

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

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U.S. DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
COLUMBUS, OHIO

STATE OF NEW YORK, STATE OF :
CONNECTICUT, STATE OF NEW :
JERSEY, STATE OF VERMONT, STATE :
OF NEW HAMPSHIRE, STATE OF :
MARYLAND, STATE OF RHODE ISLAND :
and COMMONWEALTH OF :
MASSACHUSETTS :

Plaintiffs, :

v. :

AMERICAN ELECTRIC POWER SERVICE :
CORPORATION, APPALACHIAN POWER :
COMPANY d/b/a AMERICAN ELECTRIC POWER, :
and COLUMBUS SOUTHERN POWER COMPANY, :
d/b/a AMERICAN ELECTRIC POWER, :

Defendants. :

Civil Action No.

CE-04-1098

JUDGE SMITH

MAGISTRATE JUDGE KING

COMPLAINT

The States of New York, Connecticut, New Jersey, Vermont, New Hampshire, Maryland, Rhode Island, and the Commonwealth of Massachusetts (the "Plaintiff States"), each represented by, and by authority of, its respective Attorney General, allege:

NATURE OF THE ACTION

1. The Plaintiff States commence this civil action against defendants American Electric Power Service Corporation ("AEP Service"), Appalachian Power Company d/b/a American Electric Power ("APC"), and Columbus Southern Power Company d/b/a American Electric Power ("CSPC"), all of which are wholly-owned subsidiaries of American Electric Power Company, Inc. ("AEP Co"), pursuant to 42 U.S.C. § 7604(a), based on their construction and

operation of modified major emitting facilities without the permits required by Part C of Title I of the Clean Air Act (“CAA” or “the Act”), 42 U.S.C. §§ 7470-7479, the Prevention of Significant Deterioration (“PSD”) provisions, and nonattainment new source review (“NSR”) requirements of 42 U.S.C. §§ 7502-03.

2. Through its subsidiaries, including defendants AEP Service, APC and CSPC, AEPCo owns and operates numerous coal-fired power plants in several southern, midwestern and eastern states. At several of these plants (“the Facilities”), AEP has undertaken capital projects that have had the effect of increasing the plants’ generation of electricity and emissions. AEP undertook many of these construction projects in order to extend the operational lives of the Facilities’ electricity generating units at a time when the units at issue were nearing the end of their normal operational lives.

3. At no time did the defendants apply for or obtain the preconstruction permits required under the PSD and/or NSR provisions and their implementing regulations or any equivalent state program with respect to these capital projects. To date, defendants operate all the Facilities without applying best available control technology (“BACT”) or meeting the lowest achievable emission rate (“LAER”) for both SO₂ and NO_x, and without obtaining emission offsets at the Facilities as required by, respectively, the PSD and NSR requirements.

4. Emissions of nitrogen oxides (“NO_x”) and sulfur dioxide (“SO₂”) from coal-fired power plants contribute extensively to damages to public health and the environment. The NO_x emissions from these sources contribute to the formation and transport of ozone (“O₃”) pollution. In the presence of sunlight, NO_x reacts with volatile organic compounds (“VOCs”) in a complicated reaction that leads to the creation of ozone, a major component of urban smog. The

NO_x and SO₂ emissions lead to significant levels of nitric and sulfuric acid deposition and nitrate and sulfate fine particulate deposition in the Plaintiff States.

5. Ozone contributes to many respiratory health problems, including chest pains, shortness of breath, coughing, nausea, throat irritation and increased susceptibility to respiratory infections such as asthma. Elevated ozone levels jeopardize the health of residents of each of the Plaintiff States, especially children, those suffering from respiratory illnesses, and people who work or exercise outdoors. The adverse health effects of ozone pollution are particularly severe in New York, Connecticut, New Jersey, and other northeastern urban areas, where thousands of children suffer the debilitating effects of asthma.

6. The release of ozone-creating pollutants in Ohio and West Virginia contributes to the formation of ozone in the Plaintiff States. AEP's Ohio and West Virginia power plants, described below, all release ozone-creating pollutants in those states that contribute significantly to the formation of ozone in the Plaintiff States. Because the prevailing winds are from the west, particularly in the summertime, they bring to the Plaintiff States the NO_x emitted from dozens of utilities and other industrial operations in the Midwest, and the resultant ozone pollution. This effect is exacerbated by the fact that many power plants utilize extremely high stacks, which only serve to increase the long range mobility of the emissions. In recognition of this phenomenon, Congress singled out the migration of ozone and its precursors for special emphasis in the 1990 amendments:

The bill reflects an increasing understanding of how ozone pollution is formed and transported. Because ozone is not a local phenomenon but is formed and transported over hundreds of miles and several days, localized control strategies will not be effective in reducing ozone levels. Senate Report No. 101-228, reprinted in *1990 U.S. Code Cong. and Admin. News at 3389, 3399.*

7. Each of the Plaintiff States suffers from the results of ozone transport, which directly contribute to continued difficulty of most of the Plaintiff States in attaining and maintaining the National Ambient Air Quality Standards (hereinafter "NAAQS") for ozone. Air quality modeling demonstrates that much of the ozone in the northeastern states is attributable to transport from power plants in upwind states. For example, ozone levels in Rhode Island, Connecticut, New Jersey, Maryland and New Hampshire would exceed the ozone NAAQS even if all manmade, or anthropogenic, emission sources in those states were eliminated.

8. NO_x and SO_2 emissions also contribute to the formation of acid deposition, which has caused the acidification of hundreds of lakes and ponds in the Plaintiff States. For example, the percentage of lakes in New York's Adirondack Park that are chronically acidic (i.e., corresponding to a pH of 5.28 or lower, a level at which many species of fish can no longer survive) now approaches 20%. This percentage is expected to increase in years to come, unless upwind power plants significantly reduce their emissions of NO_x and SO_2 . Many lakes, particularly those in the western Adirondacks, that were favored destinations of anglers just two generations ago, are now devoid of fish.

9. Similarly, New Hampshire's lakes and ponds are highly vulnerable to the effects of acid deposition due to their low buffering capacity, and will continue to deteriorate unless upwind emissions are reduced. Nearly half of New Hampshire's lakes have been acidified and some lakes have already been acidified to the point where they do not support many, if not most, species of naturally reproducing fish populations.

10. Vermont has suffered and continues to suffer similar extensive damage from acid deposition. In Vermont, which has undertaken a long-range monitoring effort, over 20% of the

State's lakes have been designated as sensitive or critically sensitive to acid deposition toxification. At least two apparently crystal clear lakes have a pH level so acidic that they cannot support aquatic life. Like much of the Northeast, more than 50% of Vermont's bedrock is granite or other non-calcareous rock that provides low buffering capacity for neutralizing acid and thus is able to do little to counteract the acid loading of Vermont's lakes and rivers from atmospheric deposition.

11. In 1991, as part of its implementation of the PSD provisions of the Act, see 42 U.S.C. § 7475(d), the Forest Service reported that chemistry data from lakes and streams in and adjacent to Lye Brook Wilderness in Vermont showed that these waters were acidic and very sensitive to further acidification by atmospheric deposition. In the same document, the Forest Service determined that aquatic organisms in Lye Brook were already experiencing stress and damage as a result of sulfur and nitrogen deposition and that additional deposition would cause additional damage. Only a substantial reduction in sulfur and nitrogen deposition would return the area to a situation where adverse impacts would not be occurring.

12. During the winter, acid deposition falls in New York, Vermont, New Hampshire and other Plaintiff States in the form of snow, sleet and rain. Vermont's and New Hampshire's large annual snowfall locks up large amounts of pollutants in the snow covering fields and forests. Spring runoff from snow melt creates an annual pulse of acidified water which enters lakes and streams in huge volumes, creating a phenomenon known as acid shock. Acid shock can be particularly harmful to aquatic communities because it occurs during spawning or the early life stages of many aquatic animals. Some naturally occurring levels of nutrients, such as calcium, become less available to aquatic life because they are chemically bound up buffering the effects

of the incoming acids. A decrease in calcium concentrations can be detrimental to the shell development of crustaceans and mollusks as well as to the ability of fish to respond to changes in water temperature and alkalinity.

13. New Hampshire's higher elevations experience roughly twice the deposition rate measured in lower elevations due to the acidic "fog" containing sulfur and nitrogen compounds that envelope the higher elevations. As a result, New Hampshire's high elevation forests have suffered and continue to suffer significant crown damage and death.

14. The health of northeastern high altitude forests in the Plaintiff States is deteriorating as a result of the weakening effect of acid deposition on trees. Acid deposition mobilizes and washes away calcium in the soil that is necessary to the survival and growth of trees. Levels of calcium in the soil have been measurably dropping over the years, with a concomitant drop in tree growth rates and decreased resistance to stress and disease. The northern forests face a serious threat to survival in the face of frequent assaults by the high acid levels in snow, rain, and sleet in a climate already disposed to destroy the weak.

15. The high acidity of acid deposition also leaches harmful metals such as mercury (most of which also comes from electric power plants) out of the soils and into lakes and streams, where its presence results in human health advisory warnings to avoid eating mercury-laden fish. Acid precipitation also washes aluminum otherwise harmlessly present in soils into water bodies, where it is highly toxic to fish. Acidified water may also cause lead to leach out of residential water pipes, leading to increased exposure to lead in drinking water.

16. NO_x emissions also cause eutrophication of coastal waters including Maryland's Chesapeake Bay, the Long Island Sound and others in New York, Connecticut, New Jersey,

Massachusetts, Maryland and elsewhere, and contribute to nutrient loading in other waters including those in Rhode Island, reducing the diversity of fish and other life in these essential waters.

17. Emissions of NO_x and SO₂ also lead to the creation of fine nitrate and sulfate particles, which, like ozone, are emitted in southern and midwestern states but are transported by prevailing winds to the Plaintiff States. Inhalation of fine particulate matter causes respiratory distress, cardiovascular disease and premature mortality. Fine nitrate and sulfate particles are also toxic to aquatic life and vegetation.

18. As set forth in more detail below, the Clean Air Act affords special protection to areas classified as federal "Class I" such as certain national parks and wilderness areas. See, e.g., 42 U.S.C. §§ 7473(b)(1) and 7475(d). The federal land manager for New Hampshire's and Vermont's Class I areas, the U.S. Forest Service, has determined that air quality related values, such as vegetation, wildlife, water and scenic beauty, have been seriously impacted by acid, sulfur and nitrogen deposition. The National Park Service has conducted vegetation damage surveys in New Jersey's Class I area, the Edwin B. Forsythe National Wildlife Refuge. These surveys have revealed ozone injury to a wide variety of species.

19. Sulfates resulting from power plant emissions contribute to impaired visibility, negatively impacting Class I areas including, but not limited to, the following Class I areas located in Plaintiff States:

- Edwin B. Forsythe National Wildlife Refuge (New Jersey)
- Great Gulf and Presidential Range - Dry River Wilderness Areas (New Hampshire) (almost 33,000 acres of scenic mountains that reach elevations of up to 5,807 feet above sea level)

● Lye Brook Wilderness (Vermont)

Congress has declared visibility impairment prevention a national goal in federal Class I areas.

See, e.g., 42 U.S.C. §§ 7491 and 7492.

20. In light of the extensive environmental harm attributable to the emissions from the Facilities, the Plaintiff States seek, *inter alia*, (a) an injunction prohibiting further operation of the Facilities until defendants implement BACT and/or LAER, and obtain required emission offsets, as required, and otherwise comply with the Act and the laws and regulations promulgated thereunder; (b) civil penalties for defendants' past and ongoing violations of the Act; and (c) mitigation of the harm caused by the defendants' illegal emissions.

JURISDICTION AND VENUE

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

22. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b) and (c), and § 1395(a), because AEPCo and one or more of its subsidiaries, including defendants APC, CSPC, and AEP Service may be found in this District, and a substantial part of the events or omissions giving rise to the claims asserted herein arose in this District.

ALLEGATIONS COMMON TO ALL CLAIMS

The Defendants

23. American Electric Power Service Corporation ("AEP Service") is a corporation organized under the laws of the State of New York, with a principal place of business located at 1 Riverside Plaza, Columbus, Ohio. AEP Service is a wholly-owned subsidiary of AEPCo, providing, upon information and belief, management and professional services to, among others,

the electric utility subsidiaries of AEPCo, including accounting, administrative, information systems, environmental, engineering, financial, legal, maintenance and other services. Upon information and belief, most of the directors and officers of AEPCo and each of the electric utility subsidiaries are employees of AEP Service. AEP Service is an operator of the Facilities that are the subject of this action.

24. Appalachian Power Company d/b/a American Electric Power (“APC”) is a corporation organized under the laws of the State of Virginia, with a principal place of business located at 40 Franklin Road, S.W., Roanoke, Virginia. APC, a wholly-owned electric utility subsidiary of AEPCo doing business as American Electric Power, is engaged in the generation, sale, purchase, transmission and distribution of electric power to customers in Virginia and West Virginia. APC owns and operates Unit 2 of the Amos facility, located in St. Albans, West Virginia.

25. Columbus Southern Power Company d/b/a American Electric Power (“CSPC”) is a corporation organized under the laws of the State of Ohio, with a principal place of business located at 1 Riverside Plaza, Columbus, Ohio. CSPC, a wholly-owned electric utility subsidiary of AEPCo doing business as American Electric Power, is engaged in the generation, sale, purchase, transmission and distribution of electric power to customers in several regions of Ohio. CSPC owns and operates Units 5, and 6 of the Conesville coal-fired electric power generation plant (“Conesville”) located in Coshocton County, Ohio, and owns a portion of and operates Unit 4 of the Conesville facility.

26. American Electric Power Company, Inc. (“AEPCo”) is a corporation organized under the laws of the State of New York, with a principal place of business located at 1 Riverside

Plaza, Columbus, Ohio. AEPCo is a public utility holding company that owns all outstanding common stock of its domestic electric utility subsidiaries, including APC, and CSPC, as well as its service company, AEP Service. AEPCo and its subsidiaries own and/or operate the Facilities that are the subject of this action.

27. AEP Service, APC, and CSPC are each a "person" within the meaning of 42 U.S.C. § 7602(e).

The "AEP System"

28. Although each of the electric utility subsidiaries is separately incorporated, they operate as one entity -- American Electric Power. AEP documents establish that they are all physically interconnected, their operations are coordinated as a single electric utility system, and they are centrally controlled, managed and directed out of the Columbus, Ohio offices of AEPCo and AEP Service.

29. Upon information and belief, these AEP-owned companies operate all of their generating plants as a single interconnected and coordinated electric utility system known as the "AEP System Power Pool." Pursuant to an Interconnection Agreement to which these subsidiaries are parties, they share costs and benefits associated with the System's generating plants. This "sharing" is based upon a monthly calculation of each company's maximum peak demand in relation to the sum of the maximum peak demand of all five of the subsidiaries in the preceding twelve months.

30. Upon information and belief, the AEP electric utility subsidiaries also operate their transmission lines as a single intercoordinated system known as the "AEP System Transmission Pool." Pursuant to the Transmission Agreement to which these companies are parties, they share

costs associated with their relative ownership of the extra-high-voltage transmission system and certain facilities operated at lower voltages. The agreement combines these companies' investments in transmission facilities and shares the costs of ownership in proportion to the companies' respective peak demands.

31. Upon information and belief, the AEP electric utility subsidiaries are also parties to the AEP System Allowance Agreement, pursuant to which they transfer among themselves allowances for emissions of SO₂ associated with transactions under the Interconnection Agreement.

32. Upon information and belief, the members of the AEP System Power Pool also share marketing and trading transactions involving, *inter alia*, purchase and sale of electricity under physical forward contracts at fixed and variable prices and the trading of electricity contracts including exchange traded futures and options and O-T-C options and swaps. The AEP System Power Pool also sells electric power on a wholesale basis to non-affiliated electric utilities and power marketers, and allocates the sales among the subsidiaries.

33. Upon information and belief, at times relevant to this action, virtually all of the directors and officers of AEPCo were directors and/or officers of each of the electric utility subsidiaries and AEP Service.

34. Upon information and belief, AEPCo and AEP Service exercise complete dominion and control over, and manage and direct the environmental policy of, APC and CSPC with respect to the operation of their power plants. Upon information and belief, AEPCo and AEP Service communicate directly with state and federal regulators with respect to environmental and other issues involving APC and CSPC.

35. As set forth above, AEPCo and its subsidiaries are essentially one enterprise entity, consisting of several interdependent corporations wholly owned, controlled, operated and managed by a superior corporate entity -- AEPCo -- with the goal of accomplishing one general business purpose.

36. Upon information and belief, AEPCo and AEP Service have been aware of the requirements of the environmental statutes and regulations more particularly described below, and have been aware of the impact upon downwind locations, like the Plaintiff States, of the emissions from the electric utility power generation plants owned and/or operated by AEPCo and its subsidiaries.

37. Upon information and belief, AEPCo and AEP Service, through their control over and manipulation of APC and CSPC, have illegally and unjustly increased emissions from the electric utility power generation plants owned and/or operated by these subsidiaries without complying with relevant environmental statutes and regulations, and with full awareness of the impacts such increased emissions would have, and the injuries such increased emissions would cause, upon downwind states including the Plaintiff States.

STATUTORY AND REGULATORY BACKGROUND

38. The Clean Air Act established 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).

39. Pursuant to 42 U.S.C. § 7409, the Administrator of the United States Environmental Protection Agency ("EPA") has promulgated regulations establishing primary and secondary national ambient air quality standards ("NAAQS" or "ambient air quality standards") for certain

criteria air pollutants, including ozone and SO₂. The primary NAAQS are to be adequate to protect the public health, and the secondary NAAQS are to be 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.

40. 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.

41. 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.

Prevention of Significant Deterioration

42. Part C of subchapter 1 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 attaining the NAAQS standards. These PSD program requirements are designed to protect public health and welfare, to assure that economic growth will occur in a manner consistent with the preservation of existing clean air resources and to assure 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.

43. Congress intended the PSD program 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 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).

44. The PSD program is also intended “to preserve, protect and enhance the air quality in national parks, national wilderness areas ... and other areas of special national or regional natural, recreational, scenic or historic value.” 42 U.S.C. § 7470(2). Certain procedures must be followed with regard to potential impact on Class I areas from a proposed source or modification. Under 42 U.S.C. §§ 7475(d)(2)(A)-(C), EPA must provide notice of the PSD permit application to the federal official charged with responsibility for management of any lands within a Class I area that may be affected by emissions from the proposed facility. The notification must include an analysis of the proposed source’s anticipated impacts on visibility in the Class I area.

45. The federal land manager must then make a determination whether the proposed project will adversely impact air quality related values (including visibility) of any lands within the Class I area. In any case where the federal land manager files a notice alleging that emissions from a proposed project may cause or contribute to a change in the air quality in such area and identifying the potential adverse impact of such change, a permit shall not be issued unless the owner or operator of such facility demonstrates that emissions of particulate matter and sulfur dioxide will not cause or contribute to concentrations that exceed the maximum allowable increases for a Class I area.

46. 42 U.S.C. § 7475(a) prohibits the construction of a major emitting facility in an area

designated as attainment unless a PSD permit has been issued. 42 U.S.C. § 7479(1) defines "major emitting facility" as including, *inter alia*, any fossil-fuel fired steam electric plant with a heat input of more than 250 million British thermal units per hour (250mm Btu/hr) that emit or have the potential to emit 100 tons per year (tpy) or more of any air pollutant or any other source with the potential to emit 250 tpy or more of any air pollutant.

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

48. A state may comply with 42 U.S.C. § 7471 either by being delegated by EPA the authority to enforce the federal PSD regulations set forth at 40 C.F.R. § 52.21, or by having its own PSD regulations, that must be at least as stringent as those set forth at 40 C.F.R. § 51.166, approved as part of its SIP by EPA.

49. EPA has duly promulgated regulations at 40 C.F.R. § 52.21 to implement the PSD program. 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 demonstrate, before construction commences, that construction of the facility will not cause or contribute to air pollution in violation of any ambient air quality standard or any specified incremental amount.

50. The provisions of 40 C.F.R. § 52.21(i) prohibit the construction or major modification of a major stationary source in any area that has attained the NAAQS unless a PSD permit has been issued that meets the requirements of 40 C.F.R. §§ 52.21(j)-(r). The term "major stationary source" is defined at 40 C.F.R. § 52.21(b)(1)(i) to include, *inter alia*, 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 or any other facility that emits, or has the potential to emit, 250 tpy or more of any air pollutant subject to regulation under the Act, or any physical change that would occur at a stationary source not otherwise qualifying as a major stationary source, if the changes would constitute a major stationary source by itself.

51. As set forth at 40 C.F.R. § 52.21(i), any major emitting source that intends to construct a major modification must first obtain a PSD permit. "Major modification" is defined at 40 C.F.R. § 52.21(b)(2) as meaning 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. "Significant" is defined at 40 C.F.R. § 52.21(b)(23)(i), in reference to a net emissions increase or the potential of a source to emit any of the following pollutants, as a rate of emissions that would equal or exceed any of the following: for ozone, 40 tpy of VOCs or NO_x; for SO₂, 40 tpy; for particulate matter, 25 tpy.

52. As set forth at 40 C.F.R. § 52.21(j), a new major stationary source or a major modification shall apply best available control technology ("BACT") for each pollutant subject to regulation under the Act that it would have the potential to emit in significant quantities. BACT is the maximum degree of emission reduction achievable for each pollutant regulated under the Clean Air Act, taking into consideration energy, environmental and economic impacts of the emission reductions. 40 C.F.R. § 52.21(b)(12).

53. Pursuant to 40 C.F.R. § 52.21(k), the owner or operator of the facility to be modified must demonstrate that the modified source would not contribute to violation of (a) a NAAQS in

any air quality control region (including regions located downwind of the source); or (b) any allowable pollution increments.

54. Pursuant to 40 C.F.R. § 52.21(p), notification of any permit application for a proposed major source or modification, the emissions from which may affect a Class I area, must be provided to the Federal Land Manager for that area. The notification must include an analysis of the proposed source's anticipated impacts on visibility in the Class I area. A permit may not be issued if certain impacts, including impacts on allowable increments and air quality related values (including visibility) for the Class I area, would occur.

Nonattainment New Source Review

55. The New Source Review ("NSR") preconstruction requirements of 42 U.S.C. §§ 7502-03 apply in those areas designated as nonattainment with the NAAQS standards. Congress designed these NSR requirements to protect public health and welfare and to ensure that any new construction activity in nonattainment areas, including modification of existing facilities, results in improvements in air quality.

56. In accordance with 42 U.S.C. § 7502(c)(5), all SIPs shall include plan provisions that require permits, in accordance with 42 U.S.C. § 7503, for the construction and operation of new or modified stationary sources in nonattainment areas.

57. Pursuant to 42 U.S.C. § 7503(a), NSR preconstruction permits are issued only if the following conditions, among others, are met: (a) by the time it has commenced operation, the source has obtained offsetting emissions in an amount such that the total emissions from all sources within the region are reduced in an amount to represent reasonable further progress (as defined in 42 U.S.C. § 7501); (b) the proposed source will comply with the lowest achievable

emission rate (LAER); and (c) the owner or operator of the proposed new or modified source has demonstrated that all sources it owns in that State are subject to, and in compliance with, emission limitations and standards applicable under the Act.

58. A state may comply with 42 U.S.C. §§ 7502-03 either by being delegated by EPA the authority to enforce the federal NSR regulations set forth at 40 C.F.R. § 52.24, or by having its own NSR regulations approved as part of its SIP by EPA.

59. The provisions of 40 C.F.R. § 52.24(a) and (b) prohibit the construction or major modification of a major stationary source in any area that is nonattainment with the NAAQS unless an NSR permit has been issued pursuant to a SIP that meets the requirements of 40 C.F.R. §§ 52.24. The term "major stationary source" is defined at 40 C.F.R. § 52.24(f)(4) to include, *inter alia*, 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 or any other facility that emits, or has the potential to emit, 250 tpy or more of any air pollutant subject to regulation under the Act, or any physical change that would occur at a stationary source not otherwise qualifying as a major stationary source, if the change would constitute a major stationary source by itself.

60. "Major modification" is defined at 40 C.F.R. § 52.24(f)(5) as meaning 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.

"Significant" is defined at 40 C.F.R. § 52.24(f)(10), in reference to a net emissions increase or the potential of a source to emit any of the following pollutants, as a rate of emissions that would equal or exceed any of the following: for ozone, 40 tpy of VOCs or NO_x; for SO₂, 40 tpy.

State Regulatory Provisions

A. Ohio

61. On August 7, 1980, EPA disapproved Ohio's proposed PSD program. 45 Fed. Reg. 52676, 52741 (August 7, 1980). Accordingly, the EPA promulgated the PSD regulations of 40 C.F.R. §§ 52.21(b) through (w) into the Ohio SIP at 40 C.F.R. § 52.1884, and delegated to Ohio the authority to implement the federal PSD program incorporated into the Ohio SIP. 46 Fed. Reg. 9580 (Jan. 29, 1981). Prior to August 7, 1980, the EPA administered the PSD program in Ohio, applying the regulations at 40 C.F.R. § 52.21, originally promulgated on December 5, 1974 and as amended thereafter. The regulations appearing at 40 C.F.R. § 52.21 were incorporated and made a part of Ohio's SIP. 40 C.F.R. § 52.1884 (1998). Ohio submitted a request to the EPA for approval of Ohio Administrative Code section 3745-31-01 through 3745-31-20 into the Ohio SIP on March 1, 1996 as its construction program. Ohio subsequently submitted to the EPA additional revisions to the Ohio SIP. On October 10, 2001, Ohio's PSD program was conditionally approved by the EPA. 66 Fed. Reg. 51570 (Oct. 10, 2001). Further revisions to Ohio Administrative Code Chapter 3745-31 were submitted by Ohio on July 18, 2002. On January 22, 2003, the EPA approved Ohio's PSD SIP provisions, 3745-31-01 through 3745-31-20, which became effective on March 10, 2003. 68 Fed. Reg. 2909 (Jan. 22, 2003).

62. On April 15, 1974, EPA approved revisions to Ohio's SIP that required NSR preconstruction permits for new or modified sources ("the 1974 permit requirements"). 39 Fed. Reg. 13539 (April 15, 1974). In October of 1980, U.S. EPA conditionally approved revisions of Ohio's nonattainment NSR SIP rules, which were codified at Ohio Administrative Code ("Ohio Adm. Code") 3745-31-01 through 3745-31-08. 45 Fed. Reg. 72119, 72122 (Oct. 31, 1980). On

September 8, 1993, U.S. EPA approved certain revisions to Ohio's nonattainment NSR SIP Rules. 58 Fed. Reg. 47211 (Sept. 8, 1993); see 40 C.F.R. §§ 52.1870(c)(83) and 1879 (1999). These nonattainment NSR SIP rules were promulgated pursuant to: the nonattainment NSR requirements of Part D of Title I of the CAA Amendments of 1977, 42 U.S.C. §§ 7501-08 and, following the 1990 Amendments, 42 U.S.C. §§ 7501-15. The SIP Rules, as further amended in 2001 and 2003, are now codified at Ohio Adm. Code 3745-31-01 through 3745-31-29. 40 C.F.R. §§ 52.1870(c)(83) and 1879 (1999).

63. Under the CAA and Ohio's approved nonattainment NSR SIP Rules, no person may undertake a major modification of an existing major stationary source in a nonattainment area without first obtaining a nonattainment NSR permit to install, or under the 1974 permit requirements, a permit to construct or modify, from the Ohio Environmental Protection Agency ("OEPA"). 42 U.S.C. §§ 7501-7515; Ohio Adm. Code 3745-31-02(A).

64. Under the nonattainment NSR program, incorporated by reference into the Ohio SIP, a "major stationary source" is defined as any stationary source of air pollutants that emits, or has the potential to emit, 100 tons per year or more of any pollutant subject to regulation under the Act. See 40 C.F.R. Part 51, App. S, II.A.4(i); Ohio Adm. Code 3745-31-01(WW)(1).

65. "Major modification" is defined under the nonattainment NSR program, incorporated by reference into the Ohio SIP, as any physical change in or change in the method of operation of a major stationary source that would result in a significant net emission increase of any pollutant subject to regulation under the Act. See 40 C.F.R. Part 51, App. S, II.A.5(i); Ohio Adm. Code 3745-31-01(VV). "Net emissions increase" means the amount by which the sum of the following exceeds zero: (1) Any increase in "actual emissions" (as defined by the nonattainment

NSR Rules, 40 C.F.R., Part 51, App. S.; Ohio Adm. Code 3745-31-01(C)) 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. 40 C.F.R. Part 51, App. S.II.A.6; Ohio Adm. Code 3745-31-01(DDD). “Significant” means a rate of emissions that would equal or exceed any of the following rates for the following pollutants: NO_x, 40 tons per year and SO₂, 40 tons per year. 40 C.F.R. Part 51, App. S, II.A.10(i); Ohio Adm. Code 3745-31-01(WWW).

66. “Contemporaneous” is defined as the period from five years prior to the change up to the date that the unit undergoing the physical change or change in the method of operation becomes operational again and begins to emit the pollutants. Ohio Adm. Code 3745-31-01(DDD)(3)(a). “Creditable” decreases in the contemporaneous five year period are those decreases that are “federally enforceable.” Ohio Adm. Code 3745-31-01(DDD)(3)(e)(ii).

67. 42 U.S.C. § 7503 and the Ohio SIP, Ohio Adm. Code 3745-31-01 through 3745-31-29, require that in order to obtain a nonattainment NSR permit, the owner or operator of a source undertaking a major modification must, among other things: (a) comply with the lowest achievable emission rate as defined in Section 171(3) of the Act, 42 U.S.C. § 7501(3)(a); (b) obtain federally enforceable emission offsets at least as great as the new or modified source’s emissions; (c) certify that all other major sources that it owns or operates within Ohio are in compliance with the CAA; and (d) demonstrate that the benefits of the proposed source or modification significantly outweigh the environmental and social costs imposed as a result of its construction or modification.

B. West Virginia

68. The State of West Virginia has adopted, and EPA has approved, effective May 12, 1986, State regulations for the implementation of a State PSD program at Code of State Regulations (“CSR”) Title 45, Series 14, CSR §§ 45-14-1 through 45-14-20. 51 Fed. Reg. 12517 (April 11, 1986).

69. Pursuant to CSR § 45-14-6, the construction or major modification of a major stationary source in any area of West Virginia that has attained the NAAQS is prohibited unless a PSD permit has been obtained by the source and the source complies with the requirements of CSR § 45-14-7 through CSR § 45-14-12, including the implementation of best available control technology (“BACT”), as defined in CSR § 45-14-2.9.

70. The term "major stationary source" is defined at CSR § 45-14-2.30 to include fossil fuel fired steam electric plants greater than 250 million Btu/hour heat input that emit or have the potential to emit more than 100 tpy of a “regulated pollutant,” as defined in CSR § 45-14-2.41, and any other facilities that emit, or have the potential to emit, 250 tpy or more of a regulated air pollutant.

71. The term "major modification" is defined at CSR § 45-14-2.27 to mean a physical change or change in the method of operation of a major stationary source that results in a “significant,” as defined in CSR § 45-14-2.46, “net emissions increase,” as defined in CSR § 45-14-2.34, of any “regulated pollutant.”

72. Pursuant to CSR § 45-14-2.46, a “significant” net emissions increase of the regulated pollutants NO_x and SO₂ is an increase of at least 40 tpy.

Enforcement Provisions

73. Pursuant to 42 U.S.C. § 7604(a)(3), any person may commence, in the United States District Courts, a suit against any person who constructs a modified major emitting facility without a PSD or NSR permit, whichever is required. No notice must be provided before the commencement of a suit under 42 U.S.C. § 7604(a)(3).

74. 42 U.S.C. § 7602(e) defines a "person" to include corporations and States. The States of New York, Connecticut, New Jersey, Vermont, New Hampshire, Maryland, and Rhode Island, and the Commonwealth of Massachusetts, are each a "person" within the meaning of 42 U.S.C. § 7602(e).

75. 42 U.S.C. § 7413(b) authorizes both injunctive relief and civil penalties of up to \$32,500 per day for each violation.

FIRST CLAIM FOR RELIEF

(Amos Unit 2)

76. The Amos facility includes three (3) electricity generating units, each consisting of one boiler and one steam turbine. Unit 1 was placed in service in 1971. At all times relevant to this complaint, OPC reported to the Federal Energy Regulatory Commission that Amos Unit 1 had a Maximum Generator Nameplate Rating of 816 MW. Unit 2 was placed in service in 1972. At all times relevant to this complaint, OPC reported to the Federal Energy Regulatory Commission that Amos Unit 2 had a Maximum Generator Nameplate Rating of 816 MW. Unit 3 was placed in service in 1973. At all times relevant to this complaint, OPC reported to the Federal Energy Regulatory Commission that Amos Unit 3 had a Maximum Generator Nameplate Rating of 1300 MW.

77. In 2003, the Amos facility emitted 45,435.5 tons of NO_x and 114,018 tons of SO₂.

78. At the time AEP constructed the Amos facility, and at the time that PSD regulations became effective on August 7, 1980, the facility had the potential to emit in excess of 250 tpy of NO_x and 250 tpy of SO₂.

79. The Amos facility is, and was at the time AEP made the modifications identified in this complaint, a "major emitting facility," within the meaning of 42 U.S.C. § 7479(1), and a "major stationary source," within the meaning of 40 C.F.R. § 52.21(b)(1)(i)(b) and CSR § 45-14-2.30, for NO_x and SO₂.

80. The Amos facility is located in an area that, during the time periods relevant to the claims in this complaint, was attainment for SO₂, and attainment or unclassifiable for NO_x. With respect to ozone, the Amos facility is located in an area that was nonattainment from 1978 to December 9, 1981, attainment from December 9, 1981 to November 15, 1990, nonattainment from November 15, 1990 to September 6, 1994, and attainment from September 6, 1994 to June 1, 2004.

81. AEP modified Unit 2 of the Amos facility when it (a) retubed the main condenser in 1990 (CI # 12176); and (b) replaced the 7A, 7B, 8A and 8B high pressure feedwater heaters in 1990 (CI # 12187).

82. Had AEP complied with the PSD preconstruction permitting requirements, it would have projected that the modifications identified in the preceding paragraph would result in a net increase of more than 40 tpy in emissions of SO₂ and/or NO_x.

83. The aforesaid modifications constitute major modifications, within the meaning of 40 C.F.R. § 52.21(b)(2) and CSR § 45-14-2.27, for NO_x and SO₂.

84. AEP has not applied for a PSD permit for the modifications of the Amos facility

identified in this claim for relief.

85. Prior to constructing the aforesaid modifications, AEP 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) and CSR § 45-14-7 through 45-14-12, including consideration of impacts on Federal Class I areas.

86. AEP has not implemented, or operated in accordance with, BACT for control of NO_x or SO₂ emissions from Unit 2 of the Amos facility.

87. Therefore, since 1990 or earlier, AEP has been in violation of 42 U.S.C. §§ 7475(a) and (d), 40 C.F.R. § 52.21, the West Virginia SIP, and, since April 3, 1995, CSR § 45-14-6.

88. AEP has not obtained PSD permits for the Amos facility, nor has it installed BACT for control of SO₂ or NO_x emissions from the Amos facility, or complied with any other substantive requirements of 42 U.S.C. § 7475, 40 C.F.R. § 52.21(j) through (r) and CSR § 45-14-7 through 45-14-12.

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

90. As provided in 42 U.S.C. §§ 7413(b) and 7604(a), the violations set forth above subject AEP to injunctive relief and civil penalties of up to \$25,000 per day for each violation of the Act prior to January 30, 1997, and \$27,500 per day for each such violation between January 30, 1997 and March 15, 2004, and \$32,500 per day for each violation occurring after March 15, 2004, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 and 31 U.S.C. § 3701.

SECOND CLAIM FOR RELIEF

(Conesville Units 4, 5 and 6)

91. The Conesville facility includes six (6) electricity generating units, each consisting of one boiler and one steam turbine. Unit 1 was placed in service in 1959. Unit 2 was placed in service in 1957. Unit 3 was placed in service in 1962. Unit 4 was placed in service in 1973. Unit 5 was placed in service in 1976. Unit 6 was placed in service in 1978. At all times relevant to the claims in this complaint, CSPC has reported to the Federal Energy Regulatory Commission that Unit 1 has a Maximum Generator Nameplate Rating of 118 MW, that Unit 2 has a Maximum Generator Nameplate Rating of 147 MW, that Unit 3 has a Maximum Generator Nameplate Rating of 147 MW, that Unit 4 has a Maximum Generator Nameplate Rating of 841.5 MW, that Unit 5 has a Maximum Generator Nameplate Rating of 444 MW, and that Unit 6 has a Maximum Generator Nameplate Rating of 444 MW.

92. In 2003, the Conesville facility emitted 29,050.3 tons of NO_x and 133,188.8 tons of SO₂.

93. At the time the Conesville facility was constructed, and at the time that PSD regulations became effective on August 7, 1980, the facility had the potential to emit in excess of 250 tpy of NO_x and SO₂.

94. The Conesville facility is located in an area that has attained the NAAQS for ozone and NO_x under 42 U.S.C. § 7407(d). The Conesville facility is located in an area that was nonattainment for SO₂ for the period 1979-2000, and attainment from 2000 to the present.

95. The Conesville facility is, and was at the time AEP and Columbus Southern Power Co. (CSPC) made the modifications identified in this complaint, a "major emitting facility,"

within the meaning of 42 U.S.C. § 7479(1), and a "major stationary source," within the meaning of 40 C.F.R. § 52.21(b)(1)(i)(b), for NO_x and SO₂.

96. AEP modified the Conesville facility when it (a) installed a generator stator and two low pressure turbine rotors with associated equipment at Unit 4 in 1988 (CI # 75219); (b) replaced the furnace corner, hopper slope and side wall throat tube panels, and installed a new design low pressure turbine rotor and associated turbine stationary components at Unit 5 in 1997 (CI # 75484, CI # 75478); and (c) replaced the furnace corner, hopper slope and side wall throat tube panels, and replaced the low pressure turbine rotor at Unit 6 in 1997 (CI #75485, CI # 75479).

97. Had AEP complied with the PSD preconstruction permitting requirements, it would have projected that the modifications identified in the preceding paragraph would result in a net increase of more than 40 tpy in emissions of SO₂ and/or NO_x.

98. The aforesaid modifications are major modifications, within the meaning of 40 C.F.R. § 52.21(b)(2), for NO_x and/or SO₂. Therefore, a PSD permit should have been obtained prior to the commencement of construction.

99. Neither AEP nor CSPC has applied for a PSD permit for the modifications of the Conesville facility identified in this claim for relief.

100. Prior to constructing the aforesaid modifications, AEP and CSPC 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 40 C.F.R. § 52.21(j) through (r).

101. AEP has not implemented, or operated in accordance with, BACT for control of

NO_x and SO₂ emissions from Units 4, 5 and 6 of the Conesville facility.

102. Therefore, since 1988 or earlier, AEP and CSPC have been in violation of 42 U.S.C. § 7475(a), 40 C.F.R. § 52.21, and the Ohio SIP.

103. Some of the major modifications identified in this claim for relief occurred during time periods when the Conesville Plant was located in a nonattainment area for SO₂. These major modifications resulted in significant net emission increases, as defined by the CAA and the Ohio SIP, 42 U.S.C. §§ 7501-7515, and 40 C.F.R. Part 51, App. S, as incorporated into the Ohio SIP at OAC Chapter 3745-31, of SO₂.

104. AEP and CSPC violated and continue to violate the Nonattainment NSR provisions of the CAA and the Ohio SIP by, among other things, undertaking such major modifications and operating the facility after the modifications without obtaining a Nonattainment NSR permit as required by OAC Chapter 3745-31. In addition, as required by the CAA, 42 U.S.C. § 7501-7515, and OAC Chapter 3745-31, AEP and CSPC have not (1) installed and operated LAER for control of SO₂, (2) obtained and operated with federally enforceable emission offsets at least as great as the modified source's emissions, (3) certified that all other major sources that they own or operate within Ohio are in compliance with the CAA, and (4) demonstrated that the benefits of the modifications significantly outweigh the environmental and social costs imposed as a result of the modifications.

105. Based upon the foregoing, AEP and CSPC have violated and continue to violate the Nonattainment NSR provisions of Part D of Title 1 of the CAA, 42 U.S.C. §§ 7501-7515, and OAC Chapter 3745-31.

106. Unless restrained by an order of this Court, the violations of the Act alleged in this

claim for relief will continue.

107. As provided in 42 U.S.C. §§ 7413(b) and 7604(a), the violations set forth above subject AEP to injunctive relief and civil penalties of up to \$25,000 per day for each violation of the Act prior to January 30, 1997, and \$27,500 per day for each such violation between January 30, 1997 and March 15, 2004, and \$32,500 per day for each violation occurring after March 15, 2004, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 and 31 U.S.C. § 3701.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff States request that this Honorable Court:

1. Permanently enjoin Defendants from, inter alia, operating the Amos and Conesville facilities except in accordance with the Clean Air Act, the PSD regulations, the NSR regulations and the state SIP regulations;
2. Order Defendants to remedy their past violations;
3. Order Defendants to take other appropriate actions to remedy, mitigate, or offset the harm to public health and the environment caused by the violations of the Act alleged above;
4. Assess a civil penalty against defendants of up to \$25,000 per day for each violation of the Act, the PSD and NSR regulations, and the state SIP regulations prior to January 30, 1997, \$27,500 per day for each such violation between January 30, 1997 and March 15, 2004, and \$32,500 per day for each violation occurring after March 15, 2004, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 and 31 U.S.C. § 3701.
5. Award the Plaintiff States their costs of this action and attorneys fees; and
6. Grant such other relief as the Court deems just and proper.

Dated: November 17, 2004

Respectfully Submitted,

ELIOT SPITZER
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OF THE STATE OF NEW YORK

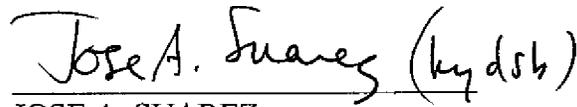
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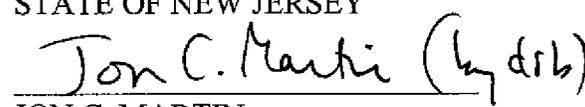
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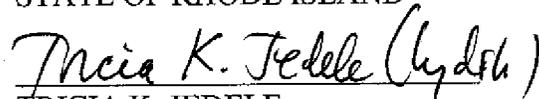
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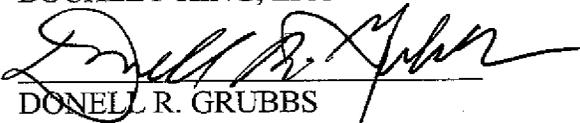
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