

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

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STATE OF NEW JERSEY, :
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 : Civil Action No. 2:11-cv-00019
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 Plaintiff, :
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 : District Judge: Terrence F. McVerry
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 v. :
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 : Electronically Filed
 :
 EME HOMER CITY GENERATION, L.P., :
 HOMER CITY OL1 LLC, HOMER CITY :
 OL2 LLC, HOMER CITY OL3 LLC, HOMER :
 CITY OL4 LLC, HOMER CITY OL5 LLC, :
 HOMER CITY OL6 LLC, HOMER CITY :
 OL7 LLC, HOMER CITY OL8 LLC, :
 NEW YORK STATE ELECTRIC :
 & GAS CORP., PENNSYLVANIA :
 ELECTRIC ENERGY CO., CHESTNUT RIDGE :
 CO., and MISSION ENERGY WESTSIDE, INC., :
 :
 Defendants. :
 :
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NATURE OF THE ACTION

1. The State of New Jersey (“New Jersey”), represented by the Office of the Attorney General, commences this civil action against EME Homer City Generation L.P. (“EME Homer City”); Homer City OL1 LLC, Homer City OL2 LLC, Homer City OL3 LLC, Homer City OL4 LLC, Homer City OL5 LLC, Homer City OL6 LLC, Homer City OL7 LLC, Homer City OL8 LLC (together “Homer City OL1-OL8”); Pennsylvania Electric Company (“PenElec”); and New York State Electric & Gas Corporation (“NYSEG”); (collectively referred to as “Defendants”) for violations of the Clean Air Act (“Act” or “CAA”), 42 U.S.C. § 7401 et seq., at Homer City Generating Station, a coal-fired power plant located in Indiana County at 1750 Power Plant Road, Homer City, Pennsylvania, (the “Plant”).

2. New Jersey alleges that Defendants PenElec and NYSEG modified the Plant without first obtaining the required preconstruction permits or installing the necessary pollution controls, and all Defendants subsequently owned and/or operated the modified Plant without limiting its emissions of sulfur dioxide (“SO₂”) emissions. As set forth below, through these actions, Defendants have violated the Prevention of Significant Deterioration (“PSD”) and Title V Operating Permit provisions of the Act.

3. Upon information and belief, from 2007-2009 the average emissions of SO₂ from Units 1 and 2 of the Plant (combined) were 104,334 tons per year. A July 2007 report by the Environmental Integrity Project, “Dirty Kilowatts: America’s Most Polluting Power Plants,” ranks Homer City as one of the top 50 polluting plants in terms of emission rate and overall tons of SO₂ emitted in 2006. According to this report, the Plant emitted approximately 106,772 tons of SO₂ in 2006, and was ranked 9th in overall emissions of SO₂ of the largest plants (378 total) nationwide. See [www.dirtykilowatts.org/Dirty Kilowatts2007.pdf](http://www.dirtykilowatts.org/Dirty%20Kilowatts2007.pdf).

4. Emissions of SO₂ from the Plant lead to the creation of fine particulate matter in Pennsylvania that is transported by the prevailing winds to states such as New Jersey located downwind. Inhalation of fine particulate matter causes respiratory distress, cardiovascular disease, and premature mortality. A recent study by the Clean Air Task Force dated September 2010 ranked New Jersey as tenth in the nation in the number of premature deaths, eighth in hospital admissions, and sixth in heart attacks attributable to fine particle pollution from power plants (the study ranked Pennsylvania as first in all three categories). See www.catf.us. Fine particles are also toxic to aquatic life and vegetation.

5. SO₂ emissions from the Plant also contribute to the formation of acid deposition, which has caused the acidification of hundreds of lakes, streams and ponds in certain parts of the Plaintiff

State. For example, over ninety percent (90%) of the streams in the New Jersey Pine Barrens are acidic (i.e. corresponding to a pH of 6.0 or lower, a level at which many fish can no longer survive). See http://www.epa.gov/acidrain/effects/surface_water.html.

6. The Clean Air Act also affords special protections to areas classified as federal “Class I” areas such as national parks and wilderness areas. See, e.g., 42 U.S.C. §§ 7473(b)(1) and 7475(d). Congress has declared visibility impairment prevention a national goal in federal Class I areas. See, e.g., 42 U.S.C. §§ 7491-7492. Sulfates resulting from power plant emissions contribute to impaired visibility, negatively impacting Class I areas, including the Edwin B. Forsythe National Wildlife Refuge in New Jersey. The Brigantine Wilderness Area is a part of the Edwin B. Forsythe National Wildlife Refuge. The Community Modeling of Air Quality evaluation conducted by the States of Maryland and Vermont demonstrates that Units 1 and 2 of the Plant rank 38th and 92nd, respectively, in the list of the top 100 power plant units that contribute to sulfate emissions at the Brigantine Wilderness Area. See Mark Garrison, Dan Riley and Paul Wishinski, *Development of Parallel CALPUFF Dispersion Modeling Platforms for Sulfate Source Attribution Studies in the Northeast U.S.* (2006).

7. In light of the extensive environmental and public harm attributable to the emissions from the Plant, New Jersey seeks, among other things, (a) an injunction prohibiting further operation of the Plant until Defendants implement the applicable pollution control technology and otherwise comply with the Act and the federal and state implementing regulations; (b) civil penalties for Defendants’ past and ongoing violations of federal law; and (c) mitigation of the harm caused by the Defendants’ illegal emissions.

JURISDICTION AND VENUE

8. This Court has jurisdiction over the subject matter of this action pursuant to 42 U.S.C. §§ 7604(a) and 7477, and 28 U.S.C. §§ 1331, 1355, and 1367.

9. With respect to all claims, venue is proper in this District pursuant to 28 U.S.C. §§ 1391(b) and (c), and 1395(a), because the Plant is located in this District, all of the property that is the subject of this action is situated in this District, and a substantial part, if not all, of the events or omissions giving rise to the claims asserted herein arose in this District.

10. Venue is also proper in this District pursuant to 42 U.S.C. § 7604(c)(1), because the major stationary source at which the violations of emission standards or limitations that are the subject of these claims is located in this District.

ALLEGATIONS COMMON TO ALL CLAIMS

The Defendants

11. PenElec is an operating utility subsidiary of First Energy, which develops, owns, and operates transmission and distribution facilities overseas and generating plants both domestically and abroad. PenElec operated the Plant from its commencement of operation until 1999.

12. NYSEG is a subsidiary of Iberdrola USA (formerly Energy East). Together with PenElec, NYSEG constructed the Plant beginning in 1965, and owned it until it sold the Plant to Edison International in 1999.

13. Upon information and belief, on March 18, 1999, Edison International created several affiliates to manage the Plant, including EME Homer City Generation L.P., a limited partnership composed of Mission Energy Westside, Inc. as its general partner and Chestnut Ridge Energy Company as its limited partner.

14. Upon information and belief, EME Homer City is the main operator of the Plant. The company sells energy, capacity, and ancillary services to power marketers and load-serving entities within PJM Interconnection. EME Homer City is based in Homer City, Indiana County, Pennsylvania.

15. Upon information and belief, Homer City OL1-OL8 LLC are individual limited liability companies registered under the laws of Pennsylvania that co-own the Plant and which permit EME Homer City to enter into sale-leaseback transactions with individual generating units at the Plant.

16. Defendants are each a “person” as that term is defined by both Section 302(e) of the Act, 42 U.S.C. § 7602(e).

17. Each Defendant is or has been an “owner” and/or “operator” as defined in the Act at all times relevant to the Complaint.

The Plant

18. The Plant is a “major source” as defined in Section 501 of the Act, 42 U.S.C. § 7661, and in 40 C.F.R. § 70.2 because it has the potential to emit more than 100 tons of SO₂ per year.

19. The Plant consists of three boiler units with 1884-megawatt (“MW”) total generating capacity. Units 1 and 2 at the Plant began operation in 1969, before the enactment of the Act. Neither unit has since been retrofitted with a flue gas desulfurization (“FGD”) scrubber to control SO₂ emissions. Unit 3 began operation in 1977; it is equipped with a wet FGD SO₂ scrubber. All three boiler units are currently equipped with electro-static precipitators (“ESPs”) for control of particulate matter as well as selective catalytic control reduction for the control of nitrogen oxides (“NO_x”).

20. Units 1 and 2 are coal-fired units. Unit 1 is rated at 620 MW and Unit 2 is rated at 614 MW net generation capacity. Each unit burns pulverized bituminous coal with No. 2 fuel oil used for startup and flame stabilization. Both boilers are “supercritical” units that were constructed as pressurized boilers and later converted to balanced draft operation. Each consists of a Foster Wheeler pulverized coal steam generator with 24 coal burners. There are six coal-grinding pulverizers, each feeding a row of four burners. Forced draft fans supply the necessary combustion air. Each burner has its own No. 2 fuel oil ignitor used for startup and flame stabilization.

22. In 2009, the Plant emitted approximately 101,000 tons of SO₂. Of this amount, approximately 96,000 tons were emitted by Units 1 and 2 together.

The Plant’s Operating Permits

23. The Pennsylvania Department of Environmental Protection (“PaDEP”) issued several operating permits for the emission sources at the Plant, the most current of which is a Title V permit No. 32-00055, issued on January 30, 2004, with an amendment effective on December 1, 2004.

24. Conditions #007(b) and (c) of Section B (General Title V Requirements) of the Plant’s current Title V permit require the Plant to be “operated and maintained in accordance with specifications in the applications and the conditions in the plan approval and operating permit issued by the Department . . .” For the purposes of this operating condition, the permit specifies that “the specifications in applications for plan approvals and operating permits are the physical configurations and engineering design details which the Department determines are essential for the permittee’s compliance with the applicable requirements in this Title V permit.”

26. The Plant's Title V operating permit was issued on the express condition that "permittee, upon becoming aware that any relevant facts were omitted or incorrect information was submitted in the permit application, shall submit such supplementary facts or corrected information during the permit renewal process. The permittee shall also provide additional information as necessary to address any requirements that become applicable to the source after the date of a complete renewal application was submitted but prior to release of a draft permit." 25 Pa. Code §§ 127.412, 127.413, 127.414, 127.446(e), 127.503 and condition # 004(d) of Section B (General Title V Requirements) of the Plant's Title V permit.

STATUTORY AND REGULATORY FRAMEWORK RELEVANT TO ALL CLAIMS-
CAA

27. The Clean Air Act establishes a regulatory scheme 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. 42 U.S.C. § 7401(b)(1).

28. Pursuant to 42 U.S.C. § 7409, the Administrator of the Environmental Protection Agency ("EPA") has promulgated regulations establishing primary and secondary national ambient air quality standards ("NAAQS") for six criteria air pollutants, including: SO₂, NO₂, ozone, particulate matter, carbon monoxide, and lead. EPA establishes the primary NAAQS as adequate to protect the public health, and the secondary NAAQS as adequate to protect the public welfare, from any known or anticipated adverse effects associated with the presence of the air pollutant in the ambient air.

29. 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 statewide.

30. Under 42 U.S.C. § 7407(d), each State is required to designate those areas within its boundaries where the air quality is better or worse than the NAAQS for each criteria pollutant, or where the air quality cannot be classified due to insufficient data. An area that meets the NAAQS for a particular pollutant is termed an “attainment” area; one that does not is termed a “non-attainment” area.

31. As described more fully below, the New Source Review (“NSR”) provisions of Parts C and D of Title I of the Clean Air Act require preconstruction review and permitting for modifications of major stationary sources. Pursuant to applicable regulations, if an existing major stationary source is planning to make a modification, then that source must obtain either a Prevention of Significant Deterioration (“PSD”) permit or a Nonattainment New Source Review permit, depending on whether the source is located in an attainment or a nonattainment area for the pollutant being increased above the significance level.

32. To obtain the required permit, the source must implement Best Available Control Technology (“BACT”) if in an attainment area, or comply with the Lowest Achievable Emission Rate (“LAER”) if in a nonattainment area. Sources may not operate after modification unless they meet the BACT or LAER emission limits determined in the permitting process.

33. The Plant is located in an area that has been in attainment with the NAAQS for SO₂ from 1980 to the present.

Title C – Prevention of Significant Deterioration (PSD)

34. Part C of subchapter 1 of the Clean Air Act, 42 U.S.C. §§ 7470-7492, sets forth requirements for the prevention of significant deterioration of air quality in those areas designated as attaining the NAAQS. These PSD program requirements are designed to protect

public health and welfare and to assure that economic growth will occur in a manner consistent with the preservation of existing clean air resources. 42 U.S.C. § 7470.

35. Congress intended the PSD program, *inter alia*, to ensure that emissions from sources in one state will not interfere with efforts to prevent significant deterioration of air quality in another state. 42 U.S.C. § 7470(4). To effectuate these goals, the PSD provisions of the Clean Air Act provide that any decision to allow increased air pollution in any area be made only after careful evaluation of all consequences of such a decision, including the interstate effects, and after adequate procedural opportunities for informed public participation in the decision-making process. 42 U.S.C. § 7470(5).

36. Section 165(a) of the Clean Air Act prohibits the construction and modification 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 PSD program and the facility employs BACT for each pollutant subject to regulation under the Act that is emitted from the facility. 42 U.S.C. § 7475(a).

37. EPA has promulgated regulations at 40 C.F.R. § 52.21 to implement the PSD program. The provisions of 40 C.F.R. § 52.21(a)(2)(iii) prohibit the construction or modification of a major stationary source in any attainment area, referred to in the regulations as a “major modification,” unless a PSD permit has been issued that meets the requirements of 40 C.F.R. §§ 52.21(j)-(r). As set forth at 40 C.F.R. § 52.21(k), the PSD program generally requires a person who wishes to construct or modify a major emitting facility in an attainment area to first demonstrate that construction or modification of the facility will not cause or contribute to air pollution in violation of any ambient air quality standard or any specified incremental amount.

38. The subsequent operation of a major stationary source after a major modification, unless the source has applied BACT pursuant to 40 C.F.R. § 52.21(j), is further prohibited.

39. An applicant for a permit to modify a stationary source is required to submit all information necessary to allow the permitting authority to perform any analysis or make any determination required in order to issue the appropriate permit. 40 C.F.R. § 52.21(r)(1).

40. 40 C.F.R. § 52.21(a)(2)(iii) prohibits the construction of any new major stationary source or any major modification without a permit that provides that the source or modification would meet the requirements of 40 C.F.R. § 52.21(j) through (r). 40 C.F.R. § 52.21(j) through (r) require, *inter alia*, that a source subject to PSD regulations undergo a control technology review, apply BACT, and conduct air quality modeling.

41. The Clean Air Act defines “major emitting facility” as including, *inter alia*, (a) any fossil-fuel fired steam electric plant with a heat input of more than 250 million British thermal units per hour (“Btu/h”) that emits or has the potential to emit 100 tons per year (“tpy”) or more of any air pollutant, and (b) any other source with the potential to emit 250 tpy or more of any pollutant. 42 U.S.C. § 7479(1).

42. The term “major stationary source” is defined in 40 C.F.R. §§ 52.21(b)(1)(i) to include, among other things, (a) any fossil-fuel fired steam electric plant of more than 250 million Btu/hr that emits or has the potential to emit 100 tpy or more of any air pollutant subject to regulation under the Act, (b) any other facility that emits, or has the potential to emit, 250 tpy or more of any pollutant subject to regulation under the Act, or (c) any physical change that would occur at a stationary source not otherwise qualifying as a major source, if the changes would constitute a major stationary source by itself.

43. “Modification” is defined as “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.” 42 U.S.C. §§ 7479(2)(c) (incorporating definition in § 7411(a)).

44. “Major modification” is defined at 40 C.F.R. § 52.21(b)(2) as “any physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the Act.”

45. “Net emissions increase” is defined at 40 C.F.R. § 52.21(b)(3)(i) with respect to any regulated pollutant emitted by a major stationary source as the amount by which the sum of the following exceeds zero: a) the increase in emissions from a particular physical change or change in method of operation at a stationary source; and (b) any other increases and decreases in actual emissions at the source that are contemporaneous with the particular change and are otherwise creditable.

46. “Significant” is defined at 40 C.F.R. § 52.21(b)(23)(i), and states in reference to SO₂ that a significant net emissions increase means an emissions rate that would equal or exceed 40 tpy or more of that pollutant. 40 C.F.R. § 52.21(b)(23)(i).

47. “Actual emissions” is defined by 40 C.F.R. § 52.21(b)(21)(i)-(ii) as the actual rate of emissions of a regulated NSR pollutant from an emissions unit and “[i]n general, actual emissions as of a particular date shall equal the average rate, in tons per year, at which the unit actually emitted the pollutant during a consecutive 24-month period which precedes the particular date and which is representative of normal source operation.” Prior to March 2003, 40 C.F.R. § 52.21(b)(21)(i)-(ii) defined “actual emissions” as the average rate, in tons per year, at

which the unit “actually emitted the pollutant during a two-year period which precedes the particular date” and which is representative of normal operation.

Pennsylvania’s PSD Program for Attainment Areas

48. In accordance with Section 161 of the Act, 42 U.S.C. § 7471, each SIP shall contain emission limitations and such other measures as may be necessary, as determined under regulations promulgated pursuant to these provisions, to prevent significant deterioration of air quality in attainment areas.

49. A state may comply with Section 161 of the Act, 42 U.S.C. § 7471 either (a) by being delegated by EPA the authority to issue permits under, and/or to enforce the federal PSD regulations set forth at 40 C.F.R. § 52.21, or (b) by promulgating its own PSD regulations that must be at least stringent as those set forth at 40 C.F.R. § 51.166, and approved as part of its SIP by EPA.

50. Pennsylvania’s SIP has been approved by EPA (*see* 40 C.F.R. § 52.2020(b)) and includes 25 Pa. Code § 127.11, which provides that a person may not cause or permit the construction or modification of an air contamination source unless the modification has been approved by PaDEP.

51. Pursuant to Part C of the Act, the Pennsylvania SIP adopts and incorporates by reference the federal PSD requirements described above and promulgated in 40 C.F.R. Part 52. *See* 25 Pa. Code §§ 127.81 through 127.83 and 40 C.F.R. § 52.2058 (49 Fed. Reg. 33128, Aug. 21, 1984). Accordingly, the Pennsylvania SIP is identical to the federal PSD program in all respects.

Federal Title V Operating Permits

52. Title V of the Act, enacted as part of the 1990 amendments to the Act, provides that no source may operate without a Title V permit after the effective date of any permit program

approved or promulgated under this section of the CAA. 42 U.S.C. § 7661a(a). EPA promulgated regulations governing state operating permit programs on July 21, 1992. *See* 57 Fed. Reg. 32995; 40 C.F.R. Part 70. Pursuant to Section 502(a) of the Act, it is unlawful for any person to operate a major stationary source except in compliance with a permit issued by a permitting authority under Title V. 42 U.S.C. § 7661a(a).

53. Pursuant to Section 504(a) of the Act, a major stationary source must have a Title V operating permit that has the necessary conditions to assure compliance with all “applicable requirements.” 42 U.S.C. § 7661c(a). At the time of promulgation and continuing until EPA approved Pennsylvania’s Title V operating permit program in 1996, 40 C.F.R. § 70.1(b) provided that: “[a]ll sources subject to these regulations shall have a permit to operate that assures compliance by the source with all applicable requirements.” 40 C.F.R. § 70.2 defined “applicable requirement” to include: “[a]ny standard or other requirement provided for in the applicable [state] implementation plan approved or promulgated by EPA through rulemaking under Title I of the Act [which includes the PSD and NSR programs] that implements the relevant requirements of the Act, including revisions to that plan promulgated in part 52 of this chapter [implementing the PSD and NSR programs]” 40 C.F.R. § 70.7(b) provided that no source subject to 40 C.F.R. Part 70 requirements may operate without a permit as specified in the Act.

54. Section 503 of the Act, 42 U.S.C. § 7661b, further requires that applicants submit timely emissions-related information specific to the design and operation of the source at the time of the application necessary to ensure compliance, including emissions rates in tons per year, operating processes, work practices, and an explanation of any proposed exemption from otherwise applicable requirements.

55. Section 503(a) of the Act, 42 U.S.C. § 7661c(a), requires that each Title V permit include enforceable emission limitations and standards, a schedule of compliance, and other conditions necessary to assure compliance with applicable requirements, including those contained in a state implementation plan. 42 U.S.C. § 7661c(a). *See also* 40 C.F.R. § 70.6.

56. At the time of promulgation and continuing until EPA approved Pennsylvania's Title V operating permit program in 1996, 40 C.F.R. § 70.5(a) and (c) required timely and complete permit applications for Title V permits with required information that must be submitted. 40 C.F.R. § 70.5(b) provided that: "Any applicant who fails to submit any relevant facts or who has submitted incorrect information in a permit application shall, upon becoming aware of such failure or incorrect submittal, promptly submit such supplementary facts or corrected information." *See also* 25 Pa. Code § 127.414.

Pennsylvania's Title V Operating Permit Program

57. U.S. EPA approved Pennsylvania's Title V program on August 29, 1996. 40 C.F.R. Part 70, Appendix A. Pennsylvania's Title V program became effective and federally enforceable and a part of the Pennsylvania SIP on that date. 61 Fed. Reg. 39597 (July 30, 1996); 40 C.F.R. §§ 52.2020-2062.

58. The Pennsylvania regulations governing the Title V permitting program are located at 25 Pa. Code 127.501 through 127.543. *See* 25 Pa. Code §§ 127.501 (stating that provisions in 25 Pa. Code §§127.501 through 127.543 are in addition to the operating permit requirements set forth in 25 Pa. Code §§ 127.401 through 127.464).

59. Title V operating permits must include "emission limitations and standards, including those operational requirements and limitations that assure compliance with applicable requirements at the time of permit issuance." 25 Pa. Code § 127.512(h).

60. Pennsylvania’s regulations define “applicable requirements” to include: (1) “[a] standard provided for in the Commonwealth’s SIP approved by the EPA under Title I of the . . . Act . . . that implements the relevant requirements of the . . . Act, including revisions to that plan;” (2) any applicable new source performance standards or requirement; and (3) “[a] term or condition of pre-construction permits issued under regulations approved or promulgated through rulemaking under Title I, including Part C or D, of the . . . Act [referencing the PSD and NSR programs].” 25 Pa. Code § 121.1.

61. The applicable requirements for stationary air contamination sources in the Title V facility must be included in the operating permit. 25 Pa. Code § 127.502(a).

62. Such permits must also contain a schedule for compliance with applicable requirements for which the facility is not in compliance. 25 Pa. Code § 127.513(3).

63. Among other things, the following information is required in an application for a Title V operating permit: (1) a citation and description of applicable air pollution control requirements; (2) other specific information that may be necessary to implement and enforce other applicable requirements of the CAA, 25 Pa. Code, Chapters 122 and 127, or 40 C.F.R. Part 70, or to determine the applicability of such requirements; and (3) a compliance plan including (a) a description of the compliance status of each stationary air source with respect to applicable requirements, (b) a narrative description of how the facility will achieve compliance with applicable requirements, if any, for which the facility is not in compliance, and (c) a schedule of remedial measures leading to compliance with applicable requirements for which it is not in compliance. 25 Pa. Code §§ 127.503(4), (5) and (8).

64. Title V applicants are further required to submit additional information as necessary to address changes occurring at the source after the date it files a complete application but prior to PaDEP taking action on the permit application. 25 Pa. Code §§ 127.411 and 412.

65. A Title V application must also include a certification of compliance with applicable requirements and a certification as to the truth, accuracy, and completeness of the application by a responsible official of the entity seeking a permit. 25 Pa. Code § 127.503(10).

66. It is unlawful to operate a source in violation of the Title V operating permit requirements. 25 Pa. Code § 127.512(c)(1).

Citizen Suit Enforcement Provision of the Clean Air Act

67. Pursuant to Section 304(a)(1) of the Act, 42 U.S.C. § 7604(a)(1), any person may commence, in the United States district courts, a suit against any person who is alleged to have violated or to be in violation of a CAA emission standard or limitation. Any person filing such a claim must provide notice of the claim at least 60 days before filing suit to the EPA administrator, to the State in which the violation occurred, and to the alleged violator. 42 U.S.C. § 7604(b)(1)(A).

68. Pursuant to Section 304(a)(3) of the Act, 42 U.S.C. § 7604(a)(3), any person may commence, in federal court, a suit against any person who constructs, or modifies a major emitting facility without a PSD permit. No notice must be provided before the commencement of a suit under this provision of law.

69. Section 302(e) of the Act, 42 U.S.C. § 7602(e), defines a “person” to include corporations and States. New Jersey is a “person” within the meaning of 42 U.S.C. § 7602(e).

70. Section 113(b) of the Act, 42 U.S.C. § 7413(b) as amended, authorizes the award of both injunctive relief and civil penalties of up to \$37,500 per day for each violation. *See* 40 C.F.R. § 19.4 (2009); 74 Fed. Reg. 626 (Jan. 7, 2009).

NOTICES

71. Notwithstanding the fact that notice is not a prerequisite for suits brought under Section 304(a)(3) of the Act, 42 U.S.C. § 7604(a)(3), New Jersey has provided notice of its claims to the owners and operators of the Plant, and in so doing has also provided notice of all claims for which such notice is required pursuant to 42 U.S.C. § 7604(b)(1)(A).

72. On or about November 29, 2010, the New Jersey Office of the Attorney General sent a notice of intent to sue to Defendants EME Homer City Generation, Homer City OL1 – OL8, LLC, PenElec, and NYSEG for violations under the CAA.

73. Among other things, the notice described the PSD and Title V operating permit claims that New Jersey sets forth in the Complaint.

74. The notice was served by certified mail on the EPA Administrator, the EPA Regional Administrator of the EPA Region in which the Plant described in the notice is located, the Governor of Pennsylvania, and the registered agent for the corporate entities. The notice provided sufficient information to permit the recipients to identify the activity alleged to be in violation, the person or persons responsible for the alleged violations, the location of the alleged violations, the date of the violations and the full name and address of each person giving the notice.

75. More than sixty days have elapsed since New Jersey sent the Notice and Defendants have not taken any action subsequently to correct their violations.

FIRST CLAIM FOR RELIEF

Major Modifications of Unit 1 -- Violations of the Clean Air Act

76. Paragraphs 1 through 75 are realleged and incorporated by reference in this claim for relief.

77. At the time Defendants NYSEG and PenElec constructed the Plant, and at the time that federal PSD regulations became effective on August 7, 1980, and the Pennsylvania PSD regulations became effective on August 21, 1984, the Plant had the potential to emit in excess of 100 tpy of SO₂.

78. The Plant is, and was at the time Defendants made the modifications identified in this Complaint, a “major emitting facility” within the meaning of 42 U.S.C. § 7479(1), a “major stationary source” within the meaning of 40 C.F.R. § 52.21(b)(1)(i)(b) and 25 Pa. Code § 127.83 (as made federal law by 40 C.F.R. §§ 52.2020 - 2062), a “major facility” within the meaning of 25 Pa. Code § 121.1, (as made federal law by 40 C.F.R. §§ 52.2020 - 2062), an “electric utility steam generating unit” within the meaning of 40 C.F.R. § 52.21(b)(31), 25 Pa. Code § 127.83, (as made federal law by 40 C.F.R. §§ 52.2020 - 2062), and 25 Pa. Code § 121.1, (as made federal law by 40 C.F.R. §§ 52.2020 - 2062), and “a major SO₂ emitting facility” within the meaning of 25 Pa. Code § 121.1 (as made federal law by 40 C.F.R. §§ 52.2020 - 2062).

79. Defendants modified Unit 1 in 1994 when they replaced the economizer and performed related work.

80. Defendants modified Unit 1 in 1996 when they replaced the vertical reheater pendants and performed related work.

81. Upon information and belief, each of the above noted modifications individually resulted or would have resulted in a significant increase in net SO₂ emissions, as defined by the Act and Pennsylvania’s SIP.

82. The aforementioned modifications constitute major modifications, within the meaning of 40 C.F.R. § 52.21(b)(2), 25 Pa. Code § 127.83 (as made federal law by 40 C.F.R. §§ 52.2020 - 2062), and 25 Pa. Code § 121.1 (as made federal law by 40 C.F.R. §§ 52.2020 - 2062) for SO₂. Therefore, Defendants should have obtained a PSD permit before modifying the unit.

83. Before commencing these modifications, Defendants did not apply for or obtain a PSD permit. Upon information and belief, subject to further investigation and discovery, Defendants may have made other major modifications to Unit 1.

84. None of the preconstruction / pre-modification approval permitting requirements contained 40 C.F.R. § 52.21(j) through (r) nor the Commonwealth of Pennsylvania's requirements contained in 25 Pa. Code §§ 127.81 *et seq*, were met prior to the major modifications at the Plant.

85. Prior to performing the aforesaid modifications, Defendants did not demonstrate that the emission increases resulting from the modifications would not contribute to nonattainment in any air quality control regions, or comply with any other substantive requirements of 42 U.S.C. § 7475, 40 C.F.R. §§ 52.21(j) through (r), or 25 Pa. Code § 127.83 (as made federal law by 40 C.F.R. §§ 52.2020 - 2062), including consideration of impacts on federal Class I areas.

86. Each of the modifications identified above, individually or collectively, was part of Defendants' project to upgrade and/or extend the life of Unit 1, was a major modification within the meaning of 40 C.F.R. § 52.21(b)(2), and constituted construction of a major emitting facility within the meaning of 42 U.S.C. §§ 7475 and 7479(2)(C) for SO₂. Accordingly, 42 U.S.C. § 7475(a)(4) required Defendants to implement BACT for the control of SO₂ emissions from Unit 1 as a condition of operating the unit. *See also* 25 Pa Code §§127.411(5) and 441(6) (requiring

that the source comply with applicable requirements under requirements promulgated by EPA under the Act as part of the operating permit application and conditions in the operating permit).

87. Defendants did not implement BACT to control the significant net increase in SO₂ emissions resulting from the above modifications to Unit 1.

88. Defendants continue to operate Unit 1 without BACT for control of SO₂ emissions from the unit.

89. Therefore, with respect to the operation of Unit 1, since 1994 and on a continuing basis, Defendants have been in violation of 42 U.S.C. §§ 7475(a) and (d), 40 C.F.R. § 52.21, the Pennsylvania SIP (as made federal law by 40 C.F.R. §§ 52.2020 - 2062) and 25 Pa. Code § 127.83 (as made federal law by 40 C.F.R. §§ 52.2020 - 2062).

90. Unless restrained by an order of this Court, these violations of the Act will continue.

91. The violations set forth above subject Defendants to injunctive relief and civil penalties of up to \$25,000 per day for each such violation of the Act prior to January 30, 1997, \$27,500 per day for each violation between January 30, 1997 and March 15, 2004, \$32,500 per day for each violation between March 16, 2004 and January 12, 2009, and \$37,500 per day for each violation occurring after January 13, 2009, as provided in 42 U.S.C. §§ 413(b) and 7604(a), as amended by the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by 31 U.S.C. § 3701, 40 C.F.R. § 19.4, and 74 Fed. Reg. 626 (Jan. 7, 2009).

SECOND CLAIM FOR RELIEF

Major Modifications of Unit 2 -- Violations of the Clean Air Act

92. Paragraphs 1 through 91 are realleged and incorporated by reference in this claim for relief.

93. At the time Defendants NYSEG and PenElec constructed the Plant, and at the time that federal PSD regulations became effective on August 7, 1980, and the Pennsylvania PSD regulations became effective on August 21, 1984, the Plant had the potential to emit in excess of 100 tpy of SO₂.

94. The Plant is, and was at the time Defendants made the modifications identified in this Complaint, a “major emitting facility” within the meaning of 42 U.S.C. § 7479(1), a “major stationary source” within the meaning of 40 C.F.R. § 52.21(b)(1)(i)(b) and 25 Pa. Code § 127.83 (as made federal law by 40 C.F.R. §§ 52.2020 - 2062), a “major facility” within the meaning of 25 Pa. Code § 121.1, (as made federal law by 40 C.F.R. §§ 52.2020 - 2062), an “electric utility steam generating unit” within the meaning of 40 C.F.R. § 52.21(b)(31), 25 Pa. Code § 127.83, (as made federal law by 40 C.F.R. §§ 52.2020- 2062), and 25 Pa. Code § 121.1, (as made federal law by 40 C.F.R. §§ 52.2020 - 2062), and “a major SO₂ emitting facility” within the meaning of 25 Pa. Code § 121.1 (as made federal law by 40 C.F.R. §§ 52.2020 - 2062).

95. In 1991 Defendants modified Unit 2 by replacing the economizer and performing related work.

96. In 1995, Defendants modified Unit 2 by replacing the vertical reheater pendants and performing related work.

97. Upon information and belief, the above noted modifications resulted in or would have resulted in a significant increase in net SO₂ emissions, as defined by the Act and Pennsylvania’s SIP.

98. The aforementioned modifications constitute major modifications, within the meaning of 40 C.F.R. § 52.21(b)(2), 25 Pa. Code § 127.83 (as made federal law by 40 C.F.R. §§ 52.2020 -

2062), and 25 Pa. Code § 121.1 (as made federal law by 40 C.F.R. §§ 52.2020 - 2062) for SO₂ emissions. Therefore, Defendants should have obtained a PSD permit before modifying the unit.

99. Before commencing these modifications, Defendants did not apply for or obtain a PSD permit. Upon information and belief, subject to further investigation and discovery, Defendants may have made other major modifications to Unit 2.

100. None of the preconstruction / pre-modification approval permitting requirements contained 40 C.F.R. § 52.21(j) through (r) nor Pennsylvania's requirements contained in 25 Pa. Code §§ 127.81 *et seq* were met prior to the major modifications at the Plant.

101. Prior to performing the aforesaid modifications, Defendants did not demonstrate that the emission increases resulting from the modifications would not contribute to nonattainment in any air quality control regions, or comply with any other substantive requirements of 42 U.S.C. § 7475, 40 C.F.R. §§ 52.21(j) through (r), or 25 Pa. Code § 127.83 (as made federal law by 40 C.F.R. §§ 52.2020 - 2062), including consideration of impacts on federal Class I areas.

102. Each of the modifications identified above, individually or collectively, was part of Defendants' project to upgrade and/or extend the life of Unit 2, was a major modification within the meaning of 40 C.F.R. § 52.21(b)(2), and constituted construction of a major emitting facility within the meaning of 42 U.S.C. §§ 7475 and 7479(2)(C) for SO₂. Accordingly, 42 U.S.C. § 7475(a)(4) required Defendants to implement BACT for the control of SO₂ emissions from Unit 2 as a condition of operating the unit. *See also* 25 Pa Code §§ 127.411(5) and 441(b) (requiring that the source comply with applicable requirements under requirements promulgated by EPA under the Act as part of the operating permit application and conditions in the operating permit).

103. Defendants did not implement BACT to control the significant net increase in SO₂ emissions resulting from the above modifications to Unit 2.

104. Defendants continue to operate Unit 2 without BACT for control of SO₂ emissions from the unit.

105. Therefore, since 1991 and on a continuing basis, Defendants have been in violation of 42 U.S.C. §§ 7475(a) and (d), 40 C.F.R. § 52.21, the Pennsylvania SIP (as made federal law by 40 C.F.R. §§ 52.2020 - 2062) and 25 Pa. Code § 127.83 (as made federal law by 40 C.F.R. §§ 52.2020 - 2062).

106. Unless restrained by an order of this Court, these violations of the Act will continue.

107. The violations set forth above subject Defendants to injunctive relief and civil penalties of up to \$25,000 per day for each such violation of the Act prior to January 30, 1997, \$27,500 per day for each violation between January 30, 1997 and March 15, 2004, \$32,500 per day for each violation between March 16, 2004 and January 12, 2009, and \$37,500 per day for each violation occurring after January 13, 2009, as provided in 42 U.S.C. §§ 413(b) and 7604(a), as amended by the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by 31 U.S.C. § 3701, 40 C.F.R. § 19.4, and 74 Fed. Reg. 626 (Jan. 7, 2009).

THIRD CLAIM FOR RELIEF

Title V Violations under the Clean Air Act

108. Paragraphs 1 through 107 are realleged and incorporated by reference in this claim for relief.

109. The Plant is, and at all times relevant to this claim has been, a source subject to Title V operating permit requirements. 42 U.S.C. § 7661a(a), and 40 C.F.R. §§ 70.2 (definitions of a “major source”) and 25 Pa. Code § 121.1 (definition of “Title V facility”). *See also* 42 U.S.C. § 7661 (defining “major source” to include “major stationary source”), 40 C.F.R. Part 70 (relating

to State Operating Permit Programs), and 25 Pa. Code §§127.501-543 (relating to Title V Operating Permits).

110. The Title V operating permit regulations under 25 Pa. Code §§ 127.501-543 describe the additional operating permit program requirements applicable to Title V facilities that are in addition to the operating permit requirements in 25 Pa. Code §§ 127.401-464. For Title V facilities, the applicable requirements for stationary air contamination sources in the Title V facility shall be included in the operating permit. 25 Pa. Code § 127.502(a).

111. As alleged above, Units 1 and 2 of the Plant became subject to BACT emission limitations, an applicable requirement under the Act, by virtue of major modifications performed at those units in 1994 and 1996, and 1991 and 1995, respectively.

112. Defendants PenElec and NYSEG did not submit a permit application that would authorize the major modifications at Units 1 and 2 of the Plant, including provisions to implement BACT to limit SO₂ emissions at the modified units. PenElec thereafter operated each modified unit without complying with BACT emission limitations for SO₂, in violation of 42 U.S.C. 7661c(a) and 25 Pa. Code § 127.502, which is a part of the Pennsylvania SIP, until the date it ceased operation of the Plant in 1999.

113. Since beginning operation of the Plant in 1999, Defendants EME Homer City and Homer City OL1-OL8 have owned and/or operated each modified unit without having an operating permit that contains conditions to ensure compliance with all “applicable requirements,” including (a) emission limitations for SO₂ that meet BACT, and (b) the requirement to operate in compliance with BACT. Therefore, Defendants have operated and are operating the Plant in violation of 42 U.S.C. § 7661c(a) and 25 Pa. Code § 127.502(a).

114. Therefore, since no later than the date of issuance of the Title V operating permit on January 30, 2004, Defendants EME Homer City and Homer City OL1-OL8 have operated and are operating the Plant in violation of its Title V permit conditions and in violation of Title V provisions of the Act, 42 U.S.C. §§ 7661-7661f and the regulations promulgated thereunder, 40 C.F.R. §§ 70.1 -70.11, and 25 Pa. Code §§ 127.401 through 127.464, and 127.501 and 127.543.

115. In their original and subsequent Title V applications for the Plant, Defendants failed to include and/or supplement the application with information regarding the modifications, or changes in emission levels for SO₂ or any other pollutants, or changes in the BACT standards applicable to the units as a result of the modifications and increased emission levels, in violation of Title V and of the specific conditions of the Plant's operating permit, 42 U.S.C. § 7661b, 40 C.F.R. §§ 70.5(b) and 71.5(b), and 25 Pa. Code §§ 127.414(a),(b) and (c).

116. Defendants failed to include specific emission and pollutant related information necessary to implement and enforce the applicable requirements of the Act, and/or failed to determine the applicability of such requirements, including, for example, to include information about the modifications and their potential impact on emissions levels and the applicability of BACT standards to the modified units, in violation of 40 C.F.R. §§ 70.5(c)(4), (5) and (8); 40 C.F.R. §§ 71.5(c)(4), (5) and (8), 25 Pa. Code §127.503(4), (5) and (8).

117. Defendants failed to include a description of the compliance status of the stationary air source with respect to the applicable BACT standards including a narrative description of how the facility would achieve BACT compliance for which it was not in compliance and a schedule of remedial measures to ensure eventual BACT compliance, in light of major modifications to the units as required by 40 C.F.R. §§ 70.5(c)(4),(5) and (8), and 25 Pa. Code § 127.503(4),(5), and (8). In failing to acknowledge that they had undertaken major modifications at Units 1 and 2

that triggered BACT emission limitations, Defendants' certifications that the applications were true, accurate, and complete were false and misleading. 25 Pa. Code §§ 127.402(d) and 127.503(10). Because Defendants failed to provide this information, the Title V permits issued to the Plant, including the Plant's current permit, did not include all "applicable requirements," and in particular did not include applicable BACT emission limitations for Units 1 and 2 as the result of those modifications. For the same reason, the Plant's permits did not include a schedule of compliance with BACT requirements consistent with 40 C.F.R. §§ 70.5(c)(8), 40 C.F.R. §§ 71.5(c)(8), and 25 Pa. Code § 127.513(3).

118. Defendants likewise failed to submit a certification of compliance with applicable requirements that addressed the units' failures to meet the applicable BACT requirements for SO₂ emissions at Units 1 and 2, in light of the units' major modifications, as required by 40 C.F.R. §§ 70.5(c)(9) and (d), and 25 Pa. Code § 127.513.

119. Defendants' continued operation of the Plant without operating permits containing BACT emission limitations and without abiding by such limitations is an ongoing violation of 25 Pa. Code § 127.441(b) (relating to operating permit terms and conditions), § 127.442(b) (relating to reporting requirements), § 127.443(a), (relating to operating permit requirements), § 127.444 (relating to compliance requirements), § 127.463(e) (relating to operating permit revisions to incorporate applicable standards), § 127.502(a) (relating to sources included within a Title V facility), and § 127.512 (requiring a source to have a Title V permit with all applicable requirements, of which PSD standards are some, as a precondition to operation).

120. The above-cited operating permit conditions and the obligation to obtain, as a condition of operations, a permit that contains conditions to ensure the owner/operator's compliance with all applicable requirements, including BACT, are each an "emission standard or limitation under

this chapter” for purposes of jurisdiction under Section 304(a)(1) of the Act. See 42 U.S.C. §§ 7604(f)(4) and 7604(a)(1).

121. Unless restrained by an order of this Court, these violations of the Act will continue.

122. The violations set forth above subject Defendants to injunctive relief and civil penalties of up to \$25,000 per day for each such violation of the Act prior to January 30, 1997, \$27,500 per day for each violation between January 30, 1997 and March 15, 2004, \$32,500 per day for each violation between March 16, 2004 and January 12, 2009, and \$37,500 per day for each violation occurring after January 13, 2009, as provided in 42 U.S.C. §§ 413(b) and 7604(a), as amended by the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by 31 U.S.C. § 3701, 40 C.F.R. § 19.4, and 74 Fed. Reg. 626 (Jan. 7, 2009).

PRAYER FOR RELIEF

WHEREFORE, New Jersey requests that this Honorable Court:

1. Permanently enjoin Defendant EME Homer City from, *inter alia*, operating the Plant except in accordance with the Act, the federal PSD and Title V operating permit regulations and the Pennsylvania SIP, including the Pennsylvania PSD and Title V regulations;
2. Order Defendants to remedy their past violations;
3. Assess civil penalties against Defendants for each violation of federal law under the Act, the federal PSD and Title V regulations, and the state SIP regulations as made federal law, including the state PSD and Title V regulations, as follows: \$25,000 per day for each such violation of the Act prior to January 30, 1997, \$27,500 per day for each violation between January 30, 1997 and March 15, 2004, \$32,500 per day for each violation between March 16, 2004 and January 12, 2009, and \$37,500 per day for each violation occurring after January 13, 2009.

4. Award the Plaintiff States their costs of this action and attorneys' fees; and
5. Grant such other relief as the Court deems just and proper.

Dated: February 10, 2011

Respectfully Submitted,

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