UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Office of Enforcement and Compliance Assurance

IN THE MATTER OF: CINERGY CORPORATION, PSI ENERGY, INCORPORATED, AND CINCINNATI GAS & ELECTRIC COMPANY Proceedings Pursuant to Section 113(a)(1) of the Clean Air Act, 42 U.S.C. §7413(a)(1)	)))))))))	Notice of Violation EPA-CAA-2000-HQ-2004

NOTICE OF VIOLATION

This Notice of Violation ("Notice") is issued to Cinergy Corporation (Cinergy), PSI Energy, Incorporated (PSI), and Cincinnati Gas & Electric Company (CG&E) (hereinafter referred to collectively as the "Cinergy Companies"), for violations of the Clean Air Act (Act), 42 U.S.C. §§ 7401-7671q and §§ 7501-7515, at the coal-fired power plants identified below. The Cinergy Companies have embarked on a program of modifications intended to extend the useful life, regain lost generating capacity, and/or increase capacity at their coal-fired power plants.

Commencing at various times [redacted] the Cinergy Companies have modified and operated the coal-fired power plants identified below without obtaining New Source Review (NSR) permits authorizing the construction and operation of physical modifications of their boiler units as required by the Act. In addition, for each of these physical modifications, the Cinergy Companies operated the modifications without installing pollution control equipment required by the Act. These violations of the Act have resulted in the release of massive amounts of sulfur dioxides (SO_2), nitrogen oxides (NO_x), and particulate matter ("PM") into the environment. Until these violations are corrected, the Cinergy Companies will continue to release massive amounts of illegal SO_2, NO_x, and/or PM into the environment.

This Notice is issued pursuant to Section 113(a)(1) of the Act, 42 U.S.C. § 7413(a)(1). Section 113(a) of the Act requires the Administrator of the United States Environmental Protection Agency (EPA) to notify any person in violation of a State Implementation Plan ("SIP") or permit of the violations. The authority to issue this Notice has been delegated to the Director, Air Enforcement Division, EPA Office of Enforcement and Compliance Assurance.

STATUTORY AND REGULATORY BACKGROUND

1. When the Clean Air Act (Act) was passed, Congress 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 grand fathered facilities to install modern pollution control devices whenever the unit is proposed to be modified in such a way that its emissions may increase.

2. The NSR provisions of Parts C and D of Title I of the Clean Air Act require preconstruction review and permitting for modifications of stationary sources. Pursuant to applicable regulations, if a major stationary source is planning upon making a major modification, then that source must obtain either a Prevention of Significant Deterioration ("PSD") permit or a nonattainment NSR permit, depending on whether the source is located in an attainment or a nonattainment area for the pollutant being increased above the significance level. If a major stationary source is planning upon making a modification that is not major, it must obtain a general, or "minor" NSR permit regardless of its location. To obtain the required permit, the source must agree to put on the Best Available Control Technology ("BACT") for an attainment pollutant or achieve the Lowest Achievable Emissions Rate ("LAER") in a nonattainment area, or, in the case of a modification that is not major, must meet the emission limit called for under the applicable minor NSR program.

3. Pursuant to Part C of the Act, the Indiana SIP requires that no construction or operation of a major modification of a major stationary source shall occur in an area designated as attainment without first obtaining a permit under 40 C.F.R. § 52.21 as incorporated into the Indiana SIP at 40 C.F.R. § 52.793.

4. Pursuant to Part C of the Act, the Ohio SIP requires that no construction or operation of a major modification of a major stationary source shall occur in an area designated as attainment without first obtaining a permit under 40 C.F.R. § 52.21 as incorporated into the Ohio SIP at 40 C.F.R. § 52.1884.

5. Pursuant to Part D of the Act, the Indiana SIP requires that no construction or operation of a major modification of a major stationary source shall occur in an area designated as nonattainment without first obtaining a permit under Indiana APC ("APC")19, approved Feb. 16, 1982, 40 C.F.R. § 52.770(c)(24) and 326 Indiana Administrative Code (IAC) 2-1 and 2-3, approved Oct. 7, 1994, 40 C.F.R. § 52.770(c)(94).

6. Pursuant to Part D of the Act, the Ohio SIP requires that no construction or operation of a major modification of a major stationary source shall occur in an area designated as nonattainment without first obtaining a permit under the Ohio Administrative Code OAC 3745-31, approved Oct. 31, 1980 (45 Fed. Reg. 72119) and Sept. 8, 1993 (58 Fed. Reg. 47211).

7. Pursuant to Section 110(a)(2)(C) of the Act, the Indiana SIP requires that no person shall commence construction or modification of any source or facility without first applying for and obtaining a construction permit ("minor NSR"). APC 19 and 326 IAC 2-1.

8. Pursuant to Section 110(a)(2)(C) of the Act, the Ohio SIP requires that no person shall commence construction or modification of any source or facility without first applying for and obtaining a construction permit ("minor NSR"). OAC 3745-31.

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

FACTUAL BACKGROUND

10. The Cinergy Companies are owners and/or operators of the facilities that are the subject of this Notice.

11. Cinergy and PSI own and/or operate the Cayuga Plant, a fossil fuel-fired electric utility steam generating plant located at P.O. Box 188, Cayuga, Vermillion County, Indiana 47928. The Cayuga Plant consists of two boiler units with 1,062 megawatts (MW) total generating capacity and began operating the first boiler unit in 1970 and the second boiler unit in 1972.

12. The Cayuga Plant is located in an area that has the following attainment classifications from 1980 to the present:

    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 PSI own and/or operate the Wabash River Plant, a fossil fuel-fired electric utility steam generating plant located at 450 Bolton Road, West Terre Haute, Vigo County, Indiana 47885. The Wabash River Plant consists of six boiler units with 974 MW total generating capacity and began operating the first boiler unit in 1953, the second boiler unit in 1953, the third boiler unit in 1954, the fourth boiler unit in 1955, the fifth boiler unit in 1956, and the sixth boiler unit in 1968.

14. The Wabash River Plant is located in an area that has the following attainment classifications from 1980 to present:

a. For Ozone and NO_2, attainment from 1980 to present;
b. For SO_2, nonattainment from 1980 to 1996 and attainment from 1996 to present;
c. For PM, nonattainment from 1980 to 1982 and attainment from 1983 to present.

15. Cinergy and PSI own and/or operate the Gallagher Plant, a fossil fuel-fired electric utility steam generating plant located at 30 Jackson Street, New Albany, Floyd County, Indiana 47150. The Gallagher Plant consists of four boiler units with 600 MW total generating capacity and began operating the first boiler unit in 1959, the second boiler unit in 1958, the third boiler unit in 1960, and the fourth boiler unit in 1961.

16. The Gallagher Plant is located in an area that has the following attainment classifications from 1980 to present:

a. For Ozone, nonattainment from 1980 to present;
b. For SO_2, attainment from 1980 to present;
c. For PM and NO_2, attainment from 1980 to present.

17. Cinergy and CG&E own and/or operate the Beckjord Plant, a fossil fuel-fired electric utility steam generating plant located at 757 U.S. Route 52 in New Richmond, Clermont County, Ohio 45157. The Beckjord Plant consists of six boiler units with 1,220 megawatts total generating capacity and began operating the first boiler unit in 1952, the second boiler unit in 1953, the third boiler unit in 1954, the fourth boiler unit in 1958, the fifth boiler unit in 1964, and the sixth boiler unit in 1968.

18. The Beckjord plant is located in an area that has the following attainment classifications from 1980 to present:

a. For Ozone, nonattainment from 1980 to present;
b. For SO_2, attainment from 1980 to present;
c. For PM and NO_2, attainment from 1980 to present.

19. Each of the Plants identified in paragraphs 11-18 above emits or has the potential to emit at least 100 tons per year of NO_x, SO_2 and/or PM and is a major stationary source under the Act.

VIOLATIONS

Indiana Facilities

20. On numerous occasions [redacted], Cinergy or PSI, or both, made "modifications" at the Cayuga Plant as defined by the Indiana SIP, 40 C.F.R. § 52.21(b) and APC-19 and IAC 2-3. These modifications included, but are not limited [redacted]

[redacted]

21. For each of these modifications that occurred at the Cayuga Plant, neither Cinergy or PSI obtained a PSD permit pursuant to 40 C.F.R. §52.21, or a minor NSR permit pursuant to APC 19 and 326 IAC 2-1. In addition, for modifications after 1992, no information was provided to the permitting agency of actual emissions after the modification as required by 40 C.F.R. § 52.21(b)(21)(v).

22. On numerous occasions [redacted] Cinergy or PSI, or both, made "modifications" at the Wabash River Plant as defined by the Indiana SIP, 40 C.F.R. § 52.21(b) and APC-19 and IAC 2-3. These modifications included, but are not [redacted]

23. For each of these modifications that occurred at the Wabash River Plant, neither Cinergy or PSI obtained a PSD permit pursuant to 40 C.F.R. § 52.21, a nonattainment NSR permit pursuant to APC 19 and IAC 2-1, nor a minor NSR permit pursuant to APC 19 and IAC 2-1. In addition, for modifications after 1992, no information was provided to the permitting agency of actual emissions after the modification as required by 40 C.F.R. § 52.21(b)(21)(v).

24. On numerous occasions [redacted] Cinergy or PSI, or both, made "modifications" at the Gallagher Plant as defined by the Indiana SIP, 40 C.F.R. § 52.21(b) and APC-19 and IAC 2-3. These modifications included, but are not limited to, the following individual modifications or projects: (1) replacement of the [redacted]

25. For each of these modifications that occurred at the Gallagher Plant, neither Cinergy or PSI obtained a PSD permit pursuant to 40 C.F.R. § 52.21; a nonattainment NSR permit pursuant to APC 19 and IAC 2-1, nor a minor NSR permit pursuant to APC 19 and IAC 2-1. In addition, for modifications after 1992, no information was provided to the permitting agency of actual emissions after the modification as required by 40 C.F.R. § 52.21(b)(21)(v).

26. The modifications at the Cayuga, Wabash River and Gallagher plants do not fall within the "routine maintenance, repair and replacement" exemption found at 40 C.F.R. § 52.21(b)(2)(iii). Each of these changes was an expensive capital expenditure performed infrequently that constituted the replacement and/or redesign of a boiler component with a long useful life. In each instance, the change was performed to increase capacity, regain lost capacity, and/or extend the useful life of the unit. In many instances, the original component was replaced with a component that was substantially redesigned in a manner that increased emissions. That the "routine maintenance, repair and replacement" exemption does not apply to such capital expenditures was known to the utility industry 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).

27. None of the modifications at the Cayuga, Wabash River, and Gallagher plants fall within the exemption found at 40 C.F.R. § 52.21(b)(2)(iii)(f) 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 where such increases follow or are otherwise linked to construction activity. That the hours of operation/rates of production exemption does not apply where construction activity is at issue was known to the utility industry 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 twice by the court of appeals, in 1989 and in 1990. Puerto Rican Cement Co. v. EPA, 889 F.2d 292 (1st Cir. 1989); Wisconsin Electric Power Co. v. Reilly, 893 F.2d 901 (7th Cir. 1990).

28. None of the modifications at the Cayuga, Wabash River, and Gallagher plants fall within the "demand growth" exemption found at 40 C.F.R. § 52.21(b)(33)(ii) because for each modification, a physical change was performed which resulted in an emissions increase.

29. Each of the modifications at the Cayuga, Wabash River, and Gallagher plants resulted in a significant net emissions increase for NO_x, SO_2 and/or PM. 40 C.F.R. § 52.21(b)(3)(I).

30. Therefore, Cinergy and PSI violated and continue to violate 40 C.F.R.§ 52.21, APC 19 and IAC 2-1 by constructing and operating modifications at the Cayuga, Wabash River, and Gallagher plants without the necessary permit required by the Indiana SIP.

31. Each of the violations exists from the start date of the construction of the modification until the time that Cinergy or PSI, or both, obtain the appropriate NSR permit and operate the necessary pollution control equipment to satisfy the Indiana SIP.

Ohio Facilities

32. On numerous occasions [redacted] Cinergy and CG&E made "modifications" at the Beckjord Plant as defined by § 52.21(b) and OAC 3745-31. These modifications included, but are not limited to, the following individual

[redacted]

33. For each of the modifications that occurred at the Beckjord Plant, neither Cinergy or CG&E obtained a PSD pursuant to 40 C.F.R. § 52.21(I), a nonattainment NSR permit pursuant to OAC 3745-31, nor a minor NSR permit pursuant to OAC 3745-31. In addition, for modifications after 1992, no information was provided to the permitting agency of actual emissions after the modification as required by § 52.21(b)(21)(v).

34. None of the modifications that occurred at the Beckjord Plant fall within the "routine maintenance, repair and replacement" exemption found at 40 C.F.R. § 52.21(b)(2)(iii) and OAC 3745-31. Each of these changes was an expensive capital expenditure performed infrequently at the Beckjord Plant that constituted the replacement and/or redesign of a boiler component with a long useful life. In each instance, the change was performed to increase capacity, regain lost capacity, and/or extend the useful life of the unit. In many instances, the original component was replaced with a component that was substantially redesigned in a manner that increased emissions. That the "routine maintenance, repair and replacement" exemption does not apply to such capital expenditures was known to the utility industry 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).

35. None of the modifications at the Cayuga, Wabash River, and Gallagher plants fall within the exemption found at 40 C.F.R. § 52.21(b)(2)(iii)(f) 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 where such increases follow or are otherwise linked to construction activity. That the hours of operation/rates of production exemption does not apply where construction activity is at issue was known to the utility industry 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 twice by the court of appeals, in 1989 and in 1990. Puerto Rican Cement Co. v. EPA, 889 F.2d 292 (1st Cir. 1989); Wisconsin Electric Power Co. v. Reilly, 893 F.2d 901 (7th Cir. 1990).

36. None of the modifications that occurred at the Beckjord Plant fall within the "demand growth" exemption found at 40 C.F.R. § 52.21(b)(33)(ii) because for each modification, a physical change was performed which resulted in an emissions increase.

37. Each of the modifications that occurred at the Beckjord Plant resulted in a significant net emissions increase for NO_x, SO_2 and/or PM. 40 C.F.R. § 52.21(b)(3)(I) and OAC 3745-31.

38. Therefore, Cinergy and CG&E violated and continue to violate 40 C.F.R. § 52.21 and OAC 3745-31 by constructing and operating modifications at the Beckjord Plant without the necessary permits required by the Ohio SIP.

39. Each of the violations at the Beckjord Plant exists from the start date of the construction of the modification until the time that Cinergy or CG&E, or both, obtain the appropriate NSR permit and operate the necessary pollution control equipment to satisfy the Ohio SIP.

ENFORCEMENT

Section 113(a)(1) of the Act provides that 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 SIP or permit, 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 and 40 C.F.R. Part 19.

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 it may have taken or proposes to take to achieve compliance. Respondent has a right to be represented by counsel. A request for a conference must be made within 10 days of receipt of this Notice, and the request for a conference or other inquiries concerning the Notice should be made in writing to:

Gregory Jaffe
U.S. Environmental Protection Agency
Air Enforcement Division
401 M Street, S.W. (2242-A)
Washington, D.C. 20460
(202) 564-1309

10/2/99
Date

Bruce C. Buckheit
Bruce C. Buckheit
Director, Air Enforcement Division
OECA