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Chief Clerk, MC-105
Texas Commission on Environmental Quality
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Via Electronic Filing

Re: Public Comments on Docket No. 2020-0071-SIP, Proposed State Implementation Plan Revision Regarding Planned Startup and Shutdown Emissions for Certain Electric Generating Units

Dear Ms. Bohac,

Environmental Integrity Project ("EIP"), Sierra Club, Texas Campaign for the Environment, Environment Texas, and Pubic Citizen ("Commenters") appreciate this opportunity to comment on the TCEQ's proposal to issue agreed orders for Southwestern Electric Power Company's H.W. Pirkey Power Plant (Docket No. 2020-0078-SIP); the Lower Colorado River Authority's Sam Seymour Fayette Power Project (Docket No. 2020-0077-SIP); Luminant Generation Company's Martin Lake Steam Electric Station (Docket No. 2020-0076-SIP); NRG Texas Power's Limestone Electric Generating Station (Docket No. 2020-0075-SIP); San Miguel Electric Cooperative's San Miguel Electric Plant (Docket No. 2020-0074-SIP); Southwestern Public Service Company's Harrington Station (Docket No. 2020-0073-SIP); Texas Municipal Power Agency's Gibbons Creek Steam Electric Station (Docket No. 2020-0178-SIP); and Public Service Company of Oklahoma's Oklaunion Power Station (Docket No. 2020-0072-SIP). Commenters are non-profit, public interest organizations with employees, programs, and thousands of members across the state of Texas. Commenters are dedicated to protecting public

health and the environment, and have decades of experience fighting to reduce dangerous pollution from Texas power plants.

I. Introduction

The proposed agreed orders represent the culmination of the Executive Director's nearly decade-long campaign to shield certain power plants in Texas from compliance with clearly-applicable SIP requirements during planned MSS activities. Beginning in 2010, the Executive Director issued a slew of New Source Review ("NSR") permit amendments for power plants creating exemptions to Best Available Control Technology ("BACT") requirements and Texas State Implementation Plan ("SIP") particulate matter and opacity limits at 30 Tex. Admin. Code §§ 111.111 and 111.153 during planned maintenance, startup, and shutdown ("MSS") activities. These permit amendments were issued without any public notice. The Executive Director's BACT reviews for these permits did not consider whether additional controls capable of operating effectively during periods of startup or shutdown should be required. The scope of those BACT reviews, as well as the specific language included in the permits, was negotiated by the Executive Director and the Association of Electric Companies of Texas during closed-door meetings in 2010.[1]

Because the Executive Director did not require public notice or allow for public comment when he amended the power plant NSR permit terms to create SIP exemptions, members of the public did not have an opportunity to participate in those proceedings. Commenters, however, were able to challenge the NSR exemptions when they were incorporated into the subject plants' Title V permits. Commenters took advantage of that opportunity and filed comments opposing

[1] Attachment 1, Petition for EPA Action Addressing Startup, Shutdown, and Maintenance Exemptions in Revised Permits for Texas Coal-fired Power Plants ("Power Plant Petition") at 30 (May 27, 2015).

the MSS exemptions incorporated into Title V permit for nearly every power plant at issue in this matter.

In 2014, the Executive Director made his first response to these comments, addressing Commenters' challenge to the Title V permit for the H.W. Pirkey Power Plant. In this response, which was subject to three separate reviews by the TCEQ's legal department, the Executive Director admitted that he had exempted the H.W. Pirkey Power Plant from Texas SIP requirements and explained that he had authority to create such exemptions under Texas's rule at 30 Tex. Admin. Code § 101.221(d).[2] After Commenters decisively refuted that argument,[3] the Executive Director developed the fallback legal theory he advances in this matter: that Texas SIP limits never applied to electric generating units ("EGUs") that use electrostatic precipitators ("ESPs") to control particulate matter emission during planned MSS activities.[4] It is hard to read the fallback position as anything more than revisionist history, given that the Executive Director has already admitted that he intended to create SIP exemptions when he revised the H.W. Pirkey Power Plant permit. Even if the Executive Director made this new theory in good faith, it is frivolous on the merits[5] and EPA has already unambiguously rejected it.[6]

After reviewing the Executive Director's argument that he had authority to relax SIP requirements through the permitting process and his subsequent claim that Texas SIP particulate

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[2] Attachment 2, The Executive Director's Response to Public Comment Regarding the Draft Title V Permit for the H.W. Pirkey Power Plant ("Pirkey Response to Comments") (July 15, 2014).
[3] Petition for Objection, Permit No. O31, SWEPCO H.W. Pirkey Plant ("Pirkey Petition") (November 30, 2014) available electronically at: https://www.epa.gov/sites/production/files/2015-08/documents/pirkey_petition2014.pdf.
[4] Letter from Steve Hagle, Deputy Director, TCEQ Office of Air to Gina McCarthy, Administrator, U.S. EPA, Re: Petitions Submitted to EPA Regarding Certain Coal-fired Power Plants in Texas ("Interpretive Letter") (December 2, 2015).
[5] *See*, *e.g.*, Attachment 3, Public Comments on the Executive Director's Response to EPA's Objection to Title V Permit No. O31 Authorizing Operation of SWEPCO's H.W. Pirkey Power Plant ("Reopening Comments") at 4-17 (June 20, 2016).
[6] *In the Matter of SWEPCO H.W. Pirkey Power Plant*, Order on Petition No. IV-2014-01 ("Pirkey Order") at 11-12 (February 3, 2016), available electronically at: https://www.epa.gov/sites/production/files/2016-02/documents/pirkey_response2014.pdf.

matter and opacity limits do not apply to EGUs with ESPs during periods of planned MSS, EPA objected to the H.W. Pirkey Power Plant permit and instructed the TCEQ to:

> Revise Pirkey's 2014 Title V Permit to ensure that it requires that the opacity and PM limits of 30 TAC §§ 111.111(a)(1)(B) and 111.153(b) apply during periods of planned MSS. . . . To the extent that the title V permit incorporates by reference conditions from an NSR permit, such incorporation may not supersede the opacity and PM limits of 30 T.A.C. §§ 111.111(a)(1)(B) and 111.153(b), which are distinct applicable requirements derived from the SIP. Because the SIP contains no source-specific exemption, the title V permit must still ensure that the SIP opacity and PM limits apply during periods of planned MSS.

And

> To the extent that the TCEQ elects to revise the 2014 NSR permit and that permit continues to include alternative BACT limits for startup and shutdown periods, the TCEQ should ensure that its permitting record explains how those limits reflect BACT for the operating conditions to which they apply.[7]

EPA issued these instructions in 2016. Though the Clean Air Act required the Executive Director to revise the H.W. Pirkey Plant Permit to resolve EPA's objection within ninety days, the issue remains unresolved.[8]

Now, nearly four years later, the Executive Director is doubling down on his bad argument to explain away his obligation to demonstrate that the SIP exemptions created by the proposed agreed orders in this matter comply with Clean Air Act requirements:

> The SIP limits for PM and opacity in 30 Texas Administrative Code … § 111.111(a)(1) and § 111.153(b) do not apply to EGUs (sometimes referred to as electric generating facility boilers … equipped with ESPs during planned startup and shutdown activities due to the technological limitations of the control devices. This SIP revision would add enforceable control measures to the SIP for these planned activities. Therefore, although the terms of the AOs are currently in permits, the SIP revision is not proposing to substitute or modify control measures in the SIP and would not interfere with attainment or maintenance of the PM National Ambient Air Quality Standards (NAAQS) or any other applicable requirement of the Federal Clean Air Act.[9]

[7] Pirkey Order at 11-12.
[8] 42 U.S.C. § 7661d(c); 40 C.F.R. § 70.8(c)(4).
[9] Agenda Item Request, Docket No. 2020-0071-SIP at 11.

And

> Lastly, the AOs would not relax the SIP and or interfere with attainment or maintenance of the PM NAAQS.[10]

The Executive Director's inability to let go of his bad argument dooms this project to failure. Before EPA may approve a SIP revision exempting the eight subject power plants from Texas SIP requirements, the Executive Director must directly ask EPA to authorize the exemptions and demonstrate that the exemptions will not interfere with Clean Air Act requirements.

The TCEQ has allowed the eight subject power plants to avoid upgrading their controls to comply with Texas SIP particulate matter and opacity limits and BACT requirements for far too long. This abuse of discretion has resulted in significant financial benefits for the large companies operating the power plants at the expense of air quality and the TCEQ's integrity.[11] The Commissioners should decline to adopt the Executive Director's proposal and direct him to take action to bring the eight subject plants—and others—into compliance with applicable SIP emission limits and pollution control requirements.

The proper path forward in this case is clear and reasonable: Require the eight subject plants to install fabric filter baghouses capable of achieving compliance with Texas SIP particulate matter and opacity limits during periods of planned MSS and that offer high levels of pollution control through all operational phases, consistent with BACT. Fabric filter baghouses are widely used controls at power plants in Texas and across the world. In a recent case, SWEPCO resolved issues raised by Commenters' petition to object to the Title V permit for the Welsh Power Plant in

[10] *Id*. at 18.
[11] *EPA v. Citgo Petroleum Corp.*, 723 F.3d 547, 552 (5th Cir. 2013) ("Generally, courts consider the financial benefit to the offender of delaying capital expenditures and maintenance costs on pollution-control equipment.").

Titus County, Texas by installing fabric filter controls capable of achieving compliance with SIP requirements during planned MSS activities on the plant's two main boilers.[12]

II. Background and Argument

A. The Executive Director's claim that § 111.111(a)(1) and § 111.153(b) emission limits do not apply to power plants that use ESPs to control particulate matter emissions during planned MSS activities is contrary to the clear language of the regulations establishing those limits.

Texas's SIP regulation establishing the opacity limits that apply to the eight power plants subject to the proposed agreed orders reads as follows:

30 Tex. Admin. Code § 111.111(a)(1)

> (a) No person may cause, suffer, allow, or permit visible emissions from any source, except as follows.
>
> (1) Stationary vents. Visible emissions from any vent shall not exceed the following opacities and must meet the following requirements.
>
> (A) Opacity shall not exceed 30% averaged over a six-minute period.
>
> (B) Opacity shall not exceed 20% averaged over a six-minute period for any source on which construction was begun after January 31, 1972.

The Executive Director's interpretation of this rule as excluding EGUs using ESPs during non-routine operations is clearly inconsistent with the rule's unambiguous language forbidding "visible emissions from any source" that exceeds "20% [or 30%] averaged over a six-minute period."[13] If the TCEQ intended to exempt certain operational phases for certain kinds of sources from this limit, it knew how to do it. In fact, the Agency did establish a narrow express exemption to the opacity limit for some activities, including activities at sources using an ESP to control

[12] *See*, Attachment 4, Technical Review Summary, Permit No. O26, Project No. 24262, Welsh Power Plant (July 17, 2018).
[13] 30 Tex. Admin. Code § 111.111(a)(1) (emphasis added).

particulate matter emissions, in its 30 Tex. Admin. Code § 111.111 rule. This express exemption is far more limited than the unwritten exception the Executive Director attempts to impose upon the text:

> Visible emissions during the cleaning of a firebox or the building of a new fire, soot blowing, equipment changes, ash removal, and rapping of precipitators may exceed the limits set forth in this section for a period aggregating not more than six minutes in any 60 minutes, nor more than six hours in any 10-day period. This exemption shall not apply to the emissions mass rate standard, as outlined in § 111.151(a) of this title (relating to Allowable Emission Limits).[14]

The Texas SIP also shows that the TCEQ understood that some sources may not be able to comply with the opacity limit using available and economically reasonable controls when it promulgated the limit. Texas's rules account for these cases, not by automatically and categorically exempting sources from regulation under the SIP limit, but by establishing a process for them to apply for and receive an alternative limit.[15] Before a source may receive an alternative opacity limit, its operator must demonstrate that the source cannot comply with the limit using available and economically reasonable control technology and that demonstration must be subject to challenge in a public adjudicatory hearing.[16] The Executive Director's story that the TCEQ never intended for its categorically-written opacity limits to apply to sources that could not meet the limits using available and economically reasonable controls makes the TCEQ's alternative opacity limit process superfluous. The Executive Director may not read the TCEQ's alternative opacity limit rule or the procedures it establishes out of existence. Thus, his current reading of the SIP opacity regulation is unreasonable.

[14] 30 Tex. Admin. Code § 111.111(a)(1)(E) (emphasis added).
[15] 30 Tex. Admin. Code § 111.113.
[16] *Id.*

Texas's SIP approved regulation establishing the particulate matter limit that applies to the eight subject power plants reads as follows:

30 Tex. Admin. Code § 111.153(b)

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

This rule, like the opacity rule at § 111.111, clearly applies to all solid fossil fuel-fired steam generators during routine and non-routine operations. The Executive Director's interpretation of this rule as allowing EGUs with ESPs to exceed the 0.3 lb/MMBtu limit during non-routine operations is unreasonable, because it is directly contrary to the rule's categorical prohibition.

B. The Executive Director has already admitted that the permit conditions reflected in the proposed agreed orders were intended to create exemptions to § 111.111 and § 111.153 emission limits.

Beginning in 2010, the Executive Director issued a series of NSR permit amendments for power plants, including the eight power plants that would be subject to the proposed agreed orders, that drastically increased hourly particulate matter emission limits during periods of planned MSS and established exemptions from SIP requirements at § 111.111(a)(1) and § 111.153(b) during planned MSS. Because the Executive Director processed these amendments without any public notice, members of the public did not have an opportunity to effectively challenge them. Accordingly, Commenters and other groups submitted comments opposing the incorporation of these exemptions into Title V permits for the H.W. Pirkey Power Plant, the Sam Seymour Fayette Power Project, the Martin Lake Power Plant, the San Miguel Power Plant, the Harrington Power Plant, the Oklaunion Power Plant, the Gibbons Creek Power Plant, and the Welsh Power Plant.

After more than a year of deliberation and three separate reviews by the TCEQ's legal department, the Executive Director responded to Commenters' challenge to the H.W. Pirkey Power Plant. This protracted and heavily-scrutinized process produced the following response to comments on the draft Title V permit revision:

> The MSS Amendment does not modify permit requirements in a way that violates the SIP. Rather, the Commission has specified limitations and conditions for certain specific operational phases. The Texas SIP includes 30 TAC § 101.221(d). That rule provides that ["s]ources emitting air contaminants that cannot be controlled or reduced due to a lack of technological knowledge may be exempt from applicable rules when so determined and ordered by the Commission," and allows the Commission to "specify limitations and conditions as to the operation of such exempt sources."[17]

In short, the Executive Director acknowledged that the work-practice standards incorporated by the H.W. Pirkey Title V permit and reflected in the proposed agreed order for that plant established exemptions to Texas SIP § 111.111 and § 111.153 requirements. The conditions established by the H.W. Pirkey permit and agreed order and the permit terms and proposed agreed orders for the seven other power plants covered by the action are indistinguishable in this respect.

C. The Executive Director only claimed that § 111.111 and § 111.153 emission limits did not apply to power plants with ESPs during planned MSS activities after Commenters decisively refuted his claim of authority to create exemptions to the SIP limits.

On November 30, 2014, Commenters petitioned EPA to object to the Title V permit revision for the H.W. Pirkey Power Plant. The Pirkey Petition decisively refuted the Executive Director's claim that he had the authority under § 101.221(d) to create exemptions to SIP requirements at § 111.111 and § 111.153.[18] This much should have been clear to the Executive Director from the plain language of § 101.221(d), which provides that "[t]he commission will not exempt sources from complying with any federal requirements," like those in the Texas SIP. Even

[17] Pirkey Response to Comments at Response 1 (emphasis added).
[18] Pirkey Petition at 3-4, 8-10.

if this language was not sufficiently clear to inform the Executive Director that he did not have the authority that he claimed, negotiations between EPA and the TCEQ as EPA considered whether to approve § 101.221(d) into the SIP and the terms of EPA's eventual approval should have eliminated any doubt.

As EPA reviewed the SIP revision that included § 101.221(d), the Agency became concerned that Texas might use that rule to relax requirements in the Texas SIP. To resolve this concern, EPA asked Texas to confirm that the TCEQ could not use § 101.221(d) to relax SIP requirements. The TCEQ sent the following response to EPA:

> The TCEQ agrees that this rule cannot be used by the agency to grant any requested relief from compliance with any State Implementation Plan (SIP) requirements, such as, for example, SIP approved rules in 30 Tex. Admin. Code Chapters 115 and 117, or in approved area-specific plans. Any such relief would be limited to state-only requirements for controlling air contaminants. Further, as stated in the last sentence [of §101.221(d)], the commission will not exempt sources from compliance with any federal requirements.[19]

When EPA approved § 101.221(d) into the Texas SIP, the preamble for the approval contained further clarification concerning the relationship between that rule and the very opacity limits at issue in this matter:

> *Comments:* One commenter asserts that the exemption provision of section 101.221(d) . . . should be interpreted to apply to the opacity requirements of 30 TAC section 111.111, while another commenter requests clarification that the exemption provision in section 101.221(d) . . . be interpreted to exclude federally approved SIP requirements. The commenter claims that TCEQ's and EPA's interpretation of that section is incorrect.
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> *Response*: 30 TAC section 111.111 entitled "Requirements for Specified Sources" was adopted by TACB on June 18, 1993, and approved by EPA as a revision to the Texas SIP on May 8, 1996 (61 FR 20734). At that time, it became federally enforceable. Therefore, the requirements in the SIP rule found at 30 TAC section 111.111 are "federal requirements." Section 101.221(d) plainly states that TCEQ

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

> will not exempt sources from complying with any "federal requirements." This position is also consistent with the April 17, 2007 letter from John Steib, Deputy Director, TCEQ Office of Compliance and Enforcement to EPA Region 6, in which the State confirmed that the term "federal requirements" in 30 TAC 101.221(d) includes any requirement in the federally-approved SIP. In section D of our May 13, 2010 proposal, we stated that new section 101.221 (Operational Requirements) requires that no exemptions can be authorized by the TCEQ for any federal requirements to maintain air pollution control equipment, including requirements such as NSPS or National Emissions Standards for Hazardous Air Pollutants (NESHAP) or requirements approved into the SIP. Texas confirmed this interpretation and, therefore, the State may not exempt a source from complying with any requirement of the federally-approved SIP. Any action to modify a state-adopted requirement of the SIP would not modify the federally enforceable obligation under the SIP unless and until it is approved by EPA as a SIP revision.[20]

A year after Commenters' Pirkey Petition laid bare the Executive Director's obviously improper claim of authority to create exemptions to Texas SIP limits, the Executive Director sent EPA a letter chastising Commenters for incorrectly characterizing his action in the Pirkey case and others as exempting power plants from Texas SIP requirements.[21] It is hard to read this letter as anything other than pretext, given the Executive Director's admission, subject to three separate reviews by the TCEQ's legal department, that the H.W. Pirkey permit included an "exemption" to Texas SIP requirements at § 111.111 and § 111.153.

D. The argument made in the Interpretive Letter and offered in support of the Executive Director's characterization of the proposed SIP revision project is frivolous.

According to the Interpretive Letter, the permit terms authorizing opacity and particulate matter emissions above SIP limits during planned MSS activities were not exemptions, because the SIP limits never applied to coal-fired power plants with electrostatic precipitators during periods of planned MSS. This position is not only contradicted by the plain language of the

[20] *Approval and Promulgation of Implementation Plans; Texas; Excess Emissions During Startup, Shutdown, Maintenance, and Malfunction Activities*, 75 Fed. Reg. 68989, 68998 (November 10, 2010).
[21] Interpretive Letter.

applicable rules[22] and unsupported by any direct evidence in the administrative record for the promulgation of the rules,[23] it is also contrary to past agency practice enforcing SIP particulate matter and opacity limits against power plants with an ESP during periods of MSS.[24]

1. The Executive Director's interpretation of SIP opacity and particulate matter limits is contrary to the TCEQ's past practice.

According to the Executive Director's new argument, the SIP opacity and particulate matter limits now found at 30 Tex. Admin. Code §§ 111.111(a)(1) and 111.153(b) never applied to non-routine operations at coal-fired EGUs equipped with ESPs. To make this argument, the Executive Director cannot rely on the language of applicable rules, which cut against his claim, nor does he identify any TCEQ policy memorandum or guidance document containing evidence of the Agency's intent. Instead, the Executive Director relies entirely on a technical note authored by the Radian Corporation in 1971, which the Executive Director claims—but does not demonstrate—provided the basis for the TCEQ's opacity and particulate matter regulations.[25]

The Radian report does not address the question of whether and how Texas should regulate non-routine operations from any source. It does not explain that EGUs with ESPs (or any other kind of power plant) should or should not be exempt from opacity and particulate matter limits during non-routine operations. In short, it has little, if any, direct relevance to the disputed question in this matter. Because this is so, the Executive Director must contend that the Radian report is indirectly decisive. According to the Executive Director, the report matters—not because of what it does say—but because it does not evaluate emissions from coal-fired EGUs using ESPs to

[22] Reopening Comments at 6-9.
[23] *Id*. at 11-12.
[24] *Id*. at 12-18.
[25] Interpretive Letter at 1-4. While the Executive Director contends that the Radian report provided the basis for the Commission's promulgation rules establishing limits on opacity and particulate emissions, he has not identified any records showing whether and how the Commission relied on the report when promulgating those rules.

control particulate emissions during operational phases when the ESPs cannot function at their optimal level.[26] The Executive Director says this omission is significant, because it suggests that the Commission did not ask Radian to evaluate non-routine emissions from coal-fired EGUs with ESPs. The Commission's decision not to ask Radian to consider non-routine emissions from EGUs with ESPs is significant, because the Executive Director believes it demonstrates the Commission's intent to regulate such emissions under different rules:

> The Radian report excludes an evaluation of emissions from startups and shutdowns during which the emissions controls do not work effectively, and therefore it is reasonable to assume that Radian would not be asked to evaluate emissions for which the agency was regulating in a different fashion on a concurrent rulemaking schedule.[27]

There are two problems with this argument. First, and most obviously, the mere fact that this particular report fails to evaluate the performance of a particular class of sources during certain operational phases is exceedingly weak support for the conclusions the Executive Director draws from it. If these conclusions were true, the Executive Director should be able to produce at least one piece of direct evidence showing the Commission's intent. The fact that the best support the Executive Director can find for his new interpretation of the Texas SIP is an unremarkable omission from a report authored by a non-governmental entity in 1971 suggests that it was not sufficiently well-developed at the time Texas's opacity and particulate matter regulations were promulgated and approved into the SIP to control their meaning at this late date.[28]

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[26] *Id*.
[27] *Id*. at 2.
[28] Even if the Executive Director was able to present credible evidence supporting his historical argument, it would not be sufficient to establish his reading of the SIP as authoritative. The Executive Director may not rely on a reading of rules that was not presented in the record for those rules' approval into the Texas SIP to establish that the rules mean something other than what they say without violating the APA and depriving the public of its right to comment on and challenge proposed rules based on the record. *Safe Air for Everyone v. EPA*, 488 F.3d 1088, 1097-1098 (9th Cir. 2007).

The second problem is more complicated but just as serious: the alternative rules adopted in 1972—that the Executive Director claims the Commission intended to apply to non-routine emissions from coal-fired EGUs with ESPs instead of the rules establishing regulatory limits—actually incorporate the disputed SIP limits as applicable requirements during non-routine activities. These rules required sources to report exceedances of applicable limits—including opacity and particulate matter limits—during planned MSS activities and upsets, but granted the Executive Director discretion to create case-by-case exemptions for properly reported exceedances of presumptively applicable limits:

> Rule 7, Notification Requirements for Major Upset
>
> The Executive Secretary and the appropriate local air pollution control agency shall be notified as soon as possible of any major upset condition which causes or may cause an excessive emission that contravenes the intent of the Texas Clean Air Act and/or the regulations of the Board.
>
> Rule 8, Notification Requirements for Maintenance
>
> The Executive Secretary and the appropriate local air pollution control agency shall be notified in writing at least ten days prior to any planned maintenance, start-up, or shut-down which will or may cause an excessive emission that contravenes the intent of the Texas Clean Air Act and/or the Regulations of the Board. If ten days notice cannot be given due to an unplanned occurrence, notice shall be given as soon as practical prior to the shut-down.
>
> Rule 12.1
>
> Emissions occurring during major upsets may not be required to meet the allowable emission levels set by the Rules and Regulations upon proper notification, as set forth in Rule 7 of these General Rules, if a determination is made by the Executive Secretary after consultation with appropriate local agencies and with appropriate officials of the subject source that the upset conditions were unavoidable and that a shut-down or other corrective actions were taken as soon as practicable.
>
> Rule 12.2

> Emissions occurring during start-up or shut-down of processes or during periods of maintenance may not be required to meet the allowable emission levels set by the Rules and Regulations if so determined by the Executive Secretary upon proper notification as set forth in Rule 8 of these General Rules. The Executive Secretary may specify the amount, time, and duration of emissions that will be allowed during start-up and shut-down and during periods of maintenance.[29]

Thus, even if the Commission directed Radian not to consider non-routine operations from coal-fired EGUs with ESPs in its report and did so because it did not intend to require these sources to comply with SIP limits during non-routine operations, it still does not follow that the limits never applied to these sources. Instead, the limits always presumptively applied (with the express § 111.111(a)(1)(E) and § 111.113 exceptions discussed above), but the Executive Director retained discretion under the MSS and upset exemption rules to excuse particular instances of non-compliance with the limits, so long as the non-compliance was properly reported.

Opacity reports submitted by coal-fired EGUs with ESPs confirm the presumptive applicability of the SIP limits during periods of non-routine operation.[30] If, as the Executive Director argues now, the Texas SIP opacity limits never applied to power plant boilers controlled by ESPs during non-routine operations, there would be no reason for SWEPCO to report exceedances of the limit during upsets and MSS activities. Nonetheless, SWEPCO did report exceedances of applicable limits during non-routine operations. It did so to comply with Texas's reporting requirements and to preserve the Executive Director's discretion to excuse non-compliance with the opacity limit on a case-by-case basis under Texas's exemption rules.

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

[30] Reopening Comments, Attachment 10, H.W. Pirkey Power Plant Excess Opacity Reports. These reports include many, but not all of the excess opacity reports for exceedances of the § 111.111(a)(1)(B) limit in 2004. SWEPCO also submitted reports for other years, both before and after 2004, but it is unnecessary to flood the docket with all these reports.

Exceedances of SIP opacity and particulate matter limits at coal-fired EGUs with ESPs have always been subject to enforcement, unless they were properly reported.[31] The San Miguel power plant is a coal-fired EGU that uses an ESP to control particulate matter emissions. In 2000, the TCEQ issued an enforcement order against the plant assessing penalties based on San Miguel's unreported violations of the § 111.111(a)(1)(B) opacity limit during upset events.[32] This Agreed Order contradicts the Executive Director's position that the SIP opacity limit does not apply during periods of non-routine operation. If the Executive Director's position were true, San Miguel would not have needed to report exceedances of the opacity limit occurring during boiler upsets and should not have been subject to an enforcement action for exceeding the limit or failing to report the exceedances. However, consistent with the clear language of applicable regulations, this enforcement order demonstrates that the § 111.111(a)(1)(B) opacity limit applied to San Miguel during non-routine operations, unless exceedances of the limit were properly reported and non-compliance with the limit was excused after the fact by the Executive Director. Because San Miguel failed to report exceedances of the opacity limit, the Executive Director lacked discretion to excuse non-compliance with the limit.

This reading of Texas's SIP opacity and particulate matter rules is also supported by the Commission's July, 2000 response to comments concerning revisions to its upset and maintenance exemption rules requiring operators to carry the burden of proof to demonstrate that unauthorized or excess emissions qualify for an exemption:

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

[31] *See, e.g.,* Reopening Comments, Attachment 11, Agreed Order, In the Matter of an Enforcement Action Concerning San Miguel Electric Cooperative, Inc., Docket No. 2000-0283-AIR-E (October 20, 2000) at Section II. Allegations, ¶¶ 1 and 2.
[32] *Id*.

> automatically subject to enforcement. The exemption has no base without a demonstration from the owner or operators that unavoidable circumstances existed.[33]

Thus, whatever the Commission's intent when it promulgated its opacity and particulate matter limits in 1972, the Executive Director's discretion to excuse non-compliance with those limits at coal-fired EGUs with ESPs (or any kind of power plant) arose from the State's upset and maintenance exemption rules. Nothing in those rules prevented the Executive Director from granting exemption requests for all properly-reported excess emissions from coal-fired EGUs with ESPs during non-routine operations. However, the Executive Director lost his authority to grant exemptions to applicable regulatory limits, including opacity and particulate matter limits, during non-routine operations at EGUs with ESPs when Texas abandoned its MSS and upset exemption rules.

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

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

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

> In an enforcement action, the defendant may raise a response or defense in an action for civil penalties, regarding which the defendant has the burden to prove that certain criteria have been met. See page 2 of the attachment to the 1999 Policy.[34]

In place of the former exemptions, Texas established affirmative defenses shielding operators from penalties but not injunctive relief for violations of applicable regulatory limits during upset events and planned MSS activities. Like the previous exemption rules, the new affirmative defense regime requires sources to report exceedances of regulatory limits during non-routine operations, and grants the Executive Director discretion to determine that such exceedances should not be subject to penalties if the operator demonstrates that criteria specified by the rules were met.[35] However, the affirmative defense rules eliminate the Executive Director's discretion to exempt sources from regulatory limits altogether. Sources qualifying for the affirmative defense are still subject to claims for injunctive relief for violations of applicable limits.[36] After Texas eliminated its exemption rules, the Texas SIP opacity and particulate matter limits were not just presumptively applicable to emissions from coal-fired EGUs with ESPs during non-routine operations, they were applicable without exception as a matter of law.[37]

The Executive Director confirmed this reading of Texas's affirmative defense rules in his response to comments demanding that the Commission establish a schedule for Luminant to correct ongoing violations of the State's opacity limits at § 111.111(a)(1)(A) and (B) at its Monticello power plant—also a coal-fired EGU with an ESP—before renewing the source's Title

[34] *Proposed Partial Approval of Texas's Implementation Plan for Excess Emissions During Startup, Shutdown, Maintenance, and Malfunction Activities*, 75 Fed. Reg. 26,892, 26,894 (May 13, 2010).
[35] *See*, 30 Tex. Admin. Code § 101.222.
[36] *Luminant Generation Co. v. EPA*, 714 F.3d 841, 852-53 (5th Cir. 2013).
[37] Subject to the express 30 Tex. Admin. Code § 111.111(a)(1)(E) exemption.

V permit.[38] The Executive Director did not claim, as he does now, that the opacity limits did not apply to Luminant during non-routine operations. Instead, he explained:

> Stationary source opacity limits are codified in 30 TAC Chapter 111, section 111.111(a)(1)(A-C). Title V permit holders subject to this requirement are required to report deviations from indications of noncompliance with those standards. Deviations are reviewed by TCEQ investigators to determine if a violation took place, and if it did, review any claims for an affirmative defense made by the permit holder as outlined in 30 TAC Chapter 101, section 101.222. If the permit holder is able to satisfy the demonstration criteria for an affirmative defense for each alleged violation, the investigator ordinarily closes the investigation without further pursuing enforcement action.
>
> ….[T]he vast majority of reported deviations are associated with startup, shutdown and malfunctions and thus may qualify for consideration under affirmative defense criteria.[39]

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

Thus, even if the Commission believed that coal-fired EGUs with ESPs could not meet regulatory opacity and particulate matter limits during non-routine operations when it promulgated those limits in 1972, it is not true that the Commission never intended those limits to apply to sources like the eight subject power plants during non-routine operations. Instead, historical evidence and the clear language of Texas's rules demonstrate that the Commission intended to

[38] Reopening Comments, Attachment 12, The Executive Director's Response to Public Comment, Draft Renewal Permit No. O64, Authorizing Operation of Luminant's Monticello Power Plant. Comments on the draft renewal permit alleged that (1) SIP opacity limits applied to Luminant's boilers during non-routine operations; (2) Luminant had reported more than 13,500 exceedances of the regulatory limits between July 2006 and January 2011; and (3) argued that the Executive Director could not renew the permit without establishing a schedule for Luminant to address its ongoing non-compliance with SIP opacity limits. *Id.* at Comment A.1.

[39] *Id*. at Response A.

retain discretion to exempt sources from presumptively applicable SIP-limits on a case-by-case basis. When EPA determined that Texas's practice of granting ad hoc exemptions to SIP limits was contrary to the Clean Air Act, the Commission abandoned the rules that gave the Executive Director discretion to excuse non-compliance with SIP opacity and particulate matter limits during upset and MSS activities at coal-fired EGUs with ESPs. Because the TCEQ declined to revise its SIP to include alternative requirements for controlling opacity and particulate matter during non-routine operations at coal-fired EGUs with ESPs when it repealed its exemption rules, the opacity and particulate matter limits necessarily apply to those sources at all times, subject to the limited express exemption at 30 Tex. Admin. Code § 111.111(a)(1)(E), without exception. Nothing in the Radian report or the Executive Director's Interpretive Letter conflicts with this reading of Texas's rules.

The Executive Director's new position is contrary to the clear language of applicable rules, EPA's reading of those rules in its SIP approvals, the Executive Director's on-the-record response to comments on the H.W Pirkey Power Plant Title V permit revision, the practices of regulated entities subject to Texas's opacity and particulate matter limits, and the Commission's past practice with respect to sources failing to report non-compliance with regulatory limits during non-routine operations. It is without merit.

E. The Executive Director's demonstration of non-interference with the SIP for particulate matter does not fulfill federal SIP revision requirements.

1. The work-practice standards listed in the proposed agreed orders is not BACT.

The Executive Director contends that the work-practice standards in the proposed agreed orders do not interfere with Clean Air Act requirements, because they are consistent with BACT requirements.[40] The Executive Director claims that the work-practice standards were established

[40] Agenda Item Request, Docket No. 2020-0071-SIP at 14-15.

through a thorough technical review "designed to limit emissions during planned startup and shutdown activities when the ESPs are operated outside the optimal range."[41] Based upon this review, the Executive Director contends that the conditions establish "time limits … [that] reflect best management practices and promote the safe, effective operation of the respective boiler and ESP."[42] But it is clear that both the Executive Director's so-called BACT review and its results fall short of what Texas and federal law requires.

The TCEQ's BACT review guidance document provides the following description of the kind of review required to identify BACT limits for permitting projects:

> During the course of the technical review of a permit application, the permit reviewer evaluates air pollution control requirements and confirms that the applicant has proposed the appropriate air pollution controls and properly determined off-site impacts for the project facilities and associated sources. The applicant's air pollution control review, along with the permit reviewer's air pollution control evaluation and final recommendation provide a record that demonstrates that the operation of a proposed facility or related source will not cause or contribute to a condition of air pollution and will comply with all applicable federal regulations and state rules as well as the intent of the TCAA.[43]

The Executive Director's review in this case falls far short of this standard. The proposed control strategies for the eight subject power plants clearly do not "comply with all applicable federal regulations and state rules" because they contain exemptions to applicable SIP particulate matter and opacity requirements. The reviews, moreover, began by presuming that ESPs represent BACT for periods of planned MSS rather than, as the TCEQ's guidance directs "evaluat[ing] air pollution control requirements and confirm[ing] that the applicant has proposed the appropriate air pollution controls[.]" While, as the Executive Director explains, "[a]t optimal operation, ESPs can

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[41] *Id*. at 15.
[42] *Id*.
[43] *Air Permit Reviewer Reference Guide, APDG 6110, Air Pollution Control: How to Conduct a Pollution Control Evaluation* at 1 (January, 2011), available electronically at: https://www.tceq.texas.gov/assets/public/permitting/air/Guidance/NewSourceReview/airpoll_guidance.pdf.

meet established BACT and SIP limits for PM and opacity,"[44] this finding is not determinative of anything, because alternative BACT requirements for startup and shutdown operations must "reflect BACT for the operating conditions to which they apply."[45] Additional controls are available, economically reasonable, and widely used to effectively limit emissions of particulate matter from EGUs during startups and shutdowns: fabric filter baghouses. Fabric filter baghouses capable of complying with Texas SIP particulate matter and opacity limits during periods of planned MSS have been installed on many power plants in Texas, including Coleto Creek (ESP retired and baghouse installed in 2007), Harrington, Units 2 and 3, JK Spruce, Sandow 5, Tolk, Twin Oaks, W.A Parish, and Welsh (baghouse installed on Units 1 and 3 in 2015). The Executive Director's presumption that baghouses could not be required as part of projects authorizing emissions during planned MSS activities rendered his analysis incomplete.

2. The Executive Director's air quality analysis does not comply with federal demonstration requirements for SIP revisions, nor does it demonstrate that the proposed SIP revision will not interfere with Clean Air Act requirements.

Before EPA may approve a SIP revision, the state must demonstrate that the proposed revision meets all applicable requirements of the Clean Air Act.[46] The Executive Director contends that he is not required to make a detailed demonstration that the proposed agreed orders in this matter will not interfere with Clean Air Act requirements, including attainment of National Ambient Air Quality Standards, because the proposed revisions do not weaken currently-applicable SIP requirements. As Commenters have shown, the Executive Director's claim is incorrect.

[44] Agenda Item Request, Docket No. 2020-0071-SIP at 15 (emphasis added).
[45] Pirkey Order at 12 (emphasis added).
[46] 42 U.S.C. § 7410(k)(3), (l).

The Executive Director's limited demonstration, given his incorrect characterization of the proposed revisions, fails to demonstrate that the proposed agreed orders are consistent with Clean Air Act requirements. The Executive Director's demonstration is limited to 1) the vague and unsupported claim that shutdown and startup activities at the eight subject power plants are infrequent and intermittent; and 2) the counties in which the power plants are located are currently designated as attainment for particulate matter.[47] These demonstrations are insufficient.

With respect to the first claim, the Executive Director explains that "[t]he TCEQ obtained data from the Electric Reliability Council of Texas … that demonstrates that start-ups are intermittent and infrequent activities for five of the eight plants that have EGUs in this demonstration."[48] The Executive Director does not define the criteria he used to characterize startups at these five plants as intermittent and infrequent, nor does he provide the names of these five power plants. The Executive Director also fails to explain how the purported infrequency of startups and shutdowns at five of the eight subject power plants establishes that non-routine operations at the remaining three power plants will not jeopardize compliance with applicable Clean Air Act requirements.

Also, if the activities covered by the proposed orders are as infrequent as the Executive Director suggests, why the do the proposed orders authorize drastic emission increases during an unlimited number of startups and shutdowns each year? Presumably, the open-ended authorization of unlimited startups and shutdowns is meant to account for increases in the number of breakdowns, shutdowns, and startups that may occur at the subject power plants as equipment degrades over time. Because the proposed orders authorize emissions during startups and shutdowns that may occur more frequently in the future, the present performance of five out of the

[47] Agenda Item Request, Docket No. 2020-0071-SIP at 14-18.
[48] *Id*. at 14 (emphasis added).

eight subject power plants does not show that the proposed orders will not interfere with maintenance of the NAAQS and other Clean Air Act requirements.

The Executive Director's reliance on the PM NAAQS attainment status of the counties where the eight subject power plants are located is also misplaced. As the Power Plant Petition explains, the work-practice standards mandated by the proposed agreed orders "apply to an unlimited number of startups and shutdowns, lasting anywhere from 24 to 48 hours each."[49] The standards also allow "extended" startups and shutdowns lasting more than 48 hours for as much as 1,200 hours per unit, per year.[50] During these startups and shutdowns, the proposed agreed orders allow hourly particulate matter emissions more than 30 times higher than the short-terms standards they replaced.[51] Commenters oppose these work-practice standards, in part, because they allow emissions that are much higher than the subject power plants would typically emit. To establish that the proposed agreed orders will protect the NAAQS, the Executive Director must, at least, produce modeling based on the maximum emissions authorized by the proposed agreed orders. The Executive Director has not performed any modeling in support of this project. His reliance on three years of data to show that power plants did not cause particulate matter NAAQS violations in 2016, 2017, or 2018 does not establish that much higher emission rates authorized by the proposed agreed orders will not result in future violations.

III. Conclusion

The Executive Director's proposed action in this case is based on an indefensible misreading of regulations that the TCEQ established to protect public health and air quality. While

[49] Power Plant Petition at 14.
[50] *Id*.
[51] *Id*. at 17 ("NRG Limestone's two coal-fired units in Limestone County are authorized to emit as much as 7,616 pounds of PM per hour during MSS events—more than 30 times the limit of 256 pounds per hour established under its NSR permit.").

the Commissioners have the legal authority to apply for source-specific exemptions to Texas SIP requirements, they should not seek to escape accountability for such requests by refusing to acknowledge that requested SIP exemptions are, in fact, exemptions. Commenters understand that it might be difficult to justify the request to exempt the eight subject power plants from pollution control requirements, because widely-used and economically reasonable controls are available to bring those plants into compliance with existing requirements. This difficulty is not a reason to ratify a decision that makes nonsense of the rules the Commissioners have a duty to uphold and enforce. Instead, it is a reason for the Commissioners to reject the Executive Director's proposal to shield the eight subject power plants from their obligation to use effective controls to reduce the amount of dangerous particulate matter pollution they emit during non-routine activities.

Commenters respectfully request that the Commissioners reject the Executive Director's proposed action. The proposed exemptions from Texas SIP requirements are unnecessary. The proposed exemptions are unfair to those operators that have already borne the reasonable expense necessary to comply with Texas SIP limits. The Executive Director's proposal to allow broad exemptions to current pollution control requirements without even considering whether the eight subject plants can install controls that will comply with those standards without undue financial hardship places the interests of industry over the public's interest in clean air. The proposal is unnecessary, unreasonable, and it should be abandoned.

Sincerely,

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Comment Attachments[52]

Attachment 1	Petition for EPA Action Addressing Startup, Shutdown, and Maintenance Exemptions in Revised Permits for Texas Coal-fired Power Plants ("Power Plant Petition") (May 27, 2015)
Attachment 2	The Executive Director's Response to Public Comment Regarding the Draft Title V Permit for the H.W. Pirkey Power Plant ("Pirkey Response to Comments") (July 15, 2014)
Attachment 3	Public Comments on the Executive Director's Response to EPA's Objection to Title V Permit No. O31 Authorizing Operation of SWEPCO's H.W. Pirkey Power Plant ("Reopening Comments") (June 20, 2016)
Attachment 4	Technical Review Summary, Permit No. O26, Project No. 24262, Welsh Power Plant (July 17, 2018)

[52] Attachments are available electronically at: https://app.box.com/s/oosw6zxupt4xpgahjhp3neoa2i9m84uy.