BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF THE PROPOSED	)
TITLE V/STATE OPERATING PERMIT NO. 48-00021	)
MINOR MODIFICATION FOR	)
	)
NORTHAMPTON GENERATING CO. LP	)
NORTHAMPTON PLANT,	)
NORTHAMPTON COUNTY, PENNSYLVANIA	)
	)
ISSUED BY THE PENNSYLVANIA	)
DEPARTMENT OF ENVIRONMENTAL PROTECTION	)
_____	)

PETITION TO THE EPA ADMINISTRATOR TO OBJECT TO ISSUANCE OF THE PROPOSED TITLE V OPERATING PERMIT MINOR MODIFICATION FOR THE NORTHAMPTON WASTE COAL PLANT

Pursuant to Section 505 of the Clean Air Act, the Sierra Club ("the Club") and the Clean Air Council ("CAC") hereby petition the Administrator of the United States Environmental Protection Agency ("EPA") to object to the proposed "minor" modification to Title V operating permit No. 48-00021 ("Northampton Permit") issued by the Pennsylvania Department of Environmental Protection ("DEP") for the Northampton Generating Co. Waste Coal Plant ("Northampton") in Northampton County, Pennsylvania. The Clean Air Act ("CAA") mandates that the EPA Administrator "shall issue an objection . . . if the petitioner demonstrates to the Administrator that the permit is not in compliance with the requirements of [the Clean Air Act]." 42 U.S.C. § 7661d(b)(2). The CAA also requires the EPA to grant or deny any such petition within sixty days of its filing. *Id.*

As demonstrated below, the Northampton Permit does not comply with the requirements of the CAA; therefore, the EPA Administrator must object to it. Specifically, the Northampton Permit lacks the monitoring conditions and terms necessary to assure that the facility actually complies with its limitations on emission of arsenic, cadmium, hexavalent chromium, lead, mercury, nickel, zinc, total volatile organic compounds ("VOCs"), and particulates. In addition, the permit modification was improperly approved through the minor modification process when the modification is in reality a significant one.

This petition explains in greater detail below why the approved permit violates the CAA, beginning with a discussion of what monitoring requirements the Act imposes. The objections discussed in this petition were timely raised in the comments by the Sierra Club and CAC on the Northampton Permit, submitted to DEP on November 4, 2019. *See* Sierra Club & Clean Air Council, Comment Letter on Proposed Operating Permit Modification for Northampton Generating Co, LP, No. 48-00021 (Nov. 4, 2019) (attached as Exhibit 1). The petition also responds to DEP's reply to the comments of the Club and CAC, sent to the Club four days after DEP approved the Northampton Permit modifications. EPA's 45-day review period on the Northampton Permit ended on November 12, 2019, and the 60-day public petition period ends January 13, 2020, making this petition timely. *See Title V Operating Permit Public Petition Deadlines in Region 3*, EPA, https://www.epa.gov/caa-permitting/title-v-operating-permit-public-petition-deadlines (last visited Jan. 7, 2020) (screenshots attached as Exhibit 2).

I. The Northampton Permit's Monitoring Regime Does Not Ensure That Emissions Restrictions Are Met

A. The CAA requires monitoring systems that ensure emissions restrictions are being met

CAA section 504(c) (codified as 42 U.S.C. § 7661c(c)), and implementing regulations in 40 C.F.R. 70.6(a)(3)(i) and 70.6(c)(1) require all Title V permits to contain monitoring requirements that ensure the permitted facility is complying with the permit's emissions limits. CAA section 504(c) states: "Each permit issued under this subchapter shall set forth inspection, entry, monitoring, compliance certification, and reporting requirements to assure compliance with the permit terms and conditions." 42 U.S.C. § 7661c(c). 40 C.F.R. 70.6(a)(3)(i), known as the Periodic Monitoring Rule, and 40 C.F.R. § 70.6(c)(1), known as the Umbrella Rule, implement this statutory requirement. Many emissions restrictions established by the EPA or state agencies state in the restrictions themselves how monitoring must occur to ensure the restrictions are met. However, some emissions restrictions do not include monitoring requirements. The periodic monitoring rule makes clear that where an emissions restriction does not itself include a monitoring requirement, the permit writer must include terms requiring "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). In other words, if the permit requires a facility to comply with a certain emissions limit, the permit must contain monitoring of a frequency and type sufficient to assure to the permitting authority and to the public that the facility is actually complying with the limit.

In situations where an emissions restriction does require periodic testing to ensure compliance, but its testing requirements are too infrequent or otherwise too weak to ensure that the facility is actually complying with its emissions limits, the Umbrella Rule requires the permit-writer to develop new monitoring requirements that ensure the facility is actually

complying with its emissions restrictions. *See Sierra Club v. E.P.A.*, 536 F.3d 673, 675-76 (D.C. Cir. 2008) (citing approvingly two EPA rulings finding that the Umbrella Rule requires "state and local permitting authorities to supplement inadequate monitoring requirements"). In other words, the Umbrella Rule backstops the Periodic Monitoring Rule by making clear that permit writers must also correct "a periodic monitoring requirement inadequate to the task of assuring compliance." *Id.* at 675. Putting all this together, the CAA and its implementing regulations require permitting authorities to ensure in all circumstances that the monitoring regime established in the permit is adequate to ensure that the permit's emissions limits are met. The EPA has stressed in numerous administrative decisions the importance of a strong monitoring system. *See, e.g.*, Tennessee Valley Authority, Bull Run, Clinton, Tennessee, Petition No. IV-2015-14 (EPA Nov. 10, 2016) at 8 [hereinafter Bull Run], https://www.epa.gov/sites/production/files/2016-11/documents/tva_bull_run_order_granting_petition_to_object_to_permit_.pdf (concluding that "[t]he rationale for the monitoring requirements selected by a permitting authority must be clear" and that adequate monitoring is determined by careful, context-specific inquiry into the nature and variability of the emissions at issue); EME Homer City Generation LP Indiana County, Pennsylvania, Petition Nos. III-2012-06, III-2012-07, III-2013-02 (EPA Jul. 30, 2014) at 45 [hereinafter EME Homer City Generation], https://www.epa.gov/sites/production/files/2015-08/documents/homer_response2012.pdf (stating that monitoring requirements should be "sufficient to assure compliance with permit terms and conditions"). As explained below, the Northampton Permit fails to meet the requirements established by the CAA for the monitoring of emissions of arsenic, cadmium, hexavalent chromium, lead, mercury, nickel, zinc, total VOCs, and particulates.

B. <u>The frequency of monitoring under the Northampton permit is woefully inadequate</u>

The Northampton facility is subject to *hourly* emissions limits for arsenic, cadmium, hexavalent chromium, lead, mercury, nickel, zinc, total VOCs, and particulates, Department Of Environmental Protection, Commonwealth Of Pennsylvania, *Northampton Generating Co. Proposed Title V Permit No: 48-00021* 25-26 (2019); yet the permit modification that the DEP approved requires the facility to conduct an emissions test only *once every five years*. *Id.* at 36. Self-evidently, a test conducted every five years cannot ensure that the facility is meeting its hourly limits—all such a test indicates is that the facility met its hourly limit during the time the testing occurred. Such a lax requirement undeniably and egregiously fails the CAA requirement that monitoring "assure compliance with the permit terms and conditions." 42 U.S.C. § 7661c(c). Plainly, a permit limit applicable every hour is hardly meaningful if the pollutant to be limited is not monitored more than once every five years.

Numerous court and EPA decisions confirm that the monitoring requirements the DEP imposed in its permit modification violate the CAA. In *Sierra Club v. E.P.A*, the U.S. Court of Appeals for the D.C. Circuit held that an annual monitoring requirement for a daily emissions

limit would be inadequate under the CAA. *Sierra Club*, 536 F.3d at 675. In *Bull Run*, the EPA found that biannual visual evaluations were inadequate to assure compliance with the applicable opacity limit of 20% using a six-minute average. Bull Run at 11. In *Pacificorp's Jim Bridger and Naughton Electric Utility Steam Generating Plants*, the EPA found that quarterly visual observations were also inadequate to assure compliance with a 20% opacity limit measured in six-minute averages. Pacificorp's Jim Bridger and Naughton Electric Utility Steam Generating Plants, Petition No. VIII-00-I (EPA Nov. 16, 2011) at 19, https://www.epa.gov/sites/production/files/2015-08/documents/woc020.pdf. In *EME Homer City Generation*, the EPA found that *weekly* visual observations were inadequate to ensure compliance with a 20% opacity limit measured in three-minute averages (with a maximum limit of 60% at any time). EME Homer City Generation LP at 44-45. If weekly monitoring is inadequate to assure compliance with a three-minute emissions limit, and annual monitoring is inadequate to assure compliance with an hourly emissions limit, it is simply not possible for a once-every-five-years monitoring requirement to adequately measure compliance with an hourly emissions limit. This precedent indicates that the Northampton permit modification violates 42 U.S.C. § 7661c and its implementing regulations.

C. The qualification of the Northampton plant as a Low-Emitting EGU does not exempt it from the monitoring requirements of the CAA

In a letter to the Sierra Club responding to the comments by the Club and CAC, dated four days after DEP approved the Northampton permit modification, DEP attempts to argue that because Northampton qualifies as a Low-Emitting Electrical Generating Unit ("LEE"), it is subject to less stringent monitoring requirements under the EPA's Mercury Air Toxics Standards ("MATS"). Specifically, DEP states that once a facility qualifies as an LEE, its only requirements are to "conduct a 30–day performance test using Method 30B at least once every 12 calendar months" for mercury emissions, 40 C.F.R. § 63.10000(c)(1)(ii), and to "conduct a performance test at least once every 36 calendar months" for Hazardous Air Pollutants (HAPs) and particulates, § 63.10000(c)(1)(iii). DEP claims that because Northampton's permit already includes the above requirements for the facility to retain its LEE status, "it is appropriate to grant Northampton Generating's request to change" its traditional monitoring requirements. Letter from Mark J. Wejkszner, Program Manager, Pa. Dep't of Envtl. Prot. Air Quality Program, to Zachary M. Fabish, Senior Attorney, Sierra Club 3 (Dec. 20, 2019) (attached as Exhibit 3).

Whether or not Northampton complies as an LEE, the DEP is still obligated under the CAA to ensure that the permits it issues "set forth inspection, entry, monitoring, compliance certification, and reporting requirements to assure compliance with the permit terms and conditions." 42 U.S.C. § 7661c(c). In other words, the CAA requires DEP (and other state environmental agencies) to write monitoring requirements that ensure that a facility is actually complying with its emissions limits, regardless of what any EPA regulations may say. Under its modified permit, Northampton is subject to the LEE compliance requirements and the once-every-five-years traditional testing. These monitoring requirements do not ensure that the facility

is actually complying with its emissions limits. At most, the modified permit requires annual testing of mercury emissions, testing of HAPs and particulates once every three years, and testing of zinc and VOCs once every five years. Annual, once-every-three-years, and once-every-five-years testing requirements are all too infrequent to ensure that a facility is meeting hourly emissions limits, for all the reasons stated in Section I.B.

To comply with the CAA, the EPA should interpret the LEE rule in concert with the Periodic Monitoring Rule and the Umbrella Rule to require *both* the tests to retain LEE status and the much more frequent traditional testing required under the Periodic Monitoring and Umbrella Rules. If the LEE Rule was interpreted to override the Periodic Monitoring and Umbrella Rules, it would violate the Clean Air Act and be null and void; EPA should avoid this possibility. Based on past precedent, EPA should object to the Northampton permit modification.

D. The qualification of the Northampton plant as a Low-Emitting EGU says nothing about the facility's emission of zinc and VOCs

Under the LEE rule a facility can attain LEE status only for mercury, HAPs, particulates, hydrochloric acid, and hydrofluoric acid emissions. 40 C.F.R. § 63.10005(h). The testing to determine whether a facility is a low-emitting EGU and whether it retains that status only measures emissions of these chemicals. *Id.* A facility cannot attain LEE status for zinc or VOCs. *Id.* Yet, DEP attempts to argue in its letter to the Sierra Club that the Northampton facility's qualification as an LEE justifies reducing its monitoring of zinc and VOCs to one test every five years. Even if DEP were correct that it could reduce monitoring for HAPS, mercury, and particulates under the LEE rule, nothing in the rule allows it to reduce monitoring requirements for zinc or VOCs. As described in Sections I.A and I.B, monitoring emissions once every five years is inadequate to assure compliance with an hourly emissions limit, as the CAA requires. *See* 42 U.S.C. § 7661c(c). Past case law has held as inadequate monitoring requirements much more frequent than once every five years. *See, e.g.*, *Sierra Club*, 536 F.3d at 675 (annual); Pacificorp's Jim Bridger and Naughton Electric Utility Steam Generating Plants at 19 (quarterly); EME Homer City Generation at 44-45 (weekly). DEP cannot argue that the LEE rule provides adequate monitoring of zinc and VOCs—therefore, the new monitoring requirements for zinc and VOCs in the Northampton permit violate the CAA.

II. DEP Erred in Allowing Northampton to Modify Its Permit Using the Less Stringent Minor Modification Process

In addition to the monitoring requirement that the DEP approved itself violating the CAA, the *process* through which the DEP approved the modifications also violated the CAA. The DEP approved the permit modification through the minor modification process. However, reducing monitoring requirements for arsenic, cadmium, hexavalent chromium, lead, mercury, nickel, zinc, total VOCs, and particulates from once a year to once every five years is a

significant modification, not a minor one. Pennsylvania's law implementing the CAA states that a "minor operating permit modification" does not include "[a] change to existing monitoring, reporting or recordkeeping requirements in the permit except as follows:" 25 Pa. Code § 121.1. The code then provides two situations in which a change to monitoring requirements would qualify as a minor modification. Both situations deal with a change in how monitoring is conducted, not in how frequently it occurs, *id.*; thus, neither situation applies here. Pennsylvania law is clear: The proposed Northampton permit modification changes existing monitoring requirements and thus must go through the significant modification process, which requires much more opportunity for public engagement and a much more rigorous review process. *See* 25 Pa. Code § 127.541. This is as it should be. The change that Northampton seeks robs the nearby community of the ability to ensure that its air is clean and safe to breath for five years, subjecting it to significant risk. The community deserves to, and Pennsylvania law provides it with the right to, actively participate in this decision.

III. Conclusion

The Clean Air Act is clear that it requires monitoring regimes that actually assure that a facility is complying with its emissions limits. This requirement is written into both the text of the law itself and the EPA's notice-and-comment rules implementing the law. The courts and the EPA have a rich body of precedent that indicates that these monitoring requirements mean that a facility must undergo testing relatively frequently for emissions limits that are sub-daily. The Northampton permit modification requires monitoring of the facility through traditional testing only once every five years; through the Low-Emitting EGU process the permit requires testing only once a year for mercury and once every three years for hazardous air pollutants and particulates. When past precedent has indicated that monitoring every *week* is inadequate for a sub-daily emissions limit, monitoring once a year for some pollutants, once every three years for others, and once every five years for the remaining pollutants is simply inadequate to satisfy the CAA's requirements. Further, the LEE process does not even apply to zinc and VOCs, so the DEP's reliance on that process to relax monitoring requirements for these two pollutants is misplaced. Finally, Pennsylvania law implementing the CAA makes clear that changes in monitoring requirements are major modifications that must go through the significant modification process, not the minor modification process DEP went through. For all these reasons, the EPA should order DEP to reject the proposed Northampton permit modifications as violating the text and spirit of the Clean Air Act.

Respectfully submitted,

/s/
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