

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

Public Citizen and the Sierra Club

(b) County of Residence of First Listed Plaintiff Travis County
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)

David Frederick and Seth Cohen, Lowerre & Frederick
44 East Avenue, Suite 100 Austin, Texas 78701

DEFENDANTS

American Electric Power Company, Inc. and Southwestern Electric Power Company, Inc.

County of Residence of First Listed Defendant _____
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

Attorneys (If Known)

Timothy K. Webster, Sidley Austin Brown & Wood, LLP
1501 K. Street, N.W. Washington, D.C. 20005

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff
- 2 U.S. Government Defendant
- 3 Federal Question (U.S. Government Not a Party)
- 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | | | | | |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury PERSONAL INJURY <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input checked="" type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS		
<input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	<input type="checkbox"/> 510 Motions to Vacate Sentence Habeas Corpus: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition		

V. ORIGIN

(Place an "X" in One Box Only)

- 1 Original Proceeding
- 2 Removed from State Court
- 3 Remanded from Appellate Court
- 4 Reinstated or Reopened
- 5 Transferred from another district (specify)
- 6 Multidistrict Litigation
- 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
Clean Air Act, 42 U.S.C. section 7401 et seq.

Brief description of cause:
Citizen suit to enforce violations of requirements under the Clean Air Act at Defendants' Welsh Power Plant.

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION DEMAND \$ _____
UNDER F.R.C.P. 23 Injunctive Relief and civil penalties CHECK YES only if demanded in complaint:
JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE _____

DOCKET NUMBER _____

DATE

03/09/2005

SIGNATURE OF ATTORNEY OF RECORD

David Frederick

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

Particulate Matter (“PM”) and Carbon Monoxide (“CO”) from the Welsh Plant at levels that violate the emissions limits established in the permits issued to Defendants pursuant to the Act. Defendants’ emissions at the Welsh Plant also violate opacity limitations set forth under the Act. Finally, Defendants made changes to the manner of operation of the Welsh Plant without first obtaining appropriate permits authorizing such changes and without installing and employing the best available control technology to control emissions of CO and PM, as the Act requires.

II. JURISDICTION AND VENUE

3. This court has subject matter jurisdiction under the Federal Clean Air, 42 U.S.C. § 7604 (citizen suit provision of the Clean Air Act), and 28 U.S.C. § 1331 (federal question jurisdiction). The relief requested is authorized pursuant to 42 U.S.C. § 7604 and 28 U.S.C. §§ 2201 and 2202.

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

5. In compliance with 42 U.S.C. §7604(b)(1)(A), on July 13, 2004, Plaintiffs notified in writing the Administrator of the EPA, the Governor of Texas, the Texas Commission on Environmental Quality (“TCEQ”) and Defendants, American Electric Power (“AEP”) and Southwestern Electric Power Company (“SWEPCO”), of the violations alleged in this complaint and of Plaintiffs’ intent to sue. More than sixty days have passed since this notice was served by U.S. mail. AEP and SWEPCO have violated and remain in violation of the Act. Neither EPA nor TCEQ has commenced and diligently prosecuted a court action to redress these violations.

6. A copy of this Complaint, pursuant to 42 U.S.C. § 7604 (c)(3), is being served simultaneously upon the Attorney General of the United States and the EPA Administrator.

III. PARTIES

7. Plaintiff Sierra Club was founded in 1872 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 Sierra Club has over 700,000 members, 23,000 of whom reside in Texas and belong to the Sierra Club's Lone Star Chapter. 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.

8. Plaintiff Public Citizen is a nonprofit membership organization founded in 1971 that advocates on behalf of the public interest on issues including clean, safe, and sustainable energy sources and strong environmental protections to protect public health. Public Citizen has 160,000 members nationwide and approximately 3,500 members in Texas.

9. Members of the Sierra Club and Public Citizen use the resources of the East Texas airshed most immediately impacted by Defendants' violations of the Act. Members reside, visit, work and recreate near the Welsh Plant and are exposed to the Welsh Plant's emissions at various times of the year. The aesthetic, recreational, environmental, spiritual, economic, and health-related interests of Plaintiffs' members have been injured by Defendants' illegal and excessive emissions of pollutants from the Welsh plant into eastern Texas air. Interests of Plaintiffs' members that are directly injured by Defendants' excessive and illegal discharges of pollutants from the Welsh Plant include, but are not limited to: (1) breathing air in eastern Texas free from Defendants' excessive pollution discharges, and without the negative health effects—and concern about those effects—that such discharges cause; (2) enjoying outdoor recreation that is unimpaired by pollution from Welsh's excessive emissions; (3) using and enjoying property, and viewing and enjoying natural scenery, wildlife and a sky that is unimpaired by pollution

from Welsh's excessive emissions; (4) protecting the natural ecology of the region from air pollution-related impacts; and (5) enjoying the right to adherence by regulated entities to clean air laws in a region where members live and work.

10. Neither the Sierra Club nor Public Citizen seeks recovery of damages for any of their members through this litigation.

11. Defendant American Electric Power Company, Inc. ("AEP"), a New York Corporation based in Columbus, Ohio, is the largest electricity generator in the United States. AEP directly or through wholly owned subsidiaries owns and operates approximately 80 power plants, more than 50 of which are coal-fired power plants. AEP has a nationwide generating capacity of 36,000 megawatts. AEP is also among the largest electric utilities in the United States, serving more than five million customers through its 11-state electricity transmission and distribution grid. AEP reported 2003 revenues of \$14.5 billion. In August of 2004, in response to shareholder concerns, AEP issued a report on the actions it is taking to mitigate the economic impact of emission reduction requirements. AEP owns and operates the Welsh Plant through its wholly owned subsidiary, Southwestern Electric Power Company ("SWEPCO").

12. Defendant SWEPCO owns and operates the Welsh Power Plant. SWEPCO is an electric utility headquartered in Shreveport, Louisiana, that serves 439,000 customers in eastern Texas and in Louisiana and Arkansas. Prior to June 15, 2000, SWEPCO was a subsidiary of Central and South West Corporation ("CSW"). Effective June 15, 2000, AEP merged with CSW, and SWEPCO became a wholly owned subsidiary of AEP.

IV. STATUTORY BACKGROUND

13. The Clean Air Act is designed to protect and enhance the quality of the nation's air, so as to promote the public health and welfare and the productive capacity of its population. Section 101(b) of the Act, 42 U.S.C. § 7401(b)(1).

14. The U.S. Environmental Protection Agency has established National Ambient Air Quality Standards ("NAAQS") to protect human health and the environment for seven "criteria pollutants," including carbon monoxide ("CO") and particulate matter ("PM"). 42 U.S.C. 7602(e); 40 C.F.R. part 50. An area that meets the NAAQS for a particular criteria pollutant is deemed to be in "attainment" for that pollutant. 42 U.S.C. § 7407(d). An area that does not meet the NAAQS is a "nonattainment" area. An area that cannot be classified due to insufficient data is "unclassifiable," a designation that allows an area to be treated for regulatory purposes as though it were an attainment area for the particular criteria pollutant in question.

15. Pursuant to 42 U.S.C. § 7410, each State must adopt and submit to EPA for approval a State Implementation Plan ("SIP") that provides for the attainment and maintenance of the NAAQS. Once a State's SIP is approved by EPA, it is published in the Code of Federal Regulations and can be enforced by the state, EPA or citizens.

16. At times relevant to this complaint, Defendants' Welsh Plant has been located in an area that has been classified as attainment or unclassified for CO and PM.

Prevention of Significant Deterioration

17. Part C of the Act, 42 U.S.C. §§ 7470-7492, sets forth requirements for the prevention of significant deterioration ("PSD") of air quality in those areas designated as either attainment or unclassifiable for purposes of meeting the NAAQS. These requirements are designed to protect public health and welfare by maintaining continued compliance with NAAQS and ensuring that

economic growth will occur in a manner consistent with the preservation of existing acceptable air resources. The PSD requirements also ensure that any decision to permit increased air pollution is made only after careful evaluation of all the consequences of such a decision and after public participation in the decision making process. These provisions are referred to herein as the “PSD program.”

18. Under 42 U.S.C. § 7471, each state’s SIP must contain a PSD program. In 1992, after Texas incorporated by reference the PSD requirements of 40 C.F.R. § 52.21 into the Texas Administrative Code, EPA promulgated federal regulations approving Texas’s PSD program. 57 Fed. Reg. 28093 (June 24, 1992, effective July 24, 1992), 40 C.F.R. §§ 52.2270(c)(73) and (102) and 52.2303.

19. Pursuant to its PSD program, Texas issues permits governing the operation of regulated facilities. Accordingly, as further described below, Texas imposed hourly limits on heat input and established maximum emission rates for specific pollutants at the Welsh Plant.

20. In addition, section 165(a) of the PSD provisions of the Act, 42 U.S.C. § 7475(a), prohibit the construction and operation of a “major emitting facility” in an area designated as attainment or unclassifiable, unless a permit has been issued that comports with the requirements of Section 165 and the facility employs the best available control technology (“BACT”)¹ for each pollutant subject to regulation under the Act that is emitted from the facility. Section 169(1) of the Act, 42 U.S.C. § 7479(1), designates as “major emitting facilities” fossil-fuel fired steam electric plants of more than two hundred and fifty million BTUs per hour heat input and that emit or have the potential to emit one hundred tons per year or more of any pollutant.

¹ BACT is not actually a requirement that any particular technology be employed. Rather, it is a specification that a particular level of emission control be obtained. Typically, BACT for a pollutant is stated in terms of pounds per hour and tons per year that may be emitted.

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

22. Applicable provisions in the federal PSD regulations incorporated by the Texas SIP have at all relevant times prohibited a major stationary source from constructing a major modification in an area designated as attainment without, among other things, first obtaining a PSD permit, undergoing a new BACT determination, and applying BACT pursuant to that determination for each relevant pollutant. The definitions contained in the PSD regulations incorporated into the Texas SIP for the PSD program have at all relevant times defined “major modification” to include “any physical change in or change in the method of operation of a major stationary source that would result in: a significant emissions increase [of specified pollutants] and a significant net emissions increase of that pollutant from the major stationary source.” 40 C.F.R. § 52.21(b)(2)(i). These regulations have at all relevant times defined “major stationary source” to include fossil fuel-fired steam electric plants of more than 250 million BTUs per hour heat input. 40 C.F.R. § 52.21(b)(1)(i). A significant emissions increase is defined as an increase in emissions of SO₂ or NO_x by more than 40 tons per year, an increase in emissions of particulate matter by more than 25 tons per year, or an increase in emissions of CO by more than 100 tons per year. 40 C.F.R. § 52.21(b)(23)(i).

Title V

23. Title V of the Act, 42 U.S.C. §§ 7661-7661f, establishes an operating permit program for certain sources, including “major sources.” The purpose of Title V is to ensure that all

“applicable requirements” for compliance with the Act, including PSD requirements, are collected in one place.²

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

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

V. THE WELSH PLANT

26. AEP, through its subsidiary, SWEPCO, owns and operates the Welsh Power Plant. The Welsh Power Plant is a coal-fired power plant located near Pittsburg, Texas, in Titus County. The Welsh Plant consists of three distinct coal-fired boiler units (Unit Nos. 1-3), which generate a total 1,650 megawatts of electric power. The three units at Welsh Plant became operational in 1977, 1980 and 1982, respectively.

27. At all times pertinent to this civil action, the Welsh Plant and each of its three units were a “major emitting facility” and a “major stationary source,” within the meaning of the Act and

² A facility’s operating requirements might be found in places in addition to its PSD permit. For example, state- or area-wide SIP provisions might apply to the facility, as might facility-specific compliance orders.

the PSD regulations in the Texas SIP. At all times pertinent to this civil action, the Welsh Plant was a “major source” within the meaning of Title V of the Act and the Texas Title V program regulations.

28. On September 10, 1998, the Texas Commission on Environmental Quality (“TCEQ”) (then, the Texas Natural Resource Conservation Commission) granted Defendants’ application for renewal of its PSD permit Nos. 4381 and PSD-TX-3, which permit governs operation of all three units at the Welsh Plant.³ Permit Nos. 4381 and PSD-TX-3 established special conditions as well as maximum allowable emission rates for specified pollutants from each of the three boiler units at the Welsh Plant. The PSD permit remains in effect until 2008.

VI. CLAIMS

FIRST CLAIM FOR RELIEF

(PSD and Title V Federal Operating Permit Violations at Welsh Plant, Unit Nos. 1, 2, 3 – Exceeding Maximum Allowable Heat Input Rate)

29. The Welsh PSD permit establishes a maximum heat (or energy) input rate of 5,156 million BTU per hour for each of the three boilers at the Welsh plant. (Attachment A, Special Conditions 2, 3 and 4.) This PSD requirement is also incorporated into the Welsh Title V permit. (Attachment B, Special Terms and Conditions 8 [2004 permit].) Defendants have operated one or more boilers in excess of the 5,156 million BTU per hour limit on numerous days between March of 2000 and the present. In fact, on many occasions over this time period, Defendants operated one or more boilers in excess of 6,000 million BTU per hour.

30. The PSD permit refers to 5,156 million BTU per hour as a “heat input limit,” and indicates that the emission limits for other pollutants are based on “firing at full load” at 5,156

million BTU per hour. In addition, the heat input limit of 5,156 million BTU per hour served as the basis for setting hourly emission limits of PM, CO, and NO_x established in the PSD permit. For example, the PSD permit establishes a maximum emission rate for PM at Unit No. 2 of 0.075 pounds per million BTU and a maximum PM emission of 387 pounds per hour, which is achieved by multiplying the maximum emission rate for PM of 0.075 pounds per million BTU by the maximum heat rate of 5,156 million BTU per hour.

31. Internal and external communications from AEP show that AEP understood that it operated the Welsh Plant under the limitation on heat input rate established in the PSD permit. A June 8, 2001, email between AEP employees Kent B. Randall and Howard Ground discusses the need for an increased heat input limit and states, "If we ask for a [higher] permitted heat input number, will it have 'new source review' implications? What happens if we exceed the heat input number?" (Attachment C.) In an April 5, 2004, letter to the Texas Commission on Environmental Quality (TCEQ) accompanying AEP's application for renewal of the Title V Federal Operating Permit, Defendants state "[Welsh Plant boiler] units W-1, W-2, and W-3 are exceeding the heat inputs listed in condition 2, 3, and 4 of the permit PSD-TX-3/4381. Our corrective action plan is to submit a permit amendment to increase the allowable heat input." (Attachment D.) The Application Compliance Plan and Schedule attached to the April 5, 2004 letter and submitted by AEP to TCEQ as part of the application for renewal of the Welsh Plant's Title V permit also indicates noncompliance with the heat input limit at each of the three units at Welsh. (Attachment D.)

32. The TCEQ has also made clear to AEP that it operates the Welsh Plant under the heat input limitation established in the PSD permit. The TCEQ identified excessive heat input at

³ Permit no. 4381 is the "state" permit number. Prior to 1992, EPA issued PSD permits in Texas, and Texas had its own, mostly parallel, permitting program. The dual numbering system is mostly a vestige of this earlier time.

Welsh during a May 25, 2004, investigation of the Welsh Plant. In the report from that investigation, TCEQ investigators noted that the Welsh Plant's "permit states that the three boilers are limited to 5,156 million British Thermal Units per hour." (Attachment E, page 3.) As a result of the May 2004 investigation, TCEQ sent Defendants a July 19, 2004, Notice of Enforcement that alleges violations on hundreds of occasions for Defendants' "[f]ailure to maintain the maximum allowable firing rate below 5,156 Million British Thermal Units per hour" at each of the three units at the Welsh Plant. (Attachment F.)

33. EPA compiles and publishes on the Internet hourly data for heat input rates at regulated power generating facilities. This information is supplied to EPA by the utilities themselves. Attachment G to this complaint incorporates EPA's data on heat input rates at Welsh since 2000 into a table that shows the highest three-hour average heat input for Unit Nos. 2 and 3 for each day during a mid-winter and a mid-summer month—January and July—from mid-2000 to 2004. The table shows that Defendants routinely operated Unit Nos. 2 and 3 at the Welsh Plant in excess of the heat PSD permit heat input limit of 5,156 million BTU per hour. As the table indicates, Defendants regularly operated the Welsh units in excess of 6,000 million BTU per hour, a level that substantially exceeds the permit limit.

34. At all times indicated in the table in Attachment G, and at various other times beginning, for purposes of the present action, in March of 2000, Defendants have operated each of the three boiler units at the Welsh Plant at heat input rates in excess of 5,156 million BTU per hour, in violation of the Welsh PSD permit, the federally-approved PSD regulations in the Texas SIP, including 30 TAC § 116.115(c), the Welsh Title V Federal Operating Permit, Texas regulations governing the federal operating permits program, 30 TAC § 122.143(4), and Section

502(a) of the Act, 42 U.S.C. § 7661(a). Unless restrained by an order of this Court, similar violations will continue to occur.

35. As provided in 42 U.S.C. § 7604(a), 40 C.F.R. § 19.4; 40 U.S.C. § 7413(b), the violations set forth above subject Defendants to injunctive relief and civil penalties of up to \$27,500 per day for each violation that occurred before March 15, 2004, and \$32,500 per day for each violation that occurred after March 15, 2004, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by 31 U.S.C. § 3701.

SECOND CLAIM FOR RELIEF

(PSD and Title V Federal Operating Permit Violations at Welsh Plant Unit Nos. 1, 2 and 3 – Exceeding Maximum Allowable Emission Rates for Particulate Matter)

36. The Welsh PSD permit establishes maximum emission rates for Particulate Matter (PM) for each of the three boilers at the Welsh plant. Defendants have exceeded these limits on numerous occasions since March of 2000 at at least one unit according to emissions data, regardless of whether emissions are calculated using unit-specific PM emissions data or averages of PM emissions data for all three units at the Welsh Plant.

Permit Limits

37. Defendants' PSD permit establishes maximum allowable hourly emission rates for particulate matter (PM) for each of the three boiler units at the Welsh Plant. (Attachment A, MAER Table.) Those limits are incorporated by reference into Welsh's title V Federal Operating Permit. (Attachment B, Special Terms and Conditions 2 [1999 permit] and 8 [2004 permit].)

38. The Welsh PSD permit establishes maximum allowable PM emission rates of 0.1, 0.075 and 0.069 pounds per million BTU input for Unit Nos. 1, 2 and 3, respectively. Unit No. 1's

limit derives from the New Source Performance Standard for that category of source. The permit establishes the maximum hourly PM emission rate for each unit by multiplying each unit's PM rate by the maximum allowable heat input, which for each unit is 5,156 million BTU per hour. The Welsh PSD permit, accordingly, sets PM limits of 515.6, 387, and 358 pounds of PM per hour for Unit Nos. 1, 2 and 3, respectively.

PM Emission Rates at the Welsh Plant

39. Defendants conducted "stack tests" to determine the Welsh Plant's actual PM emission rates for each unit.⁴ An AEP facsimile to the Welsh Plant's Environmental Coordinator Jennifer Meyer from AEP/SWEPCO Air Quality Engineer Bill Wilson dated February 27, 2001 indicates various historical stack test results for each of Welsh's three units. (Attachment H.) For Welsh Unit No. 1, 1977 and 1978 stack tests indicated a PM emission rate of 0.08 and 0.0787 pounds per million BTU, respectively. Stack tests conducted in 1980 for Welsh Unit No. 2, and 1982 for Welsh Unit No. 3 yielded PM emission rates of 0.075 and 0.039 pounds per million BTU, respectively.

40. Defendants averaged the results from the 1977, 1978, 1980 and 1982 stack tests to arrive at an average PM emission rate of 0.0682 pounds per million BTU across all three units at the Welsh Plant. Defendants used this 0.0682 emission rate to calculate PM emissions in Defendants' 2002 Emissions' Inventory, and a March 6, 2003, e-mail from Russell Gedeon, SWEPCO Engineer to AEP/SWEPCO Air Quality Engineer Bill Wilson reflects the company's understanding that, indeed, .0682 pounds per million BTU was the units' PM emission rate. (Attachment I.) A February 26, 2001 e-mail from Mr. Wilson to Cecil Johnson refers to these stack tests, noting that, "the TNRCC rules require the use of stack tests for estimating emissions

⁴ Stack tests collect and weigh samples of PM emitted through the exhaust stack of a facility under certain theoretically routine operating conditions.

if stack test results are available – which they are at Welsh. Those tests were conducted by METCO and I have no reason to question the validity of those tests.” (Attachment J.)

41. For over 22 years, since 1982, Defendants refrained from conducting any further stack tests at the Welsh Plant. Defendants’ communications indicate a policy of avoiding additional stack tests based on concerns about generating incriminating results. A March 6, 2003, e-mail between Russell Gedeon, SWEPCO Engineer to AEP/SWEPCO Air Quality Engineer Bill Wilson, explains Defendants’ reluctance to conduct a new stack test, noting that “on a bad day (just prior to an ESP cleaning or six months after an ESP cleaning or bad coal quality) ... Welsh PM might possibly be higher than 0.0682lb/mmBtu,” and stating that Defendants “do not want to test until required.” (Attachment I.) After a May 2004 inspection by TCEQ, which inspection noted violations related to PM, and in the face of imminent enforcement action, Defendants conducted stack tests at the Welsh Plant in June of 2004 that resulted in a November 29, 2004 report on PM emissions. The validity of Defendants’ 2004 stack tests is subject to question. In any event, the June 2004 stack test resulted in total PM emission rates, measured in pounds per million BTU, of 0.0795, 0.0527, and 0.0706, for Unit Nos. 1, 2, and 3, respectively. These results represent an average PM emission rate of 0.0676 pounds per million BTU across all three Welsh units.

PM Violations

42. The table in Attachment G indicates that application of Defendants’ own plant-wide average emission rate for PM of 0.0682 pounds per million BTU to actual heat input rates yields almost daily PM violations since 2000 at Unit Nos. 2 and 3. For example, as indicated in the table in Attachment G, the heat input of 6185 million BTU at Unit No. 3 on July 19, 2002,

resulted in PM emissions of 421.8 pounds per hour, compared to a permit limit of 358 pounds per hour.

43. These violations can alternatively be demonstrated by applying the specific PM emission factors for each unit, which factors are reported per million BTU, by each unit's actual heat input, which is measured in millions of BTU per hour. As the table in Attachment K indicates, application of Unit No. 2's PM emission rate of 0.075 pounds per million BTU, as determined in the 1980 stack test, to actual heat input data yields almost daily PM violations from 2000 until the June 2004 stack test.

44. As established in the Texas SIP, PM violations must be determined using total particulate emissions (adding both the front and back halves of stack test measurements for PM), 30 TAC § 101.1(73), 40 C.F.R. § 52.2270(c), (re-approved by EPA at 62 Fed. Reg. 44083 (8/19/97), 65 Fed. Reg. 70792 (11/28/00) and 66 Fed. Reg. 57260 (11/14/01)). Accordingly, application of the average total PM emission rate for Unit No. 3 of 0.0706 (June 2004 stack test) yields almost daily PM violations at Unit No. 3 between June 2004 and the present. Less frequent violations occurred at Unit No. 1. Even if Defendants were to claim—contrary to the Texas SIP—that compliance with PM emissions limits should be determined based only on “filterable” particles (which includes only the “front-half” of stack test measurements for PM), this does not affect the almost daily PM violations at Unit No. 2 since 2000, because the 0.075 PM emission rate at Unit No. 2 was based only on “front-half” measurements of PM.

45. Based on the foregoing, at various times since March of 2000, Defendants' operation of Unit Nos. 1, 2, and 3 at the Welsh Plant has generated and continues to generate PM emissions that exceed the maximum allowable levels in violation of Defendants' PSD permit, applicable provisions of the Texas SIP (including 30 TAC §§ 116.115(b)(2)(F) and 116.115(c)),

Defendants' Title V Federal Operating Permit, 42 U.S.C. § 7661a(a), and Texas regulations governing the federal operating permits program, 30 TAC § 122.143(4).

46. As provided in 42 U.S.C. § 7604(a), 40 C.F.R. § 19.4; 40 U.S.C. § 7413(b), the violations set forth above subject Defendants to injunctive relief and civil penalties of up to \$27,500 per day for each violation that occurred before March 15, 2004, and \$32,500 per day for each violation that occurred after March 15, 2004, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by 31 U.S.C. § 3701.

THIRD CLAIM FOR RELIEF

(PSD and Title V Federal Operating Permit Violations
at Unit No. 2 of the Welsh Plant – Exceeding Maximum Allowable Rate for Carbon Monoxide)

47. The Welsh PSD permit establishes maximum emission rates for Carbon Monoxide (CO) for Unit No. 2 at the Welsh plant. (Attachment A.) This limit is incorporated into Defendants' Title V permit. (Attachment B.) Defendants have exceeded this limit on numerous occasions since March of 2000 at Unit No. 2.

48. Defendants' PSD permit establishes maximum allowable hourly emission rates for Carbon Monoxide (CO) for the Welsh Plant's Unit No. 2 of 0.085 pounds per million BTU. Based on the maximum allowable heat input for Unit No. 2 of 5,156 million BTU per hour, the PSD permit establishes a maximum CO emissions rate for Unit No. 2 of 438 pounds of CO per hour.

49. Based on information and belief, at various times since March of 2000, Defendants' operation of Welsh Plant's Unit No. 2 has generated and continues to generate excessive emissions of CO in violation of Defendants' PSD permit, Title V Federal Operating Permit, Section 502(a) of the Act, 42 U.S.C. § 7661a(a), and Texas regulations governing the federal operating permits program, 30 TAC § 122.143(4). Defendants' excessive CO emissions also

violate applicable provisions of the Texas SIP, including 30 TAC §§ 116.115(b)(2)(F) and 116.115(c).

50. As provided in 42 U.S.C. § 7604(a), 40 C.F.R. § 19.4; 40 U.S.C. § 7413(b), the violations set forth above subject Defendants to injunctive relief and civil penalties of up to \$27,500 per day for each violation that occurred before March 15, 2004, and \$32,500 per day for each violation that occurred after March 15, 2004, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by 31 U.S.C. § 3701.

FOURTH CLAIM FOR RELIEF

(Texas SIP and Title V Federal Operating Permit Violations – Exceeding Opacity Limits at Welsh Plant Unit Nos. 1, 2, 3)

51. According to the Texas SIP, opacity is defined as “the degree to which an emission of air contaminants obstructs the transmission of light expressed as the percentage to which the light is obstructed as measured by an optical instrument or trained observer.” Section 101.01, 40 C.F.R. § 52.2270(c).

52. Pursuant to the Texas SIP, visible emissions from any stationary vent shall not exceed 30 percent opacity averaged over a six-minute period. 40 C.F.R. § 52.2270(c), Section 111.111(a)(1)(A); 40 C.F.R. § 52.2299(c)(94).

53. Pursuant to the Texas SIP, visible emissions from any stationary vent shall not exceed 20 percent opacity averaged over a six-minute period for any source on which construction was begin after January 31, 1972. 40 C.F.R. § 52.2270(c), Section 111.111(a)(1)(B); 40 C.F.R. § 52.2299(c)(94).

54. Each of the three units at Welsh has a smoke stack that is a “stationary vent” within the meaning of the Texas SIP at 40 C.F.R. § 52.2270(c), Section 111.111(a)(1), and each of these stacks falls under the 20 percent opacity requirement.

55. At various times since March of 2000, Defendants have violated and continue to exceed the 20 percent and 30 percent opacity limits at Welsh Unit Nos. 1, 2, and 3 in violation of the Texas SIP, 30 TAC § 111.111(a)(1)(A) and (B), Defendants’ Title V Federal Operating Permit, Section 502(a) of the Act, 42 U.S.C. § 7661a(a), and Texas regulations governing the federal operating permits program, 30 TAC § 122.143(4).

56. As provided in 42 U.S.C. § 7604(a), 40 C.F.R. § 19.4; 40 U.S.C. § 7413(b), the violations set forth above subject Defendants to injunctive relief and civil penalties of up to \$27,500 per day for each violation that occurred before March 15, 2004, and \$32,500 per day for each violation that occurred after March 15, 2004, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by 31 U.S.C. § 3701.

FIFTH CLAIM FOR RELIEF

(PSD Violations at Welsh Plant – New Source Review, Unit Nos. 1, 2, 3)

57. At various times, Defendants commenced one or more major modifications, as defined in the Act, at the each of the three boiler units at the Welsh Plant. Defendants violated the Act by failing to comply with multiple requirements of the Act with respect to those major modifications.

58. Defendants’ modifications included changes in the method of operation at Welsh Unit Nos. 1, 2, and 3, including significant increases in the operational capacity or heat input rates as set forth, *supra*. These modifications resulted in significant net emissions increases, as defined by the relevant PSD regulations, of one or more of the following: SO₂, CO and PM.

59. Defendants did not comply with the PSD requirements in the Texas SIP with respect to the major modifications at the Welsh Unit Nos. 1, 2, and 3. Among other things, Defendants failed to obtain a PSD permit as required by 40 C.F.R. § 52.21 and 30 TAC Chapter 116, prior to commencing the major modifications at Welsh Unit Nos. 1, 2, and 3. Defendants did not undergo a new BACT determination in connection with these major modifications. Defendants failed to install and operate the best available control technology (“BACT”) for control for PM and CO, as applicable, pursuant to such determinations, as required by Texas law and the Act, 42 U.S.C. § 7475(a).

60. Defendants have violated and continue to violate Section 165(a) of the Act, 42 U.S.C. § 7475 (a), and the applicable PSD provisions of the Texas SIP, including 30 TAC § 116.160, at Welsh Unit Nos. 1, 2, and 3. Unless restrained by an order of this Court, these and similar violations of the Act will continue.

61. As provided in 42 U.S.C. § 7604(a), 40 C.F.R. § 19.4; 40 U.S.C. § 7413(b), the violations set forth above subject Defendants to injunctive relief and civil penalties of up to \$27,500 per day for each violation that occurred before March 15, 2004, and \$32,500 per day for each violation that occurred after March 15, 2004, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by 31 U.S.C. § 3701.

VI. PRAYER FOR RELIEF

WHEREFORE, based upon all the allegations set forth above, Plaintiffs request that this Court:

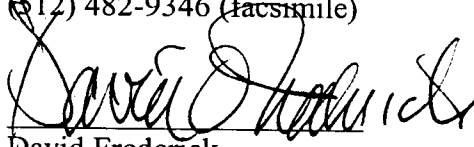
1. Permanently enjoin Defendants from operating the Welsh Plant, except in accordance a compliance schedule that will cause the plant to attain in a timely manner the standards of the Clean Air Act and applicable regulatory requirements;

2. Order Defendants, among other things, to install and operate, as appropriate, the best available control technology at the Welsh Plant for each pollutant subject to regulation under the Clean Air Act;
3. Order Defendants to take other appropriate actions to remedy, mitigate, and offset the harm to the public health and the environment caused by the violations of the Clean Air Act alleged above;
4. Order Defendants to apply for permits that are in conformity with the requirements of the PSD and Title V programs;
5. Assess a civil penalty against Defendant of \$27,500 or, as appropriate, \$32,500 per day, for each violation of the Clean Air Act and applicable regulations;
6. Award Plaintiffs their costs and fees related to this action; and
7. Grant such other relief as the Court deems just and proper.

Dated for filing: March 9, 2005

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By:


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Citizen and the Sierra Club

INDEX OF ATTACHMENTS

Attachment A	Welsh 1998 PSD Permit: PSD-TX-3
Attachment B	Welsh 1999 and 2004 Title V Federal Operating Permits No. O-00026 (excerpts)
Attachment C	June 8, 2001 e-mail: K. Randall to H. Ground
Attachment D	April 5, 2004 letter and Title V renewal application (excerpt) from AEP to TCEQ
Attachment E	TCEQ Report from May 25, 2004 Investigation (excerpt)
Attachment F	July 19, 2004 TCEQ Notice of Enforcement (excerpt)
Attachment G	Table of Actual Heat Input Rates at Welsh Plant Unit Nos. 2 and 3
Attachment H	February 27, 2001 Facsimile from B. Wilson to J. Meyer (stack test data, 1977-1982)
Attachment I	March 6, 2003 e-mail: R. Gedeon to B. Wilson
Attachment J	February 26, 2001 memo: B. Wilson to C. Johnson
Attachment K	Table of PM Emissions – Unit No. 2 emissions at the Unit No. 2 (only) rate