

**BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

In the Matter of the Title V
Operating Permit Issued to:

Indian River Power LLC
to operate an electricity generating power
plant located in Millsboro, Delaware

Facility Permit No. AQM-005/00001

**PETITION REQUESTING THAT THE ADMINISTRATOR OBJECT TO
ISSUANCE OF THE PROPOSED TITLE V OPERATING PERMIT FOR
INDIAN RIVER POWER PLANT**

Pursuant to section 505(b)(2) of the Clean Air Act (Act), 42 U.S.C. § 7661d(b)(2), and 40 C.F.R. § 70.8(d), the Clean Air Council (Council) hereby petitions the Administrator (Administrator) of the United States Environmental Protection Agency (EPA) to object to issuance of the Title V Operating Permit for the Indian River Power Plant, Permit No. AQM-005/00001. The proposed permit was issued on April 5, 2004 by the Secretary of the Delaware Department of Natural Resources (DNREC). This petition is filed within sixty days following the expiration of the EPA's 45-day review period, as required by section 505(b)(2) of the Act, 42 U.S.C. § 7661d(b)(2). The Administrator must grant or deny this petition within sixty days after it is filed. *Id.*

In compliance with section 505(b)(2) of the Act, this petition is based on objections to Indian River's proposed permit that were raised during the public comment period. Copies of the Clean Air Council's September 18, 2002 written comments on the draft permit are attached as Exhibit A. If the Administrator determines that a permit does not comply with legal requirements, he or she must object to its issuance. See 40 C.F.R. § 70.8(c)(1) ("The Administrator will object to the issuance of any proposed permit determined by the Administrator not to be in compliance with applicable

requirements or requirements under this part").

The Mid-Atlantic Environmental Law Center (Center) represents the Council in this matter. The Center is a not-for-profit environmental law firm that provides legal services to individuals and public interest organizations in environmental matters. The Center works to ensure that environmental requirements are met, and that legislation and regulations are adequately implemented by responsible federal, state and local agencies. The Center is located at Widener University School of Law and works in tandem with students in Widener's Environmental and Natural Resources Law Clinic.

The Council is a member-supported, non-profit environmental organization dedicated to protect everyone's right to breathe clean air. Founded in 1967, the Council is the oldest member-supported environmental organization in the Mid-Atlantic region. The Council works through public education, community advocacy, and government oversight to ensure enforcement of environmental laws. The Council has members who live, work, recreate and breathe air in the state of Delaware and throughout the Mid-Atlantic region, including the air impacted by emissions from the Indian River Power Plant.

The Council requests that the Administrator object to the final Title V permit for Indian River Power Plant because the proposed permit fails to contain or require a compliance schedule, See Draft Permit, page 69, Condition 5. This is improper for two reasons. First, a compliance schedule is required because the Indian River Power Plant had repeated violations of its Title V operating permit, including releases of soot, combustion products, and other unspecified pollutants. While the June 11, 2002 permit application submitted by Indian River Power LLC included a compliance status form prepared on November 20, 1996 indicating that all sources are in compliance with all

applicable requirements, during the period of September 2001 through February 2002 alone, the permittee had at least 176 unauthorized releases. See www.dnrec.state.de.us/DNRECCeis/ (Copy attached as Exhibit B). When these releases were raised during the public comment period, DNREC admitted that during the nine-week period of March 10, 2002 to May 13, 2002, the permittee had at least 58 unauthorized releases. See Exhibit C, DNREC response to the Center's comments at p. 12 (Response to Comment B) and p. 19 (Response to Comment R). In addition, the Indian River Power Plant received a Notice of Violation from DNREC in April 2003 for permit violations that, according to the DNREC website, have still not been corrected. See Exhibit D. Immediate corrective actions should be taken to prevent these repeated and ongoing releases and a compliance schedule should be incorporated into the Title V permit reflecting the permittee's obligations. 40 C.F.R. § 70.6 provides that the compliance schedule must include a schedule of remedial measures and an enforceable sequence of milestones that will lead to compliance, as well as a schedule for submission of certified progress reports. Because of the permittee's history of violations, a schedule of compliance must be incorporated into the proposed permit.

Second, even if there are no pending violations, 40 CFR 70.6(c) requires a schedule of compliance. See also 42 U.S.C. § 7661c(a). 40 C.F.R. § 70.6(c)(3) requires that the permit include a compliance schedule consistent with 40 C.F.R. § 70.5(c)(8). Under § 70.5(c)(8)(iii), a permit application¹ must include a "compliance schedule" for all part 70 sources that contains:

(A) For all applicable requirements with which the source is in compliance, a statement that the source will continue to comply with such requirements.

¹ DNREC suggests that, because 40 CFR 70.5(c)(8) applies to permit applications, it has no application to the actual permit itself. See Exhibit C at p. 19 (Response to Comment Q). However, 40 CFR 70.6(c)(3) specifically applies 40 CFR 70.5(c)(8) to the permit itself, and thus DNREC's suggestion is wrong.

(B) For applicable requirements that will become effective during the permit term, a statement that the source will meet such requirements on a timely basis . . .

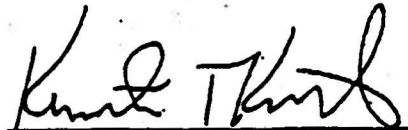
(C) A schedule of compliance for sources that are not in compliance with all applicable requirements at the time of permit issuance. Such a schedule shall include a schedule of remedial measures, including an enforceable sequence of actions with milestones, leading to compliance with any applicable requirements for which the source will be in noncompliance at the time of permit issuance. The compliance schedule shall resemble and be at least as stringent as that contained in any judicial consent decree or administrative order to which the source is subject. Any such schedule of compliance shall be supplemental to, and shall not sanction noncompliance with, the applicable requirements on which it is based.

Thus, 40 CFR 70.6(c) requires permits to include a compliance schedule even for sources that are in compliance. These requirements create federally enforceable permit provisions that facilitate future enforcement actions. The Indian River Power Plant draft permit, however, does not contain the required compliance schedule.

Indeed, Clean Air Council is concerned that the draft permit reflects a fundamental misunderstanding of the regulations by DNREC. In its response to comments raising this issue, DNREC claims that "a compliance schedule is only required where there is an ongoing noncompliance issue." See Exhibit C at p.19 (Response to Comment Q). That contradicts the express requirement of 40 CFR 70.5(c)(8)(iii)(A), applicable to the draft permit via 40 CFR 70.6(c)(3). Likewise, DNREC's suggestion that a compliance plan is not required because the permittee submitted an opacity reduction plan dated December 18, 2002, see Exhibit C at p. 19 (Response to Comment R), also ignores the express language of 40 CFR 70.5(c)(8)(iii). Rejection of the Indian River Power Plant draft permit for failure to include the required compliance schedule would send a needed message that DNREC cannot ignore the express requirements of the federal regulations.

In light of the significant noncompliance with 40 C.F.R. Part 70 and the Act identified in this petition, Clean Air Council respectfully requests that the Administrator object to the issuance of the Title V permit for Indian River Power Plant.

Dated: August 18, 2004



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