit after expressly concluding that NSPS had not been triggered. EPA did not object, the Sierra Club did not request a hearing on the proposed permit, and the permit was thereafter modified. 615 F. 3 d at 1020. The court concluded that EPA's decision not to object within 45 days triggered Sierra Club's right to petition for an objection, and that filing such a petition would have allowed Sierra Club to obtain review of the issue. *Id.* at 1021. Thus,

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since Sierra Club “could have” obtained review of whether NSPS had been triggered during the permitting process, district court review of the issue was barred by § 7607(b)(2).

*9 Here, the claims made by TCE are quite similar to those that the Sierra Club made in *Otter Tail*, and share the common characteristic that review of the underlying issue of whether the CAA requirements should have been included in the Title V permit could have been obtained through administrative review. As was the case in *Otter Tail*, the state agency here made a specific determination with which plaintiffs disagreed. In *Otter Tail*, the decision was that NSPS had not been triggered—in this case TCEQ determined that prior permits 3010 and 9233 had been made obsolete, and the limitations set forth in those permits had been superseded by the Flexible Air Permit. Like *Otter Tail*, the EPA in this case made no objection to the Title V permit application which did not expressly include the prior permits as relevant sources of limitations. When EPA failed to object on the basis that the prior permits should have been included as sources of relevant limitations, TCE had the opportunity to petition for an objection, but failed to do so. Therefore, TCE missed its opportunity to obtain review during the administrative procedure, and this court lacks jurisdiction to address TCE's enforcement claims.

The logic of this result is “bolstered by the practicalities of the permitting process” because if plaintiffs were permitted to choose either to raise claims during the permitting process, or wait until later (sometimes *much* later) to file “an enforcement action,” this could lead to “simultaneous suits by multiple parties raising the same or similar issues” thereby wasting judicial resources and hazarding inconsistent decisions. 615 F.3d at 1022. “In addition, to allow plaintiffs to raise issues resolved during the permitting process long after that process is complete would upset the reasonable expectations of facility operators and undermine the significant investment of regulatory resources made by

state permitting agencies.” *Id.* In this case, LCRA expended huge sums of money to comply with state-approved permits which were uncontested by the EPA. Indeed, the statutory framework making resolution of permitting claims during the administrative process mandatory is a “sensible and efficient regulatory scheme.” *Id.*

TCE makes the rather circular argument that it had no reason to object during the Title V permitting process to the lack of the express inclusion of the heat input and Unit 3 hourly particulate matter limitations because it believed that TCEQ's actions in voiding those limitations has no legal effect. Thus, TCE believes it had no need to object to the absence of those limitations because, in their view, those limitations survive regardless of whether they were included in the Title V permit, or can be “read into” the permit as a matter of law. As set forth above, however, decisions concerning the content of a Title V permit can be reviewed only as set forth in the statute, and as explained in *Otter Tail*, this divests district courts of jurisdiction over any claim that is the functional equivalent of a challenge to the appropriate provisions of a Title V permit that has been issued. Thus, TCE's need to raise the issue during the permitting process arises from its inability to raise it in a later enforcement suit.
 FN1

FN1. TCE also asserts that this result gives LCRA the benefit of a “permit shield” that LCRA did not obtain with respect to whether requirements from Permit Nos. 3010 and 9233 survived the Flexible Air Permit. Briefly, an operator may use its Title V permit as a defense to a claim that CAA requirements apply, but only when “the permit includes the determination” that those specific requirements do not apply. § 7661c(f)(2). In this case, there is no mention in either the 2004 or 2009 operating permits of TCEQ's determination that Permit Nos. 3010 and 9233 are “obsolete.” Thus, LCRA would not be entitled to a

“permit shield” with respect to TCE’s claims. This, however, does not change the court’s analysis of its jurisdiction, as the Fifth Circuit explained in *Otter Tail*:

Sierra Club may be correct that the district court’s interpretation of §§ 7661d and 7607 restricts the permit shield’s applicability, but this does not persuade us that its interpretation is erroneous. While § 7661c(f) is a statutory defense to liability, § 7607(b)(2) limits district court subject matter jurisdiction. To the extent the two provisions are in tension, the jurisdictional limit is paramount.

615 F.3d at 1022.

*10 The court lacks jurisdiction over any claim raised in this enforcement suit that could have been raised as an objection during the permitting process. Counts 1 and 4 are, therefore, DISMISSED in their entirety. Count 2 is DISMISSED IN PART, and to the extent that it is based upon an assertion that prior permit requirements were not voided by the 2002 Flexible Air Permit (Dkt. 14 ¶¶ 38–45).

3. Remainder of Count 2—Rule 12(b)(6).

The portion of Count 2 that is not barred by *Otter Tail* is contained in ¶¶ 46–49 of the First Amended Complaint, in which TCE alleges that between 2006 and 2009 FPP exceeded the Plantwide Applicability Limit (“PAL”) for emissions set forth in the 2002 Flexible Air Permit and incorporated into the 2004 Operating Permit. Dkt. 14 ¶ 47. This exceedance is alleged to have triggered Prevention of Serious Deterioration or “PSD” requirements under the 2004 Operating Permit and required LCRA at the time of the exceedances to apply for a federal PSD permit and to comply with Best Available Control Technology (“BACT”) requirements. *Id.* ¶¶ 48–49.

LCRA disagrees, and cites to the specific terms of the PAL, and the requirement that any exceedance be linked to either replacement or modi-

fication of existing facilities—which TCE has not alleged. The applicable provisions of the 2002 Flexible Air Permit read in relevant part:

SPECIAL CONDITION FOR REPLACEMENT AND MODIFIED FACILITIES

17. A. **Replacement Facilities**—This flexible permit authorizes permit holder to replace any facility covered in this flexible permit with a facility that functions in the same or similar manner so long as the replacement facility complies with all applicable permit conditions, the replacement facility emissions do not cause an exceedance of the plantwide maximum allowable emission caps, and emissions are included in emission cap calculation and recordkeeping.

B. **Modification of Facilities**—The flexible permit authorizes the permit holder to **modify any existing facility covered by the flexible permit or implement a change inconsistent with any representation of the flexible permit application** so long as such modification or change does not cause an exceedance of the plantwide maximum allowable emission caps, and emissions are included in emission cap calculation, and recordkeeping. Such authorization provided under this condition shall not apply to modifications involving removal of any existing air pollution control device unless it is replaced by a new control device achieving equivalent emissions control levels.

Dkt. 18–1 at 9 (bold emphasis added). This provision is then referenced in the PAL portion of the permit as follows:

PLANTWIDE APPLICABILITY LIMIT (PAL)

18. Any project to be authorized pursuant to Special Condition No. 17A and B, permit by rule, or other TCEQ permitting mechanisms, including a permit amendment for the addition of new facilities, shall not be subject to federal new source review provided the total plantwide emissions do not exceed the PAL thresholds established by this permit for any air pollutant regulated by federal

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new source review

***11 Only the changes that cause the new emission rates to exceed the PAL are subject to federal new source review.**

Dkt. 18–1 at 10–11 (bold emphasis added). Thus, as defined in the 2002 Flexible Air Permit, only “changes that cause the new emissions rates to exceed the PAL” are subject to PSD review, and “changes” are defined as either replacement of existing facilities, modification of an existing facility or “a change inconsistent with any representation of the flexible permit.”

Indeed, as LCRA suggest, TCE does not plead either a “replacement” of existing facilities, or that existing facilities were “modified” thereby causing the alleged exceedances. Instead, TCE asserts that FPP operated at “heat input” levels beyond what was contained in prior, ostensibly obsolete and voided permits, and that each time a heat input level was exceeded, this constituted a “change in the method of operation” sufficient to trigger PSD review. Dkt. 21 at 47. The applicable language from Paragraph 17 B, however, is that it applies to *modification* of existing facilities, which is not alleged, or “a change in operation inconsistent with any representation of the flexible permit application.” Dkt. 18–1 at 9 (emphasis added). The court is not at all certain that a change in the heat input levels, which may be nothing more than increasing the hours of operation of a particular unit, would qualify as a modification of the method of operation of a facility generally. However, there is a more specific standard in the Flexible Air Permit—the change in operation must be inconsistent with a representation in the permit application, and TCE has simply not made any such allegation.

Therefore, the court finds that TCE has not alleged a PAL exceedance that would trigger PSD review under the express terms of the 2002 Flexible Air Permit. Thus, TCE has not alleged a plausible claim for relief, and the motion to dismiss the remaining portion of Count 2 is GRANTED. *Bell At-*

lantic Corp. v. Twombly, 550 U.S. 544, 547, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (complaint must state claim plausible on its face to survive Rule 12(b)(6) review).

4. TCE's motion for partial summary judgment (Dkt.31).

TCE moves for partial summary judgment with respect to the issue of whether the hourly PM limit from Permit No. 9233 is still effective, and has been violated as alleged in Count 4. This court lacks jurisdiction to address Count 4, however, and the motion is DENIED in this respect.

TCE also seeks summary judgment with respect to Count 3, which survives the motion to dismiss. The court stayed discovery in this matter pending resolution of the motion to dismiss (Dkt.41) and believes it best to await the completion of discovery before ruling on summary judgment. Thus, the motion is DENIED WITHOUT PREJUDICE as to Count 3.

CONCLUSION

LCRA's and City of Austin's motions to dismiss (Dkts. 18 and 28) are GRANTED IN PART AND DENIED IN PART, leaving only Count 3 of the first amended complaint.

***12** It is further ORDERED that TCE's motion for partial summary judgment (Dkt.31) is DENIED as to Count 4, and DENIED as to Count 3 without prejudice to TCE's right to reassert its motion at the close of discovery.

It is further ORDERED that the stay of discovery entered in this case (Dkt.41) is LIFTED, and the parties are directed to submit a joint proposed scheduling order within 14 days of the date of this order.

It is so ORDERED.

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