

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

IN THE MATTER OF)	
NRG ENERGY, INC.)	
)	
PROPOSED PERMIT NUMBER)	
24-017-0014)	
)	PETITION TO OBJECT TO PERMIT
ISSUED BY THE MARYLAND)	
DEPARTMENT OF THE ENVIRONMENT)	
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Pursuant to section 505(b)(2) of the Clean Air Act, 42 U.S.C. § 7661d(b)(2), and 40 C.F.R. § 70.8(d), Chesapeake Climate Action Network, Sierra Club, Environmental Integrity Project and Physicians for Social Responsibility, Chesapeake, Inc. (collectively, “Petitioners”) petition the Administrator of the U.S. Environmental Protection Agency to object to the proposed Title V Operating Permit Number 24-017-0014 (“Proposed Permit” or “Permit”) issued by the Maryland Department of the Environment (“MDE”) to NRG Energy, Inc. (“NRG”) for the Morgantown Generating Station (“Morgantown”). Morgantown is a coal-fired power plant located at 12620 Crain Highway, Newburg, Maryland 20664.

I. INTRODUCTION

EPA must object to the Proposed Permit for three main reasons:

First, § 504 of the Clean Air Act and § 70.6 of EPA’s Title V regulations require that Title V permits include enforceable emission limits and standards to assure compliance with all “applicable requirements” for a source, which include standards in the relevant State Implementation Plan (“SIP”). Section 70.6(b) of EPA’s Title V regulations also provides that all

terms and conditions in a Title V permit are enforceable by EPA and citizens — except for terms and conditions that are not required under the Act and that a state permitting authority designates as not being federally enforceable. Here, in violation of these requirements, MDE replaced the 20% SIP opacity requirement — which applies to all “fuel-burning equipment” in the relevant area of Maryland — with a consent-decree particulate matter (“PM”) limit of 0.10 lbs/mmBtu housed in the Permit’s state-only section. Because that PM limit is in the Permit’s state-only section, it is not enforceable by EPA or citizens. Thus — outside of the SIP revision process (which is the only acceptable way to weaken the opacity SIP limit applicable to Morgantown) — MDE has effectively removed the SIP opacity limit (or any equivalent) from the Permit and made it unenforceable in federal court.

Second, relatedly, if (as anticipated by the consent decree) Morgantown is to monitor using PM CEMS instead of opacity COMS, EPA’s Title V regulations on compliance schedules require the 0.10 lbs/mmBtu consent-decree PM limit to be incorporated into the federally-enforceable sections of the Permit.

MDE made it impossible for Petitioners to raise these issues during the public comment period. The draft permits for Morgantown allowed NRG to comply with the 0.10 lbs/mmBtu consent-decree PM limit in lieu of the SIP opacity limit, but the 0.10 PM limit was listed as being federally enforceable. It was also clear that the 0.10 PM limit was roughly equivalent to the 20% SIP opacity limit. Thus, Petitioners did not object during the comment period to the replacement of the SIP opacity limit with a federally-enforceable 0.10 PM limit. In fact, Petitioners could not have objected to the replacement of the SIP opacity limit with a state-only 0.10 PM limit, as the draft permits did not list the 0.10 limit as being state-only.

Third, the Clean Act and EPA's Title V regulations require that Title V permits include monitoring and reporting sufficient to assure compliance with applicable limits. Here, the Maryland SIP imposes a 0.14 lbs/mmBtu PM limit on Morgantown, and that limit has an averaging period of three (or at most, six) hours. Yet the Proposed Permit only requires an annual stack test to show compliance with the SIP PM limit. A stack test that only occurs once a year cannot assure compliance with a PM limit that has an averaging period of three or six hours.

II. BACKGROUND

A. The Plant, Its Relevant Limits and the Proposed Permit

Morgantown's two primary boilers (Units 1 and 2) are each rated at 640 MW and began operations in the very early 1970s. Ex. 1, Proposed Permit, at 5. Units 1 and 2 are subject to a SIP opacity limit — found in COMAR § 26.11.09.05A — of 20% except for certain limited periods. Proposed Permit at 37-38. The only exception to the 20% limit is found in COMAR § 26.11.09.05A, which provides that the 20% limit does not apply to emissions during load changing, soot blowing, startup, or adjustments or occasional cleaning of control equipment provided that the opacity does not exceed 40% and such emissions do not occur for more than six consecutive minutes in any 60-minute period. COMAR § 26.11.09.05A(1), (3).

In the Proposed Permit, however, MDE has replaced this SIP opacity limit for Units 1 and 2 with a 0.10 lbs/mmBtu PM limit found in the Permit's state-only section and originally contained in a 2008 consent decree. That consent decree resolved a state-court lawsuit filed by MDE against NRG's predecessor over opacity and other particulate-related violations at the Morgantown plant and two other coal-fired power plants. Ex. 2, Consent Decree. The Permit says the following to replace the SIP opacity limit with a state-only limit for Units 1 and 2:

The Permittee shall comply with the terms of the March 2008 Decree. Compliance with the March 2008 Consent Decree will be

considered compliance for **COMAR 26.11.09.05A(1)**. See the details of the March 2008 Consent Decree *in State Only Section of the Permit*.

Proposed Permit at 38 (italics added).

The Proposed Permit’s monitoring and record-keeping requirements confirm that MDE has replaced the opacity limit for Units 1 and 2 with a limit for PM. The Permit’s federally-enforceable monitoring and record-keeping requirements *for opacity* refer to the *monitoring requirements for PM*. Proposed Permit at 45-46. The federally-enforceable monitoring requirements *for PM* only mention monitoring opacity with respect to the plant’s bypass stack.¹ *Id.* at 46, 58-59. Even the opacity monitoring at the bypass stack will rarely take place, as NRG stated that it will almost never use the bypass stack going forward: the final fact sheet notes that a March 2015 letter from NRG stated that, “[w]ith the implementation of EPA’s Mercury and Air Toxics Standards (MATS) rule in April, the option of operating units on the bypass stacks will be all but eliminated” Ex. 3, Fact Sheet, at 42.

Units 1 and 2 are also subject to a higher PM SIP limit of 0.14 lbs/mmBtu. COMAR 26.11.09.06A(1); Proposed Permit at 38.² This PM SIP limit has an averaging period of three — and at most, six — hours. While the SIP does not specifically state an averaging period, COMAR 26.11.09.06C states that compliance with the PM limit “shall be calculated as the average of 3 test runs using EPA Test Method 5 or other [EPA] test method approved by the

¹ When Morgantown’s Flue Gas Desulfurization (“FGD”) system is in use, Units 1 and 2 exhaust through the 400-foot main stack. Proposed Permit at 4. When the FGD system is not in use, the flue gas is exhausted through the 700-foot bypass stack. *Id.* Our review of the most recent Title V deviation reports for Morgantown reveal that Morgantown is just reporting opacity values for the bypass stack (when the bypass is actually used) and not the main stack.

² The Proposed Permit in our possession mistakenly identifies the limit as 1.4 lbs/mmBtu. If MDE has not corrected this mistake in the version of the Proposed Permit provided to EPA, EPA should object to the Permit on this grounds alone. *See* 42 U.S.C. § 7661c(a); 40 C.F.R. § 70.6(a)(1).

Department.” Although the SIP does not provide a time for each stack-test run, each test run of a PM stack test (including stack tests conducted under Method 5) is generally one or two hours. This has been confirmed by an expert in the industry.³ See Ex. 4, Decl. of R. Sahu, at ¶¶ 3-4.

B. By Making Changes to the Permit After the Close of the Public Comment Period, MDE Made it Impossible for Petitioners to Raise Their Current Objections.

The Clean Air Act provides that a petition to EPA to object to a Title V permit “shall be based only on objections to the permit that were raised with reasonable specificity during the public comment period provided by the permitting agency (unless the petitioner demonstrates in the petition to the Administrator that it was impracticable to raise such objections within such period or unless the grounds for such objection arose after such period).” 42 U.S.C. § 7661d(b)(2); see also 40 C.F.R. § 70.8(d) (providing the same).

Here, it was impracticable to raise Petitioners’ current objections during the comment period, and the grounds for these objections arose after the comment period: the draft permits for Morgantown did not list the 0.10 lbs/mmBtu consent-decree PM limit as being a state-only limit, and the permits did not list the 0.14 lbs/mmBtu SIP PM limit at all. Instead, the two draft permits that MDE released for public comment⁴ made the consent decree’s 0.10 lbs/mmBtu PM

³ It is also consistent with the duration of stack-test runs for other pollutants. See 40 C.F.R. pt. 60 app. A-4.

⁴ MDE actually provided for three public comment periods, but there were only two draft versions of the Morgantown permit during these three comment periods. The first public comment period took place during the summer/late fall in 2013, and all Petitioners except for Physicians for Social Responsibility, Chesapeake, Inc. (“Chesapeake PSR”) (which did not submit comments) submitted timely comments on MDE’s first draft permit in September 2013. Ex. 5, attaching Sept. 2013 Comments. Because there were significant public comments on the draft permit and because a hearing was scheduled on the permit, the comment period was reopened for the same first version of the draft permit. Petitioners EIP and Chesapeake Climate Action Network submitted timely comments during this second comment period in December 2013. Ex. 6, attaching Dec. 2013 Comments. Then, in the summer of 2015, MDE opened a new comment period and issued a second, different version of the draft permit. With respect to the issues discussed in this petition, both versions of the draft permit were materially the same. All Petitioners other

limit federally enforceable, listing the PM limit applicable to Units 1 and 2 as follows in the federally-enforceable section of the draft permits:

COMAR 26.11.09.06A(1) – Fuel-Burning Equipment Constructed Before January 17, 1972. “A person may not cause or permit particulate matter caused by the combustion of solid fuel or residual fuel oil in the fuel burning equipment erected before January 17, 1972, to be discharged into the atmosphere in excess of the amounts shown in Figure 1.”

PM limit is 0.100 pounds per million Btu of heat input by stack test and 0.100 pounds per million Btu of heat input 24-hour rolling average by PEM. (Condition 32 and 40, March 2008 Consent Decree)

The Permittee shall comply with the terms of the March 2008 Consent Decree. See the details of the March 2008 Consent Decree in Table IV – 1b of the Permit under Emission Units F-1 and F-2.

Ex. 8, 2013 Draft Permit, at 37; Ex. 9, 2015 Draft Permit, at 38. As indicated in the quoted language above, the draft permits listed at least most of the relevant terms of the 2008 consent decree — including the 0.1 lbs/mmBtu PM limit —in Table IV –1b of the permits, which was housed in the federally-enforceable section of the permits. 2013 Draft Permit at 57-60; 2015 Draft Permit at 59-62. Also as indicated above, the draft permits provided for PM monitoring through PM CEMS.

The opacity section of the draft permits allowed NRG to substitute the consent decree’s 0.10 lbs/mmBtu PM limit for the SIP opacity limit, but again for purposes of that substitution the 0.10 PM limit was listed as being federally enforceable:

The Permittee shall comply with the terms of the March 2008 Consent Decree. Compliance with the March 2008 Consent Decree

than Chesapeake PSR (which did not submit comments) submitted timely comments on this second draft permit in July 2015. Ex. 7, attaching July 2015 Comments.

will be considered compliance for **COMAR 26.11.09.05A(1)**. See the details of the March 2008 Consent Decree in *Table IV-1b*⁵

2013 Draft Permit at 36-37; 2015 Draft Permit at 37-38.

Based on testing performed in 2007 on Unit 2 at Morgantown, the consent decree's 0.10 lbs/mmBtu PM limit was roughly the equivalent of the 20% SIP opacity limit: at 20% opacity, the PM emissions were predicted to be around 0.095 lbs/mmBtu, and at 18% opacity, the PM emissions were approximately 0.085 lbs/mmBtu. *See* Permit Fact Sheet at 36.

Because the 0.10 lbs/mmBtu PM limit was roughly equivalent to the 20% SIP opacity limit, and because the 0.10 limit was federally enforceable, Petitioners did not object during the comment period to the replacement of the SIP opacity limit with the 0.10 PM limit. Nor did Petitioners object to the monitoring for the federally-enforceable PM limit listed in the draft permits because the permits required monitoring by PM CEMS.

Petitioners, however, did object to the draft permits' incorporation of a state law that is not part of the Maryland SIP and that limited the ability of EPA and citizens to enforce violations recorded by PM CEMS. Specifically, the draft permits — through their incorporation of the 2008 consent decree — stated that violations of the 0.10 PM limit demonstrated through CEMS data would be subject to Maryland Environmental Article § 2-611 (2013 Draft Permit at 59; 2015 Draft Permit at 61), which provides that a person will not be subject to enforcement action if that person submits a compliance plan that is approved by MDE.

In their comments, Petitioners objected that the incorporation of state law § 2-611 impermissibly limited the ability of EPA and citizens to enforce the federally-enforceable 0.10 PM limit and the opacity limit in the draft permits. Sept. 2013 Comments at 12-13; 2015

⁵ The opacity section of the draft permits mentioned the state-only section of the permit — but only in reference to the requirements for the bypass stack: “*See State-only Section for additional Requirements for the By-Pass Stack.*” 2013 Draft Permit at 37; 2015 Draft Permit at 38.

Comments at 5-7. Petitioners also objected that the reference to § 2-611 was contrary to EPA’s regulations because it precluded the use, in an enforcement suit, of PM CEMS data as credible evidence of a violation of Morgantown’s PM limits. 2015 Comments at 6 (citing to, among other things, 40 C.F.R. § 51.212(c)). In addition, Petitioners objected that the incorporation of § 2-611 impermissibly weakened the federally-enforceable PM and opacity limits and did not assure compliance with these limits. Sept. 2013 Comments at 12-13.

In direct response to Petitioners’ objections regarding § 2-611 during the comment period, MDE — instead of simply removing the reference to § 2-611 or making clear that 2-611 was a state-only requirement — revised the Morgantown permit to *eliminate the 0.10 lbs/mmBtu limit as a federally-enforceable standard*, moving the 0.10 limit and the summary of the consent decree requirements (including the incorporation of §2-611) to the separate state-only section of the Proposed Permit. Proposed Permit at 37-38, 155-58. As discussed below in more detail, in doing so, MDE eliminated the SIP opacity limit applicable to Morgantown.

In response to Petitioners’ comments, MDE also replaced 0.10 lbs/mmBtu as a federally-enforceable limit with the 0.14 lbs/mmBtu SIP PM limit, which previously appeared nowhere in the draft permits for Morgantown. Proposed Permit at 38. Instead of requiring monitoring by PM CEMS (as MDE had done in the draft permits for the previously federally-enforceable 0.10 limit), MDE only required that NRG conduct annual stack tests to assure compliance with the 0.14 PM SIP limit at Morgantown’s main stack. *Id.* at 45-46. While the Proposed Permit includes what are presumably Compliance Assurance Monitoring (“CAM”) requirements for the 0.10 lbs/mmBtu PM limit at Morgantown’s bypass stack,⁶ there are no CAM requirements for PM for the main stack. *Id.* at 46, 58-59.

⁶ Instead of CAM, the Proposed Permit refers to the monitoring for the bypass stack as “Enhanced Monitoring.” Proposed Permit at 46, 58-59. Also, it is unclear why MDE retained the consent decree’s

By making these changes after the end of the comment period, MDE made it impossible for Petitioners to raise their objections at the heart of this petition.

C. Petitioners Would All Be Harmed if the Proposed Permit Did Not Meet the Requirements of the Clean Air Act.

Petitioner Chesapeake Climate Action Network (“CCAN”) is a Maryland-based grassroots, non-profit organization founded to transition the region towards clean-energy solutions to climate change, specifically in Maryland, Virginia, and Washington, D.C. CCAN's mission is to educate and mobilize citizens in a way that fosters a rapid societal switch to clean energy sources. This mission includes ensuring that facilities that contribute to global warming, such as coal-fired power plants, do not impact the health of CCAN's members or the environment through emitting dangerous pollutants. CCAN's mission and its members are adversely impacted if Title V permits do not comply with the Clean Air Act and thus permit power plants and other facilities to emit more pollutants than they should be allowed to emit under the Act — or if permits do not assure compliance with the limits established under the Act.

Petitioner Chesapeake PSR is dedicated to creating a healthy, just and peaceful world for both the present and future generations. Among other efforts, Chesapeake PSR uses its medical and public-health expertise to promote clean, renewable energy and to minimize the amount of air pollution emitted from coal-fired power plants. Chesapeake PSR, which has approximately 300 members, actively participates in the regulatory and permitting processes for coal-fired power plants in an effort to ensure that Maryland adequately addresses public-health issues associated with the operation of these plants. Chesapeake PSR and its members would be harmed if the Proposed Permit allowed more PM than legally permissible and thus adversely affected public health.

0.10 PM limit in the federally-enforceable Enhanced Monitoring provisions for the bypass stack but removed the 0.10 limit as a federally enforceable limit applicable to the main stack.

Petitioner Sierra Club is the nation's largest and oldest grassroots environmental organization, with a mission to explore, enjoy, and protect the wild places of the earth; to practice and promote the responsible use of the earth's ecosystems and resources; and to educate and enlist humanity to protect and restore the quality of the natural and human environments. Sierra Club's Maryland Chapter has more than 13,000 members. For decades, the Sierra Club in Maryland has worked to clean up and protect the State's air, water and lands, and to promote public health through regulatory, legislative and legal processes, and through grassroots engagement. Sierra Club has members who live in proximity to the Morgantown plant and would be adversely affected by unlawfully-elevated emissions of PM that are authorized by MDE's Proposed Permit.

Petitioner Environmental Integrity Project ("EIP") is a Washington, D.C. based non-profit founded to advocate for the effective enforcement of environmental laws, with a specific focus on the Clean Air Act and large stationary sources of air pollution like the Morgantown plant. As one method of achieving its mission, EIP participates in permitting proceedings for major sources of air pollution in the State of Maryland. EIP's ability to carry out its mission of improving the enforcement of environmental laws is adversely impacted if EPA fails to object to the issuance of Title V permits that do not comply with the Clean Air Act.

Thus, Petitioners would all be harmed if EPA failed to object to the Proposed Permit. An objection by EPA is especially important here given that the issues in this petition deal with particulates, including fine particulates, for which there is no safe level of exposure.

III. SPECIFIC OBJECTIONS

"If any [Title V] permit contains provisions that are determined by the Administrator as not in compliance with the applicable requirements of this chapter . . . the Administrator *shall* . . .

object to its issuance.” 42 U.S.C. § 7661d(b)(1) (emphasis added). EPA “does not have discretion whether to object to draft permits once noncompliance has been demonstrated.” *See N.Y. Pub. Interest Group v. Whitman*, 321 F.3d 316, 334 (2d Cir. 2003) (holding that EPA is required to object to Title V permits once a petitioner has demonstrated that a permit does not comply with the Clean Air Act).

Here, EPA must object to the Proposed Permit for the reasons discussed below.

A. The Proposed Permit Wrongfully Removes the SIP Opacity Limit and Makes it Unenforceable by Citizens and EPA.

Section 504 of the Clean Air Act requires each Title V permit to include “enforceable emission limitations and standards . . . and such other conditions as are necessary to assure compliance with applicable requirements of this chapter, including the requirements of the applicable implementation plan.” 42 U.S.C. § 7661c(a). Similarly, 40 C.F.R. § 70.6(a)(1) provides that each Title V permit “shall include” “[e]mission limitations and standards, including those operational requirements and limitations that assure compliance with all applicable requirements at the time of permit issuance.” EPA’s Title V regulations define “applicable requirement” to include, among other things, any standard or other requirement provided for in the applicable SIP. 40 C.F.R. § 70.2. Relatedly, § 70.6(b) of EPA’s Title V regulations also provides that all terms and conditions in a Title V permit are enforceable by EPA and citizens — except for terms and conditions that are not required under the Act and that a state permitting authority specifically designates as not being federally enforceable. In keeping with these requirements, the Fourth Circuit has stated: “The [Title V] permit . . . contains, in a single, comprehensive set of documents, all CAA requirements relevant to the particular polluting source. In a sense, a permit is a source-specific bible for Clean Air Act compliance.” *Virginia v. Browner*, 80 F.3d 869, 873 (4th Cir. 1996) (citations omitted).

Here, in violation of these requirements from the Act and the Title V regulations, MDE replaced the 20% SIP opacity requirement — which applies to all “fuel-burning equipment” in the relevant area of Maryland — with the consent-decree particulate matter PM limit of 0.10 lbs/mmBtu housed in the Permit’s state-only section. As noted in the Proposed Permit, Units 1 and 2 at Morgantown are subject to the COMAR § 26.11.09.05 opacity limit, which provides that “[i]n Areas I, II, V, and VI, a person may not cause or permit the discharge of emissions from any fuel burning equipment, other than water in an uncombined form, which is greater than 20 percent opacity,” subject to the very limited exceptions discussed above. COMAR § 26.11.09.05A(1); Proposed Permit at 37-38. That opacity limit is part of the Maryland SIP and is thus an applicable requirement under EPA’s Title V regulations. *See* 40 C.F.R. § 52.1070(c) (listing § 26.11.09.05 as having been approved by EPA as part of Maryland’s SIP).

Because the 0.10 lbs/mmBtu PM limit is in the Permit’s state-only section, under 40 C.F.R. § 70.6(b), that limit is not enforceable by EPA or citizens. Thus MDE has effectively removed the SIP opacity limit from the Permit in violation of 42 U.S.C. § 7661c(a) and 40 C.F.R. § 70.6(a)(1). MDE’s designation of the SIP opacity limit as a state-only requirement also violates 40 C.F.R. § 70.6(b)’s requirement that permitting authorities only designate as not being federally enforceable those terms “that are not required under the Act or under any of its applicable requirements.”

MDE’s change to the permit has real-world consequences. First, as discussed above, testing performed in 2007 on Unit 2 at Morgantown shows that the 0.10 lbs/mmBtu PM limit from the consent decree was roughly the equivalent of the 20% SIP opacity limit. *See* Permit Fact Sheet at 36. Now, the only federally-enforceable PM or opacity limit is the 0.14 lbs/mmBtu

SIP PM limit, which equates to a much higher opacity — 29% opacity.⁷ Sahu Decl. at ¶¶ 5-6. Further, even if citizens or EPA could somehow still federally enforce the 0.10 consent decree PM limit, such enforcement would be severely hampered because the Proposed Permit still provides that violations of the 0.10 PM limit are subject to the compliance-plan provisions of state law § 2-611.

Under §§ 110(i) and 116 of the Clean Air Act and EPA’s regulations, if MDE wished to weaken or remove the SIP opacity limit applicable to Morgantown, MDE was required to do so through the SIP revision process — which MDE did not do. Section 116 provides that states “may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under” the SIP. 42 U.S.C. § 7416. Similarly, § 110(i) provides that “no order, suspension, plan revision, or other action modifying any requirement of an applicable implementation plan may be taken with respect to any stationary source by the State or by the Administrator” except under certain actions that are not relevant or have not taken place here — a “primary nonferrous smelter order under section 7419 of this title, a suspension under subsection (f) or (g) of [§ 110 of the Act] (relating to emergency suspensions), an exemption under section 7418 of this title (relating to certain Federal facilities), an order under section 7413(d) of this title (relating to compliance orders [in federal enforcement]), a plan promulgation under subsection (c) of [§ 110], or a plan revision under subsection (a)(3) of [§ 110].” 42 U.S.C. § 7410(i). EPA’s regulations also similarly provide that SIP revisions “will not be considered part of an applicable [SIP] until such revisions have been approved by the Administrator in accordance with this part.” 40 C.F.R. § 51.105.

⁷ Morgantown plans to monitor PM as a surrogate for non-mercury metals under the MATS Rule. The MATS Rule’s 0.03 lbs/mmBtu PM limit is not an adequate surrogate for the SIP opacity limit: the MATS limit has a much longer averaging period (30 days, versus 6 minutes for the SIP opacity limit), and MATS excludes from compliance much longer periods during at least startup than the SIP opacity limit (up to four hours after the generation of electricity).

Here, because MDE did not go through the SIP revision process to amend the SIP opacity limit applicable to Morgantown Units 1 and 2 and because the Proposed Permit violates the Act and EPA's regulations in the other ways discussed above, EPA must object to MDE's change to that limit in the plant's Title V permit. If Morgantown is to continue to use PM CEMS in lieu of opacity COMS on the plant's main stack, the 0.10 lbs/mmBtu PM limit should be placed back into the federally-enforceable section of Permit to provide a sufficient proxy for the 20% SIP opacity limit — minus the availability of NRG to rely on state law § 2-611 or any other provisions of the 2008 consent decree that violate the Clean Air Act.⁸

B. If Morgantown Will Use PM CEMS Instead of COMS, EPA's Title V Regulations on Compliance Schedules Require the 0.10 Consent-Decree PM Limit to Be Incorporated Into the Federally-Enforceable Sections of the Permit.

The 2008 consent decree resolved violations of the SIP opacity limit at Morgantown. Consent Decree at p. 7. As part of resolving those violations, the consent decree subjected Morgantown to the 0.10 lbs/mmBtu PM limit in lieu of the 0.14 lbs/mmBtu SIP PM limit otherwise applicable to the plant. *Id.* at p. 2, ¶40. At the time of the consent decree, NRG's predecessor planned to install an FGD device at Morgantown by early 2010, and anticipated that the FGD device would reduce particulate emissions at the plant. *Id.* at pp. 2, 7. Because NRG's predecessor apparently believed that condensed water in the flue gas stream could impeded the accuracy of the opacity COMS during FGD operation, the consent decree anticipated that Morgantown might opt to monitor using PM CEMS instead of opacity COMS while the FGD

⁸ For example, paragraph 38 of the consent decree provides that “in demonstrating compliance, particulate emissions during periods of startup and shutdown shall not be included.” The Proposed Permit currently does not include this language. If MDE attempted to incorporate this language into the federally-enforceable portions of the Permit, that would violate §§ 110(i) and 116 of the Clean Air Act. Likewise, if MDE were to keep the SIP opacity limit but also attempt to incorporate the lax opacity requirements from COMAR § 26.11.09.05A(4) into the federally-enforceable sections of the Permit, this would also violate these sections of the Clean Air Act: § 26.11.09.05A(4) is not part of the SIP, as evidenced by the fact that it is currently in the state-only section of the Morgantown Permit. *See* Proposed Permit at 152-54.

device is running. *Id.* at ¶ 39. The 2008 consent decree also specifically contemplated that all continuing obligations under the decree (which would include the 0.10 PM limit) be incorporated into — and “made fully and finally enforceable through” — Morgantown’s Title V permit. *Id.* at ¶ 66. Nothing in the consent decree limits that enforceability to enforcement by the State.

EPA’s Title V regulations are in keeping with the consent decree on this last point. 40 C.F.R. § 70.6(c)(3) requires that Title V permits include a schedule of compliance consistent with § 70.5(c)(8). Section 70.5(c)(8), in turn, requires permit applications to include a “schedule of compliance for sources that are not in compliance with all applicable requirements at the time of permit issuance.” 40 C.F.R. § 70.5(c)(8)(iii)(C). That section also specifically states that “[t]his compliance schedule shall resemble and be at least as stringent as that contained in any judicial consent order to which the source is subject.” *Id.*

Thus, because the 0.10 lbs/mmBtu PM limit was part of the consent decree’s schedule for bringing Morgantown into compliance with the SIP opacity limit, EPA’s Title V regulations specifically contemplated that — when Morgantown’s Title V permit was issued and the Plant was in violation of the SIP opacity limit — the 0.10 PM limit be incorporated into the federally-enforceable provisions of the plant’s Title V permit. This is especially true given that the consent decree contemplated that Morgantown could discontinue monitoring using opacity COMS after installation of the FGD device. Under these regulations on compliance schedules, MDE should not now be allowed to remove — from the federally-enforceable portions of the Permit — Morgantown’s obligation to comply with both the underlying SIP opacity limit and the 0.10 PM limit that was part of the consent decree’s plan to bring Morgantown into compliance with the opacity limit.

C. The Proposed Permit Does Not Assure Compliance with the PM SIP Limit of 0.14 lbs/mmBtu.

The Clean Air Act states that Title V permits must include monitoring and reporting requirements sufficient to assure compliance with all applicable emission limits and standards. 42 U.S.C. § 7661c(c). The D.C. Circuit Court of Appeals has specifically stated that Title V requires that a “monitoring requirement insufficient ‘to assure compliance’ with emission limits has no place in a permit unless and until it is supplemented by more rigorous standards.” *See Sierra Club v. EPA*, 536 F.3d 673, 677 (D.C. Cir. 2008). The court has also acknowledged that the mere existence of periodic monitoring requirements may not be sufficient. *Id.* at 676–77. For example, the court noted — much like here — that annual testing is unlikely to assure compliance with a daily emission limit. *Id.* at 675. In other words, the frequency of monitoring methods must bear a relationship to the averaging time used to determine compliance.

If applicable requirements themselves contain no periodic monitoring, EPA’s regulations specifically require permitting authorities to add “periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source’s compliance with the permit.” 40 C.F.R. § 70.6(a)(3)(i)(B); *see also In the Matter of Mettiki Coal, LLC*, Petition No. III-2013-1 (EPA Sept. 26, 2014) (“Mettiki Order”) at 7. In addition, 40 C.F.R. § 70.6(c)(1) acts as a “gap filler” and requires that permit writers must also supplement a periodic monitoring requirement inadequate to the task of assuring compliance. *Sierra Club*, 536 F.3d at 675; *see also Mettiki Order* at 7.

In addition to including permit terms sufficient to satisfy EPA’s Title V monitoring requirements, permitting authorities must include a rationale for the monitoring requirements selected that is clear and documented in the permit record. *Mettiki Order* at 7-8 (citing 40 C.F.R. § 70.7(a)(5)).

Here, the Permit's provisions for the 0.14 lbs/mmBtu SIP PM limit fail to meet these requirements for the main stack for Units 1 and 2. As noted above, the PM SIP limit has an averaging period of three — and at most, six — hours. Despite this relatively short averaging period, the Proposed Permit only requires an annual stack test to show compliance with this limit at the main stack for Units 1 and 2. Proposed Permit at 45-49.

While the Permit's monitoring provision for PM mentions PM CEMS, this appears to only refer to monitoring for the PM limit (as a surrogate for non-mercury metals) under the Mercury and Air Toxics Standards, as the PM-limit section of the permit lists the 0.03 lbs/mmBtu MATS PM limit, and the monitoring provision states: "The Permittee shall comply with the particulate emission monitoring (PEM) requirements of 40 CFR Part 63, Subpart UUUU." Proposed Permit at 46. Morgantown's monitoring and reporting for MATS cannot assure compliance with the SIP PM limit because, as mentioned above, MATS has a much longer averaging period (30 days) and exempts sources from compliance with numerical limits during the first four hours after generation, which the SIP PM limit does not do. Further, while the Permit contains separate monitoring for the bypass stack, the bypass stack is only used at limited times, and NRG's March 2015 letter to MDE stated that the company will almost never use the bypass stack going forward.

A stack test that only occurs once a year cannot assure compliance at the main stack with a PM limit that has an averaging period of three or six hours. *Sierra Club*, 536 F.3d at 675. In addition, MDE has not provided any rationale that could explain how an annual stack test could assure compliance with a limit with such a short averaging period. Thus, EPA must object to the Proposed Permit. To ensure compliance with the SIP PM limit, the Permit's monitoring and

reporting provisions for the limit should require monitoring by PM CEMS and reporting in three or six-hour periods.

D. MDE's Response to Comments Does Not Address Petitioners' Arguments in this Petition.

Because MDE — after the close of the public comment period — changed the Permit to create the problems discussed in this petition, MDE's response to comments does not (and cannot) address Petitioners' arguments here. In its response to comments, MDE reasoned that moving the 0.10 lbs/mmBtu PM limit to the Permit's state-only section was appropriate because that consent-decree limit was never submitted to EPA for SIP approval and thus remains a state-only requirement. RTC at 2. MDE, however, provides no reasoning for its effective removal of the SIP opacity limit from the Permit, or for why removal of the consent-decree PM limit from the federal sections of the Permit does not violate EPA's regulations on compliance schedules. Nor does MDE provide any reasoning for its inadequate monitoring and reporting requirements for the 0.14 lbs/mmBtu SIP PM limit.

IV. CONCLUSION

For the reasons discussed above, EPA must object to the Proposed Permit. The Permit must include a federally-enforceable SIP opacity limit — or the 0.10 lbs/mmBtu PM limit from the consent decree should be placed back into the federally-enforceable section of the Permit (along with monitoring through PM CEMS) to provide a sufficient proxy for the SIP opacity limit. In addition, to ensure compliance with the 0.14 lbs/mmBtu SIP PM limit, the Permit's monitoring and reporting provisions for the SIP PM limit should require monitoring by PM CEMS and reporting in three or six-hour periods.

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Respectfully submitted,



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