

CAUSE NO. D-1-GN-06-003957

ENVIRONMENTAL DEFENSE, INC.	§	IN THE DISTRICT COURT OF
	§	
Plaintiff,	§	
	§	
v.	§	
	§	
TEXAS COMMISSION ON	§	TRAVIS COUNTY, TEXAS
ENVIRONMENTAL QUALITY	§	
AND STATE OFFICE OF	§	
ADMINISTRATIVE HEARINGS	§	
	§	
Defendants.	§	345 TH JUDICIAL DISTRICT

**ORIGINAL PETITION IN INTERVENTION AND REQUEST FOR TEMPORARY AND
PERMANENT INJUNCTION**

TO THE HONORABLE JUDGE STEPHEN YELENOSKY:

COMES NOW, Sierra Club, and files this Original Petition in Intervention in the above-styled cause, and would show the Court as follows:

I. PARTIES

1. Intervenor Sierra Club (“Club”) was founded in 1892 by John Muir and is a nonprofit corporation organized under California law. It is one of the oldest and largest grassroots environmental organizations in the country. The Club has more than 700,000 members nationwide, and roughly 23,000 Texas members. Among the goals of the Sierra Club are preserving and enhancing the natural environment and protecting public health. The Sierra Club has the specific goal of improving outdoor air quality. The Sierra Club is a party in administrative proceedings that are at issue in this litigation.

2. Plaintiff Environmental Defense is a New York non-profit corporation with a principal place of business in Austin, Texas. Environmental Defense is a national organization

with over 400,000 members. Environmental Defense has members that live and work in areas downwind of, and will be affected by, the proposed power plants discussed in this lawsuit.

3. Defendant, Texas Commission on Environmental Quality (“TCEQ”) is an administrative agency in the State of Texas. Service of process may be had on the TCEQ by serving Glenn Shankle, Executive Director of TCEQ, at 12100 Park 35 Circle, Building F, Austin, Travis County, Texas.

4. Defendant State Office of Administrative Hearings (“SOAH”) is an administrative agency in the State of Texas. Service of process may be had on SOAH by serving Shelia Bailey Taylor, Chief Administrative Law Judge, at 300 W. 15th Street, Suite 502, Austin, Travis County, Texas 78701-1649.

II. JURISDICTION AND VENUE

5. This Court has jurisdiction under §2001.038 of the Texas Government Code, §37.003 of the Texas Civil Practice & Remedies Code, the due course of law clause of the Texas Constitution (Article I, Section 19), and the due process clauses of the United States Constitution.

6. Venue is proper in Travis County because the cause of action accrued in Travis County, Defendants are state agencies, and venue is established under §2001.038(b).

III. DISCOVERY PLAN

7. Discovery is intended to be conducted under Level 2. Plaintiff and Intervenor have affirmatively pled that they seek injunctive relief.

IV. SUMMARY OF THE CASE

A. Summary of Sierra Club's Interests

8. A massive expansion of Texas' coal-fueled electric generating capacity is underway. Electric power companies have applied for air pollution permits from the Texas Commission on Environmental Quality ("TCEQ") to build 17 new coal-fired electric generating units. The Sierra Club has been designated as an "affected party" under the rules of the TCEQ and SOAH in six pending administrative dockets relating to air pollution permit applications (hereinafter, "permits") filed by the Dallas-based utility TXU Generation Company LP ("TXU").¹ Sierra Club members own property, reside, and recreate nearby and downwind of each of these proposed plants. Sierra Club is attempting to represent its interests and those of its members in the administrative proceedings, but is being impermissibly thwarted in these efforts.

9. In order to build and operate a new power plant, a company must obtain, among other required authorizations, an air pollution permit from the TCEQ. Each of the six pending TXU permits would authorize construction and operation of a "major stationary source," or "major emitting facility" as that term is defined under applicable state and federal laws. Clean Air Act § 169(1), 42 USC § 7479(1); Texas Clean Air Act, Health and Safety Code Ann. § 382.001 *et seq.* (Vernon Supp. 2005); 30 TAC 116.12(16) (definition of "major facility"); and 30

¹ SOAH Docket No. 582-07-0614, TCEQ Docket No. 2006-1851-AIR (Application of TXU Generation Company LP for State Air Quality Permit No. 78750 and PSD Permit No. PSD-TX-1071 for Martin Lake Steam Electric Station); SOAH Docket No. 582-07-0615, TCEQ Docket No. 2006-1850-AIR (permits for Big Brown Unit 3); SOAH Docket No. 582-07-0616, TCEQ Docket No. 2006-1853-AIR (permits for Monticello Station); SOAH Docket No. 582-07-0724, TCEQ Docket No. 2006-1856-AIR (permits for Tradinghouse Steam Electric Station); SOAH Docket No. 582-07-0723, TCEQ Docket No. 2006-1865-AIR (permits for Lake Creek Station); SOAH Docket No. 582-07-0722, TCEQ Docket No. 2006-1857-AIR (permits for Valley Steam Electric Station).

TAC 116.12(17) (definition of “major stationary source,” incorporating by reference the “major source thresholds” for prevention of significant deterioration pollutants identified in 40 CFR §51).

10. These major new sources of pollution are supposed to undergo a stringent required permitting review intended to ensure that they do not degrade air quality and are made only after careful evaluation and adequate procedural opportunities for informed public participation in the decision making process. *See*, Clean Air Act § 160, 42 USC § 7470. But the permitting process for new power plants in Texas is currently being “fast-tracked,” pursuant to an executive order by the Governor, and a complete and thorough review of these major new air pollution sources is rendered impossible. In order to accommodate the tight schedule imposed by the Governor’s executive order, SOAH has consolidated six separate pending TXU permits into one administrative docket. The executive order imposes an unreasonable schedule to thoroughly develop the required technical and legal issues for one major air permit of the type being considered, let alone six of them.

11. To put the magnitude of the six TXU permits in context, it is worth noting the additional greenhouse gases associated with these new coal plants. While not addressed in the permits, the new units will emit an additional estimated 51 million tons of CO₂ *per year* into Texas skies. In 2005, *all existing* Texas power plants emitted 255.4 million tons of CO₂.²

12. Participating in the contested case process puts Sierra Club in a *catch-22* position. The Club is essentially being forced into an administrative process that is unprecedented, unreasonable, and, we contend, illegal. The Club can not reasonably protect its interests under

² According to U.S. EPA, Clean Air Markets website: State Level Emissions Quick Report for Texas (142

the tight time constraints imposed by the Executive Order. Further, in attempting to engage in the required administrative proceedings, the Club becomes an unwilling participant in what is sure to be a hastily- and under-developed administrative record.

B. Sierra Club Seeks a Ruling that the Governor's Executive Order is Illegal and Void (Plaintiff's Sixth Cause of Action)

13. The Governor's Executive Order RP 49 infringes on the rights of Texas citizens to participate meaningfully in the environmental permitting arena. The right of any affected party to participate in agency permitting decisions is rooted in the constitutional right to due process. The Governor lacks authority to unilaterally alter this system. Further, the Governor lacks the authority to dictate to an administrative law judge exactly how much time is allowed for a judicial administrative decision, and to do so violates the doctrine of separation of powers. The Sierra Club requests a ruling that this is so.

14. "Fast-tracked" processing of the applications and the scheduling of hearings is objectionable for several reasons. The Governor's executive order is illegal to the extent that its implementation by TCEQ and SOAH denies Sierra Club due process and the equitable right to participate adequately in a contested case hearing. Fast-tracking, whether or not done pursuant to Executive Order RP 49, violates state and federal laws regarding permit processing, public notice and comment, and the opportunity to participate as an affected party in a contested case hearing. Finally, consolidation, in whole or in part, of several pending permit applications into one administrative proceeding substantially prejudices the rights of Sierra Club and its members.

facilities and 381 units), available at: <http://cfpub.epa.gov/gdm/>. (Website last visited on August 3, 2006).

15. The governor lacks authority to step into the judicial arena and remove the discretion of an administrative law judge in setting a hearing schedule. That power is given to SOAH by the legislature, and is also inherent in SOAH's judicial powers. The governor does not know – indeed he could not have known at the time he issued the order – the legal and technical issues, or the complexity of the issues now before the state administrative agencies. Both the TCEQ and the State Office of Administrative Hearings serve a judicial role in air quality permitting decisions, and the air permits currently pending before these agencies entail complex legal and technical issues. TCEQ and SOAH may not cede their duties to establish reasonable and fair permit processing and hearing schedules as justice requires and based on the case-specific circumstances, and Sierra Club requests a ruling that this is so.

C. Sierra Club Seeks Declaratory Relief with Respect to TCEQ's Implementation of Certain Air Permitting Rules (Plaintiff's First through Fifth Causes of Action)

16. State and federal laws require that applicants for new air pollution permits in areas designated to be in attainment with national health based air quality standards demonstrate that their proposed facilities will meet “best available control technology” (or “BACT”) standards. BACT is an emissions limitation based on the “maximum degree of reduction for each pollutant subject to regulation” which TCEQ “on a case-by-case basis, taking into account energy, environmental and economic impacts and other costs, determines is achievable for such source ... through application of production processes or available methods, systems, and techniques, including fuel cleaning or treatment or innovative combustion techniques.” *See*, 40 CFR 52.21(b)(12).

17. TCEQ has reviewed several permit applications and has issued or is threatening to

issue air pollution permits without requiring the applicants to conduct the mandated analyses or otherwise comply with TCEQ rules. Further, by issuing permits without requiring applicants to demonstrate compliance with BACT, TCEQ violates the Texas Clean Air Act, its own rules and Sierra Club's constitutional due process rights.

18. TCEQ's failure to require these demonstrations violates the Texas Clean Air Act, TCEQ's own rules and Plaintiff's constitutional due process rights.

19. Finally, TCEQ is issuing or threatening to issue permits without considering the cumulative risks of the 17 proposed new power plants or how an individual application contributes to the cumulative risks posed by the 17 proposed new power units.

V. STATEMENT OF FACTS

A. Background

20. More than any other single fuel source, coal provides the electricity that powers America's homes and businesses. In 2005, roughly 50 percent of the electricity produced in the United States was generated by burning coal; the remainder of the nation's electricity came from natural gas (18.7 percent), nuclear energy (19.3 percent), hydroelectric (6.5 percent), petroleum (3 percent), and renewable energy sources (2.3 percent).³

21. Texas is currently home to approximately 19 large coal-fired power plants concentrated largely along the state's lignite belt, which runs, generally, from Central Texas northeast to the Piney Woods. Most of the states existing coal-fired power plants came on line in

³ *Electric Power Annual* (2005), United States Energy Information Administration, available at: http://www.eia.doe.gov/cneaf/electricity/epa/epa_sum.html

the late-1970's through the early-1980's. These large power plants are called "base-load" plants; that is, they operate year-round, producing a steady flow of electricity for the grid. While there are many more natural gas-fired power plants in Texas, the State's fleet of coal-fired plants account for most of the electricity that is produced.⁴

22. Coal combustion causes pollution. Power plants are responsible for about 40 percent of all man-made carbon dioxide emissions nationwide.⁵ Power plant CO₂ emissions are directly linked to the efficiency with which fossil fuels are converted into electricity, and coal-fired power plants are inherently inefficient. Efficiency improvements – and lower CO₂ emissions – can be achieved through currently available and economically viable technologies that can almost double fossil-fuel-fired plants' thermal efficiency, up to 60 percent.⁶ For example, combined-cycle generators and combined heat and power systems capture and use "waste heat" to produce additional electricity. In addition, supercritical designs for steam boilers, new materials, and gas turbines (instead of steam), which withstand higher temperatures and pressures, significantly improve power plant efficiency and lower CO₂ emissions.

23. Coal-fired electric generating units are by far the largest single contributor of

⁴ According to the U.S. Energy Information Administration, coal accounted for 69 percent of electric utility-produced power in Texas in 2004, and natural gas accounted for 29 percent. See, http://www.eia.doe.gov/cneaf/electricity/epa/generation_state.xls

⁵ According to the U.S. EPA's most recent Inventory of U.S. Greenhouse Gas Emissions, electricity generators consume about 34 percent of U.S. fossil fuel energy and emit roughly 40 percent of all CO₂ from fossil fuel combustion. Electricity generators rely on coal for more than half of their total energy requirements, and electric generation accounts for 94 percent of all coal consumed in the United States. *Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2004* (April 2006) USEPA #430-R-06-002, p. ES-8, available at: [http://yosemite.epa.gov/oar/globalwarming.nsf/UniqueKeyLookup/RAMR6MBLP4/\\$File/06ES.pdf](http://yosemite.epa.gov/oar/globalwarming.nsf/UniqueKeyLookup/RAMR6MBLP4/$File/06ES.pdf)

⁶ See, "Controlling Power Plant CO₂ Emissions: A Long Range View," by John Marion and Nsakala ya Nsakala, ALSTOM Power Plant Laboratories, Windsor, CT (U.S. offices), available at: http://www.netl.doe.gov/publications/proceedings/01/carbon_seq/1b2.pdf

sulfur dioxide pollution in the United States, accounting for approximately 67 percent of all SO₂ emissions nationwide.⁷ Sulfates (from SO₂) are major components of fine particle pollution that affects communities nearby and directly downwind of coal-fired power plants. Sulfur dioxide also interacts with nitrogen oxides to form nitric and sulfuric acids, commonly known as acid rain, which damages forests and acidifies soil and waterways.

24. Harvard School of Public Health studies have shown that SO₂ emissions from power plants significantly harm the cardiovascular and respiratory health of people who live near the plants. According to U.S. EPA studies, fine particle pollution from power plants causes more than 20,000 premature deaths a year.

25. According to the United States EPA, electric utilities account for 22 percent of all NO_x emissions in the U.S.⁸ Ground-level ozone, which is especially harmful to children and people with respiratory problems such as asthma, is formed when NO_x and volatile organic compounds (VOCs) react in sunlight. NO_x also reacts with ammonia, moisture, and other compounds to form fine particle pollution, which damages lung tissue and is linked to premature death. Small particles penetrate deeply into sensitive parts of the lungs and can cause or worsen respiratory disease such as emphysema and bronchitis, and aggravate heart disease.

⁷ U.S. EPA, *Acid Rain Program 2002 Progress Report*, EPA-430-R-03-011, November 2003, available at <http://www.epa.gov/airmarkets/cmprpt/arp02/2002report.pdf>. See also, <http://www.epa.gov/air/urbanair/so2/what1.html>.

⁸ See, <http://www.epa.gov/air/urbanair/nox/what.html>

26. Coal-fired power plants are the single largest source of mercury air pollution, accounting for roughly 40 percent of all mercury emissions nationwide.⁹ Mercury is a highly toxic metal that, once released into the atmosphere, settles in lakes and rivers, where it moves up the food chain to humans. The Centers for Disease Control has found that roughly 10 percent of American women carry mercury concentrations at levels considered to put a fetus at risk of neurological damage.¹⁰

27. Carbon dioxide, one of several greenhouse gases that contributes to climate change, is released into the atmosphere when fossil fuels (oil, natural gas, and coal), wood, and solid waste are burned. Power plants are responsible for about 40 percent of all man-made CO₂ emissions in the nation,¹¹ and unlike emissions of SO₂ and NO_x, the electric power industry's CO₂ emissions are steadily rising. Power plant CO₂ emissions are directly linked to the efficiency with which fossil fuels are converted into electricity, and coal-fired power plants are inherently inefficient. According to the U.S. Energy Information Administration, a typical power plant converts only about a third of the energy contained in coal into electricity, while the

⁹ See, <http://www.epa.gov/mercury/about.htm>

¹⁰ *Second National Report on Human Exposure to Environmental Chemicals*, Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Environmental Health, Division of Laboratory Sciences, Atlanta, Georgia, NCEH Pub. No. 02-0716, January 2003; available at: <http://www.cdc.gov/exposurereport/>

¹¹ According to the EPA's most recent Inventory of U.S. Greenhouse Gas Emissions, electricity generators consume about 34 percent of U.S. fossil fuel energy and emit roughly 40 percent of all CO₂ from fossil fuel combustion. Electricity generators rely on coal for more than half of their total energy requirements, and electric generation accounts for 94 percent of all coal consumed in the United States. *Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2004* (April 2006) USEPA #430-R-06-002, p. ES-8, available at: [http://yosemite.epa.gov/oar/globalwarming.nsf/UniqueKeyLookup/RAMR6MBLP4/\\$File/06ES.pdf](http://yosemite.epa.gov/oar/globalwarming.nsf/UniqueKeyLookup/RAMR6MBLP4/$File/06ES.pdf).

remainder is emitted as waste heat.¹² In fact, coal-fired power plant efficiency, including plants similar to those being proposed by TXU, has remained largely unchanged since the mid 1960's.

B. Executive Order RP 49

28. On October 27, 2005, Governor Rick Perry issued Executive Order RP 49 (“executive order”) that ordered TCEQ to fast-track “environmental permit applications that are protective of the public health and environment and propose to use Texas’ natural resources to generate electrical power.” Executive Order RP 49 also takes the extraordinary step of compelling SOAH to “set a schedule that returns a proposal for decision to the Commission *in no more than six consecutive months* from the date of the referral” of an air quality permit application by TCEQ to SOAH. (emphasis added). (*See*, Pl’s First Am. Pet., Exh. D.)

29. Absent the Executive Order, a SOAH decision on just one of the six permits would typically take one year or more from the time of referral to issuance of a proposal for decision.

30. Four days after the Governor issued Executive Order RP 49, SOAH’s Chief Administrative Law Judge Sheila Bailey Taylor issued a Standing Order (“SOAH’s Standing Order”) to effectuate the Governor’s Executive Order. (*See* Pl’s First Am. Pet., Exhibit E).

C. New Texas Coal-fired Power Plants

31. Texas is experiencing an unprecedented planned expansion of its coal-based electric generating capacity. Electric power generators have applied to TCEQ for permits to emit

¹² *See*, “Carbon Dioxide Emissions from the Generation of Electric Power in the United States,” July 2000, Department of Energy, Environmental Protection Agency, available at: http://www.eia.doe.gov/cneaf/electricity/page/co2_report/co2report.html.

air pollution from 17 proposed new coal-fired electric generating units.¹³

32. To comply with federal and state air pollution laws, the various applicants must obtain air quality permits prior to initiating construction of the proposed power plants. These applications are in various stages of the administrative process at TCEQ or at the State Office of Administrative Hearings (“SOAH”).

33. Sierra Club is attempting to exercise its constitutional and statutory rights to represent its interests, and those of its members, by participating as an affected party in contested case proceedings before the TCEQ and SOAH.

D. TXU Applications

34. On April 20, 2006, TXU Generation, LP, filed seven separate applications for air permits to build and operate eight new coal-fired electric generating units in the State of Texas. Between October 13 and October 20, 2006, the TCEQ issued notices – one notice for each of six separate applications – stating that preliminary decisions to approve these permits had been made. TCEQ issued draft permits recommending approval of the permits for Big Brown III (Freestone County); Lake Creek III (McLennan County); Martin Lake IV (Rusk County); Monticello IV (Titus County); Tradinghouse III & IV (McLennan County); and Valley 4 (Fannin County).

35. Between October 23 and November 2, 2006, the Commission issued notices stating that, on request of the Applicant, six of the seven draft permits have been referred to the State Office of Administrative Hearings, and setting preliminary hearings on each draft permit, to be held at various locations around the state. Preliminary hearings were scheduled for two

¹³ A potential 18th coal-fired unit is subject to a federal consent decree and is currently being reviewed in the United

draft permits on November 27; for one draft permit on November 28; and for three draft permits on December 7, 2006. (One of TXU's seven applications has not yet been referred to SOAH.)

36. Almost as soon as SOAH received the six referrals, it issued an Order setting the case schedules, and also setting a joint pre-hearing conference for December 14, 2006. The purpose of the joint pre-hearing conference is to attempt to efficiently manage these hearings, avoid scheduling conflicts, and to consider whether the six administrative cases will be consolidated in whole or in part.

37. Both TCEQ and SOAH have taken the position that all pending permits for electric generating units in Texas are subject to Executive Order RP 49, and thus must be "fast-tracked." In the pending administrative proceedings, SOAH determined that the order applies on its face. In the pending administrative proceedings currently before SOAH, six permits would authorize major sources of air pollution in six different communities. Not only will these sources impact air quality cumulatively and in downwind areas, but they will also have local pollution impacts. All of the complicated air pollution questions that need to – indeed are *required* to – be thoroughly vetted on six such permits simply can not be given due consideration in the six-month constraint of the Governor's executive order.

38. Pursuant to Executive Order RP 49 and SOAH's Standing Order, the Administrative Law Judges ("ALJs") presiding over all six pending dockets, have entered scheduling orders putting all six separate permit applications on the Governor's fast track and, in order to meet the tight timeline imposed by the executive order, SOAH has further consolidated all six applications into one contested case proceeding.

VI.

**FIRST CAUSE OF ACTION:
REQUEST FOR DECLARATION THAT TCEQ FAILED TO PROVIDE A
REASONED JUSTIFICATION WHEN DELETING THE FEDERAL BACT
DEFINITION FROM 30 TAC §116.160(a)**

39. Sierra Club incorporates by reference paragraphs 1 through 38 above, and incorporates Plaintiff Environmental Defense's First Cause of Action in its entirety.

40. TCEQ failed to provide a "reasoned justification" when it amended 30 TAC §116.160(a) to delete the incorporation by reference of the federal BACT definition. Pursuant to APA §§2001.038 and 2001.040 and CPRC §37.004(a), Plaintiff respectfully requests that the Court declare: (a) that TCEQ's amendment to 30 TAC §116.160 deleting the federal BACT definition failed to state a reasoned justification and therefore violates APA §2001.033(a)(1) as a matter of law and is invalid; and (b) because TCEQ failed to provide the requisite "reasoned justification," the version of 30 TAC §116.160(a) in existence prior to February 1, 2006 remains in effect, at least insofar as it incorporated by reference the federal BACT definition at 40 CFR §52.21(b)(12).

VII.

**SECOND CAUSE OF ACTION:
REQUEST FOR DECLARATION THAT TCEQ's AUTHORIZING STATUTES &
RULES REQUIRE THE TCEQ TO APPLY THE FEDERAL BACT DEFINITION**

41. Sierra Club incorporates by reference paragraphs 1 through 40 above, and incorporates Plaintiff Environmental Defense's Second Cause of Action in its entirety.

42. Plaintiff respectfully requests that the Court declare that TCEQ must apply the federal BACT definition when considering and acting on PSD permit applications. Plaintiff further requests a declaration that TCEQ's acts and omissions in failing to apply the proper

standards and the manner in which it conducts its BACT review in the Pending Applications violates TCEQ's own rules, the Texas Clean Air Act and Plaintiff's due process and due course of law rights.

43. Alternatively, if TCEQ is not required to apply the federal BACT definition, then TCEQ's "BACT means BACT" definition creates an invalid, unconstitutionally vague and standardless regulation. Before Plaintiff can effectively protest the pending applications, due process requires that TCEQ's rules set clear standards. Plaintiff respectfully requests that if the Court determines that TCEQ is not required to apply the federal BACT definition to PSD permit applications, then the Court declare that TCEQ's BACT rules, including 30 TAC §§116.10(3) and 116.160, are invalid, unconstitutionally vague and thus violate the Texas Clean Air Act and Plaintiff's due process rights.

VIII.

**THIRD CAUSE OF ACTION:
REQUEST FOR DECLARATION THAT TCAA AND TCEQ RULES REQUIRE
APPLICANTS TO CONSIDER OTHER TECHNOLOGIES, ALTERNATIVELY, THE
TCEQ'S PSD RULES ARE INVALID**

44. Sierra Club incorporates by reference paragraphs 1 through 43 above, and incorporates Plaintiff Environmental Defense's Third Cause of Action in its entirety.

45. TCEQ's failure and threatened failure to require PSD Applicants to analyze "production processes or available methods, systems, and techniques" including "innovative fuel combustion techniques" and the use of ultra super critical pulverized coal technology as part of BACT as mandated by Texas law is arbitrary and capricious and violates the Texas Clean Air

Act, TCEQ's own rules and Plaintiff's due process rights. Plaintiff respectfully requests that the Court declare that the Texas Clean Air Act and TCEQ rules require PSD Applicants to analyze "production processes or available methods, systems, and techniques" including "innovative fuel combustion techniques" like IGCC, CFB, and the use of ultra super critical pulverized coal technology.

46. Alternatively, to the extent TCEQ fails to require PSD Applicants to analyze other "production processes or available methods, systems, and techniques" including "innovative fuel combustion techniques" like IGCC, CFB, and the use of ultra super critical pulverized coal technology, and otherwise fails to conduct a proper PSD permit review, Plaintiff requests that the Court declare said that TCEQ's acts and omissions are arbitrary and capricious and violate the Texas Clean Air Act, TCEQ's own rules and Plaintiff's due process and due course of law rights.

IX.

FOURTH CAUSE OF ACTION: REQUEST FOR DECLARATION THAT TCEQ MUST REQUIRE PSD APPLICANTS TO PERFORM BACT ANALYSIS CONSISTENT WITH TCAA AND TCEQ RULES

47. Sierra Club incorporates by reference paragraphs 1 through 46 above, and incorporates Plaintiff Environmental Defense's Forth Cause of Action in its entirety.

48. 30 TAC §116.160(c)(2) incorporates by reference 40 CFR §52.21(k) which provides:

(k) *Source Impact Analysis.* The owner or operator of the proposed source or modification shall demonstrate that allowable emission increases from the proposed source or modification, in conjunction with all other applicable emissions increases or reductions (including secondary emissions) would not cause or contribute to air pollution in violation of:

(1) Any national ambient air quality standard in any air quality control

region; or

(2) Any applicable maximum allowable increase over the baseline concentration in any area.

49. Taken together, these statutory provisions and rules require a PSD Applicant to: (a) analyze the “energy, environmental and economic impacts” of its proposed emissions on non-attainment areas, such as Dallas/Fort Worth, and on areas at risk of becoming non-attainment, such as Austin/Round Rock; (b) demonstrate that its proposed emissions will not impair the public’s health and physical property in non-attainment areas or in areas at risk of becoming non-attainment; (c) demonstrate that its proposed emissions do not “cause or contribute” to the violation of any NAAQS in any “air quality control region” including non-attainment areas or areas at risk of becoming non-attainment; and (d) if the proposed emissions do cause or contribute to a violation of NAAQS, evaluate the additional emissions reductions that non-attainment areas and/or areas at risk of becoming non-attainment areas will be required to achieve in order to comply with NAAQS. TCEQ is not requiring applicants to make these demonstrations and/or is applying standards that differ from those set out above.

50. To the extent TCEQ is not requiring the demonstrations listed in (a) through (d) above or applying standards that differ from the standards set in (a) through (d) above, TCEQ is violating the Texas Clean Air Act, TCEQ’s own rules, and Plaintiff’s constitutional due process rights. Plaintiff respectfully requests that the Court declare that the Texas Clean Air Act and the referenced TCEQ rules require PSD Applicants to make the demonstrations listed in (a) through (d) above before TCEQ approves a PSD permit application. Plaintiff further requests a declaration that TCEQ’s acts and omissions in failing to consider the foregoing and by failing to

require PSD applicants to make the demonstrations listed in (a) through (d) above violates TCEQ's own rules, the Texas Clean Air Act and Plaintiff's due process and due course of law rights.

X.

**FIFTH OF ACTION:
REQUEST FOR DECLARATION THAT TCEQ MUST CONSIDER THE
CUMULATIVE RISKS ASSOCIATED WITH THE 17 PROPOSED
NEW COAL-FIRED UNITS**

51. Sierra Club incorporates by reference paragraphs 1 through 50 above, and incorporates Plaintiff Environmental Defense's Fifth Cause of Action in its entirety.

52. The cumulative impact of the 18 proposed new coal-fired boilers will have long-lasting environmental, health, and economic impacts on surrounding communities including nearby non-attainment areas like Dallas/Fort Worth and Houston/Galveston. Texas Water Code §5.130 (entitled "Consideration of Cumulative Risks") requires TCEQ to "develop and implement policies, by specific environmental media, to protect the public from cumulative risks in areas of concentrated operations." Likewise, 30 TAC §116.161 prevents TCEQ from issuing PSD permits for any emissions source that "contributes" to the violation of any NAAQS. TCEQ is issuing and threatening to issue permits without considering the cumulative risks of the 18 proposed new power plants and without considering how an individual PSD application contributes to the cumulative risks posed by the 18 proposed new power plants taken together. By issuing and threatening to issue permits without taking into account the cumulative risks posed by the 18 new power plants, TCEQ exceeds its statutory authority, violates Texas Water Code §5.130 and its own rules, and violates Plaintiff's due course of law and due process rights.

53. Accordingly, Plaintiff respectfully requests that the Court declare that Texas Water Code §5.130 requires TCEQ to consider the “cumulative risks” associated with emissions from the 18 proposed new coal fire boilers and how each proposed plant contributes to that cumulative risk before granting any PSD permit application.

XI.

SIXTH CAUSE OF ACTION: REQUEST FOR DECLARATION THAT EXECUTIVE ORDER RP 49, SOAH’S STANDING ORDER, AND THE SCHEDULING ORDER ARE UNCONSTITUTIONAL AND HAVE NO LEGAL EFFECT

54. Sierra Club incorporates by reference paragraphs 1 through 53 above, and incorporates Plaintiff Environmental Defense’s Sixth Cause of Action in its entirety.

55. Four days after the Governor issued Executive Order RP 49, SOAH’s Chief Administrative Law Judge Sheila Bailey Taylor issued a Standing Order (“SOAH’s Standing Order”) to effectuate the Governor’s Executive Order. (*See* Pl’s. Second Am. Compl. Exhibit E). Pursuant to Executive Order RP 49 and SOAH’s Standing Order, the Administrative Law Judges presiding over the SOAH dockets for the six TXU permit applications entered scheduling orders putting each application on the “fast track.” On December 14, 2006, the ALJs consolidated all six pending permit applications into one docket and ruled that the now consolidated docket is subject to the Governor’s fast-track order.

56. In the pending administrative proceedings currently before SOAH, six permits would authorize major sources of air pollution in six different communities. Not only will these sources impact air quality cumulatively and in downwind areas, but they will also have local pollution impacts. All of the complicated air pollution questions that need to – indeed are

required to – be thoroughly vetted on six such permits simply can not be given due consideration in the six-month constraint of the Governor’s executive order.

57. Executive Order RP 49 violates the separation of powers provision of the Texas Constitution Article II, Sec. 1. That section provides for three branches of government, and it forbids one branch from exercising the power of either of the other branches, except as expressly provided in the Constitution. Section §2003.021(a) of the Texas Government Code states:

(a) The State Office of Administrative Hearings is a state agency created to serve as an independent forum for the conduct of adjudicative hearings in the executive branch of state government. The purpose of the office is to separate the adjudicative function from the investigative, prosecutorial, and policymaking functions in the executive branch in relation to hearings that the office is authorized to conduct.

The Governor thus lacks the power to order SOAH to fast track the applications, and Executive Order RP 49 has no legal effect. Likewise, because the Standing Order purports to order the ALJs to fast track applications pursuant to the Governor’s order, the Standing Order violates the separation of powers provision and Gov’t. Code §2003.041 by purporting to place the ALJ’s under the direct or indirect control of the Governor. Accordingly, the Court should declare that Executive Order RP 49, the Standing Order, and any scheduling orders based thereon, are unconstitutional and without legal effect.

58. Alternatively, the Court should strike these orders because the Governor’s “fast track” of the applications violates Plaintiff’s due process and due course of law rights. The complex preparation necessary to effectively protest the applications requires far more than the time constraints being imposed by the Governor’s executive order. Accordingly, the Court should strike any and all SOAH orders that base contested case hearing scheduling on the

Governor's Executive Order. This is even more critical now that SOAH has ordered consolidation of *six* major air pollution permits into one proceeding.

59. Executive Order RP 49 violates the separation of powers provision of the Texas Constitution Article II, Sec. 1. That section provides for three branches of government, and it forbids one branch from exercising the powers delegated to either of the other branches, except as expressly provided in the Constitution. Under Gov't. Code §2003.021(a), the legislature acknowledged the adjudicative role of SOAH, even within the executive branch. The Governor has exceeded his authority in ordering SOAH to "fast track" the applications, and Executive Order RP 49 has no legal effect. Likewise, because the Standing Order purports to order the Administrative Law Judge in SOAH Docket No. 582-07-0615 and any other ALJs presiding over any other applications to fast track applications pursuant to the Governor's order, the Standing Order violates the separation of powers provision and Gov't. Code §§2003.041 by purporting to place the ALJs under the direct or indirect influence of the Governor. Accordingly, the Court should declare that Executive Order RP 49 and the Standing Order, and the Scheduling Order entered pursuant thereto, are unconstitutional, violate Gov.'t Code §§2003.021, 2003.041, and are of no legal effect.

60. Alternatively, the Court should declare that the Governor's "fast track" of the applications violates Plaintiff's rights to due process and due course of law rights in all six pending administrative dockets.

61. Sierra Club respectfully requests that the Court declare that Executive Order RP 49, the SOAH Standing Order, and any scheduling orders based thereon, violate Texas

Constitution Article I, Sec. 19 and Article II, Sec. 1 and Gov't. Code §§2003.021(a) and 2003.041. Plaintiff also requests a declaration that the orders have no legal effect.

XII.

REQUEST FOR TEMPORARY & PERMANENT INJUNCTION

62. Plaintiff incorporates by reference paragraphs 1 through 60 above.

63. Sierra Club has already been, is being, and will be irreparably harmed by SOAH's implementation of Executive Order RP 49, because it violates the Club's due process and due course of law rights as described in sections IV, V, and XI above. There is no adequate remedy at law other than injunctive relief. Sierra Club is entitled to injunctive relief prohibiting TCEQ and SOAH from proceeding under Executive Order RP 49, the invalid Standing Order, or any invalid scheduling order, or from otherwise "fast tracking" the applications, in violation of Plaintiff's due process and due course of law rights, the Texas Constitution, and the Government Code.

PRAYER FOR RELIEF

Wherefore, premises considered, Intervenor Sierra Club requests that the Court enter judgment for Plaintiff:

- a. Declaring that: (i) TCEQ's amendment to 30 TAC §116.160 deleting the incorporation by reference of the federal BACT definition failed to state a reasoned justification and therefore violates APA §2001.033(a)(1) as a matter of law and is invalid; and (ii) that the version of 30 TAC §116.160(a) in existence prior to February 1, 2006 remains in effect, at least insofar as it incorporated by reference the federal BACT definition;

- b. Declaring that: (i) the BACT definition applicable to PSD applications in Texas is the federal BACT definition, and (ii) further declaring that TCEQ's acts and omission in failing to apply the proper standards, and the manner in which TCEQ conducted its BACT review in the Pending Applications, violate the TCEQ's own rules, the Texas Clean Air Act and Plaintiff's due process and due course of law rights; or (iii) alternatively, that TCEQ's BACT rules are unconstitutionally vague, violate the Texas Clean Air Act and violate Plaintiff's due course of law and due process rights and are, therefore, invalid;
- c. Declaring that: (i) the Texas Clean Air Act and TCEQ rules require PSD Applicants to analyze "production processes or available methods, systems, and techniques" including "innovative fuel combustion techniques" like IGCC, CFB, and the use of ultra super critical pulverized coal technology as part of their BACT analysis or, (ii) alternatively, declaring that TCEQ's acts and omissions in failing to require PDS applicants to evaluate "production processes or available methods, systems or techniques" including "innovative fuel combustion techniques" such as IGCC, CFB, and the use of ultra super critical pulverized coal technology and in failing to require this analysis violates the Texas Clean Air Act, TCEQ's own rules and Plaintiff's due course of law and due process rights;
- d. Declaring that: (i) PSD Applicants are required to: analyze the "energy, environmental and economic impacts" of their proposed emissions on non-attainment areas such as Dallas/Fort Worth and on areas at risk of becoming non-

attainment such as Austin/Round Rock; demonstrate that their proposed emissions will not impair the public's health and physical property in non-attainment areas or in areas at risk of becoming non-attainment; demonstrate that their proposed emissions do not "cause or contribute" to the violation of any NAAQS in any "air quality control region" including non-attainment areas or areas at risk of becoming non-attainment and if they do cause or contribute to a violation of NAAQS, evaluate the additional emissions offsets that non-attainment areas such as Dallas/Fort Worth, and areas at risk of becoming non-attainment, such as Austin/Round Rock, will be required to achieve in order to comply with NAAQS; and (ii) TCEQ's acts and omissions in failing to consider the demonstrations above and by failing to require PSD applications to make the demonstration listed above, violate TCEQ's own rules, the Texas Clean Air Act and Plaintiff's due process and due course of law rights;

- e. Declaring that: (i) Texas Water Code §5.130 requires TCEQ to consider the "cumulative risks" associated with emissions from the 18 proposed new coal fired boilers and how each proposed plant contributes to that cumulative risk before granting any PSD permit application; and (ii) that TCEQ's acts and omissions in failing to evaluate, and in failing to require PSD applicants to evaluate, the cumulative risk posed by the 18 new power units violates Texas Water Code §5.130 and violates Plaintiff's due course of law and due process rights;
- f. Declaring that Executive Order RP 49, the Standing Order, and any scheduling order based thereon, violate Texas Constitution Articles I, Sec. 19 and Article II,

Sec. 1 and Gov't. Code §§2003.021(a) and 2003.041, and that none of the orders has legal effect.

- g. Enjoining the TCEQ from violating its authorizing statutes and its own rules as described in Sections VI through XI; and
- h. Enjoining SOAH from violating the separation of powers provision under Tex. Const. Article II, Sec. 1, from violating Gov't Code §§2003.021(a) and §2003.041, and from violating Sierra Club's due process and due course of law rights by invalidly "fast tracking" and/or consolidating the Pending Applications.
- i. Awarding such other and further relief, including attorney's fees and costs of court, to which Sierra Club shows itself justly entitled.

Respectfully submitted,

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ATTORNEY FOR SIERRA CLUB

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of December, 2006, the foregoing document was served on the following by U.S. Mail:

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Brent Ryan
Matthew W. Baab
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Ilan Levin

VERIFICATION

STATE OF TEXAS §
 §
COUNTY OF TRAVIS §

BEFORE ME, the undersigned notary, on this day personally appeared Ken Kramer, a person whose identity has been verified by me, who, upon the administration of an oath, stated and deposed as follows:

“My name is Kenneth Kramer. I am over the age of 21, have never been convicted of a felony, and am competent in all respects to make this affidavit.

I am the director of the Lone Star Chapter of the Sierra Club. I have read the foregoing Petition in Intervention and Request for Temporary and Permanent Injunction. I verify that the facts stated in paragraphs 1, 8, 12, 14, 33, and 63 thereof are within my personal knowledge, and are true and correct.”

Further affiant sayeth not.

Kenneth Kramer

Sworn to and subscribed before me this ____ day of December, 2006.

Notary Public, State of Texas