

IN THE SUPERIOR COURT FOR THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

**JOHN A. HUGHES, SECRETARY OF
THE DELAWARE DEPARTMENT OF
NATURAL RESOURCES &
ENVIRONMENTAL CONTROL OF
THE STATE OF DELAWARE, an
Administrative Agency of the State of
Delaware,**

Case No.: _____

Plaintiffs,

v.

INDIAN RIVER POWER, LLC,

Defendant.

COMPLAINT

COMES NOW the Plaintiff John A. Hughes, Secretary of the State of Delaware Department of Natural Resources and Environmental Control ("DNREC"), by and through his Attorney, Valerie M. Satterfield, Deputy Attorney General, and brings this action seeking civil penalties and injunctive relief for Defendant's violations of emission standards set forth in a permit issued to the Indian River Generating Station pursuant to the Delaware Environmental Control Act, Title V of the Federal Clean Air Act ("CAA"), and the Delaware State Implementation Plan. Plaintiff alleges that from January 1, 2004, to December 31, 2008, Defendant's Indian River Generating Station has on numerous occasions exceeded opacity standards and exceeded standards for the emission of nitrogen oxides and sets forth those allegations more specifically as follows:

Statutory and Regulatory Background

1. A central purpose of the CAA is “to protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its population.” 42 U.S.C. § 7401(b)(1).

2. To achieve this and other goals, the CAA affords Delaware and the other states the primary responsibility for regulating sources of air pollution and attaining ambient air quality standards. *See, e.g.*, 42 U.S.C. §§ 7401, 7410.

3. As such, the CAA authorizes Delaware and the other states to promulgate State Implementation Plans in order to achieve compliance with federal air quality standards and to adopt and enforce additional standards that are consistent with the CAA. 42 U.S.C. §§ 7410, 7416.

4. The CAA also requires Delaware and the other states to develop and implement an operating permit program that meets minimum federal requirements. All “major” stationary sources that emit certain air pollutants are required to obtain operating permits. 42 U.S.C. §§ 7661-7661f. The purpose of the operating permit, also known as a “Title V permit,” is to set forth a source’s federally enforceable air pollution compliance requirements and to contain sufficient monitoring and reporting requirements so that it is possible to ensure whether or not the source has complied with those requirements.

5. Delaware has enacted the Delaware Environmental Control Act, in part, to authorize development of programs for the “control of pollution of the land, water, underwater and air resources of the State to protect the public health, safety and welfare.” 7 Del. C. § 6001.

6. The Delaware Environmental Control Act authorizes the DNREC to promulgate regulations and to issue permits for the discharge of air contaminants. 7 Del. C. § 6003(c).

7. The Delaware Environmental Control Act prohibits the discharge of air contaminants without a permit from the DNREC or in violation of any condition of a DNREC permit. 7 Del C. §§ 6003(a)(1), 6005(b).

8. Pursuant to the CAA and the Delaware Environmental Control Act, Delaware has adopted a U.S. EPA approved State Implementation Plan (“the Delaware SIP”) that is intended to fulfill Delaware’s air quality obligations under the CAA. 40 C.F.R. §§ 52.420-52.465.

9. Under the Delaware Regulations and the Delaware SIP, “[n]o person shall cause or allow the emission of visible air contaminants or smoke from a stationary or mobile source, the shade or appearance of which is greater than 20% opacity for an aggregate of more than three minutes in any one hour or more than 15 minutes in any 24 hour period.” 7 Del. Admin. Code § 1114.2.1.

10. The Delaware Regulations and the Delaware SIP also prescribe a case-by-case Reasonably Available Control Technology standard for the limitation of nitrogen oxides from coal-fired major emitting sources. 7 Del. Admin. Code § 1112.3.

11. Additionally, Delaware has adopted an operating permit program under Title V of the CAA and the Delaware Environmental Control Act. 7 Del. Admin. Code § 1130; 40 C.F.R. Pt. 70 App. A.

12. The Indian River Generating Station is subject to a Title V operating permit AQM-005/00001 (“Permit”), which sets forth obligations by Indian River Generating Station under the above mentioned laws and regulations.

13. Section 2.1 of the Permit contains specific limitations on opacity, or visible emissions.

14. In addition, the Permit prohibits Indian River Generating Station's Unit 4 from discharging any gases "which contain greater than 20% opacity, except for one six-minute period per hour of not more than 27 percent opacity." Permit Condition 3 - Table 1(c)(5)(i)(A).

15. The Permit further states that nitrogen oxides emissions from Unit 3 of the Indian River Generating Station "shall not exceed 0.57 lb/MMBTU heat input as a 24-hour rolling average." Permit Condition 3-Table 1(b)(4)(i)(A).

16. The Permit further imposes certain monitoring and reporting requirements. As part of those requirements the Indian River Generating Station must submit quarterly reports of data monitored by Continuous Emission Monitoring Systems ("CEMS").

17. The Delaware Environmental Control Act authorizes the Secretary of the DNREC to bring a civil enforcement action seeking civil penalties of up to \$10,000 for each violation and for each day of complete violations and injunctive relief to prevent further violations. 7 Del. C. § 6005(b).

Parties

18. Plaintiff John A Hughes is Secretary of the DNREC. DNREC is an Administrative Agency of the State of Delaware and as such Plaintiff has primary responsibility for the administration and enforcement of the environmental laws of the State of Delaware pursuant to 7 Del. C. Chapter 60 and the regulations promulgated thereunder. Plaintiff's principle place of business is 89 Kings Highway, Dover, DE 19901.

19. Defendant is incorporated in the State of Delaware, and it owns and operates the Indian River Generating Station in Sussex County, Delaware, located at 29416 Power Plant Road, Dagsboro, DE 19939.

Jurisdiction

20. This Court has jurisdiction over violations of any rule, regulation, or permit issued by the DNREC in which a civil penalty is sought under 7 Del. C. § 6005(b)(1).

Statement of Facts

21. From January 1, 2004, to December 31, 2008, the Indian River Generating Station has monitored visible emissions and nitrogen oxides emissions from the stacks of the generating station using Continuous Emissions Monitoring Systems.

22. From January 1, 2004, to December 31, 2008, Defendant has submitted quarterly reports of the Continuous Emissions Monitoring Systems data to DNREC.

23. Data from those reports reveal that Defendant exceeded the opacity standards and emissions standards for nitrogen oxides on numerous occasions as more specifically detailed below.

24. The above mentioned exceedances were violations of the opacity limits in the Permit and the applicable law.

Claim 1
(Opacity violations, 3-minute standard)

25. Pursuant to the permit and applicable law, Indian River Generating Station is prohibited from emitting visible air contaminants “the shade or appearance of which is greater than 20% opacity for an aggregate of more than three minutes in any one hour” See §§ 9, 13.

26. Quarterly reports from each quarter of 2004 through 2006, the second, third and fourth quarters of 2007, and the entirety of 2008 (ending on December 31, 2008) reveal that emissions from the Indian River Generating Station exceeded this standard on hundreds of occasions. See §§ 9, 13.

Claim 2
(Opacity violations, 15-minute standard)

27. Pursuant to the permit and applicable law, Indian River Generating Station was prohibited from emitting visible air contaminants “the shade or appearance of which is greater than 20% opacity for an aggregate of more than . . . 15 minutes in any 24 hour period.” See §§ 9, 13.

28. Quarterly reports from each quarter of 2004 through 2006, the second, third and fourth quarters of 2007, and the entirety of 2008 (ending on December 31, 2008) reveal that emissions from the Indian River Generating Station exceeded this standard on hundreds of occasions.

Claim 3
(Opacity/Particulate violations, Unit 4)

29. Unit 4 of the Indian River Generating Station is prohibited from discharging any gases “which contain greater than 20% opacity, except for one six-minute period per hour of not more than 27 percent opacity.” See § 14.

30. Quarterly reports from the second quarters of 2004 and 2005, and the first quarters of 2006 and 2007 reveal that emissions from Unit 4 of the Indian River Generating Station exceeded this standard on a number of occasions.

Claim 4
(Nitrogen Oxides violations, Unit 4)

31. Unit 3 of the Indian River Generating Station must comply with a Reasonably Available Control Technology requirement that prohibits Nitrogen Oxides emissions that “exceed 0.57 lb/MMBTU heat input as a 24-hour rolling average.” Permit Condition 3-Table 1(b)(4)(i)(A). See §§ 10, 15.

32. Continuous Emissions Monitoring Systems data reveals that Unit 4 exceeded this standard on a number of occasions from April through June of 2005.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff respectfully seeks the following relief:

- a. that the Court grant judgment against Defendant for civil penalties of not less than \$1,000 nor more than \$10,000 for each separate day and each separate violation in accordance with 7 Del. C. § 6005(b);
- b. that the Court enjoin further violations of the Permit and applicable standards;
- c. that the Court order Defendant to reimburse Plaintiff's expenses pursuant to 7 Del. C. § 6005(c);
- d. that the Court order Defendant to pay Plaintiff's court costs; and
- e. that the Court grant such other relief as this Court may deem to be just and proper.

Date: January 5, 2009



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