July 14, 2010

Thomas G. Mason, General Manager  
LCRA  
P.O. Box 220  
Austin, TX 78767

Plant Manager  
LCRA Sam Seymour/Fayette Power Project  
6549 Power Plant Rd.  
La Grange, TX 78945-3714

RE: Notice of Intent to Sue for Clean Air Act Violations at the Sam Seymour Fayette Power Project Located near La Grange, Fayette County, Texas.

Dear Mr. Mason and Plant Manager:

We are writing on behalf of the Environmental Integrity Project ("EIP"), Texas Campaign for the Environment ("TCE"), and Environment Texas to provide you with notice of intent to file suit for significant and ongoing violations of the federal Clean Air Act at the coal-fired Fayette Power Project (also known as the Sam Seymour plant, hereinafter “FPP”) located near La Grange, Texas.

Citizens are entitled to bring suit to enjoin violations of an emission standard or limitation under the Clean Air Act and seek redress and civil penalties for such violations. 42 U.S.C. § 7604(a). The Clean Air Act provides for civil penalties of up to $37,500 per violation per day after January 12, 2009, and up to $32,500 for violations on or before January 12, 2009. 42 U.S.C. § 7413(d)(1), (e), and 7604(a); 40 C.F.R. §§ 19.2 and 19.4 (2009).

In accordance with Section 7604(b)(1) of the Clean Air Act, we are writing to notify you we intend to file suit in federal district court any time sixty (60) days after the postmarked date of this letter to enjoin the violations described below, ensure future compliance, obtain civil penalties for past noncompliance, recover attorneys fees and costs of litigation, and obtain any other appropriate relief.

EIP (http://www.environmentalintegrity.org/) is a nonprofit organization dedicated to the enforcement of anti-pollution laws, including the Clean Air Act. EIP has offices at 1303 San Antonio Street, Suite 200, Austin, Texas, 78701. Members of EIP’s staff live, work, and recreate downwind of the Fayette Power Plant.

TCE (http://www.texasenvironment.org/) is a nonprofit membership organization dedicated to informing and mobilizing Texans to protect their health, their communities and the
environment. TCE has offices located at 3303 Lee Parkway #402, Dallas, TX 75219; 611 S. Congress #200-B, Austin, TX 78704; and 3100 Richmond #290, Houston, TX 77098. TCE members and staff live, work, and recreate in the vicinity and downwind of FPP.

Environment Texas (http://www.environmenttexas.org/) is a statewide, citizen-based environmental advocacy organization focused on protecting Texas’ air, water and open spaces. Environment Texas has offices at 815 Brazos, Suite 600, Austin, TX 78701. Environment Texas combines independent research, practical ideas and tough-minded advocacy to help clean up pollution and win results for Texas’ environment. Environment Texas has staff and members who live, work, and recreate in the vicinity and downwind of FPP.

Please direct all communications regarding this matter to the Environmental Integrity Project. Contact information for Ilan Levin, Senior Attorney and Eric Schaeffer, Executive Director are in the signature block below.

I. LCRA’s Fayette Power Project

The Lower Colorado River Authority is owner and operator of the Fayette Power Project (FPP) facility located near La Grange, in Fayette County Texas. FPP consists of three coal-fired boilers, designated as Units 1, 2, and 3, and associated facilities and material handling. Units 1 and 2, jointly owned by LCRA and Austin Energy, each have an electric generation capacity of approximately 600-megawatts. Unit 3 is owned solely by LCRA and has an electric generation capacity of approximately 450 megawatts. Unit 1, 2, and 3 began commercial operation in 1979, 1980, and 1988, respectively.

Prior to 2002, FPP Units 1 & 2 were authorized under Texas Natural Resources Conservation Commission (the predecessor agency to the Texas Commission on Environmental Quality) Air Quality Permit No. 3010, and Unit 3 was authorized under Permit No. 9223 and PSD-TX-486M3. In July 2002, LCRA submitted an application to the TCEQ for a Flexible Air Permit. In October 2002, TCEQ issued LCRA Flexible Permit No. 51770/PSD-TX-486M3 (“Flex Permit”). Today, FPP Units 1, 2, and 3 are authorized under the Flex Permit and under Federal Operating Permit No. O21. In addition, the terms and conditions in the Flex Permit are incorporated by reference into Title V Federal Operating Permit No. O21.1

II. Statutory Background

The Clean Air Act is designed to protect and enhance the quality of the nation’s air, so as to promote the public health and welfare and the productive capacity of its population. Section 101(b) of the Act, 42 U.S.C. § 7401(b)(1). The U.S. Environmental Protection Agency has established National Ambient Air Quality Standards (“NAAQS”) to protect human health and the environment for seven “criteria pollutants,” including particulate matter (“PM”).2 An area that meets the NAAQS for a particular criteria pollutant is deemed to be in “attainment” for that

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1 TCEQ Federal Operating Permit No. O21, issued to LCRA Sam Seymour Fayette Power Project (See, “New Source Review Authorization References”).

2 42 U.S.C. § 7409(a); 40 C.F.R. part 50.
pollutant. An area that does not meet the NAAQS is a “nonattainment” area. An area that cannot be classified due to insufficient data is “unclassifiable,” a designation that allows an area to be treated for regulatory purposes as though it were an attainment area for the particular criteria pollutant in question.³

Pursuant to 42 U.S.C. § 7410, each State must adopt and submit to EPA for approval a State Implementation Plan (“SIP”) that provides for the attainment and maintenance of the NAAQS. Once a State’s SIP is approved by EPA, it is published in the Code of Federal Regulations and can be enforced by the state, EPA or citizens. At all times relevant to this notice of intent to sue, the Fayette Power Project has been located in an area that has been classified as attainment or unclassified.

A. New Source Review and Prevention of Significant Deterioration

Congress established the Clean Air Act’s New Source Review (NSR) requirements as part of the 1977 Clean Air Act Amendments. According to U.S. EPA (see, http://www.epa.gov/NSR/), NSR serves two purposes. First, stationary sources of air pollution must obtain a permit prior to construction and operation in order to ensure that air quality is not significantly degraded from the addition of new and modified pollution sources like power plants. In areas with air quality that is deemed unhealthy – that is, areas designated as “nonattainment” for certain air pollutants – these new or modified sources must obtain “Nonattainment New Source Review” air permits. In areas designated as “attainment” or “unclassifiable,” new or modified sources must obtain “prevention of significant deterioration” (“PSD”) air permits.

Part C of the Clean Air Act, 42 U.S.C. §§ 7470-7492, sets forth requirements for the prevention of significant deterioration (“PSD”) of air quality in those areas designated as either attainment or unclassifiable for purposes of meeting health-based national ambient air quality standards (“NAAQS”). These requirements are designed to protect public health and welfare by maintaining continued compliance with NAAQS and ensuring that economic growth will occur in a manner consistent with the preservation of existing acceptable air resources. The PSD requirements also ensure that any decision to permit increased air pollution is made only after careful evaluation of all the consequences of such a decision and after public participation in the decision making process. These provisions are referred to as the “PSD program.”

Under 42 U.S.C. § 7471, each state’s SIP must contain a PSD program. In 1992, after Texas incorporated by reference the federal PSD requirements of 40 C.F.R. § 52.21 into the Texas Administrative Code, EPA promulgated federal regulations approving Texas’s PSD program.⁴

Pursuant to its EPA-approved PSD program, Texas issues air pollution permits governing the operation of regulated facilities. In addition, section 165(a) of the PSD provisions of the Act,

³ 42 U.S.C. § 7407(d).

⁴ 57 Fed. Reg. 28093 (June 24, 1992, effective July 24, 1992), 40 C.F.R. §§ 52.2270(c) and 52.2303.
42 U.S.C. § 7475(a), prohibits the construction and operation of a “major emitting facility” in an area designated as attainment or unclassifiable, unless a permit has been issued that comports with the requirements of Section 165 and the facility employs the best available control technology (“BACT”)\(^5\) for each pollutant subject to regulation under the Act that is emitted from the facility. Section 169(1) of the Act, 42 U.S.C. § 7479(1), designates as “major emitting facilities” fossil-fuel fired steam electric plants of more than two hundred and fifty million BTUs per hour heat input and that emit or have the potential to emit one hundred tons per year or more of any pollutant.

Section 169(2)(C) of the Act, 42 U.S.C. § 7479(2)(C), defines “construction” as including “modification.” “Modification” is defined in Section 111(a), 42 U.S.C. § 7411(a), of the Act to be “any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.”

Applicable provisions in the federal PSD regulations incorporated into the Texas SIP have at all times relevant to this notice of intent to sue prohibited a major stationary source from undertaking a major modification without, among other things, first obtaining a new or an amended PSD permit, undergoing a new BACT determination, and applying BACT pursuant to that determination for each relevant pollutant.

### B. Title V Federal Operating Permit

Title V of the Act, 42 U.S.C. §§ 7661-7661f, establishes an operating permit program for certain sources, including “major sources.” The purpose of Title V is to ensure that all “applicable requirements” for compliance with the Act, including PSD requirements, are collected in one federally-enforceable permit.

Texas implements the Title V program pursuant to EPA-approved regulations in Ch. 122, Texas Administrative Code. Section 502(a) of the Act, 42 U.S.C. § 7661c(a), and the Texas Title V operating permit program (30 TAC Ch.122) have at all times relevant to this notice of intent to sue made it unlawful for any person to violate any requirement of a permit issued under Title V or to operate a major source except in compliance with a permit issued by a permitting authority under Title V.

Section 504(a) of the Act, 42 U.S.C. § 7661(c), and implementing regulations of the Act, 40 C.F.R. § 70.2, and the Texas Title V operating permit program, 30 TAC Ch. 122, have at all relevant times required that each Title V permit include, among other things, enforceable emission limitations and such other conditions as are necessary to assure compliance with applicable requirements of the Clean Air Act and the requirements of the applicable SIP, including any applicable PSD requirements.

\(^5\) BACT is not actually a requirement that any particular technology be employed. Rather, it is a specification that a particular level of emission control be obtained. Typically, BACT for a pollutant is stated in terms of pounds per hour and tons per year that may be emitted.
III. **Clean Air Act Violations**

A. **New Source Review**

   i. **FPP’s Flex Permit Constitutes a Continuous and Ongoing Violation of CAA §§ 110 and 165.**

   Prior to October 2002, FPP Units 1 and 2 were authorized under Permit No. 3010, and FPP Unit 3 was authorized under Permit No. 9233/PSD-TX-486M3. In October 2002, LCRA received from the TCEQ a Flexible Permit No. 51770/PSD-TX-486M3 (“Flex Permit”). The Flex Permit purports to replace the individual emission limits for Units 1, 2, and 3 with plantwide caps and remove existing operational limitations.

   The TCEQ’s Flex Permit program has never been approved by the U.S. EPA as part of the Texas State Implementation Plan. Thus, the Flex Permit may not be used to circumvent federal requirements in the Texas SIP, nor may a Flex Permit be a substitute for a federally required NSR/PSD permit.

   Texas flexible permits have never been incorporated into the federally approved State Implementation Plan. On September 25, 2007, EPA sent all Texas Flex Permit holders a fair notice letter informing you that Flexible Permits are pertinent only to Texas State air permit requirements and that facilities remain “obligated to comply with the Federal requirements applicable to (their) plant, in addition to any particular requirements of (their) flexible permit.” See, Attachment A.

   On June 30, 2010, EPA formally disapproved the Texas Flexible Permitting Program because it fails to satisfy the New Source Review state implementation plan requirements of the federal Clean Air Act.

   If LCRA contends that Flex Permit No. 51770/PSD-TX-486M3 replaces FPP’s SIP-approved air permits, replaces individual Unit 1, 2, and 3 emission limits, and/or removes operational limitations in SIP-approved permits, then FPP is currently operating in violation of the federal Clean Air Act. You are hereby notified that EIP, TCE, and Environment Texas intend to sue you for continuous and ongoing violations of the federal Clean Air Act’s PSD provisions, 42 USC § 7475, and state implementation plan (SIP) requirements, 42 USC §7410, because FPP is required to have – but lacks – a valid SIP-approved federal air pollution permit.

   Put simply, the federal Clean Air Act and the Texas SIP require FPP to be authorized under a valid PSD air permit, and your Flex Permit is not it.

   ii. **FPP has Undergone Major Modification Without Complying with the Clean Air Act’s New Source Review.**

   Based on LCRA’s 2002 Flex Permit Application and self-reported emissions data reported to the U.S. EPA’s publicly accessible “Clean Air Markets” database (http://cammdadataandmaps.epa.gov/gdm/index.cfm?fuseaction=emissions.wizard), and for the reasons described below, FPP has undergone major modification without complying with the Clean Air Act’s New Source Review provisions designed to protect air quality and bring new and modified pollution sources up to best available technology standards.
You are hereby notified that EIP, TCE, and Environment Texas intend to sue you for continuous and ongoing violations of the federal Clean Air Act’s new source review (specifically, the prevention of significant deterioration, or “PSD”) provisions, Section 165, 42 U.S.C. § 7475, 42 U.S.C. § 7401 et seq., with respect to emissions of particulate matter, by failing to obtain required permits, install required control technology, meet emission limits, and comply with requirements for monitoring, record-keeping and reporting, as specified in the Act.

a. Evidence of Increased Heat Input Capacity.

Heat input is a measure of energy expressed in millions of British thermal units (mmBtu). Coal-fired boilers such as FPP’s Units 1, 2, and 3, always have a maximum heat input rate, which is expressed in mmBtu per hour, and is essentially a measure of the boiler’s size, or capacity to burn coal. Thus, the greater the maximum heat input rating, the more coal can be burned in the boiler.

According to LCRA, Units 1, 2, and 3 are each capable of operating far in excess of original authorized capacity, indicating that major modification has occurred.

FPP Units 1 and 2 were constructed in the late 1970s and are nearly identical, approximately 600 megawatt coal-fired boilers. The original state-issued preconstruction permits for both units are based on LCRA’s representations corresponding to a maximum design value of 5,736 mmBtu/hr and 5,884 mmBtu/hr for units 1 and 2, respectively. Subsequently, in permitting matters before the TCEQ and its predecessors, LCRA represented a slightly higher maximum heat input, 6,000 mmBtu/hr for both units.

FPP Unit 3 was permitted in 1983 as a 4,735 mmBtu/hr (415 megawatt net, 450 gross) lignite-fired unit. LCRA was only authorized to construct a 4,735 mmBtu/hr lignite-fired steam generator.

In 2002, LCRA obtained a Flex Permit based on maximum heat inputs far in excess of FPP’s original heat input capacity limits. Moreover, according to LCRA’s self-reported data, available on EPA’s Clean Air Markets database, Units 1, 2, and 3 routinely reach levels far in excess of FPP’s original heat input capacity limits.

Thus, by LCRA’s own admission, each of FPP’s coal-fired boilers have a greater capacity today than what was originally authorized.

LCRA’s self-reported hourly heat input values for Units 1, 2, and 3, in excess of 6,000 mmBtu/hr (for Units 1 and 2) and 4,735 mmBtu/hr (for Unit 3) are provided in Attachment B, which is a compact disk attached to this notice letter containing an Excel spreadsheet (“FPP U1 U2 U3 Heat Input.xls”) detailing the date, time, and reported heat input value.

b. Evidence of Increased Particulate Matter Emissions.

Particulate matter (“PM”) is a mixture of small particles, including organic chemicals, metals, and ash, which can cause health and environmental problems. Once inhaled, PM can affect the heart and lungs and cause serious health effects. Numerous scientific studies have linked particulate matter 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.

We are relying on the exact assumptions and the same formula for determining PM emission levels that LCRA used in obtaining the FPP Flex Permit. The method for determining PM emission levels is described in LCRA’s July 3, 2002, Flex Permit Application, Section 5.4 (“PM/PM$_{10}$ Caps”). LCRA stated in the Flex Permit Application that Units 1 and 2 emit PM at a rate of 0.1 lb/mmBtu, and that Unit 3 emits PM at a rate of 0.03 lb/mmBtu. According to your Flex Permit Application, these emission levels “provide the best estimate of current actual [total] PM/PM$_{10}$ emissions from the FPP boilers.” These emission rates are applied to reported heat input levels, and the product of these two values is a ton per year, or pound per hour, particulate matter emission level.

Relying on your representation of actual PM emission rates (that is, 0.1 lb/mmBtu for Units 1 and 2, and 0.03 lb/mmBtu for Unit 3), multiplied by your actual self-reported heat input levels reported to EPA’s Clean Air Markets database, it is evident that actual PM emissions have crept upward, as shown in Table 1, Increased PM Emissions, below.

<table>
<thead>
<tr>
<th>Year</th>
<th>Unit 1 mmBtu/yr</th>
<th>Unit 2 mmBtu/yr</th>
<th>Unit 3 mmBtu/yr</th>
<th>Unit 1 PM Tons</th>
<th>Unit 2 PM Tons</th>
<th>Unit 3 PM Tons</th>
<th>Units 1, 2, 3 PM Tons</th>
</tr>
</thead>
<tbody>
<tr>
<td>1990</td>
<td>30,262,778</td>
<td>37,627,350</td>
<td>30,699,804</td>
<td>1,513.1</td>
<td>1,881.4</td>
<td>460.5</td>
<td>3,855.0</td>
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<td>1995</td>
<td>34,110,808</td>
<td>37,432,976</td>
<td>30,189,187</td>
<td>1,705.5</td>
<td>1,871.6</td>
<td>452.8</td>
<td>4,030.0</td>
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<td>1996</td>
<td>25,741,229</td>
<td>29,715,188</td>
<td>20,481,192</td>
<td>1,287.1</td>
<td>1,485.8</td>
<td>307.2</td>
<td>3,080.0</td>
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<tr>
<td>1997</td>
<td>40,657,512</td>
<td>32,822,434</td>
<td>34,046,765</td>
<td>2,032.9</td>
<td>1,641.1</td>
<td>510.7</td>
<td>4,184.7</td>
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<td>1998</td>
<td>33,021,607</td>
<td>36,746,118</td>
<td>29,969,012</td>
<td>1,651.1</td>
<td>1,837.3</td>
<td>449.5</td>
<td>3,937.9</td>
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<td>1999</td>
<td>44,949,137</td>
<td>41,762,454</td>
<td>37,299,977</td>
<td>2,247.5</td>
<td>2,088.1</td>
<td>559.5</td>
<td>4,895.1</td>
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<td>2000</td>
<td>41,915,654</td>
<td>44,888,903</td>
<td>35,167,413</td>
<td>2,095.8</td>
<td>2,244.4</td>
<td>527.5</td>
<td>4,867.7</td>
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<td>2001</td>
<td>42,467,876</td>
<td>44,180,965</td>
<td>32,296,242</td>
<td>2,123.4</td>
<td>2,209.0</td>
<td>484.4</td>
<td>4,816.9</td>
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<td>2002</td>
<td>38,201,367</td>
<td>46,197,880</td>
<td>37,294,553</td>
<td>1,910.1</td>
<td>2,309.9</td>
<td>559.4</td>
<td>4,779.4</td>
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<td>2003</td>
<td>46,687,839</td>
<td>45,889,735</td>
<td>35,652,883</td>
<td>2,334.4</td>
<td>2,294.5</td>
<td>534.8</td>
<td>5,163.7</td>
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<td>2004</td>
<td>40,793,114</td>
<td>40,429,267</td>
<td>37,021,015</td>
<td>2,039.7</td>
<td>2,021.5</td>
<td>555.3</td>
<td>4,616.4</td>
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<td>2005</td>
<td>42,464,872</td>
<td>44,217,429</td>
<td>30,180,043</td>
<td>2,123.2</td>
<td>2,210.9</td>
<td>452.7</td>
<td>4,786.8</td>
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<td>2006</td>
<td>37,917,768</td>
<td>37,311,415</td>
<td>33,965,366</td>
<td>1,895.9</td>
<td>1,865.6</td>
<td>509.5</td>
<td>4,270.9</td>
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<td>2007</td>
<td>46,476,660</td>
<td>48,316,231</td>
<td>34,895,288</td>
<td>2,323.8</td>
<td>2,415.8</td>
<td>523.4</td>
<td>5,263.1</td>
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<td>2008</td>
<td>43,738,332</td>
<td>43,378,894</td>
<td>36,376,291</td>
<td>2,186.9</td>
<td>2,168.9</td>
<td>545.6</td>
<td>4,901.5</td>
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<td>2009</td>
<td>44,477,738</td>
<td>43,674,339</td>
<td>33,744,477</td>
<td>2,223.9</td>
<td>2,183.7</td>
<td>506.2</td>
<td>4,913.8</td>
</tr>
</tbody>
</table>

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6 July 2002, LCRA Flex Permit Application at Section 5.4.1, page 5-6.
The values in Table 1 are graphically depicted below.

c. Flex Permit Special Condition 19: Plantwide Applicability Limit (PAL).

FPP’s Flex Permit contains Special Condition 19, entitled “Plantwide Applicability Limit (PAL),” which contains plantwide caps for eight listed pollutants, including particulate matter (“PM”) and particulate matter with a diameter of 10 micrometers or less (“PM$_{10}$”). (This Special Condition was numbered as Special Condition 18 in LCRA’s original, 2002, Flex Permit issuance.)

This Flex Permit condition states that “[i]f future actual emission rates calculated for an air pollutant exceed the PAL thresholds listed above, the permittee shall be subject to federal new source review for that air pollutant.” Special Condition 19 establishes a threshold plantwide annual limit of 5,156 tons for PM and 5,091 tons for PM$_{10}$ for the “initial” period, and 5,171 tons for PM and 5,098 tons for PM$_{10}$ for the “interim” period. The interim period became effective on May 1, 2005.7

Compliance with all annual limits contained in your Flex Permit is based on a 12-month rolling average.8

Relying on your Flex Permit Application representation of actual PM emission rates (that is, 0.1 lb/mmBtu for Units 1 and 2, and 0.03 lb/mmBtu for Unit 3), multiplied by your actual self-reported heat input levels reported to EPA’s Clean Air Markets database, FPP has exceeded...

7 Flex Permit Special Condition 11.

8 Flexible Air Permit 51770/ PSDTX486M3 Special Condition 21, incorporated by reference into Title V Federal Operating Permit No. O21 (See, New Source Review Authorization References table).
the PAL cap for PM contained in your Flex Permit, as shown in Table 2, Violations of Flex Permit “PAL” Interim Emission Cap for PM.

<table>
<thead>
<tr>
<th>12-Month Period</th>
<th>PM Cap (TPY)</th>
<th>Unit 1 (tons)</th>
<th>Unit 2 (tons)</th>
<th>Unit 3 (tons)</th>
<th>Units 1, 2 &amp; 3 (tons)</th>
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</thead>
<tbody>
<tr>
<td>12/1/2006 - 11/30/2007</td>
<td>5,171</td>
<td>2,283.65</td>
<td>2,377.50</td>
<td>517.58</td>
<td>5,178.72</td>
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<td>1/1/2007 - 12/31/2007</td>
<td>5,171</td>
<td>2,323.83</td>
<td>2,415.81</td>
<td>523.43</td>
<td>5,263.07</td>
</tr>
<tr>
<td>2/1/2007 - 1/31/2008</td>
<td>5,171</td>
<td>2,359.37</td>
<td>2,455.68</td>
<td>535.81</td>
<td>5,350.86</td>
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<td>3/1/2007 - 2/29/2008</td>
<td>5,171</td>
<td>2,387.54</td>
<td>2,475.84</td>
<td>546.79</td>
<td>5,410.17</td>
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<tr>
<td>4/1/2007 - 3/31/2008</td>
<td>5,171</td>
<td>2,400.31</td>
<td>2,253.36</td>
<td>545.05</td>
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<td>6/1/2007 - 5/31/2008</td>
<td>5,171</td>
<td>2,404.60</td>
<td>2,157.70</td>
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<td>2,413.80</td>
<td>2,164.04</td>
<td>607.89</td>
<td>5,185.72</td>
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Similarly, relying on your Flex Permit Application representation of actual PM10 emission rates (that is, 0.1 lb/mmBtu for Units 1 and 2, and 0.03 lb/mmBtu for Unit 3), multiplied by your actual self-reported heat input levels reported to EPA’s Clean Air Markets database, FPP has exceeded the PAL cap for PM10 contained in your Flex Permit, as shown in Table 3, Violations of Flex Permit “PAL” Interim Emission Cap for PM10.

<table>
<thead>
<tr>
<th>12-Month Period</th>
<th>PM10 Cap (TPY)</th>
<th>Unit 1 (tons)</th>
<th>Unit 2 (tons)</th>
<th>Unit 3 (tons)</th>
<th>Units 1, 2 &amp; 3 (tons)</th>
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<tr>
<td>12/1/2006 - 11/30/2007</td>
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<td>2,283.65</td>
<td>2,377.50</td>
<td>517.58</td>
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<td>1/1/2007 - 12/31/2007</td>
<td>5,098</td>
<td>2,323.83</td>
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<td>3/1/2007 - 2/29/2008</td>
<td>5,098</td>
<td>2,387.54</td>
<td>2,475.84</td>
<td>546.79</td>
<td>5,410.17</td>
</tr>
<tr>
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<td>5,098</td>
<td>2,400.31</td>
<td>2,253.36</td>
<td>545.05</td>
<td>5,198.71</td>
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<tr>
<td>6/1/2007 - 5/31/2008</td>
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<td>2,404.60</td>
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<tr>
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<td>2,158.70</td>
<td>602.32</td>
<td>5,167.75</td>
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<td>10/1/2007 - 9/30/2008</td>
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<td>2,406.39</td>
<td>2,129.22</td>
<td>589.67</td>
<td>5,125.27</td>
</tr>
</tbody>
</table>

As a result of these exceedances of LCRA’s Flex Permit PAL caps for PM and PM10, new source review permitting should have been triggered. LCRA failed to comply with this requirement of the Flex Permit, incorporated by reference into Federal Operating Permit No. O21.
For the foregoing reasons, LCRA’s Fayette Power Project is currently in violation of the federal Clean Air Act’s new source review (specifically, the prevention of significant deterioration, or “PSD”) provisions, Section 165, 42 U.S.C. § 7475, 42 U.S.C. § 7401 et seq., with respect to emissions of particulate matter, for failing to obtain required permits, install required control technology, meet emission limits, and comply with requirements for monitoring, record-keeping and reporting, as specified in the federal Clean Air Act.

B. Particulate Matter Limits Contained in FPP’s Title V Federal Operating Permit No. O21

FPP’s Flex Permit is incorporated into Federal Operating Permit No. O21, issued to LCRA by the TCEQ pursuant to Title V of the federal Clean Air Act.9 The Flex Permit includes a maximum allowable emission rate table (“MAERT”). According to the MAERT, FPP is limited to 5,155.16 tons of PM per year (on a rolling 12-month basis), and 5,090.52 tons of PM10 per year (on a rolling 12-month basis).

Again, we are relying on the exact method for determining PM emission levels that LCRA relied upon in your July 3, 2002, Flex Permit Application, Section 5.4 ("PM/PM10 Caps"). According to your Flex Permit Application, Units 1 and 2 emit PM and PM10 at a rate of 0.1 lb/mmBtu, and Unit 3 emits PM and PM10 at a rate of 0.03 lb/mmBtu, and these emission levels “provide the best estimate of current actual [total] PM/PM10 emissions from the FPP boilers.”10 These emission rates are applied to the heat input levels that LCRA reports to EPA’s publicly accessible Clean Air Markets database, and the product of these two values is a ton per year, or pound per hour, particulate matter emission level.

Tables 4 and 5, below, provide notice of violations of the annual PM emission cap and violations of the annual PM10 emission cap contained in the Flex Permit’s MAERT, which are federally enforceable through FPP’s Federal Operating Permit No. O21. Exceedances of these limits are violations of your Federal Operating Permit No. O21.

<table>
<thead>
<tr>
<th>12-Month Period</th>
<th>Permit Limit-Annual Cap (TPY)</th>
<th>Unit 1 (tons)</th>
<th>Unit 2 (tons)</th>
<th>Unit 3 (tons)</th>
<th>Units 1, 2 &amp; 3 (tons)</th>
</tr>
</thead>
<tbody>
<tr>
<td>12/1/2006 - 11/30/2007</td>
<td>5,155.16</td>
<td>2,283.65</td>
<td>2,377.50</td>
<td>517.58</td>
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<td>1/1/2007 - 12/31/2007</td>
<td>5,155.16</td>
<td>2,323.83</td>
<td>2,415.81</td>
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<tr>
<td>2/1/2007 - 1/31/2008</td>
<td>5,155.16</td>
<td>2,359.37</td>
<td>2,455.84</td>
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<td>2,387.54</td>
<td>2,475.84</td>
<td>546.79</td>
<td>5,410.17</td>
</tr>
<tr>
<td>4/1/2007 - 3/31/2008</td>
<td>5,155.16</td>
<td>2,400.31</td>
<td>2,253.36</td>
<td>545.05</td>
<td>5,198.71</td>
</tr>
<tr>
<td>6/1/2007 - 5/31/2008</td>
<td>5,155.16</td>
<td>2,404.60</td>
<td>2,157.70</td>
<td>610.05</td>
<td>5,172.36</td>
</tr>
</tbody>
</table>

---


10 July 2002, LCRA Flex Permit Application at Section 5.4.1, page 5-6.
The Clean Air Act imposes a penalty for each day of violation, therefore the twenty 12-month periods listed in Tables 4 and 5, above, constitute 7,302 days of violation.

C. Violations of Heat Input Limits for FPP Units 1, 2, and 3

FPP Unit 1 was originally authorized as a 5,736 mmBtu/hour boiler.\footnote{Based on Unit 1 original application, Table 6, Boilers and Heaters, representing design maximum fuel flow 620,930 lbs/hr and gross heating value of 9238 Btu/lb.} FPP Unit 2 was originally authorized as a 5,884 mmBtu/hour boiler.\footnote{Permit 4629, issued Oct. 13, 1976, Table 6, representing design maximum 516,100 lb/hr and gross heating value of 11,400 Btu/lb.} The original permitted limits for both Units 1 and 2 were based on a maximum firing rate of 6,000 mmBtu/hour. For example, the hourly maximum emission limits for particulate matter for each Unit were set at 600 pounds per hour, based on the product of 6,000 mmBtu/hour and 0.1 pounds of PM/mmBtu (the federal New Source Performance Standard for boilers of Unit’s 1 and 2 vintage). In subsequent permit
decisions by the TCEQ and its predecessor agencies, LCRA represented that the maximum capacity for both Units 1 and 2 is 6,000 mmBtu/hour, each.\textsuperscript{13}

FPP Unit 3 was originally authorized as a 4,735 mmBtu/hour boiler.\textsuperscript{14} As with emission limits for Units 1 and 2, all hourly and annual emission limits for Unit 3 were derived using the simple formula: maximum heat input $\times$ new source performance standard = hourly and annual emission limit. So, for example, Unit 3 was initially permitted to emit 4,735 pounds of sulfur dioxide per hour, based on a then-existing federal NSPS limit of a pound of SO$_2$ for every mmBtu of fuel fed into the boiler.

Texas rules, incorporated into the federally-enforceable Texas SIP, provides that all permit application representations are conditions upon which the permit is issued, and that it is unlawful to vary from those representations. Since at least 1975, the regulations have required “All representations with regard to construction plans and operation procedures in an application for a permit to construct or a permit to operate become conditions upon which a subsequent permit to construct or operate are issued. . .” Rule 605, Regulation VI (April 27, 1975). This provision of state law was approved by EPA into the Texas SIP in 1982. 47 Fed. Reg. 35,193 (Aug. 13, 1982). After 1975, but prior to September 13, 1993, see 31 TAC § 116.5; thereafter and now, see, 30 TAC 116.116(a). The current TCEQ rule, 30 TAC §116.116(a), says:

(a) Representations and conditions. The following are the conditions upon which a permit, special permit, or special exemption is issued: (1) representations with regard to construction plans and operation procedures in an application for a permit, special permit, or special exemption; and (2) any general and special conditions attached to the permit, special permit, or special exemption itself.

For all time periods relevant to this notice of intent to sue, FPP is required to comply with a 6,000 mmBtu/hour limit on Unit 1 and Unit 2, and 4,735 mmBtu/hour for Unit 3. These limits are federally-enforceable pursuant to 30 TAC 116.116(a) (incorporated into the federally-enforceable Texas SIP). These limits are also incorporated into FPP’s federal Title V Federal Operating Permit No. O21 (“Title V” permit) through the following conditions:

- General Terms and Conditions (Title V permit, at p. 1), incorporating 30 TAC 122.143 – 146;
- General Condition 8 (Title V permit at p. 10), regarding New Source Review Authorizations; and
- General Condition 19 (Title V permit at p.13), regarding Acid Rain Permit Requirements for units FPP-1, FPP-2, and FPP-3.

\textsuperscript{13} See, for example, July 25, 2000, letter from Joe D. Bricker, FPP Plant Manager, to Jesse Alonso, TNRCC, re Permit Alteration Request for FPP Units 1 and 2 ( Permit No. 3010), Attachment 2 (stating that “Maximum Boiler Heat Input = 6,000 mmBtu/hr.”)

\textsuperscript{14} PSD permit No. 9233 (Dated 12-22-83) authorizes construction of Unit 3, “4735 MMBtu/hr/Lignite Fired Steam Generator”. The permit’s condition No. 4 also states: “the facility covered by this permit shall be constructed as specified in the application for permit to construct.”
According to LCRA’s self-reported emissions data, publicly available on EPA’s Clean Air Markets website, FPP Units 1, 2, and 3 have each violated, and continue to violate, the mmBtu/hour heat input limit applicable to each unit.

You are hereby notified of 11,299 separate violations of the hourly heat input limit for Unit 1; 14,165 separate violations of the hourly heat input limit for Unit 2; and 11,183 separate violations of the hourly heat input limit for Unit 3, during the period July 2005 through the first quarter of 2010. The date, time, and LCRA’s reported hourly heat input for each of these noticed violations is included in Attachment B—the compact disk attached to this notice letter—containing an Excel spreadsheet (“FPP U1 U2 U3 Heat Input.xls”).

D. Violations of Hourly Particulate Matter Limit Contained in PSD-TX-486M3

For all times relevant to this notice of intent, LCRA’s FPP Unit 3 is required to meet an hourly PM/PM$_{10}$ limit of 142.1 pound per hour.\textsuperscript{15} This emission limit was originally derived by LCRA and the predecessor agency to TCEQ when Unit 3 was first granted its PSD authorization, and the PSD authorization has never been voided and remains in effect today. The rate is based on 0.03 lb/mmBtu multiplied by the maximum heat input capacity for Unit 3, (4,735 mmBtu/hr), the product of which is 142.1 pounds per hour.

Based on LCRA’s 2002 Flex Permit Application representation that 0.03 lb/mmBtu of particulate matter represents the actual emission rate for Unit 3, then every hourly heat input level above 4,735 mmBtu results in emissions above the PSD hourly permit limit.

You are hereby notified of 11,132 separate violations of the hourly PM/PM$_{10}$ limit for Unit 3, during the period July 2005 through March 2010.\textsuperscript{16} The date, time, and LCRA’s reported hourly heat input for each of these noticed violations is included in an Excel spreadsheet (“FPP U3 Hourly PM Violations.xls”) in the CD attached to this notice letter. See, Attachment B.

E. Failure to Pay Emissions Fees

Section 502 of the Clean Air Act, 42 U.S.C § 7661a(b)(3)(A), requires that under a State or local law or interstate compact that the owner or operator of all sources subject to the requirements to obtain a permit pay an annual fee, or the equivalent over some other period. The fee will not be less than $25 per ton of each regulated pollutant.\textsuperscript{17} Section 502(b)(9)(B)(ii) states that the fee will not be paid on emissions in excess of 4,000 tons per year. Texas rules (30 TAC

\textsuperscript{15} Permit Nos. 9233 and PSD-TX-486M3 (See, “Emission Sources – Maximum Allowable Emission Rates” for Emission Point No. 3-1B, “No. 3 Boiler.”

\textsuperscript{16} The number of violations of this emission limit is slightly less than the number of violations of the heat input limit described in Section C of this notice letter, above, due to rounding. The product of the calculation (4,735 * 0.03 = 142.05) is the basis for the 142.1 lb/hour Unit 3 emission limit.

\textsuperscript{17} 42 U.S.C. § 7661a(b)(3)(B)(i).
101.27) require that owners or operators pay a fee for each ton of regulated pollutant. The fee is based on either actual emissions or on the permitted emission rate. However, fees will not be less than the actual emission rates. 30 TAC 101.27(f)

LCRA failed to pay sufficient emission fees six times between 2003-2008, as detailed in Table 6, Failure to Pay Fees on PM Emissions, below.

<table>
<thead>
<tr>
<th>Year</th>
<th>Emission Fee ($/ton)</th>
<th>LCRA Reported Emissions (TPY)</th>
<th>Estimated Amount Paid to TCEQ</th>
<th>Actual emissions (TPY)</th>
<th>What should have been paid</th>
<th>Estimated Unpaid Fees</th>
</tr>
</thead>
<tbody>
<tr>
<td>2003</td>
<td>28.63</td>
<td>1,517.79</td>
<td>$43,454.47</td>
<td>5,163.7</td>
<td>$114,520.00</td>
<td>$71,065.53</td>
</tr>
<tr>
<td>2004</td>
<td>29.18</td>
<td>1,349.01</td>
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<tr>
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<td>4,786.8</td>
<td>$119,080.00</td>
<td>$76,415.69</td>
</tr>
<tr>
<td>2006</td>
<td>30.90</td>
<td>1,213.50</td>
<td>$37,497.15</td>
<td>4,270.9</td>
<td>$123,600.00</td>
<td>$86,102.85</td>
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<tr>
<td>2007</td>
<td>32.39</td>
<td>1,478.11</td>
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<td>$129,560.00</td>
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</tr>
<tr>
<td>2008</td>
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<td>4,913.8</td>
<td>$134,960.00</td>
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<td>TOTAL:</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>$561,767.70</td>
<td></td>
</tr>
</tbody>
</table>

IV. Conclusion

As stated above the Environmental Integrity Project, Texas Campaign for the Environment, and Environment Texas intend to file suit to enjoin the Clean Air Act violations described in this notice letter and to ensure future compliance, obtain civil penalties for past noncompliance, recover attorney fees and costs of litigation, and obtain other appropriate relief. Additionally, we intend to seek additional civil penalties to be used for beneficial mitigation projects consistent with 42 U.S.C. § 7604(g)(2).

We would be happy to discuss any aspect of the allegations in this notice letter and look forward to your reply if you believe any of the foregoing information is incorrect, wish to discuss the further exchange of information, or are interested in discussing settlement prior to the initiation of litigation. If you wish to discuss this matter, please contact the Environmental Integrity Project at the address, phone numbers, or E-mail addresses listed in the signature block below.


19 Data obtained from TCEQ’s Emissions Inventory database ([http://www.tceq.state.tx.us/implementation/air/industei/psei/psei.html](http://www.tceq.state.tx.us/implementation/air/industei/psei/psei.html)). As described in this notice of intent, LCRA’s actual PM emissions are significantly higher than what LCRA reported to the TCEQ Emissions Inventory.

20 Based on TCEQ emission fee per ton and LCRA reported emissions.

21 Based on LCRA’s Flex Permit Application representation of actual emissions.
Sincerely,

[Signature]

ENVIRONMENTAL INTEGRITY PROJECT

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Enclosures

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Mr. Mark R. Vickery, Executive Director
TCEQ
MC 109
P. O. Box 13087
Austin, TX 78711-3087

Hon. Rick Perry, Governor
Office of the Governor
P.O. Box 12428
Austin, TX 78711-7568
ATTACHMENT A
Re: Flexible Permit Number

Dear:

The Environmental Protection Agency, Region 6 (EPA) and the Texas Commission on Environmental Quality (TCEQ) have been working together to address the complex issues related to air quality in the State of Texas. One of the areas that we have been focusing on is the development of a federally-approvable flexible permit rule. Although TCEQ has state-approved flexible permit rules in Title 30 of the Texas Administrative Code, Chapter 116, Subchapter G (30 TAC 116.710 et seq.), EPA has not approved these rules into the implementation plan for the State of Texas (Texas SIP). Consequently, permits issued under these flexible permit rules reflect Texas state requirements and not necessarily the federally-applicable requirements.

The purpose of this letter is to clarify that you, as owner or operator of sources included in a TCEQ flexible permit, are obligated to comply with the federal requirements applicable to your plant, in addition to any particular requirements of your flexible permit.

_____________________________
was issued Flexible Permit Number 39142, under 30 TAC 116.710 et seq. We recognize that the flexible permit is the State permitting vehicle for certain operational requirements at your plant. However, unless and until such time as the Texas flexible permitting rules become part of the Texas SIP, you must continue to comply with applicable federal requirements, including those in the Texas SIP. This includes all terms and conditions of permits approved under the Texas SIP. An example of what is meant by the reference to “federal requirements” is the emission control limitations (e.g., lbs/MBtu) and destruction efficiencies together with the associated monitoring and recordkeeping provisions contained in state or federal permits issued under SIP-approved rules.

Enclosed is a list of Frequently Asked Questions regarding this letter and the federal and state permitting programs. Should you have further questions or inquiries, please contact Raymond Magyar of my staff at (214) 665-7288, or Rick Bartley in the Office of Regional Counsel at (214) 665-8046.

Sincerely yours,

John Blevins
Director
Compliance Assurance and Enforcement Division

Enclosure

cc: Steve Hagle, Assistant Director, Air Permits Division
Texas Commission on Environmental Quality

We promote compliance with Federal environmental regulations in partnership with our States and Tribes
Internet Address (URL) • http://www.epa.gov/region6/enforcement
Frequently Asked Questions
EPA’s Fair Notice Letter regarding TCEQ’s Flexible Permits

Q1: Purpose of Letter: What is the purpose of the letter?

Response: The purpose of the letter is to remind owners and operators of sources of their obligation to comply with all federal and state air permitting requirements. Both EPA and TCEQ expect sources to operate in compliance with all federal and state air permitting requirements. EPA may enforce the provisions of any permit issued to a source under a SIP-approved process, and it is not bound by changes made to those permits by non-SIP approved mechanisms, such as the current Texas flexible permit provisions. EPA also understands that some emission units covered by flexible permits may no longer be operating in the same manner as they had under previous SIP permits or that new emission units may be covered by a flexible permit that have not previously been permitted under any SIP-approved permitting program. Owners and operators must continue to meet their obligations under the federal Clean Air Act, including the requirement to comply with all federal programs such as the NSPS, NESHAP, PSD, non-attainment NSR, and SIP-approved permits. In particular, the letter reminds the recipient that EPA has not approved the Texas flexible permit rules and, consequently, Texas issued flexible permits are not federally-enforceable. More precisely, changes to SIP-approved permits may only be accomplished through SIP-approved procedures, and the flexible permit mechanism is not yet a SIP-approved process to effect changes to a SIP permit.

Q2: Timing of Letter - Why the Sudden Interest? I’ve had my flexible permit for over 10 years now, why is EPA suddenly concerned about my flexible permit?

Response: TCEQ and EPA both agree that it is now time to focus resources on ensuring that all major sources with the State of Texas have federally-enforceable, SIP-approved permits. The two agencies are working together to develop a flexible permit rule that can be approved as part of the Texas SIP. Both TCEQ and EPA have been aware of issues related to the flexible permit rule and have worked over the last several years to address various permitting issues as part of EPA program revisions, including permit streamlining within the context of Title V, the federal PAL program and NSR reform. Because TCEQ is committed to ensuring the continuing success of its efforts to maintain and improve the air quality of Texas, EPA is providing its assistance to ensure that sources are also meeting their federal obligations under the Clean Air Act. One way for EPA to assist Texas in its efforts is to ensure that there are no adverse air quality impacts associated with the implementation of the flexible permitting rules prior to EPA action on the program.
Q3: **Compliance with “legacy permits”:** EPA’s letter states that it expects our facility to comply with the SIP-approved permit conditions and terms that existed prior to issuance of our flexible permit. What does that mean for my facility?

Response: EPA maintains that SIP permits issued to a source remain effective until amended, modified, or revoked in accordance with the SIP-approved methods for effecting such permit changes. This means that all SIP permit conditions and terms, including any representations upon which the SIP permit was issued, are not, and have not been, superceded, voided, or replaced by the terms, conditions, or permit application representations associated with a flexible permit. Owners and operators of sources included in a TCEQ flexible permit should review their previously issued SIP permits (“legacy permits”) to ensure that they are complying with those terms, conditions, and representations. To the extent that such conditions, terms and representations were rolled over into the flexible permit, then there should be no issue associated with compliance obligations and the source should simply continue to comply with those requirements. However, EPA understands that there may be some instances where specific terms, conditions, or representations made in the legacy permits have been “modified” or “changed” by the flexible permit. Therefore, in accordance with EPA’s policy entitled “Revised Guidance on Enforcement During Pending SIP Revisions,” (http://www.epa.gov/compliance/resources/policies/civil/CAA/Stationary/enf-siprev-rpt.pdf) dated March 1, 1991, EPA will assess its enforcement options on a case-by-case basis.

Q4: **New Units Not Covered by a SIP Permit:** I was issued a flexible permit for a new source (site) or a new or amended flexible permit for a change to a source (site) that involves construction of a new unit. Is the source operating in violation of federal requirements since it obtained authorization for those emissions in a non SIP-approved permit?

Response: To the extent that the modification followed the federally-approved review requirements but for the inclusion of those requirements in a SIP-approved permit, EPA will look to the 1991 guidance referenced above in determining whether or not to bring an enforcement action for failure to effect changes to the source in accordance with approved SIP procedures. As previously mentioned in response to Q2, EPA’s focus will be to ensure that the source is not creating any adverse air quality impacts as a result of its operations under the flexible permit. In addition, if there is a need for changes to the monitoring, record-keeping, or reporting requirements to ensure no adverse air quality impacts, then an EPA enforcement action to effect those changes may be appropriate under the circumstances.
ATTACHMENT A

Flexible Air Permits Letter • September 2007

Permission 71623 (BQ0009S, RN100219005)
Ms. Wendy Reno
Advanced Environmental Engineer
3M Company
P.O. Box 33331
Saint Paul, MN 55133-3331

Permission 56685 (JE0016C, RN100225671)
Mr. Lee Murphy
Vice President Manufacturing
850 Pine Street Inc.
P.O. Box 20318
Beaumont, TX 77720-0918

Permission 21865 (HG0037Q, RN100211523)
Mr. Paul Mikulis
Environmental Manager
Akzo Nobel Chemicals Inc.
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Pasadena, TX 77507-1104

Permission 50595 (TA0021L, RN100214949)
Mr. Weinan Chen, PhD
Senior Environmental Engineer
Alon USA LP
P.O. Box 1311
Big Spring, TX 79721-1311

Permission 36645 (HT0011Q, RN100205869)
Mr. Joseph A. Concionne III
Vice President and Refinery Manager
Alon USA LP
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Big Spring, TX 79721-1311

Permission 47724 (SK0016S, RN101162774)
Mr. Doug Hunsley
Business Leader
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Tyler, TX 75707

Permission 81593 (NE0024E, RN100642040)
Mr. Dale Lebsack
Operations & EHS
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Permission 7278 (HX0005V, RN102528197)
Mr. Jay Brough
Hsse Manager
BP Amoco Chemical Company
P.O. Box 2016
Pasadena, TX 77501-2016

Permission 1176 (GB0001R, RN102536307)
Mr. Ruben Herrera, P.E.
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Texas City, TX 77592-0401

Permission 47256 (GB0004L, RN102535077)
Ms. Katherine Gardner
Environmental Manager
BP Products North America Inc.
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Texas City, TX 77592-0401

Permission 56233 (LA0005R, RN100216753)
Mr. Dennis Dawson
Company Contact
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P.O. Box 9016
Paris, TX 75461

Permission 34184 (HG0985L, RN100561182)
Mr. Tim Butzke
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CB&L Constructors Inc
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Houston, TX 77064

Permission 21865 (HG0037Q, RN100211523)
Mr. Ken May
Site Director
Celanese Ltd.
P.O. Box 937
Pampa, TX 79066-0937

Permission 56396 (., RN1014855597)
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Permission 70652 (HG0979B, RN102341880)
Mr. Ken Bartels
Regional Operations Manager West Region
Chemcentral Southwest LP
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Permission 32468 (HG3143S, RN102904794)
Mr. Charles Daigle
Environmental Manager
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Pasadena, TX 77507

Permission 50478 (CI0052O, RN100918754)
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President
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Baytown, TX 77521-7700

Permission 32713 (JE0508W, RN100209857)
Mr. R. T. Cuneo
Plant Manager
Chevron Phillips Chemical Company LP
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Port Arthur, TX 77641-1547

Permission 21918 (HW0013C, RN102320850)
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<th>Contact Information</th>
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ATTACHMENT A
ATTACHMENT B

(on Compact Disc)