

1 Suma Peesapati (CA State Bar No. 203701)
EARTHJUSTICE
2 426 17 St., 5th Floor
Oakland, California 94612
3 Tel: (510) 550-6725
Fax: (510) 550-6749
4 Email: speesapati@earthjustice.org

5 Ilan Levin (TX State Bar No. 00798328)
ENVIRONMENTAL INTEGRITY PROJECT
6 1303 San Antonio Street, Ste. 200
Austin, TX 78701
7 (512) 637-9479
(512) 584-8019 (facsimile)
8 Email: ilevin@environmentalintegrity.org

9 Robert W. Weber (TX State Bar No. 21044800)
C. David Glass (TX State Bar No. 24036642)
10 SMITH WEBER, L.L.P.
5505 Plaza Drive
11 Post Office Box 6167
Texarkana, Texas 75503 / 75505
12 Tel: 903-223-5656
Fax: 903-223-5652
13 Email: bweber@smithweber.com
Email: dglass@smithweber.com

14
15 IN THE UNITED STATES DISTRICT COURT
16 FOR THE EASTERN DISTRICT OF TEXAS,
17 TEXARKANA DIVISION

18 SIERRA CLUB,)
19 Plaintiff,) Civil Action No. _____
20 vs.)
21 ENERGY FUTURE HOLDINGS CORPORATION and) COMPLAINT FOR CLEAN AIR
LUMINANT GENERATION COMPANY, LLC,) ACT VIOLATIONS
22 Defendants.)
23

24 **ORIGINAL COMPLAINT**

25 **I. STATEMENT OF THE CASE**

26 1. The Sierra Club (“Plaintiff”) brings this lawsuit on behalf of itself and the public to
27 prevent Energy Future Holdings Corporation and Luminant Generation Company, LLC
28

1 (collectively, the “Defendants”) from violating the federal Clean Air Act (“CAA” or the “Act”) and
2 exposing the public to illegal amounts of harmful air pollution. In this lawsuit, Plaintiffs allege that
3 Defendants have exceeded, and continue to exceed, federal emission limits, thereby violating the
4 Act. Although this suit seeks to reduce air pollution, generally, from Defendants’ facility, it is
5 particularly concerned with exceedances of opacity and heat input limits on the plant’s large coal-
6 fired boilers. Opacity is an indicator of the excessive levels of particulate matter (“PM”) pollution
7 being emitted by the facility. Heat input is a constraint on capacity to burn coal.

8 2. Particulate matter is a mixture of small particles, including organic materials, metals,
9 and ash, which can cause health and environmental problems. According to the United States
10 Environmental Protection Agency (“EPA”), once inhaled, PM can affect the lungs and pulmonary
11 and respiratory systems, causing serious health effects such as “disease, cancer, and premature
12 mortality.” 52 Fed. Reg. 24,634, 24,663 (July 1, 1987). Numerous studies have linked PM exposure
13 to increased respiratory symptoms, such as irritation of the airways, coughing, or difficulty
14 breathing; decreased lung function; aggravated asthma; development of chronic bronchitis; irregular
15 heartbeat; heart attacks; and premature death in people with heart or lung disease. Additionally, PM
16 can be carried long distances to settle over land or water, which may result in acidic lakes and
17 streams, nutrient imbalances in aquatic systems, and damage to forests and farmlands.

18 3. This suit is brought under the citizen enforcement provision, 42 U.S.C. § 7604, of the
19 Act. Among other things, the suit seeks injunctive relief and the assessment of civil penalties for
20 violations of permits and requirements under Title V (i.e., the federal operating permits program) of
21 the Act, 42 U.S.C. §§ 7661-7661f, and the State Implementation Plan (“SIP”) adopted by the State
22 of Texas and approved by EPA pursuant to section 110 of the Act, 42 U.S.C. § 7410.

23 4. Defendants have operated and continue to operate three electric generating units at
24 the Martin Lake Power Plant (Martin Lake) in Rusk County, Texas in violation of the Act.

25 Specifically:

- 26 A. Defendants have violated and continue to violate opacity limits contained in
27 the federally approved Texas SIP. These same limits are labeled “applicable
28 requirements” in the facility’s Title V Federal Operating Permit; and,

1
2 B. Defendants have violated and continue to violate the heat input limit
3 contained in Permit No. 933. Under the Texas SIP and the plain language of
4 Defendants' permit, all representations made in any application for Permit No.
5 933 became a condition of that permit. Those same permit requirements are
6 also conditions of the Martin Lake plant's Title V Federal Operating Permit
7 because it expressly incorporated Permit No. 933.

8 **II. JURISDICTION AND VENUE**

9 5. This court has subject matter jurisdiction under the Clean Air Act, 42 U.S.C. § 7604
10 (citizen suit provision), and the federal jurisdiction statute, 28 U.S.C. § 1331 (federal question
11 jurisdiction). The relief requested is authorized pursuant to 42 U.S.C. section 7604 and 28 U.S.C.
12 sections 2201- 2202.

13 6. The violations complained of occurred and continue to occur in the Eastern District of
14 Texas. Venue is therefore proper the Eastern District of Texas, pursuant to the Clean Air Act, 42
15 U.S.C. § 7604(c)(1), and the federal venue statute, 28 U.S.C. § 1391(b)-(c).

16 7. Consistent with the Clean Air Act's citizen suit provision, 42 U.S.C. § 7604
17 (b)(1)(A), on July 25, 2008, Plaintiff notified in writing the Administrator of the EPA (the
18 "Administrator"), the Governor of Texas, the Texas Commission on Environmental Quality
19 ("TCEQ"), Defendants Energy Future Holdings Corporation, Luminant Generation Company, LLC,
20 and the plant manager of the Martin Lake Power Plant of the violations alleged in this complaint and
21 of Plaintiff's intent to sue. More than sixty days have passed since this notice ("Notice of Intent To
22 Sue") was served via U.S. mail. Defendants have violated and remain in violation of the Act, SIP
23 and Title V permit. Neither EPA nor TCEQ has commenced and diligently prosecuted a court action
24 to redress these ongoing violations.

25 8. A copy of this complaint, pursuant to the Clean Air Act's citizen suit provisions, 42
26 U.S.C. § 7604(c)(3), is being served simultaneously upon the Attorney General of the United States
27 and the Administrator.

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2 **III. PARTIES**

3 9. Plaintiff Sierra Club was founded in 1872 by John Muir and is a nonprofit corporation
4 organized under California law. It is one of the oldest and largest grassroots environmental
5 organizations in the country. The Sierra Club has over 700,000 members, 23,000 of whom reside in
6 Texas and belong to Sierra Club's Lone Star Chapter. Among the goals of the Sierra Club are
7 preserving and enhancing the natural environment and protecting public health. The Sierra Club has
8 the specific goal of improving outdoor air quality.

9 10. Members of the Sierra Club use the resources of the East Texas airshed most
10 immediately impacted by Defendants' violations of the Act. Members reside, visit, work and
11 recreate near Martin Lake and are exposed to the Martin Lake emissions at various times of the year.
12 The aesthetic, recreational, environmental, economic and health-related interests of Plaintiffs'
13 members have been injured by Defendants' illegal and excessive emissions of pollutants from
14 Martin Lake into eastern Texas air. Interests of Plaintiffs' members that are directly injured by
15 Defendants' excessive and illegal discharges of pollutants from Martin Lake include, but are not
16 limited to: (1) breathing air in eastern Texas free from Defendants' excessive pollution discharges,
17 and without the negative health effects—and concern about those effects—that such discharges
18 cause; (2) enjoying outdoor recreation that is unimpaired by pollution from Martin Lake's excessive
19 emissions; (3) using and enjoying property, and viewing and enjoying natural scenery, wildlife and a
20 sky that is unimpaired by pollution from Martin Lake's excessive emissions; (4) protecting the
21 natural ecology of the region from air pollution-related impacts; and (5) enjoying the right to
22 adherence by regulated entities to clean air laws in a region where members live and work.

23 11. Defendant Energy Future Holdings Corporation, a corporation organized under the
24 laws of Texas, through its subsidiary, Luminant Generation Company, a (Texas) Limited Liability
25 Company ("LLC"), owns and operates the Martin Lake Power Plant. Luminant Generation
26 Company, LLC, also owns and operates the Martin Lake Power Plant. Together, Defendants are
27 Texas' largest power providers.
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3 **IV. STATUTORY BACKGROUND**

4 **Clean Air Act citizen enforcement provision**

5 12. The Clean Air Act is designed to protect and enhance the quality of the nation’s air,
6 so as to promote the public health and welfare and the productive capacity of its population. 42
7 U.S.C. § 7401(b)(1).

8 13. Any person may commence a civil enforcement action under the Clean Air Act
9 against any party “who is alleged to have violated . . . or to be in violation of [] an emission standard
10 or limitation.” *Id.* § 7604(a). An “emission standard or limitation” is, among other things, any term
11 or condition of a permit issued under an approved State Implementation Plan, any standard or
12 limitation under any approved State Implementation Plan, or any permit term of a Title V operating
13 permit. *Id.* § 7604(f)(4).

14 **State Implementation Plans (SIPs)**

15 14. The EPA has established National Ambient Air Quality Standards (“NAAQS”) for a
16 number of “criteria pollutants,” such as particulate matter. *Id.* § 7409; 40 C.F.R. pt. 50. An area that
17 meets the NAAQS for a particular criteria pollutant is deemed to be in “attainment” for that
18 pollutant. 42 U.S.C. § 7407(d)(1). An area that does not meet the NAAQS is a “nonattainment”
19 area. *Id.*

20 15. Pursuant to 42 U.S.C. § 7410, each state must adopt and submit to EPA for approval a
21 State Implementation Plan that provides for the attainment and maintenance of the NAAQS.
22 Specifically, SIPs set forth requirements for permitting programs and specific emission standards
23 and limitations to assure that geographic areas either remain in attainment or regain attainment
24 status. Compliance with permit terms and conditions is a critical component of NAAQS attainment
25 and maintenance. Once a state’s SIP is approved by EPA, it is published in the Code of Federal
26 Regulations and becomes enforceable federal law. 42 U.S.C. § 7413; 40 C.F.R § 52.23.

27 16. 30 Tex. Admin. Code § 111.111, related to the control of air pollution from visible
28 emissions and particulate matter, provides that “[o]pacity shall not exceed 20 percent averaged over

1 a six-minute period for any source on which construction was begun after January 31, 1972.” 30
2 Tex. Admin. Code § 111.111. This emission standard or limitation is a requirement in the Texas
3 SIP. 40 C.F.R. § 52.2270(c); 61 Fed. Reg. 20,732 (May 8, 1996); 74 Fed. Reg. 19,144 (Apr. 28,
4 2009). This emission standard or limitation is suspended for up to six consecutive minutes each
5 hour if it is determined that the event that caused the opacity exceedance in that period was the
6 cleaning of a firebox or the building of a new fire, soot blowing, equipment changes, ash removal, or
7 rapping of precipitators. 30 Tex. Admin. Code § 111.111(a)(1)(E).

8 17. Another, separate requirement of the Texas SIP provides that a preconstruction permit
9 is a prerequisite to the construction of a new source of air contaminants, such as a power plant boiler.
10 *Id.* § 116.110; 68 Fed. Reg. 64,543 (Nov. 14, 2003); 40 C.F.R. §52.2270(c).

11 18. The Texas SIP also requires facility owners to obtain permits that regulate emissions
12 for new or modified sources of pollution. *Id.* The Texas SIP further states that “representations
13 with regard to . . . operation procedures in an application for a permit” are conditions upon which a
14 permit is issued and provides that “the permit holder shall not vary from any representation or permit
15 condition without obtaining a permit amendment if the change will cause: (A) a change in the
16 method of control of emissions; (B) a change in the character of the emissions; or (C) an increase in
17 the emission rate of any air contaminant.” 30 Tex. Admin. Code § 116.116 (as approved by EPA at
18 68 Fed. Reg. 64,543 (Nov. 14, 2003)); 40 C.F.R. § 52.2270(c).

19 **Title V Operating Permits**

20 19. Title V of the Clean Air Act, 42 U.S.C. §§ 7661 -7661f, establishes an operating
21 permit program for “major sources” of air emissions, such as the Martin Lake Plant. The purpose of
22 the Title V program is to ensure that all “federally-enforceable” requirements for a source’s
23 compliance with the Act are collected in one place—the Title V Federal Operating Permit. Thus, for
24 example, the SIP provisions applicable to a source are incorporated into the source’s Title V permit.
25 EPA has stated that the Title V program “will enable the source, States, EPA, and the public to
26 understand better the requirements to which the source is subject, and whether the source is meeting
27 those requirements. Increased source accountability and better enforcement should result.” 57 Fed.
28 Reg. 32,250, 32,251 (July 21, 1992).

1 20. Texas implements the Title V program pursuant to EPA-approved regulations. 30
2 Tex. Admin. Code ch. 122; 40 C.F.R. § 52.2270(c). This chapter and Section 502(a) of the Act, 42
3 U.S.C. § 7661c(a), make it unlawful for any person to violate any requirement of a permit issued
4 under Title V or to operate a major source except in compliance with a permit issued by a permitting
5 authority under Title V.

6 **Opacity**

7 21. Opacity is defined in the Texas SIP as “the degree to which an emission of air
8 contaminants obstructs the transmission of light expressed as the percentage of light obstructed as
9 measured by an optical instrument or trained observer.” 30 Tex. Admin. Code § 101.1(72)
10 (Definitions regarding General Air Quality Rules) (as approved by EPA at 70 Fed. Reg. 16,129
11 (Mar. 30, 2005); 40 C.F.R. § 52.2270(c)). For example, when the plume from the stack of a power
12 plant obscures 20% of the light that would otherwise travel through that space, there is 20% opacity.

13 22. Martin Lake Units 1, 2, and 3 are limited to 20% opacity under the Texas SIP,
14 Control of Air Pollution from Visible Emissions and Particulate Matter, 30 Tex. Admin. Code §
15 111.111(a)(1)(B) (as approved by EPA at 61 Fed. Reg. 20,734 (May 8, 1996)), Defendants’ Title V
16 Federal Operating Permit pursuant to Section 502(a) of the Act, 42 U.S.C. § 7661(a), and Texas
17 regulations governing the federal operating permits program, 30 Tex. Admin. Code § 122.143(4).¹

18 23. Many of the ongoing opacity violations, set forth in Section V, are associated with
19 opacity above 90%. These levels are more than quadruple the limits contained in the Texas SIP and
20 in the Title V Federal Operating Permit. At these high levels, light is nearly totally obscured by the
21 plume of air contaminants.

22 24. Opacity may also be used to help assure compliance with emission limits for
23 particulate matter. Specifically, under their Title V Federal Operating Permit’s compliance
24 assurance monitoring (“CAM”) terms, Defendants must monitor opacity to assure that the
25 electrostatic precipitators—the primary plant controls for PM—are operating properly and, thus,

26
27 ¹ The law provides one narrow exception to opacity limits. In calculating the number of opacity
28 violations at Martin Lake, Plaintiff conservatively excepted one opacity violation per hour, under the
generous assumption that the reason for the excess emissions might fall under the exception. See 30
Tex. Admin. Code § 111.111(a)(1)(E); Pl.’s Compl. ¶¶ 36-42, *infra*.

1 assure compliance with various particulate emission limits set by the SIP and Defendants’
2 underlying air quality permit. According to the terms of the Title V permit and related CAM
3 requirements, opacity violations are not mere technicalities. This is because opacity is an indicator
4 for particulate matter pollution. In fact, according to the CAM provisions of the facility’s Title V
5 permit, opacity levels above 30% may indicate failure to meet the particulate matter limits contained
6 in 30 Tex. Admin. Code section 111.153.

7 25. PM is a mixture of small particles, including organic chemicals, metals and ash, that
8 can cause health and environmental problems. EPA has stated “that health evidence from various
9 disciplines provides a strong and coherent basis for concluding that both short-term and long-term
10 exposure to fine particles is associated with health effects ranging from subtle changes in lung
11 function to premature mortality.” 71 Fed. Reg. 2620, 2636 (Jan. 17, 2006). Furthermore, the weight
12 of scientific opinion is that there is no safe level at which particulate matter does not pose a threat to
13 human health. *See, e.g.,* U.S. Env’tl. Prot. Agency, *Air Quality Criteria for Particulate Matter*, Vol.
14 II, pp. 8-346 (Oct. 2004).

15 26. Defendants are subject to separate emission limits for particulate matter established
16 under “New Source Performance Standards” at 40 C.F.R. section 60.42(a)(2), and under the
17 federally enforceable SIP at 30 Tex. Admin. Code section 111.153 and 74 Fed. Reg. 19,144 (Apr.
18 28, 2009).

19 **Heat Input**

20 27. A coal-fired boiler’s heat input rate, or the number of British Thermal Units
21 (“BTUs”) it consumes hourly, is directly related to the rate of coal combustion by that boiler. As
22 such, it is an indirect measure of the boiler’s size or capacity and is correlated to the amount of
23 pollution it can emit. Heat input limits are one of the most important indirect capacity constraints on
24 emissions of numerous pollutants, including, but not limited to, particulate matter, sulfur dioxide,
25 mercury and carbon dioxide. In short, higher heat input, if other operating parameters are constant,
26 results in more pollution. As already noted, under the Texas SIP, representations with regard to
27 construction plans and operation procedures in an application for a permit are the conditions upon
28 which that permit is issued. 30 Tex. Admin. Code § 116.116; (Control of Air Pollution by Permits

1 for New Construction or Modification—Changes to Facilities); 68 Fed. Reg. 64,543 (Nov. 14,
2 2003). As explained below, emission rates allowed under Permit No. 933 are based on Defendants’
3 representations to TCEQ regarding heat input rates.

4 28. Defendants submitted an application to the Texas Air Control Board (the predecessor
5 to TCEQ) requesting a permit. In that application, Defendants represented a heat input rate of 8,530
6 MMBTU/hr for the Martin Lake facility. Based on Defendants’ representation of a heat input rate of
7 8,530 MMBTU/hr, the Martin Lake facility was given a permit (Permit No. 933) with corresponding
8 emission limits. For example, Permit No. 933 limited the facility’s hourly allowable emission rate
9 for particulate matter to 853 lbs/hr and its hourly allowable sulfur dioxide emission rate to 10,236
10 lbs/hr. These hourly emission limits are simply the products of the maximum hourly heat rate
11 represented in Defendant’s application (i.e. 8,530 MMBTU/hr) multiplied by separate regulatory
12 limits—0.1 lbs/MMBTU (for PM10) and 1.2 lbs/MMBTU (for sulfur dioxide). The results of these
13 calculations remain the hourly emission limits reflected in Defendants’ current air quality permit,
14 most recently renewed in 2004, for Martin Lake. *See* Permit No. 933, Maximum Allowable
15 Emission Rates (Sept. 3, 2004), at 1.

16 29. EPA compiles and electronically publishes hourly data for heat input rates at
17 regulated power generating facilities. This information is supplied to EPA by the facilities
18 themselves.

19 **Martin Lake Power Plant**

20 30. Defendants Energy Future Holdings Corporation and Luminant Generation Company,
21 LLC, own and operate the Martin Lake Power Plant. Martin Lake is a three-unit, coal-fired power
22 plant in Rusk County, Texas. The Martin Lake Power Plant consists of three distinct coal-fired
23 boiler units (unit numbers 1-3). The three units at Martin Lake became operational in 1977, 1978,
24 and 1979, respectively. The units have electrostatic precipitators and wet flue gas desulfurization
25 units to control particulate matter and sulfur emissions. None of the units has instrumentation for the
26 real-time monitoring of particulate emissions. Each unit has continuous opacity monitors.

27 31. At all times relevant to this civil action, the Martin Lake Power Plant and each of its
28 three units were a “major source” within the meaning of Title V of the Act and the Texas SIP.

1 32. On September 3, 2004, TCEQ consolidated each of Defendants' preconstruction
2 permits for Units 1, 2, and 3 into Permit No. 933, and renewed Permit No. 933 for a period of 10
3 years with new permit conditions and a Maximum Allowable Emission Rate Table ("MAERT").

4 33. On November 3, 2005, TCEQ granted the most recent version of Defendants' Title V
5 Federal Operating Permit – Permit No. O53. The provisions of Permit No. 933 are applicable
6 requirements of the Title V Federal Operating Permit. Permit No. O53, § 9.

7 **V. FIRST CLAIM FOR RELIEF**

8 (SIP Violations at Martin Lake Plant's Unit Nos. 1, 2, 3 – Exceeding Opacity Limitations)

9 34. Plaintiff re-alleges and incorporates the allegations set forth in Paragraphs 1-33.

10 35. At various times since July 2006, Defendants have exceeded, and continue to exceed,
11 the 20 percent opacity limit at Martin Lake Units 1, 2, and 3 in violation of the Texas SIP, 30 Tex.
12 Admin. Code §§ 111.111(a)(1)(B); 61 Fed. Reg. 20734 (May 8, 1996); 40 C.F.R. § 52.2270(c); 74
13 Fed. Reg. 19,144 (Apr. 28, 2009).

14 36. The table below summarizes the number of opacity violations per unit and per quarter
15 at Martin Lake between July 2006 and April 2008 (inclusive).

16 **Summary of Number of Opacity Violations**
17 **(per Unit per Quarter)**

<u>Unit</u>	<u>Violations</u> <u>3rd Q</u> <u>2006</u>	<u>Violations</u> <u>4th Q</u> <u>2006</u>	<u>Violations</u> <u>1st Q 2007</u>	<u>Violations</u> <u>2nd Q</u> <u>2007</u>	<u>Violations</u> <u>3rd Q</u> <u>2007</u>	<u>Violations</u> <u>4th Q</u> <u>2007</u>	<u>Violations</u> <u>2008</u>	<u>Total</u>
1	375	636	566	439	457	55	267	2795
2	589	1057	620	408	154	123	593	3544
3	260	660	1169	679	72	340	701	3881
Total	1224	2353	2355	1526	683	518	1561	10,220

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22 Defendants have continued to violate the 20 percent opacity limit identified in paragraph 35 since
23 April of 2008.

24 37. Attachment B to the Notice of Intent to Sue provided Defendants notice of each
25 separate opacity violation between July 2006 and April 2008 (inclusive) at Martin Lake, including
26 the date and time of each violation.

27 38. In calculating the number of opacity violations at Martin Lake, Plaintiff
28 conservatively excepted one opacity violation per hour, under the conservative assumption that the

1 reason for the excess emissions could fall under one of the allowable exceptions specified at 30 Tex.
2 Admin. Code section 111.111(a)(1)(E).

3 39. As provided at 42 U.S.C. section 7604(a), 40 C.F.R section 19.4 and 42 U.S.C.
4 section 7413(d)(1) and the Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as
5 amended by 31 U.S.C. § 3701, the violations set forth above subject Defendants to injunctive relief
6 and civil penalties of up to \$32,500 per day for each violation of the opacity standard identified in
7 Paragraph 35 that has occurred since July 2, 2006.

8
9 **VI. SECOND CLAIM FOR RELIEF**

10 (Title V Federal Operating Permit and SIP Violations at Martin Lake Plant, Unit Nos. 1, 2, 3 –
11 Exceeding Maximum Allowable Heat Input Rate)

12 40. Plaintiff re-alleges and incorporates the allegations set forth in Paragraphs 1- 39.

13 41. Martin Lake routinely exceeds the 8,530 MMBTU/hr heat input limit for each of its
14 three units, and operation above this limit constitutes a violation of Permit No. 933 (General
15 Condition 1), Title V Federal Operating Permit No. O53, and 30 Tex. Admin. Code section 116.116,
16 a requirement of the Texas SIP. 68 Fed. Reg. 64,543 (Nov. 14, 2003).

17 42. Each of these alleged violations was identified in Attachment C to the Notice of
18 Intent to Sue..

19 43. At various times since July 2006, Defendants have exceeded and continue to exceed
20 the 8,530 MMBTU/hr heat input limit at Martin Lake Units 1, 2, and 3 in violation of the Texas SIP,
21 30 Tex. Admin. Code § 111.111(a)(1)(B), Defendants’ Title V Federal Operating Permit, Section
22 502(a) of the Act, 42 U.S.C. § 7661(a), and Texas regulations governing the federal operating
23 permits program, 30 Tex. Admin. Code § 122.143(4).

24 **VII. PRAYER FOR RELIEF**

25 WHEREFORE, based upon the allegations set for above, Plaintiff respectfully requests that this
26 Court:

- 27 A. Declare that the Defendants have violated the Clean Air Act, have violated the
28 relevant provisions of the Texas SIP, and have violated their Title V permit by

1 failing to comply with the opacity limits and heat input limits mandated
2 therein;

3 B. Enjoin Defendants preliminarily and permanently from operating the Martin
4 Lake Power Plant, except in accordance with a compliance schedule that will
5 cause the plant to attain the standards of the State SIP, the plant's air quality
6 permit and its Title V permit in a timely manner;

7 C. Order Defendants to take other appropriate actions, including beneficial
8 mitigation projects authorized under the Clean Air Act, 42 U.S.C. §
9 7604(g)(2), to remedy, mitigate, and offset the harm to the public health and
10 the environment caused by the violations of the Clean Air Act alleged above;

11 D. Assess a civil penalty against Defendants of \$32,500 per day, for each
12 violation proven by Plaintiff; Award Plaintiff its costs and attorneys fees
13 related to this action;

14 E. Grant such other relief as the Court deems just and proper.

15 Respectfully submitted,

16 DATED: September 2, 2010

17 SMITH WEBER, L.L.P.
18 5505 Plaza Drive
19 Post Office Box 6167
20 Texarkana, Texas 75503/75505
21 Tel: 903-223-5656
22 Fax: 903-223-5652
23 Email: bweber@smithweber.com

24 By:

25 _____
26 Robert W. Weber
27 State of Texas Bar No. 21044800

28 C. David Glass
State of Texas Bar No. 24036642

Counsel for Plaintiff