

19<sup>TH</sup> JUDICIAL DISTRICT COURT  
PARISH OF EAST BATON ROUGE  
STATE OF LOUISIANA

SIERRA CLUB, ALLIANCE FOR AFFORDABLE ENERGY, LOUISIANA ENVIRONMENTAL ACTION NETWORK, and O'Neil Couvillion, Petitioners,	*	NUMBER ____
v.	*	DIV. " __ "
LOUISIANA DEPARTMENT OF ENVIRONMENTAL QUALITY, Defendant.	*	JUDGE _____
In the Matter of: Louisiana Generating, LLC, Big Cajun I Power Plant Part 70/Title V Air Permit No. 2260-00007-V2	*	

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**PETITION FOR JUDICIAL REVIEW**

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1. Sierra Club, the Louisiana Environmental Action Network (“LEAN”), Alliance for Affordable Energy, and O’Neil Couvillion appeal Louisiana Department of Environmental Quality’s (“LDEQ”) final permit decision to issue a modified Part 70/Title V air operating permit No. 2260-00007-V2 (the “Permit”) to Louisiana Generating, LLC for the Big Cajun I petroleum coke/coal-fired power plant (the “Plant”) in Jarreau, Pointe Coupee Parish, Louisiana. LDEQ sent notice of this permit decision to Petitioners on September 23, 2009 (post-marked date).
2. LDEQ’s decision is illegal because it allows the Plant to emit excessive levels of hazardous air pollutants. The limits set in the Permit for the Plant’s hazardous air pollutants, including, but not limited to, mercury, hydrochloric acid, and hydrofluoric acid emissions do not meet the “maximum achievable control technology” (“MACT”) requirements of state air regulations, La. Admin. Code, tit. 33, pt. III, § 551, and Clean Air Act § 112.

**PARTIES**

3. Sierra Club, LEAN, Alliance for Affordable Energy, and Mr. Couvillion are persons aggrieved by LDEQ’s final permit decision in this matter.
4. Sierra Club is a national advocacy group and one of the oldest conservation groups in the country. Sierra Club has over 700,000 members nationally and approximately 2,800 members in the state of Louisiana, roughly 600 of whom reside near Baton Rouge. Sierra

Club's primary purpose is to preserve and protect the natural environment of Louisiana and the nation.

5. The Plant's emissions of air pollutants will impair Sierra Club's interest in fostering vibrant, healthy communities in Louisiana and elsewhere in the nation with clean air and water.

6. Alliance for Affordable Energy is a non-profit, public interest, membership organization that serves Louisiana's 1.8 million electric and gas ratepayers by promoting citizen participation in the decision-making process, conducting community education campaigns on energy issues, helping citizens and businesses become more energy efficient, and promoting environmentally responsible energy decisions.

7. LDEQ's permit decision allows emissions of air pollutants from the Plant that will directly harm Alliance for Affordable Energy's interest in environmentally responsible, community-based energy policies for Louisiana and the nation.

8. LEAN is a nonprofit corporation whose purpose is to preserve and protect Louisiana's land, air, water, and other natural resources, and to protect its members and other residents of the state from threats of pollution.

9. Members of Sierra Club, LEAN, and the Alliance for Affordable Energy live near and enjoy the environment near the Plant. The members of Sierra Club, LEAN, and Alliance for Affordable Energy and are concerned that the pollutants the Permit illegally authorizes Louisiana Generating to emit from the Plant will threaten their health, and impair their use and enjoyment of the areas affected by the Plant's emissions.

10. Mr. Couvillion is an individual member of LEAN who lives and recreates in Baton Rouge, which is approximately 20 miles from the Plant. Mr. Couvillion is concerned that the pollutants the Permit illegally authorizes Louisiana Generating to emit from the Plant will threaten his health, and impair his use and enjoyment of his community and other areas affected by the Plant's emissions.

11. LDEQ is an agency of the State of Louisiana with the power to sue and be sued; LDEQ made the final permit action in this matter.

## **JURISDICTION AND VENUE**

12. Jurisdiction and venue are proper in this Court pursuant to La. R. S. § 30:2050.21.A.

## **DETAILED ALLEGATIONS**

### **MACT Laws and Regulations**

13. Congress has subjected the emission of hazardous air pollutants to pollution control standards under the Clean Air Act—known as “Maximum Achievable Control Technology” or “MACT” standards—because these pollutants cause serious health effects such as cancer, birth defects, and brain damage. CAA § 112, 42 U.S.C. § 7412(b).

14. Louisiana laws implementing MACT regulations command: “No person may begin actual construction or reconstruction of a major source of hazardous air pollutants . . . unless the owner or operator obtains or revises a permit issued in accordance with Louisiana’s Part 70 Program” codified under La. Admin. Code tit. 33, pt. III § 551. La. Admin. Code, tit. 33, pt. III, § 551.D.1.

15. Permits issued pursuant to Louisiana’s Part 70 Program, La. Admin. Code tit. 33, pt. III § 507, “shall comply with any federally applicable requirement, as defined in LAC 33:III.502, established under the federal Clean Air Act as amended or promulgated by the administrator pursuant to the federal Clean Air Act as amended.” La. Admin. Code tit. 33, pt. III § 501.C.5; *see also* La. Admin. Code tit. 33, pt. III § 501.A.1 (applying these permit procedures and requirements to any “major source” as defined by § 502.A).

16. “Federally applicable requirement,” as defined by La. Admin. Code tit. 33, pt. III, § 502, includes “any standard or other requirement under Section 112 (Hazardous Air Pollutants) of the Clean Air Act.”

17. Louisiana MACT regulations provide that where the major source is not specifically regulated pursuant to a nationally applicable MACT standards for the source category, “No person may begin actual construction or reconstruction of a major source of hazardous air pollutants . . . unless . . . the [LDEQ] has made a final and effective case-by-case determination in accordance with the provisions of this Section such that emissions from the

affected source will be controlled to a level no less stringent than the MACT emission limitation for new sources.” La. Admin. Code, tit. 33, pt. III, § 551.D.1.a; *see also* § 551.D.1.b.

18. The Clean Air Act forbids construction of a major source of hazardous air pollutants unless the owner or operator obtains a MACT determination from the regulating authority for every hazardous air pollutant that the source will emit. *See Nat’l Lime Ass’n v. EPA*, 233 F.3d 625, 634 (D.C. Cir. 2000) (noting the “clear statutory obligation to set emission standards for each listed HAP”).

19. Hazardous air pollutants are “any air pollutants listed in or pursuant to Section 112(b) of the Clean Air Act.” La. Admin. Code, tit. 33, pt. III, § 551.B.

20. The hazardous air pollutants listed pursuant to § 112(b) of the Act are pollutants “which present, or may present, through inhalation or other routes of exposure, a threat of adverse human health effects (including, but not limited to, substances which are known to be, or may reasonably be anticipated to be, carcinogenic, mutagenic, teratogenic, neurotoxic, which cause reproductive dysfunction, or which are acutely or chronically toxic) or adverse environmental effects whether through ambient concentrations, bioaccumulation, deposition, or otherwise.” 42 U.S.C. § 7412(b)(2).

21. Mercury, hydrochloric acid, and hydrofluoric acid are included on the list of hazardous air pollutants under section 112(b) of the Act.

22. La. Admin. Code, tit. 33, pt. III, § 551.B defines “Maximum Achievable Control Technology” as “the emission limitation that is not less stringent than the emission limitation achieved in practice by the best controlled similar source and that reflects the maximum degree of reduction in emissions that the department, taking into consideration the cost of achieving such emission reduction and any non-air quality health and environmental impacts and energy requirements, determines is achievable by the constructed or reconstructed major source.” La. Admin. Code, tit. 33, pt. III, § 551.B; *see also* 42 U.S.C. § 7412(d)(2)-(3).

23. The definition of “similar source” is: “[A] stationary source or process that has comparable emissions and is structurally similar in design and capacity to a constructed or reconstructed major source such that the source could be controlled using the same control technology.” La. Admin. Code, tit. 33, pt. III, § 551.B; 40 C.F.R. § 63.41 (same).

24. When making its case-by-case MACT determination, LDEQ shall not issue MACT emission limitations that are “less stringent than the emission control that is achieved in practice by the best controlled similar source as determined by [LDEQ].” La. Admin. Code, tit. 33, pt. III, § 551.E.1.

25. The MACT emission limitation and control technology approved by LDEQ when making its case-by-case MACT determination “shall achieve the maximum degree of reduction in emissions of hazardous air pollutants that can be achieved by utilizing those control technologies that can be identified from the available information, taking into consideration the costs of achieving such emission reduction, any non-air quality health and environmental impacts, and energy requirements associated with the emission reduction.” La. Admin. Code, tit. 33, pt. III, § 551.E.2.

26. The Clean Air Act defines MACT to include “measures which . . . reduce the volume of, or eliminate emissions of, such pollutants through process changes, substitution of materials or other modifications . . . .” 42 U.S.C. § 7412(d)(2)(A).

27. The Clean Air Act defines “emission limitation” as “a requirement established by the State or the Administrator which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction, and any design, equipment, work practice or operational standard promulgated under this chapter.” 42 U.S.C. § 7602(k).

28. The Clean Air Act requires a continuous compliance standard under §§ 112 and 302(k) of the Act for covered sources, including during times of startup, shutdown, and malfunction. *Sierra Club v. EPA*, 551 F.3d 1019 (D.C. Cir. 2008).

29. MACT emission limits must apply at all times, even during periods of startup, shutdown, and malfunctions of emitting units. *Sierra Club v. EPA*, 551 F.3d 1019 (D.C. Cir. 2008).

*LDEQ’s Failure to Apply MACT Laws and Regulations*

30. Louisiana Generating plans to construct a circulating fluidized bed (CFB) boiler at the Plant, making the Plant a new major source of hazardous air pollutants as defined by La. Admin. Code tit. 33, pt. III § 502.A and Clean Air Act § 112, 42 U.S.C. 7412(a)(1).

31. Louisiana Generating must obtain a permit for the Plant that meets the requirements of La. Admin. Code, tit. 33, pt. III, § 551 and Clean Air Act § 112(g).

32. LDEQ must conduct a case-by-case MACT determination for the hazardous air pollutants the Plant's CFB Boiler will emit in accordance with La. Admin. Code, tit. 33, pt. III, § 551 and Clean Air Act § 112(g).

33. The Plant's CFB Boiler will emit mercury, hydrofluoric acid, and hydrochloric acid, among other hazardous air pollutants.

34. The Permit contains the following emission limitations for the mercury emissions from the Plant's CFB Boiler:

0.008 lb/GWh 12 month rolling average when burning bituminous coal

0.003 lb/GWh 12 month rolling average when burning petroleum coke

0.005 lb/GWh 12 month rolling average when burning subbituminous coal

35. The Permit contains an emission limitation of 0.00035 lb/MMBTU for hydrochloric acid from the Plant's CFB Boiler.

36. The Permit contains an emission limitation of 0.000044 lb/MMBTU for hydrofluoric acid from the Plant's CFB Boiler.

37. LDEQ identified, or the administrative record of the Permit decision otherwise shows LDEQ was aware of, "similar sources" to the Plant's CFB Boiler that achieve in practice lower emission limits for mercury, hydrochloric acid, and hydrofluoric acid.

38. The emission limitations set by LDEQ in the Permit for the hazardous air pollutants from the Plant's CFB Boiler, including but not limited to, mercury, hydrochloric acid, and hydrofluoric acid, are "less stringent than the emission control that is achieved in practice by the best controlled similar source."

39. LDEQ's decision to set three separate limitations for mercury emissions for each fuel type the CFB Boiler will burn is illegal because La. Admin. Code, tit. 33, pt. III, § 551 and Clean Air Act § 112 prohibit LDEQ from issuing a MACT emission limitation that is "less stringent than the emission control that is achieved in practice by the best controlled similar source."

40. LDEQ's decision to set three separate limitations for mercury emissions for each fuel type the CFB Boiler will burn is illegal because the emissions limitations do not offer a constant or continuous means of reducing emissions as required under the Clean Air Act. 42 U.S.C. § 7602(k).

41. The Permit fails to include an emission limitation for each hazardous air pollutant the Plant would emit from the CFB Boiler and for all periods including startup, shutdown, and malfunction periods of the emitting unit.

#### **ASSIGNMENTS OF ERROR**

42. LDEQ's issuance of the modified permit violates the Louisiana Environmental Quality Act and the Clean Air Act.

43. LDEQ's issuance of the modified permit violates constitutional, statutory, or regulatory provisions, is in excess of statutory authority, is affected by error of law, is arbitrary or capricious, and is not supported and sustainable by a preponderance of evidence. La. Rev. Stat. § 49:964(G).

#### **DESIGNATION OF RECORD FOR APPEAL**

44. Petitioners designate the following as the record on appeal in this matter: the entire public record regarding the Permit that exists as of the date of the filing of this Petition for Judicial Review, including but not limited to the proposed permit and application materials, the final permits, basis of decision, comments regarding the Permit, and LDEQ's responses to comments.

#### **REQUEST FOR STAY**

45. Pursuant to La. R.S. 30:2050.22(B), Petitioners request that this Court grant a stay of the effectiveness of the Permit, pending the resolution of this appeal for the following reasons:

(a) LDEQ's decision allows illegal emissions of hazardous air pollutants "which present, or may present, through inhalation or other routes of exposure, a threat of adverse human health effects (including, but not limited to, substances which are known to be, or may reasonably be anticipated to be, carcinogenic, mutagenic, teratogenic, neurotoxic, which cause reproductive dysfunction, or which are acutely or chronically toxic) or adverse environmental effects whether

through ambient concentrations, bioaccumulation, deposition, or otherwise.” 42 U.S.C. § 7412(b)(2);

(b) The illegal emissions of hazardous air pollutants that the Permit allow will expose Petitioner Mr. Couvillion, and members of Sierra Club, LEAN, and Alliance for Affordable Energy who live, recreate or work in areas affected by the Plant’s illegal emissions, to the threat of harmful health effects associated with these emissions;

(c) The illegal emissions of hazardous air pollutants that the Permit allow will diminish Petitioner Mr. Couvillion’s, and members of Sierra Club, LEAN, and Alliance for Affordable Energy who live, recreate or work in areas affected by the Plant’s illegal emissions, enjoyment of the area due to the threats of environmental harm associated with the emissions;

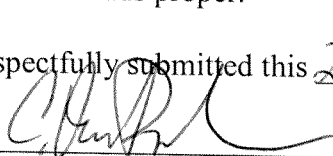
(d) “Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e. irreparable.” *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987).

**PRAYER FOR RELIEF**

**WHEREFORE**, Petitioners Sierra Club, LEAN, Alliance for Affordable Energy, and Mr. Couvillion respectfully request that this Court:

- a. Vacate the Permit, and remand the matter to LDEQ;
- b. Stay the effectiveness of the Permit pending final resolution of this appeal; and
- c. Award all other relief the Court finds proper.

Respectfully submitted this <sup>23<sup>rd</sup></sup> day of October, 2009,



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DIV. " \_\_\_ "

JUDGE \_\_\_\_\_

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**ORDER**

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The Court received the Petition for Judicial Review appealing the Louisiana Department of Environmental Quality's permits that Petitioners Sierra Club, LEAN, the Alliance, and O'Neil Couvillion filed with this Court on October 23, 2009.

The record designated by the Petitioners shall be compiled and forwarded to the 19th Judicial District Court, and the appeal shall be returnable to the 19th Judicial Court on or before the \_\_\_ day of \_\_\_\_\_, 2009.

Additionally, the Court stays the effectiveness Air Permit No. 2260-00007-V2 that is the subject of this appeal pending final resolution of this matter.

Baton Rouge, Louisiana, this \_\_\_ day of \_\_\_\_\_, 2009.

\_\_\_\_\_  
DISTRICT JUDGE  
NINETEENTH JUDICIAL DISTRICT COURT