



AR-1475

For a thriving New England

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March 28, 2013

VIA CERTIFIED MAIL
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OFFICE OF THE REGIONAL ADMINISTRATOR

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Public Service Company of New Hampshire
780 North Commercial Street
Manchester, New Hampshire 03101

Robert A. Bersak, Esq.
Registered Agent
Public Service Company of New Hampshire
780 North Commercial Street
Manchester, New Hampshire 03101

Re: Notice of Intent to File Clean Air Act Citizen Suit

Dear Messrs. Long and Bersak:

Conservation Law Foundation (“CLF”) provides this Notice of Intent to Sue Public Service Company of New Hampshire (“PSNH”) pursuant to Clean Air Act (“CAA”) §§ 304(a)(1), 42 U.S.C. § 7604(a)(1).¹

The activities undertaken by PSNH at its Merrimack Station facility located at 97 River Road in Bow, New Hampshire described in this notice constitute: (1) constructing and operating, without required permits, modifications that have resulted or will result in increased air pollutant emissions as prohibited by CAA § 110(a)(2)(C), 42 U.S.C. § 7410(a)(2)(C), and the New Hampshire State Implementation Plan (“N.H. SIP”); (2) operating a modified source subject to New Source Performance Standards (“NSPS”) established under CAA § 111, 42 U.S.C. § 7411, in violation of NSPS applicable to the source, as prohibited by 42 U.S.C. § 7411(e).

The factual background for these claims is discussed at length in CLF’s prior Notice of Intent to File Citizen Suit, dated April 8, 2011 (the “Prior NOI”). The Prior NOI, with exhibits, was attached as Exhibit A to CLF’s Complaint in the pending CAA citizen suit against PSNH (the “Complaint”) and is incorporated herein by reference.

¹ As necessary and appropriate, CLF may seek redress and assert the claims set forth herein either as a plenary action in the United States courts or in CLF’s pending CAA citizen suit against PSNH. *Conservation Law Foundation v. Public Service Company of New Hampshire*, Civil Action No. 11-353 (D.N.H., filed July 21, 2011).

Violations

Failure to Obtain Preconstruction and Operating Permits for Modifications to MK2

As discussed in the Prior NOI, the CAA and the N.H. SIP prohibit construction of new or modified major sources of air pollution without obtaining a permit prior to beginning construction.² Merrimack Station is a major source subject to this permitting requirement, which is commonly known as Minor New Source Review.³

For these purposes, a modification to an existing major source is “any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.” CAA § 169(2)(C), 42 U.S.C. § 7479(2)(C) (incorporating definition of modification set forth at CAA § 111(a)(4), 42 U.S.C. § 7411(a)(4)) (emphasis supplied). The N.H. SIP applies the same definition. *See* N.H. Admin. Rules Env-A (Env-A) 101.57 (1990) (defining “modification,” as “any physical change in, or change in the operation of, a stationary source or device which increases the amount of a specific air pollutant emitted by such source or device, or which results in the emission of any additional air pollutant”) (emphasis supplied).

Under the N.H. SIP, “air pollutants” are “aerosols, fume, gas, mist, other than uncombined water, odor, toxic or radioactive material, particulate matter, or any combination thereof.” Env-A 101.05 (1990).

As discussed in the Prior NOI, PSNH made various physical and/or operational changes at Merrimack Unit Two (“MK2”) related to the replacement and/or upgrade of MK2’s high-pressure/intermediate pressure (“HP/IP”) turbine during outages in 2008, including an outage

² Under the N.H. SIP, a temporary permit, “which contains conditions, shall be required prior to commencement of construction or installation of any new or modified device.” Env-A 602.01(a) (1990) (emphasis supplied). A permit to operate, “which contains conditions, shall be issued with respect to a device for which a temporary permit is in effect.” Env-A 602.02(a) (1990) (emphasis supplied). The N.H. SIP provides that “[n]o person shall cause or allow the commencement of construction or installation of a new or modified device or the operation of an existing device without having applied for and been issued a temporary permit or a permit to operate for each device specified in Env-A 603.02 and Env-A 603.03.” Env-A 603.01 (1990).

³ Specified devices requiring such permits include: (i) devices “using coal, wood, number 6 fuel oil, waste oil or any combination thereof, with a designed rating greater than or equal to 2 million BTUs per hour of gross heat input,” *see* Env-A 603.02(c) (1990); (ii) “a rock, coal, or stone crusher with a throughput greater than or equal to 10,000 tons per year,” *see* Env-A 603.02(m) (1990); and (iii) devices subject to the New Source Performance Standards set forth in 40 C.F.R. Part 60; the National Emission Standards for Hazardous Air Pollutants set forth in 40 C.F.R. Part 61; the Prevention of Significant Deterioration rules set forth in 40 C.F.R. Part 51; the rules governing nonattainment areas set forth in Env-A 610 (1993); or the New Hampshire Hazardous Waste Rules promulgated under N.H. RSA ch. 147-A, *see* Env-A 603.03(a)-(e) (1990).

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beginning on April 1, 2008, and in 2009 during an outage beginning on August 1, 2009. PSNH did not obtain a preconstruction temporary permit or operating permit from the New Hampshire Department of Environmental Services (“DES”) authorizing such changes.

The turbine-related changes in 2008 and 2009 were designed to increase MK2’s efficiency and power production. According to recent analysis of operational data, the changes also increased the maximum rate at which MK2 can burn coal, allowing MK2 to produce additional power beyond gains achieved through increased efficiency. Subsequent to such changes, PSNH has operated MK2 combusting more coal than the level at which MK2 was capable before such changes. As a result of additional coal combustion and other factors discussed in the Prior NOI, MK2’s emissions of air pollutants have increased and/or will increase.

The unpermitted changes have increased and/or will increase emissions of air pollutants from MK2, in violation of preconstruction permitting requirements for modifications to major sources under the CAA and the N.H. SIP. In addition to pollutants subject to NAAQS, the modifications have increased and/or will increase emissions of other air pollutants, including those listed in **Exhibit A**.

Operating MK2 in Violation of New Source Performance Standards

Under the CAA, New Source Performance Standards (“NSPS”), 42 U.S.C. § 7411, 40 C.F.R. Part 60, define emissions limitations and other requirements for new and modified stationary sources. Owners or operators of a modified source are prohibited from operating those sources in violation of NSPS after the effective date of the NSPS applicable to the source. 42 U.S.C. § 7411(e). NSPS apply to modified existing facilities, which are deemed “affected facilities,” “for each pollutant to which a standard applies and for which there is an increase in the emission rate to the atmosphere.” 40 C.F.R. § 60.14(a). An “affected facility” for NSPS purposes is “any apparatus to which a standard is applicable.” 40 C.F.R. § 60.2.

The NSPS found at 40 C.F.R. Part 60, Subpart Da, apply to “electric steam generating units” (“ESGUs”).⁴ As applicable to coal-fired ESGUs, the ESGU NSPS include standards for

⁴ See 40 C.F.R. § 60.40Da(a) (“the affected facility to which this subpart applies is each electric utility steam generating unit: (1) That is capable of combusting more than 73 megawatts (MW) (250 million British thermal units per hour (MMBtu/hr)) heat input of fossil fuel (either alone or in combination with any other fuel); and (2) For which construction, modification, or reconstruction is commenced after September 18, 1978”); 40 C.F.R. § 60.41Da (“Electric utility steam-generating unit means any steam electric generating unit that is constructed for the purpose of supplying more than one-third of its potential electric output capacity and more than 25 MW net-electrical output to any utility power distribution system for sale.”); 40 C.F.R. § 60.41Da (2007) (“Steam generating unit means any furnace, boiler, or other device used for combusting fuel for the purpose of producing steam.”); 43 Fed. Reg. 42,154, 42,174 (Sept. 19, 1978) (term “electric utility steam generating unit” encompasses “fuel combustion system” and “steam generating system”). See also *Sierra Club v. Portland Gen. Elec. Co.*, 663 F. Supp. 2d 983, 994 (D. Or. 2009) (“NSPS Da applies to fossil-fuel-fired steam generating units for which modification commenced after September 18, 1978”).

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emissions of particulate matter (“PM”) (including overall pounds/MMBtu and opacity), sulfur dioxide (“SO₂”), and nitrogen oxides (“NO_x”), as well as testing, notification, record keeping, and reporting requirements. *See* 40 C.F.R. §§ 60.42Da - 60.52Da.

The U.S. Environmental Protection Agency (“EPA”) has further defined “modification” for NSPS purposes to include “any physical or operational change to an existing facility which results in an increase in the emission rate to the atmosphere of any pollutant to which a standard applies.” 40 C.F.R. § 60.14(a). “Emissions increases for NSPS purposes are determined by changes in the hourly emissions rates at maximum physical capacity.” 57 Fed. Reg. 32,314, 32,316 (July 21, 1992). To constitute “modifications” of existing ESGUs, physical or operational changes must “increase the maximum hourly emissions of any pollutant regulated under [NSPS] above the maximum hourly emissions achievable at that unit during the 5 years prior to the change.” *See* 40 C.F.R. § 60.14(h).

The MK2 coal-fired boiler and associated equipment are an existing ESGU. As discussed in the Prior NOI and according to recent analysis of steam flow and other operational data, the changes to MK2 in 2008 and 2009 associated with replacement of the HP/IP turbine included physical and/or operational changes to the MK2 ESGU, including without limitation physical and/or operational changes to the boiler, fuel combustion system, and/or steam-generation system.

These physical and/or operational changes supported additional steam flow from the MK2 boiler to the turbine, allowing PSNH to increase MK2’s power production and maximum coal-firing rate. As a result, the changes increased MK2’s maximum hourly emissions of PM, NO_x, and SO₂, pollutants regulated under the ESGU NSPS, above the maximum hourly emissions achievable during the 5 years prior to the changes. Therefore, such changes constituted a “modification” of the MK2 ESGU within the meaning of 40 C.F.R. §§ 60.14(a) and (h), triggering the application of the ESGU NSPS.

According to monitoring data reported to DES and EPA between 2008 and the present, emissions from MK2 have repeatedly and/or continuously exceeded the NSPS emission rate limits for PM, NO_x, and SO₂, and the NSPS opacity standards for PM emissions, in violation of the NSPS. *See* 40 C.F.R. §§ 60.42Da(b) & (c), 40 C.F.R. § 60.43Da(i)(3), and 40 C.F.R. § 60.44Da(e)(3).⁵ PSNH also has not complied and does not comply with the testing, notification, record keeping, and reporting requirements of the ESGU NSPS. Thus, PSNH is violating the NSPS provisions of the CAA. 42 U.S.C. § 7411(e).

⁵ When MK2 is operated, the recently installed flue gas desulphurization (“Scrubber”) system at Merrimack Station, completed in 2012, reduces MK2’s typical SO₂ emissions, which had previously violated the NSPS SO₂ emission rate. However, PSNH’s state permit to construct and operate the Scrubber neither requires compliance with NSPS SO₂ emission rate limits nor incorporates monitoring, reporting, and record-keeping requirements applicable under the NSPS.

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Cause of Action and Remedies

Any person may commence a civil action against any person who is alleged to have violated an “emission standard or limitation,” CAA § 304(a)(1), 42 U.S.C. § 7604(a)(1). “Emission standard or limitation” is defined, in relevant part, as “any other standard, limitation, or schedule established under any permit issued pursuant to subchapter V of this chapter or under any applicable State implementation plan approved by the Administrator, any permit term or condition, and any requirement to obtain a permit as a condition of operations.” CAA § 304(f)(4), 42 U.S.C. § 7604(f)(4).⁶

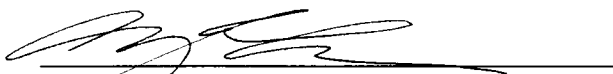
The CAA authorizes federal courts to issue injunctions and to apply appropriate civil penalties. CAA § 304(a), 42 U.S.C. § 7604(a); *Sierra Club v. Franklin County Power of Illinois*, 546 F.3d 918, 935 (7th Cir. 2008). PSNH is liable for up to \$37,500 for each day of each violation. *See* CAA § 113(b)(1), 42 U.S.C. § 7413(b); 40 C.F.R. § 19.4.

CAA citizen suit claims are subject to a five-year statute of limitations, which is tolled during the sixty-day period following notification of intent to sue. *Cf. Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d 1517, 1524 (9th Cir. 1987) (“[I]n citizen enforcement actions the five-year statute of limitations period [set forth in 28 U.S.C. § 2462] is tolled sixty days before the filing of the complaint, to accommodate the statutorily mandated sixty-day notice period.”).

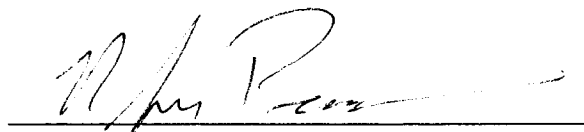
* * *

CLF reserves all rights to amend this notice and identify additional claims as further facts are developed. If you believe that any portion of this Notice is in error and/or if you wish to discuss any portion of this Notice, please contact us at the address and phone number listed below. CLF welcomes the opportunity to discuss with you the violations identified in this Notice.

Sincerely,



Christophe G. Courchesne, Esq.
Staff Attorney



N. Jonathan Peress, Esq.
Vice-President and Director, Clean Energy and
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⁶ Violations of such limits, standards, and permit requirements are federally enforceable in a CAA citizen suit. *See, e.g., Nat'l Parks Conservation Ass'n v. Tennessee Valley Auth.*, 480 F.3d 410, 418 (6th Cir. 2007); *Cmtys. for a Better Env't v. Cenco Ref. Co.*, 180 F. Supp. 2d 1062, 1082 (C.D. Cal. 2001).

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cc: (all by certified first-class mail)

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Notice of Intent to File Clean Air Act Citizen Suit

Exhibit A
Non-NAAQS Air Pollutants*

2, 3, 7, 8 TCDD	Dimethyl sulfate
1, 3 Butadiene	Ethylbenzene
2, 4 Dinitrotoluene	Ethyl chloride
2 Chloroacetophenone	Ethylene dibromide
5 Methyl chrysene	Ethylene dichloride
Acenaphthene	Fluoranthene
Acenaphthylene	Fluorene
Acetaldehyde	Formaldehyde
Acetophenone	Hexane
Acrolein	Hydrogen Chloride
Anthracene	Hydrogen fluoride
Antimony	Indeno(1,2,3-cd)pyrene
Arsenic	Indo(1,2,3-cd)pyrene
Benz(a)anthracene	Isophorone
Benzene	Manganese
Benzo(a)anthracene	Mercury
Benzo(a)pyrene	Methyl bromide
Benzo(b)fluoranthene	Methyl chloride
Benzo(b,j,k)fluoranthene	Methyl ethyl Ketone
Benzo(b,k)fluoranthene	Methyl hydrazine
Benzo(g,h,i)perylene	Methyl methacrylate
Benzo(k)fluoranthene	Methyl tert butyl ether
Benzyl chloride	Methylene chloride
Beryllium	Naphthalene
Biphenyl	Nickel
Bis(2-ethylhexyl)phthalate (DEHP)	o-Xylene
Bromoform	PAH
Cadmium	Phenanthrene
Carbon disulfide	Phenol
Chlorobenzene	Propionaldehyde
Chloroform	Pyrene
Chromium	Selenium
Chromium(VI)	Styrene
Chrysene	Tetrachloroethylene
Cobalt	Toluene
Cumene	Vinyl acetate
Cyanide	Xylenes
Dibenz(a,h)anthracene	

* Letter from PSNH to N.H. DES, Table 4 (July 28, 2009), available at http://des.nh.gov/organization/divisions/air/pehb/apps/documents/psnh_20090728addinfoapp.pdf.