

IN THE SUPERIOR COURT FOR THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

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

Plaintiff,

v.

INDIAN RIVER POWER, LLC,

Defendant.

C.A. No.

CONSENT ORDER

WHEREAS, Plaintiff John A. Hughes is the Secretary of the Department of Natural Resources and Environmental Control (“DNREC”) and is charged with administering and enforcing the environmental laws of the State of Delaware;

WHEREAS, Defendant Indian River Power, LLC (“Indian River”) owns and operates the Indian River coal-fired electric generating facility in Sussex County, Delaware (hereinafter the “Indian River Facility”);

WHEREAS, the Indian River Facility was acquired by Indian River from Delmarva Power & Light Company in June 2001;

WHEREAS, beginning on January 1, 2004, and through December 31, 2008, (the “Applicable Period”), the Indian River Facility has been owned and operated by Indian River and nitrogen oxides (“NO_x”) and visible emissions (“Opacity”) from the stacks of the power plant have been monitored by Continuous Emission Monitoring Systems (“CEMS”);

WHEREAS, reports of the data collected by the CEMS are submitted quarterly to the Delaware Department of Natural Resources & Environmental Control (“DNREC”);

WHEREAS, Indian River entered into a consent order in the Delaware Superior Court (C.A. No. 07C-02-283FSS) with DNREC dated September 24, 2007, in response to Indian River’s challenge to DNREC Order No. 2006-A-0056 (“Multi-P Consent Order”), which will require Indian River to take significant and costly measures to control emissions from the Indian River Facility including measures that will reduce opacity;

WHEREAS, DNREC previously reviewed the CEMS data from the three-month period from April 1, 2005, through June 30, 2005, and concurred with Defendant that the data indicated NO_x emissions exceedances resulted from faulty CEMS performance and that the data did not indicate that actual NO_x emissions occurred and consequently DNREC did not pursue enforcement action against Indian River for NO_x emissions exceedances at Indian River Station during that time period;

WHEREAS, DNREC filed a Complaint against Indian River in this Honorable Court on January 5, 2009, alleging violations of the relevant visible emissions standards (Delaware Air Quality Regulations No. 1114 and 1120) during the Applicable Period;

WHEREAS, Indian River and DNREC (collectively the “Parties”) have reached a settlement to address and resolve the alleged claims in the Complaint and the Parties desire to memorialize that agreement in this Consent Order; and

WHEREAS, the Parties have agreed, and the Court so finds, that this Consent Order was negotiated at arms length and in good faith, will avoid litigation over DNREC’s claimed violations, will address the alleged opacity exceedances, and is fair, reasonable and in the interest of the Parties and the people of this State;

NOW, THEREFORE, in consideration of the mutual covenants herein contained, and intending to be legally bound hereby, the Parties hereto agree, and it is hereby ORDERED AND DECREED, as follows:

I. JURISDICTION

1. This Court has jurisdiction over the alleged non-compliance with any rule or regulation duly promulgated by the Secretary of DNREC pursuant to 7 *Del. C.* § 6005(b).

II. APPLICATION, SCOPE AND TRANSFER

2. The provisions of this Consent Order shall apply to and be binding upon DNREC and Indian River, including Indian River's officers, employees, agents, successors and assigns, and shall apply to the Indian River Facility for the term of this Consent Order. In the event Indian River elects to sell or transfer any of its assets or operations subject to the requirements of this Consent Order, it shall advise the purchaser or transferee or successor-in-interest (hereinafter "purchaser") in writing of the existence of this Consent Order before such sale or transfer. If the Indian River Facility, or any of its units, are rendered inoperable, the provisions of this Consent Order requiring controls on those units shall not apply to any and all such inoperable units. Indian River shall at that time provide a copy of the Consent Order and shall send a copy of the written notification to DNREC at least 30 days prior to the proposed sale or transfer. Such notification may be submitted as confidential business information which DNREC shall not disclose publicly without Indian River's prior written approval except as may be required by law. This provision does not relieve Indian River from having to comply with any applicable state or local regulatory requirement regarding notice and transfer of facility permits.

III. FACTUAL BACKGROUND

3. The foregoing recitals are hereby incorporated herein.

IV. AGREEMENT

4. Indian River shall immediately commence and by no later than April 30, 2009, complete an investigation on Units 3 and 4 at the Indian River Facility to evaluate the cause of opacity exceedances from those Units. Within 30 days after completing the investigation, Indian River will submit a Report of its findings to DNREC. If the findings point to causes that may be resolved or mitigated through measures that are cost-effective and commercially reasonable in light of the period remaining prior to full implementation of emissions limitations under the Multi-P Consent Order, Indian River shall propose a schedule for implementation of such interim measures. Upon approval by DNREC, Indian River shall implement such interim measures upon the schedule agreed upon by DNREC and Indian River. The Report must consider, among other measures, SO₃ injection to reduce flue gas particulate resistivity that could improve ESP performance at Unit 3 and 4.

5. In addition to the measures required in paragraph 4, Indian River shall as soon as practicable but no later than June 30, 2009, develop and implement an optimization plan for Units 1, 2, 3 and 4 that include best maintenance, repair, and operating practices in light of Indian River's particular circumstances to optimize ESP availability and performance in accordance with manufacturers' specifications, the operational design of the unit, and good engineering practices.

6. As soon as practicable but no later than April 30, 2009, Indian River shall establish policies that require operators and managers at the Indian River Facility to operate the Units in a manner reasonably anticipated to minimize opacity exceedances in addition to the

existing policies related to minimize NO_x emissions. Among other such policies, Indian River shall consider establishing an employee incentive program that rewards managers and operators for operating the Units with reduced opacity.

7. No later than 90 days after entry of this consent order, Indian River shall purchase and provide to DNREC an Ultrafine Particle Monitor comparable to Model 3031 which is specifically designed for long-term, air quality monitoring networks and continuous, 24-hour a day operation with minimal maintenance. The cost of the particulate monitor is not intended to exceed \$60,000.

V. PERMITTING

8. This Consent Order is not a permit. Except as provided herein, this Consent Order in no way affects or relieves Indian River of its responsibility to comply with all applicable federal, state and local laws, regulations and permits.

9. Indian River shall apply for all necessary permits to effectuate the requirements of this Consent Order. DNREC agrees to make all reasonable efforts to timely issue any permits that may be necessary to implement any requirements of this Consent Order.

VI. ENFORCEMENT/PENALTIES

10. Within 30 days after entry of this Consent Order by the Court, Indian River shall pay a civil penalty of \$5,000 to DNREC.

11. DNREC retains the right to seek to enforce the terms of this Consent Order, and to take any action authorized by federal or state law not inconsistent with the terms of this Consent Order to achieve or maintain Indian River's compliance with the terms and conditions of this Consent Order.

12. At any reasonable time, an authorized representative of DNREC, including any independent contractors, upon presentation of credentials, shall have a right of entry upon the premises of Indian River's Indian River facility for the purpose of monitoring compliance with the provisions of this Consent Order, including inspecting plant equipment, and inspecting and copying any records required to be maintained by Indian River by this Consent Order. Nothing in this Consent Order shall limit the preexisting authority of DNREC to conduct tests and inspections pursuant to any other applicable statutory or regulatory provision.

VIII. EFFECT OF SETTLEMENT

13. Satisfaction of the requirements of this Consent Order constitutes full settlement of, and shall forever resolve all civil liability of Indian River and its affiliates, to DNREC for noncompliance with the requirements of the Delaware Air Quality Regulations No. 1112, 1114, and 1120, and those regulations as they are implemented through the 1990 Clean Air Act and its amendments (42 U.S.C. §7401 *et seq.*) and the associated permit conditions as those legal provisions specifically relate to the actual emissions of NO_x and opacity identified during the Applicable Period.

14. This Consent Order does not pertain to any matters other than those expressly specified herein. Nothing in this Consent Order is intended or shall be construed as a waiver by the DNREC of its right to institute a civil or criminal action against Indian River for any past, present or future civil or criminal violations of any statutes, rules or regulations administered or enforceable by the DNREC, other than with respect to the NO_x and opacity emissions requirements as set out above.

IX. GENERAL PROVISIONS

15. Other Laws. This Consent Order in no way affects or relieves Indian River of its

responsibility to comply with all applicable federal, state and local laws, regulations and permits.

16. Public Documents. All information and documents submitted by Indian River to DNREC pursuant to this Consent Order shall be subject to public inspection, unless subject to legal privileges or protection or identified and supported as business confidential by Indian River in accordance with the applicable state law and regulations.

17. Notice. Unless otherwise provided herein, notification to or communications with DNREC or Indian River shall be deemed submitted on the date they are post marked and sent either by overnight receipt mail service or by certified or registered mail, return receipt requested. Except as otherwise provided herein, when written notification or communication is required by this Consent Order, it shall be addressed as follows:

As to Indian River

John W. Ragan
Executive Vice President & Regional President
NRG Energy, Inc.
211 Carnegie Center
Princeton, NJ 08540-6213

J. Andrew Murphy, Esquire
Executive Vice President & General Counsel
NRG Energy, Inc.
211 Carnegie Center
Princeton, NJ 08540-6213

As to DNREC

Ali Mirzakhali, Administrator
Air Quality Management
Delaware Department of Natural Resources
& Environmental Control
156 S. State Street
Dover, DE 19901

Valerie M. Satterfield
Deputy Attorney General
State of Delaware Department of Justice
102 W. Water Street, 3rd Floor

Dover, DE 19901

18. Either party may change either the notice recipient or the address for providing notices to it by serving the other party with a written notice setting forth such new notice recipient or address.

19. The undersigned representative of each Party to this Consent Order certifies that he or she is duly authorized by the Party whom he or she represents to enter into the terms and bind that Party to them.

20. The Parties shall bear their own costs and attorneys' fees related to this action.

21. Effective Date. The effective date of this Consent Order shall be the date it is ordered and entered by this Court.

22. Modification. This Consent Order may be modified only by the written consent of DNREC and Indian River or by Order of the Court.

23. Continuing Jurisdiction. This Court retains jurisdiction of this case after entry of this Consent Order to enforce compliance with the terms and conditions of this Consent Order and to take any action necessary or appropriate for its interpretation, construction, execution, or modification. During the term of this Consent Order, any party may apply to the Court for any relief necessary to construe or effectuate this Consent Order.

24. This Consent Order constitutes the entire agreement and settlement between the Parties.

X. TERMINATION

25. This Consent Order shall be subject to termination upon motion by DNREC or Indian River after Indian River satisfies all requirements of this Consent Order. The requirements for termination include installation of any equipment as specified herein and the

performance of all other Consent Order requirements and the receipt of all permits specified herein. At such time, if Indian River believes that it is in compliance with all the requirements of the Consent Order then Indian River shall so certify to DNREC, and unless DNREC objects in writing with specific reasons within 60 days of receipt of the certification, this Consent Order shall be terminated on Indian River's motion. If DNREC objects to Indian River's certification, then Indian River shall bear the burden of proving that this Consent Order should be terminated. Termination of this Consent Order under this paragraph shall conclusively and finally establish

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that Indian River has satisfied all of the requirements of this Consent Order for purposes of Paragraph 13 (effect of settlement).

FOR PLAINTIFF

John A. Hughes, Secretary
Department of Natural Resources
& Environmental Control
89 Kings Highway
Dover, DE 19901

Date: _____

Valerie M. Satterfield
Deputy Attorney General
State of Delaware Dept. of Justice
102 W. Water Street, 3rd Floor
Dover, DE 19901
Attorney for DNREC

Date: _____

FOR DEFENDANT

Indian River Power LLC

By: _____
John W. Ragan
President

Date: _____

William Bumpers, Esquire
Baker Botts LLP
The Warner
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2400
Attorney for Indian River

SO ORDERED this ____ day of _____, 2009.

Judge