UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

IN THE MATTER OF:	)	
CINERGY CORPORATION, PSI	)	**Notice of Violation**
ENERGY, INCORPORATED, AND	)	**EPA-5-00-22-IN/OH**
CINCINNATI GAS & ELECTRIC	)	
COMPANY	)	
	)	
	)	
Proceeding Pursuant to Section 113(a)(1) of	)	
the Clean Air Act, 42 U.S.C.	)	
§7413(a)(1)	)	

NOTICE OF VIOLATION

The United States Environmental Protection Agency (EPA) is issuing this Notice of Violation to Cinergy Corporation (Cinergy) and to Cinergy's wholly owned subsidiaries, PSI Energy, Incorporated (PSI) and Cincinnati Gas & Electric Company (CG&E), (referred to collectively as the Cinergy Companies) for violations of the Clean Air Act (Act), 42 U.S.C. §§ 7401-7671q, at the coal-fired power plants identified below. These violations involve modifications performed by the Cinergy Companies to extend the useful life, regain lost generating capacity, and/or increase capacity at their coal-fired power plants.

At various times [redacted] the Cinergy Companies have modified and operated the coal-fired power plants identified below without obtaining Prevention of Significant Deterioration (PSD) permits requiring, among other things, the installation of Best Available Control Technology (BACT) as required by the Act and by the Indiana and Ohio state implementation plans (SIPs). These violations have resulted in significant net increases in sulfur dioxide (SO_2) and nitrogen oxide (NO_x) emissions which will continue unless these violations are corrected.

EPA is issuing this Notice pursuant to Section 113(a)(1) of the Act, 42 U.S.C. § 7413(a)(1). Section 113(a) requires the Administrator of EPA to issue a notice of violation to any person in violation of a SIP. The Administrator has delegated the authority to issue this Notice to the Director, Air Enforcement Division, EPA Office of Enforcement and Compliance Assurance.

STATUTORY AND REGULATORY BACKGROUND

1. When Congress passed the Act, it exempted existing facilities from many of its requirements. However, Congress also made it quite clear that this exemption would not last forever. As the United States Court of Appeals for the D.C. Circuit explained in Alabama Power v. Costle, 636 F.2d 323 (D.C. Cir. 1979), "the statutory scheme intends to 'grandfather' existing industries; but...this is not to constitute a perpetual immunity from all standards under the PSD program." Rather, the Act requires grandfathered facilities to install modern pollution control devices when units are modified in such a way that their emissions may increase.

2. Part C of Title I of the Act and the PSD regulations implementing Part C, at 40 C.F.R. § 52.21, prohibit a major stationary source from constructing a modification without first obtaining a PSD permit if the modification is major in that it will result in a significant net increase in emissions of a regulated pollutant and if the source is located in an area which has achieved the National Ambient Air Quality Standards (NAAQS) for that pollutant. Part C and its implementing regulations further require that a source subject to PSD regulations install BACT.

3. A major stationary source is defined at 40 C.F.R. § 52.21(b)(1)(i)(a) to include certain listed stationary sources of air pollutants which emit, or have the potential to emit, 100 tons per year or more of any pollutant subject to regulation under the Act. This list explicitly includes fossil fuel-fired steam electric plants of more than 250 mmBTU. See 40 C.F.R. § 52.21(b)(1)(i)(a).

4. 40 C.F.R. § 52.21(B)(3)(i) defines "net emissions increase" as "the amount by which the sum of the following exceeds zero:
(a) Any increase in actual emissions from a particular physical change or change in method of operation at a stationary source (emphasis added); and
(b) Any other increases and decreases in actual emissions at the source that are contemporaneous with the particular change and are otherwise creditable."

5. "Actual emissions" are defined at 40 C.F.R. § 52.21(b)(21). In general, actual emissions as of a particular date equal the average rate, in tons per year, at which the unit actually emitted the pollutant during a two-year period which precedes the particular date and which is representative of normal source operations. Actual emissions are calculated using the unit's actual operating hours, production rates, and types of materials processed, stored, or combusted during the time period. 40 C.F.R. § 52.21(b)(21)(ii).

6. 40 C.F.R. § 52.21(b)(21)(iii) allows the Administrator to presume that source specific allowable emissions for a unit are equivalent to the actual emissions of the unit.

7. EPA amended the PSD regulations in 1992 to allow an electric utility steam generating unit that is implementing a physical change or change in operation to determine whether

the change will result in a significant emissions increase by equating actual emissions of the unit following the physical or operational change with representative actual annual emissions of the unit, provided the source owner or operator maintains and submits to the Administrator on an annual basis for a period of five years from the date the unit resumes regular operation, information demonstrating that the physical or operational change did not result in an emissions increase. 40 C.F.R. § 52.21(b)(21)(v).

8. The PSD regulations were incorporated by reference into the Indiana SIP on August 7, 1980. 40 C.F.R. § 52.793 (45 Fed. Reg. 52741).

9. The PSD regulations were incorporated by reference into the Ohio SIP on August 7, 1980. 40 C.F.R. § 52.1884 (45 Fed. Reg. 52741).

10. The SIP provisions identified in this Notice are federally enforceable pursuant to Sections 110 and 113 of the Act, 42 U.S.C. §§ 7410 and 7413.

FACTUAL BACKGROUND

11. Cinergy and PSI own and/or operate the Gibson Generating Station, a fossil fuel-fired electric utility steam generating plant located at East Mount Carmel, Gibson County, Indiana 47670. The Gibson plant consists of five boiler units with 3340 megawatts (MW) total generating capacity. The plant began operating the first boiler unit in 1976, the second boiler unit in 1975, the third boiler unit in 1978, the fourth boiler unit in 1979, and the fifth boiler unit in 1982.

12. The Gibson Plant is located in an area that has been classified as follows:
    a. For NO_2 and Ozone, attainment or unclassifiable from 1980 to present;
    b. For SO_2, attainment from 1980 to present;
    c. For PM, attainment or unclassifiable from 1980 to present.

13. Cinergy and CG&E own and/or operate the Miami Fort Generating Station, a fossil fuel-fired electric utility steam generating plant located in North Bend, Hamilton County, Ohio 45052. The Miami Fort plant consists of four boiler units with 1478 megawatts total generating capacity. The plant began operating the first boiler unit in 1949, the second boiler unit in 1960, the third boiler unit in 1975, and the fourth boiler unit in 1978.

14. The Miami Fort plant is located in an area that has been classified as follows:
    a. For Ozone, nonattainment from 1980 to present;
    b. For SO_2, attainment from 1980 to present;
    c. For PM, nonattainment from 1980 to 1982, and attainment from 1983 to present;
    4. For NO_2, attainment from 1980 to present.

15. Each of the plants identified above emits or has the potential to emit at least 100 tons per year of NOx and SO_2 and is a major stationary source under the Act.

VIOLATIONS

Gibson Facility

16. Between [redacted] Cinergy or PSI or both "modified" the Gibson plant as defined at 40 C.F.R. § 52.21(b). These modifications included, but are not limited to, the following projects: [redacted]

17. Each of these modifications resulted in a "significant net increase" in NOx emissions, SO_2 emissions, or both, as defined at 40 C.F.R. § 52.21(b)(3) and (23).

18. The modifications at the Gibson plant did not constitute "routine maintenance, repair and replacement" and therefore were not exempt from PSD requirements pursuant to 40 C.F.R. § 52.21(b)(2)(iii). Each of these changes constituted replacement of a boiler component with a long useful life and involved a substantial capital expenditure. Each modification was performed to increase capacity, regain lost capability, and/or extend the useful life of the unit. The utility industry has known that the "routine maintenance, repair and replacement" exemption does not apply to capital expenditures of this nature since at least 1988 when EPA issued a widely publicized applicability determination regarding utility modifications at a Wisconsin Electric Power Co. ("WEPCO") facility. EPA's interpretation of this exemption was upheld by the court of appeals in 1990. Wisconsin Electric Power Co. v. Reilly, 893 F.2d 901 (7th Cir. 1990).

19. None of the modifications at the Gibson Plant fall within the exemption found at 40 C.F.R. §52.21(b)(2)(ii)(f) and 326 IAC 2-3-1 for an "increase in the hours of operation or in the production rate." This exemption is limited to stand-alone increases in operating hours or production rates, not to construction activity which causes such increases to occur. The utility industry has known that this exemption does not apply where the increases in hours of operation or in production rate is caused by construction activity, since at least 1988 when EPA issued a widely publicized applicability determination regarding utility modifications at a Wisconsin Electric Power Co. ("WEPCO") facility. EPA's interpretation of this exemption was upheld by the court of appeals in 1990. Wisconsin Electric Power Co. v. Reilly, 893 F.2d 901 (7th Cir. 1990).

20. None of the modifications at the Gibson plant qualify for the "demand growth" exemption found at 40 C.F.R. § 52.21(b)(33)(ii) because the emissions increases which occurred after each modification resulted from the modification.

21. Neither Cinergy nor PSI obtained a PSD permit prior to constructing these modifications to the Gibson plant as required by 40 C.F.R. §52.21 and by the Indiana SIP. Nor did Cinergy or PSI provide any information to EPA regarding actual emissions after the modification as required by 40 C.F.R. § 52.21(b)(21)(v).

20. Therefore, Cinergy and PSI violated and continue to violate 40 C.F.R.§ 52.21 and the Indiana SIP by constructing and operating major modifications at the Gibson plant without first obtaining PSD permits.

21. Each of the violations has continued from the start of construction of the modification and will continue until Cinergy or PSI obtain the appropriate PSD permit and install BACT.

Miami Fort Facility

22. Between [redacted] Cinergy and CG&E "modified" the Miami Fort plant as defined by § 52.21(b). These modifications included, but are not limited to, the following projects: [redacted]

23. Each of the modifications at the Miami Fort plant resulted in a "significant net increase" in NOx emissions, SO2 emissions, or both, as defined at 40 C.F.R. § 52.21(b)(3) and (23).

24. The modifications at the Miami Fort plant did not constitute "routine maintenance, repair and replacement" and therefore were not exempt from PSD requirements pursuant to 40 C.F.R. § 52.21(b)(2)(iii). Each of these changes constituted replacement of a boiler component with a long useful life and involved a substantial capital expenditure. Each modification was performed to increase capacity, regain lost capability, and/or extend the useful life of the unit. The utility industry has known that the "routine maintenance, repair and replacement" exemption does not apply to capital expenditures of this nature since at least 1988 when EPA issued a widely publicized applicability determination regarding utility modifications at a Wisconsin Electric Power Co. ("WEPCO") facility. EPA's interpretation of this exemption was upheld by the court of appeals in 1990. Wisconsin Electric Power Co. v. Reilly, 893 F.2d 901 (7th Cir. 1990).

25. None of the modifications at the Miami Fort plant fall within the exemption found at 40 C.F.R. §52.21(b)(2)(ii)(f) and 326 IAC 2-3-1 for an "increase in the hours of operation or in the production rate." This exemption is limited to stand-alone increases in operating hours or production rates, not to construction activity which causes such increases to occur. The utility industry has known that this exemption does not apply where the increases in hours of operation or in production rate is caused by construction activity, since at least 1988 when EPA issued a widely publicized applicability determination regarding utility modifications at a Wisconsin Electric Power Co. ("WEPCO") facility. EPA's interpretation of this exemption was upheld by the court of appeals in 1990. Wisconsin Electric Power Co. v. Reilly, 893 F.2d 901 (7th Cir. 1990).

26. None of the modifications at the Miami Fort plant fall within the "demand growth" exemption found at 40 C.F.R. § 52.21(b)(33)(ii) because the emissions increase which occurred after each modification resulted from the modification.

27. Neither Cinergy nor CG&E obtained a PSD permit prior to constructing these modifications to the Miami Fort plant as required by 40 C.F.R. §52.21 and by the Ohio SIP. Nor did Cinergy or CG&E provide any information to EPA regarding actual emissions after the modification as required by 40 C.F.R. § 52.21(b)(21)(v).

27. Therefore, Cinergy and CG&E violated and continue to violate 40 C.F.R.§ 52.21 and the Ohio SIP by constructing and operating major modifications at the Miami Fort plant without first obtaining PSD permits.

28. Each of the violations has continued from the start of construction of the modification and will continue until Cinergy or CG&E obtain the appropriate PSD permit and install BACT.

ENFORCEMENT

Pursuant to Section 113(a)(1) of the Act, at any time after the expiration of 30 days following the date of the issuance of this Notice, the Regional Administrator may, without regard to the period of violation, issue an order requiring compliance with the requirements of the SIPs or bring a civil action pursuant to Section 113(b) for injunctive relief and/or civil penalties of not more than $25,000 per day for each violation before January 30, 1997, and no more than $27,500 per day for each violation after January 30, 1997. See 31 U.S.C. § 3701.

OPPORTUNITY FOR CONFERENCE

Respondents may, upon request, confer with EPA. The conference will enable Respondents to present evidence bearing on the finding of violation, on the nature of violation, and on any efforts they may have taken or propose to take to achieve compliance. Respondents have a right to be represented by counsel. Respondent must make any request for a conference within 10 days of receiving this Notice, and should make the request for a conference or other inquiries concerning the Notice in writing to:

Sarah Graham
U.S. Environmental Protection Agency
Air and Radiation Division
77 W. Jackson Blvd. (AE-17J)
Chicago, IL 60604
(312) 886-6797

6/28/00
Date

FOR
Bharat Mathur, Director
Air and Radiation Division

CERTIFICATE OF MAILING

.. I, Betty Williams, certify that I sent a Notice of Violation, No. EPA-5-00-22-IN/OH, by Certified Mail, Return Receipt Requested, to:

Jack Randolph, CEO
Cinergy Corporation
139 East Fourth Street
Cincinnati, Ohio 45201

I also certify that I sent copies of the Notice of Violation by first class mail to:

Bernard L. Huff, PhD, Manager
Operational Compliance Environmental Services Department
Cinergy Corporation
139 East Fourth Street
Cincinnati, Ohio 45201

Barb Gambill, Council
Cinergy Corporation
139 East Fourth Street
Cincinnati, Ohio 45201

Patrick M. Raher
Hogan and Hartson
555 Thirteenth Street, NW
Washington, D.C. 20004-1109

Felicia Robinson, Assistant Commissioner
Office of Enforcement
Indiana Department of Environmental Managment
100 North Senate Avenue
P.O. Box 6015
Indianapolis, Indiana 46206-6015

Robert Hodanbosi, Chief
Division of Air Pollution Control
Ohio Environmenral Protection Agency
P.O. Box 1049
Columbus, Ohio 43138

on the 28th day of June, 2000.

Betty Williams

Betty Williams, Secretary
AECAS, (IL/IN)

CERTIFIED MAIL RECEIPT NUMBER: Z 199 026 419