

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

_____	)	
UNITED STATES OF AMERICA	)	
	)	
	)	
Plaintiff,	)	
	)	Civil Action No.
v.	)	
	)	
EME HOMER CITY GENERATION L.P,	)	
HOMER CITY OL1 LLC, HOMER CITY OL2 LLC,	)	
HOMER CITY OL3 OLC, HOMER CITY OL4 LLC,	)	
HOMER CITY OL5 LLC, HOMER CITY OL6 LLC,	)	
HOMER CITY OL7 LLC, HOMER CITY OL8 LLC,	)	
NEW YORK STATE ELECTRIC AND GAS	)	
CORPORATION, and PENNSYLVANIA	)	
ELECTRIC CO.	)	
	)	
Defendants.	)	
_____	)	

**COMPLAINT**

The United States of America ("United States"), by authority of the Attorney General of the United States and through the undersigned attorneys, acting at the request of the Administrator of the United States Environmental Protection Agency ("U.S. EPA"), alleges as follows:

**NATURE OF THE ACTION**

1. This is a civil action brought against EME Homer City Generation L.P. ("EME Homer City"), Homer City OL1 LLC, Homer City OL2 LLC, Homer City OL3 LLC, Homer City OL4 LLC, Homer City OL5 LLC, Homer City OL6 LLC, Homer City OL7 LLC, Homer

City OL8 LLC (collectively “the OLs”), New York State Electric and Gas Corporation (NYSEG), and Pennsylvania Electric Co. (PENELEC) (collectively, “Defendants”) pursuant to Sections 113(b) and 167 of the Clean Air Act (“the Act” or “CAA”), 42 U.S.C. §§ 7413(b) and 7477, for injunctive relief and assessment of civil penalties for violations of: (1) the Prevention of Significant Deterioration (“PSD”) provisions of the Act, 42 U.S.C. §§ 7470-92 and applicable implementing regulations; (2) the federally approved and enforceable Pennsylvania State Implementation Plan (“Pennsylvania SIP”); and (3) Title V of the Act, 42 U.S.C. § 7661-7661(f), the Title V regulations at 40 C.F.R. Part 70, and the Pennsylvania Title V Program (25 Pa. Code §§ 127.501-127.543 and 127.401-464).

2. EME Homer City is the current operator of the electric generating units located at the Homer City coal-fired electricity generating power plant in Homer City, Pennsylvania (the “Homer City Plant”). The OLs are the current owners of the plant, having acquired the plant through a sale-leaseback transaction with EME Homer City in 2001. NYSEG and PENELEC owned the plant prior to its ownership and operation by the OLs and EME Homer City, from January 1968 until June 1998. PENELEC also operated the plant during that time. At various times prior to the sale, during NYSEG and PENELEC’s ownership, the plant was modified, triggering an ongoing duty to obtain appropriate permits under the Act and to install and operate state-of-the-art pollution controls. Following such modifications, Defendants NYSEG and PENELEC and later, Defendants EME Homer City and the OLs, continued to own and operate the modified plant. Defendants made such modifications and subsequently operated the Homer City Plant without first obtaining appropriate permits authorizing the modifications and subsequent operation of the modified plant, and without installing and employing the best

available control technology (“BACT”) to control emissions of sulfur dioxide (“SO<sub>2</sub>”) and/or particulate matter (“PM”) as the CAA and the Pennsylvania SIP require.

3. As a result of the operation of the Homer City Plant following these unlawful modifications, and the absence of appropriate controls, significant amounts of SO<sub>2</sub> and/or PM pollution each year have been, and continue to be, released into the air. These pollutants harm public health and the environment, contributing to premature mortality, asthma attacks, acid rain, and other adverse effects in downwind communities and natural areas. The SO<sub>2</sub> pollution alone from the Homer City Plant is approximately 100,000 *tons each year*, making it one of the largest air pollution sources in the nation.

#### **JURISDICTION AND VENUE**

4. This Court has jurisdiction over the subject matter of this action pursuant to CAA Sections 113(b) and 167, 42 U.S.C. §§ 7413(b) and 7477, and pursuant to 28 U.S.C. §§ 1331, 1345, and 1355.

5. Venue is proper in this District pursuant to CAA Sections 113(b), 42 U.S.C. § 7413(b), and 28 U.S.C. §§ 1391(b), (c), and 1395(a), because EME Homer City resides in this District and has its principal place of business in this District, the violations have occurred and are occurring in this District, and the plant at issue is located in this District.

#### **NOTICES**

6. U.S. EPA issued a Notice and Finding of Violation (“NOV”) to EME Homer City and the OLS, at which time it also provided a copy to Pennsylvania, in accordance with CAA Sections 113(a)(1) and (b)(1), 42 U.S.C. §§ 7413(a)(1), (b)(1). The NOV, dated June 12, 2008,

docket no. CAA-III-08-0008, was originally sent to EME Homer City and the OLs on or about June 12, 2008. On or about May 6, 2010, U.S. EPA issued a subsequent NOV (docket no. CAA-III-10-0006) to EME Homer City and the OLs as well as NYSEG and PENELEC, at which time it also provided a copy to Pennsylvania. Another NOV was sent by EPA to the Defendants on or about November 1, 2010, again with a copy provided to Pennsylvania.

7. The 30-day period between issuance of the NOV and commencement of a civil action, required under CAA Section 113, 42 U.S.C. § 7413, has elapsed.

8. The United States has provided notice of the commencement of this action to the Pennsylvania Department of Environmental Protection (“PADEP”) as required by CAA Section 113(b), 42 U.S.C. § 7413(b).

#### **AUTHORITY**

9. Authority to bring this action is vested in the Attorney General of the United States by CAA Section 305, 42 U.S.C. § 7605, and pursuant to 28 U.S.C. §§ 516 and 519.

#### **THE DEFENDANTS**

10. The OLs are the current owners of the Homer City Plant. This plant generates, and at all relevant times has generated, electricity from coal-fired, steam generating boilers.

11. The OLs are Delaware Limited Liability Companies and are registered to do business in Pennsylvania. They all list the same registered agent address as: The Corporation Trust Company, Corporation Trust Center, 1209 Orange Street, New Castle, Delaware 19801.

12. The OLs are corporate entities and, as such, are “persons” within the meaning of CAA Section 302(e), 42 U.S.C. § 7602(e).

13. EME Homer City is the current operator of the Homer City Plant.

14. EME Homer City is a Pennsylvania Limited Partnership registered to do business in Pennsylvania. Its principal place of business is publicly listed only as “Philadelphia”. Two addresses are publicly available for EME Homer City: (1) 18101 Von Karman Ave., Suite 1700, Irvine CA 92612, and (2) 1750 Power Plant Road, Homer City, PA 15748.

15. EME Homer City is a corporate entity and, as such, is a “person” within the meaning of CAA Section 302(e), 42 U.S.C. § 7602(e).

16. NYSEG owned the Homer City Plant at times relevant to this action.

17. NYSEG is a New York corporation and is registered to do business in Pennsylvania. Its principal place of business is 89 East Avenue, Rochester, NY 14649.

18. NYSEG is a corporate entity and, as such, is a “person” within the meaning of CAA Section 302(e), 42 U.S.C. § 7602(e).

19. Penelec owned and operated the Homer City Plant at times relevant to this action.

20. Penelec is a Pennsylvania corporation and is registered to do business in Pennsylvania. Its principal place of business is 1001 Broad Street, Johnstown, PA 15907.

21. Penelec is a corporate entity and, as such, is a “person” within the meaning of CAA Section 302(e), 42 U.S.C. § 7602(e).

### **STATUTORY BACKGROUND**

22. The Clean Air Act is designed to protect and enhance the quality of the nation's air, so as to promote the public health and welfare and the productive capacity of its population. CAA Section 101(b)(1), 42 U.S.C. § 7401(b)(1).

#### **The National Ambient Air Quality Standards**

23. Section 109 of the Act, 42 U.S.C. § 7409, requires the Administrator of U.S. EPA to promulgate regulations establishing primary and secondary national ambient air quality standards ("NAAQS") for those air pollutants ("criteria pollutants") for which air quality criteria have been issued pursuant to CAA Section 108, 42 U.S.C. § 7408. The primary NAAQS are intended to be adequate to protect public health with an adequate margin of safety, and the secondary NAAQS are intended to be adequate to protect public welfare from any known or anticipated adverse effects associated with the presence of the air pollutant in the ambient air. The NAAQS promulgated by U.S. EPA pursuant to this provision are set forth in 40 C.F.R. Part 50.

24. Under CAA Section 107(d), 42 U.S.C. § 7407(d), each state is required to designate those areas within its boundaries where the air quality is better or worse than the NAAQS for each criteria pollutant or where the air quality cannot be classified due to insufficient data. An area that meets the NAAQS for a particular pollutant is an "attainment" area. An area that does not meet the NAAQS is a "nonattainment" area. An area that cannot be classified due to insufficient data is "unclassifiable".

25. The Homer City plant is located in Indiana County, Pennsylvania. At the time of the alleged modifications, the Homer City plant was located in an area that had been designated as being in attainment with the NAAQS for NO<sub>2</sub>, SO<sub>2</sub>, PM, and PM<sub>10</sub> (PM having a diameter less than 10 micrometers), and is currently in an area designated as attainment for PM<sub>2.5</sub> (PM having a diameter less than 2.5 micrometers).

The Prevention of Significant Deterioration Requirements

26. Part C of Title I of the Act, 42 U.S.C. §§ 7470-7492, sets forth requirements for the prevention of significant deterioration of air quality in those areas designated as either attainment or unclassifiable for purposes of meeting the NAAQS. These requirements are designed to protect public health and welfare, to assure that economic growth will occur in a manner consistent with the preservation of existing clean air resources, and to assure that any decision to permit increased air pollution is made only after careful evaluation of all the consequences of such a decision and after public participation in the decision making process. These provisions are referred to collectively as the “PSD program.”

27. Pursuant to CAA Section 110, 42 U.S.C. § 7410, each State must adopt and submit to U.S. EPA for approval a State Implementation Plan (“SIP”) that includes, among other things, regulations to prevent the significant deterioration of air quality under CAA Sections 161-165, 42 U.S.C. §§ 7471-7475. Section 161 of the Act, 42 U.S.C. § 7471, requires that each applicable SIP contain a PSD program.

28. Pursuant to CAA Section 302(q), 42 U.S.C. § 7602(q), an applicable implementation plan is the implementation plan, or most recent revision thereof, which has been

approved by U.S.EPA pursuant to CAA Section 110, 42 U.S.C. § 7410, or promulgated by U.S. EPA pursuant to CAA Section 110(c), 42 U.S.C. § 7410(c), and which implements the relevant requirements of the Act. Upon EPA approval, SIP requirements are federally enforceable under Section 113 of the Act, 42 U.S.C. § 7413, and 40 C.F.R. § 52.23.

29. A state may comply with CAA Section 161, 42 U.S.C. § 7471, by having its own PSD regulations approved by U.S.EPA as part of its SIP, which must be at least as stringent as those set forth at 40 C.F.R. § 51.166. If a state does not have a PSD program that has been approved by U.S. EPA and incorporated into the SIP, then the federal PSD regulations set forth at 40 C.F.R. § 52.21 shall be incorporated by reference into the SIP. 40 C.F.R. § 52.21(a).

30. On August 7, 1980, EPA found that the Pennsylvania SIP lacked approvable PSD provisions, and incorporated by reference the provisions of 40 C.F.R. § 52.21(b) through (w) into the Pennsylvania SIP at 40 C.F.R. § 52.2058 (1980). 45 Fed Reg. 52,676, 52,741 (Aug. 7, 1980). On August 21, 1984, EPA approved a revision to the Pennsylvania SIP which provided for the Pennsylvania Department of Environmental Resources to administer the PSD program, and incorporated by reference EPA's PSD regulations found at 40 C.F.R. § 52.21. See 40 C.F.R. § 52.2058 (1985); 49 Fed. Reg. 33127 (Aug. 21, 1984). The federally approved PSD program in the Pennsylvania SIP is codified at 25 Pa. Code §§ 127.81- 127.83. All citations to the PSD regulations herein refer to the provisions of 40 C.F.R. § 52.21 incorporated into and part of the Pennsylvania SIP as applicable at the time of the alleged violations.

31. Section 165(a) of the Act, 42 U.S.C. § 7475(a), among other things, prohibits the construction and operation of a "major emitting facility" in an area designated as attainment, unless a permit has been issued that comports with the requirements of CAA Section 165 and the



facility employs BACT for each pollutant subject to regulation under the Act that is emitted from the facility. Section 169(a) of the Act, 42 U.S.C. § 7479(1), designates fossil-fuel fired steam electric plants for more than two hundred and fifty million British thermal units (“Btus”) per hour heat input and that emit, or have the potential to emit, one hundred tons per year or more of any pollutant to be “major emitting facilities”.

32. Section 169(2)(c) of the Act, 42 U.S.C. § 7479(2)(c), defines “construction” as including “modification” (as defined in CAA Section 111(a)). “Modification” is defined in CAA Section 111(a), 42 U.S.C. § 7411(a), to be “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.”

33. “Major modification” is defined at 40 C.F.R. § 52.21(b)(2)(i) as “any physical change or change in the method of operation of a major stationary source that would result in a significant net emission increase of any pollutant subject to regulation under the Act.”

34. Under the PSD program, a “major stationary source” is defined to include fossil-fueled steam electric generating plants of more than 250 million Btus per hour heat input that emit, or have the potential to emit, one hundred tons per year or more of any regulated air pollutant. 40 C.F.R. § 52.21(b)(1)(i)(a).

35. As set forth at 40 C.F.R. § 52.21(i), any major stationary source in an attainment or unclassifiable area that intends to construct a major modification must first obtain a PSD permit, undergo a BACT determination, and apply BACT pursuant to such determination for each relevant pollutant.

36. Section 169(3) of the Act, 42 U.S.C. § 7479(3) defines BACT, in pertinent part, as “an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this chapter emitted from or which results from any major emitting facility which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility...”

37. “Net emissions increase” means “the amount by which the sum of the following exceeds zero: (a) [a]ny increase in actual emissions [as defined by 40 C.F.R. § 52.21(b)(21)] from a particular physical change or change in the method of operation at a stationary source; and (b) [a]ny other increases and decreases in actual emissions [as defined by 40 C.F.R. § 52.21(b)(21)] at the source that are contemporaneous with the particular change and are otherwise creditable.” 40 C.F.R. § 52.21(b)(3)(i). A “significant” net emissions increase means an increase in the rate of emissions that would equal or exceed 40 tons per year of SO<sub>2</sub>. 40 C.F.R. § 52.21(b)(23)(i). Effective July 15, 2008, SO<sub>2</sub> is regulated as a precursor to PM<sub>2.5</sub>. 73 Fed. Reg. 28321, 28327-28 (May 16, 2008).

38. As set forth at 42 U.S.C. § 7475(a)(4) and 40 C.F.R. § 52.21(j), a source with a major modification in an attainment or unclassifiable area must install and operate BACT, as defined in 40 C.F.R. § 52.21(b)(12) and 42 U.S.C. § 7479(3), where the modification would result in a significant net emissions increase of a pollutant subject to regulation under the Act. 42 U.S.C. § 7475(a)(4).

39. Any application for a PSD permit must be accompanied by an analysis of ambient air quality in the area. 40 C.F.R. § 52.21(m).

40. The PSD program also requires any person who elects to modify a major source in an attainment area to demonstrate, before construction begins, that the construction will not cause or contribute to air pollution that is in violation of any national ambient air quality standard or the maximum allowable increase in emissions of that pollutant. 40 C.F.R. § 52.21(k).

41. In addition, the owner or operator of a proposed source or modification must submit all information necessary to perform any analysis or make any determination required under 40 C.F.R. § 52.21(n).

42. The Clean Air Act and the implementing regulations codified at 40 C.F.R. § 52.21, establish requirements that begin in the preconstruction phase and continue for the operational life of a facility, establishing requirements for the lawful operation of the source following a modification.

43. Pursuant to CAA Section 110(j), 42 U.S.C. Section 7410(j), governing permits issued under state implementation plans, “the owner or operator of each ... modified stationary source which is required to obtain such a permit must show ... that the technological system of continuous emission reduction which is to be used will enable such source to comply with the standards of performance which are to apply to such source and that the construction or modification and operation of such source will be in compliance with all other requirements of this chapter.” CAA Section 165(a)(3), 42 U.S.C. Section 7475(a)(3), allows issuance of a permit only if “the owner or operator of such facility demonstrates, as required pursuant to section 7410(j) of this title, that emissions from construction or operation of such facility” will not compromise compliance with applicable air quality standards. EPA’s regulations also

require that “[a] major modification shall apply best available control technology,” 40 C.F.R. Section 52.21(j)(3), creating an ongoing obligation to meet NSR emission rates.

44. In addition, the Pennsylvania SIP requires a “source” and “air contamination source” to obtain operating permits that incorporate PSD permitting obligations and prohibit the operation of such sources in violation of these permits. 25 Pa. Code § 127.25 prohibits operation of a source which is subject to 25 Pa. Code § 127.11 (relating to plan approval requirements prior to modification or construction), unless the source operates in accordance with specifications in the application and conditions in the plan approval issued by PADEP. 25 Pa. Code § 127.25 was added to the Pennsylvania SIP on August 29, 1996. 61 Fed. Reg. 39597. 25 Pa. Code § 127.444 prohibits operation of a source unless the source is operated in accordance with specifications in the application and conditions in the plan approval (see 25 Pa. Code § 127.11) and operating permit. 25 Pa. Code § 127.444 was added to the Pennsylvania SIP on August 29, 1996. 61 Fed. Reg. 39597.

45. The Pennsylvania SIP also requires operating permits for “air contamination sources” to incorporate emission and performance standards and other requirements of the Pennsylvania Air Pollution Control Act, the Clean Air Act or the regulations thereunder including monitoring, recordkeeping and reporting requirements. 25 Pa. Code § 127.441. The Pennsylvania SIP prohibits the operation of a source the construction, modification or reactivation of which is subject to 25 Pa. Code § 127.11 (relating to plan approval requirements, without an operating permit. 25 Pa. Code 127.443. 25 Pa. Code § 127.11 was part of the approved Pennsylvania SIP on May 31, 1972. 37 Fed. Reg. 10889 (1972). EPA approved 25 Pa.

Code § 127.441 and 127.443 as part of the Pennsylvania SIP on August 29, 1996, and these provisions are therefore federally enforceable. 61 Fed. Reg. 39597.

Title V

46. Title V of the Act, 42 U.S.C. §§ 7661-7661f, establishes an operating permit program for certain sources, including “major sources”. The purpose of Title V is to ensure that all “applicable requirements” for compliance with the Act, including PSD and SIP requirements, are collected in one place.

47. A “major source” for purposes of Title V is defined, among other things, as a source with a potential to emit greater than 100 tons per year of any criteria pollutant. 42 U.S.C. § 7661(2).

48. Pursuant to CAA Section 502(b), 42 U.S.C. 7661a(b), U.S.EPA promulgated regulations implementing Title V regulations, which are codified at 40 C.F.R. Part 70. 57 Fed. Reg. 32,250 (July 21, 1992).

49. Pennsylvania’s Title V program was granted final approval by EPA on August 29, 1996. 40 C.F.R. Part 70, Appendix A. Pennsylvania’s Title V program became effective on that date. 61 Fed. Reg. 39597. The Pennsylvania Title V program is codified at 25 Pa. Code §§ 127.501 – 127.543 (which incorporate by reference 25 Pa. Code §§ 127.401 – 127.464.)

50. Section 502(a) of the Act, 42 U.S.C. 7661a(a), and the Pennsylvania Title V permit program, 25 Pa. Code §§ 127.501 – 127.543, have at all relevant times made it unlawful for any person to operate a major source except in compliance with a permit issued by a permitting authority under Title V.

51. Section 503(c) of the Act, 42 U.S.C. 7661b(c), the Title V regulations at 40 C.F.R. §§ 70.5(a), (c), and (d), and 25 Pa. Code §§ 127.501 – 127.543 and §§ 127.401 – 127.464, have at all relevant times required the owner or operator of a source to submit an application for a Title V permit that is timely and complete and includes, among other things: the citations and descriptions of all requirements applicable to the source (including any requirement to comply with an emission rate that meets BACT pursuant to PSD); a description of, and compliance plan for, requirements for which the source is not in compliance; and a certification by a responsible official of the truth, accuracy, and completeness of the application.

52. Section 504(a) of the Act, 42 U.S.C. § 7661c(a), implementing regulations of the Act, 40 C.F.R. § 70.6(a)(1), and 25 Pa. Code §§ 127.501 – 127.543 and §§ 127.401 – 127.464 have at all relevant times required that each Title V permit include, among other things, enforceable emissions limitations and such other conditions as are necessary to assure compliance with applicable requirements of the CAA and the requirements of the applicable SIP, including any applicable PSD requirement to comply with an emission rate that meets BACT.

#### **CLEAN AIR ACT ENFORCEMENT PROVISIONS**

53. Sections 113(a)(1) and (3) of the Act, 42 U.S.C. §§ 7413(a)(1) and (3), provide that the Administrator may bring a civil action in accordance with CAA Section 113(b) whenever, on the basis of any information available, the Administrator finds that any person has violated, or is in violation of, any other requirement or prohibition of, among other things: (1) the PSD requirements of CAA Section 165(a), 42 U.S.C. § 7475(a); (2) the federally enforceable provisions of the PA SIP or any permit issued thereunder; and (3) Title V of the Act, 42 U.S.C. §§ 7661-7661f, or any rule or permit issued thereunder.

54. Section 113(b) of the Act, 42 U.S.C. § 7413(b), authorizes the Administrator to initiate a judicial enforcement action against “the owner or operator of an affected source, a major emitting facility, or a major stationary source” or “any other person” for a permanent or temporary injunction and/or for a civil penalty of up to \$25,000 per day for each violation occurring before January 31, 1997; \$27,500 per day for each violation occurring before January 31, 1997; \$32,500 per day for each violation occurring after March 15, 2004; and \$37,500 per day for each such violation occurring after January 12, 2009, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by 31 U.S.C. § 3701, against any person whenever such person has violated, or is in violation of, among other things, the requirements or prohibitions described in the preceding paragraph.

55. 40 C.F.R. § 52.23 provides, among other things, that any failure by a person to comply with any provision of 40 C.F.R. Part 52, or with any approved regulatory provision of a SIP, shall render such person in violation of the applicable SIP, and subject to enforcement action pursuant to CAA Section 113, 42 U.S.C. § 7413.

56. Section 167 of the Act, 42 U.S.C. § 7477, authorizes the Administrator to initiate an action for injunctive relief, as necessary, to prevent the construction, modification, or operation of a major emitting facility that does not conform to the PSD requirements in Part C of the Act.

#### **DEFENDANTS' COAL-FIRED GENERATING UNITS**

57. At times pertinent to this civil action, NYSEG, Penelec and/or the Ols and EME Homer City owned and operated the Homer City plant.

58. The Homer City Plant includes three coal-fired generating units, Homer City Unit 1, Homer City Unit 2, and Homer City Unit 3.

59. At all times pertinent to this civil action, the Homer City Plant, Homer City Unit 1, Homer City Unit 2, and Homer City Unit 3 were each a “major emitting facility” and a “major stationary source,” within the meaning of the Act and the PSD regulations in the Pennsylvania SIP for SO<sub>2</sub> and/or PM.

60. At all times pertinent to this civil action, the Homer City Plant was a “major source” within the meaning of Title V of the Act and the Pennsylvania SIP.

61. On August 3, 1995, PENELEC submitted a Title V application for the Homer City Plant. On January 30, 2004, PADEP issued a final Title V permit for the plant to the OLS and EME Homer City. The effective date of the permit was December 1, 2004.

#### **HISTORY OF OWNERSHIP AND OPERATION AMONG THE DEFENDANTS**

62. In or about March 1999, EME Homer City became the operator of the Homer City Plant and continues to operate the plant. From March 1999 until on or about December 7, 2001, EME Homer City also owned the Homer City plant.

63. On or about December 7, 2001, EME Homer City completed a sale-leaseback transaction that transferred ownership of the Homer City plant to the OLS. The OLS remain the current owners of the plant.

64. Beginning in or about January 1968 until in or about March of 1999, PENELEC was an owner of the Homer City Plant.



65. Beginning in or about January 1968 until in or about June of 1998, NYSEG was an owner of the Homer City Plant.

66. Relief is available against NYSEG and PENELEC, the former owners and operators of the Homer City Plant. They can be ordered to fund and implement contracts with the third-party vendors who design, fabricate, and install the air pollution controls at issue. They can also take various actions to mitigate their past illegal air pollution such as purchasing and retiring air pollution credits known as “allowances”. To the extent that EME Homer City and the OLs, the current owners and operators of the Homer City plant, are necessary to fully implement relief, they can be joined as necessary parties under Fed. R. Civ. P. 19.

**FIRST CLAIM FOR RELIEF**

(PSD Violations at Homer City Unit 1)

67. Paragraphs 1 – 66 are realleged and incorporated herein by reference.

68. Homer City Unit 1 began operating in 1969. In or about March 1994, Defendants NYSEG and PENELEC commenced construction of one or more “major modifications” on Homer City Unit 1, as defined in the CAA and the Pennsylvania SIP. These modifications included one or more physical change or change in the method of operation at Homer City Unit 1, including, but not limited to: a project to replace the economizer on Unit 1, which included modification of the backpass gas ductwork to accommodate the new economizer and the installation of the new reheat temperature control dampers and internal boiler supports, and related work. These multi-million dollar modifications were described in the NOV dated June 12, 2008, and again in the NOV dated May 6, 2010 and November 1, 2010. These modifications

resulted in significant net emissions increases, as defined by the relevant PSD regulations, 40 C.F.R. § 52.21(b)(3)(i), of SO<sub>2</sub> and/or PM.

69. Defendants NYSEG, PENELEC, the OLS, and EME Homer City did not comply with the PSD requirements in the Act and Pennsylvania SIP with respect to the major modification(s) at Homer City Unit 1. Among other things, Defendants (i) undertook such major modification(s) and/or operated Homer City Unit 1 after the modifications without obtaining a PSD permit for the construction and operation of the modified unit, (ii) failed to undergo a BACT determination in connection with the major modification(s), (iii) failed to install and operate BACT for control of SO<sub>2</sub> and/or PM pursuant to such BACT determination, (iv) failed to operate in compliance with BACT emission limitations, and/or (v) continued to operate without meeting PSD requirements and without including PSD requirements in operating permits as required by the Act and the Pennsylvania SIP.

70. Defendants have violated and continue to violate Section 165(a) of the Act, 42 U.S.C. § 7475(a), and the PSD provisions of the Pennsylvania SIP (including 25 Pa. Code §§ 127.11, 127.25, 127.81 – 127.83, 127.441 – 127.444, and the federal regulations incorporated in the SIP) at Homer City Unit 1. Unless restrained by an order of this Court, these and similar violations of the Act will continue.

71. As provided in Section 113(b) of the Act, 42 U.S.C. § 7413(b), and Section 167 of the Act, 42 U.S.C. § 7477, the violations set forth above subject Defendants to injunctive relief and subject EME Homer City and the OLS to civil penalties of up to \$32,500 per day of each violation for violations occurring after March 14, 2004 but before January 12, 2009, and \$37,500 per day of each violation for violations occurring after January 12, 2009, pursuant to the Federal

Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by 31 U.S.C. § 3701; see 40 C.F.R. Part 19, 73 Fed. Reg. 75340 (Dec. 11, 2008).

**SECOND CLAIM FOR RELIEF**

(Title V Violations at Homer City Unit 1)

72. Paragraph 1 – 71 are realleged and incorporated herein by reference.

73. As set forth above, Defendants NYSEG and PENELEC commenced construction of one or more major modifications at Homer City Unit 1, as defined under the PSD regulations and the Pennsylvania SIP. As a result, these modifications triggered the requirements to, *inter alia*, undergo a BACT determination, obtain a PSD permit establishing emissions limitations that meet BACT requirements pursuant to such determination, and operate in compliance with such limitations. Defendants failed to satisfy these requirements.

74. Subsequently, Defendants failed to submit a complete application for a Title V operating permit for Homer City Unit 1 that identifies all applicable requirements, accurately certifies compliance with such requirements, contains a compliance plan for all applicable requirements for which the source was not in compliance, including the requirement to meet BACT pursuant to a determination under PSD, and other specific information that may be necessary to implement and enforce the applicable requirements of the Act, Title V, or to determine the applicability of such requirements.

75. Defendants have failed to obtain a proper or adequate Title V operating permit for Homer City Unit 1 that contains emission limitations for SO<sub>2</sub> and/or PM that meet BACT. Defendants thereafter have operated Homer City Unit 1 without meeting such limitations and

without having an adequate operating permit that requires compliance with such limitations or that contains a compliance plan for all applicable requirements for which the source is not in compliance.

76. Defendants' conduct has violated and continues to violate Sections 502(a), 503(c), and 504(a) of the Act, 42 U.S.C. §§ 7661a(a), 7661b(c), and 7661c(a), and the Title V operating permit regulations including 40 C.F.R. §§ 70.5-70.6, and 25 Pa. Code §§ 127.411-127.412, 127.414, 127.441, 127.502-127.503, 127.505, 127.511-127.512, and 127.542. Unless restrained by an order of this Court, these and similar violations will continue.

77. As provided in Section 113(b) of the Act, 42 U.S.C. § 7413(b), the violations set forth above subject Defendants to injunctive relief and subject EME Homer City and the OLs to civil penalties of up to \$32,500 per day of each violation for violations occurring after March 14, 2004 but before January 12, 2009, and \$37,500 per day of each violation for violations occurring after January 12, 2009, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by 31 U.S.C. § 3701; see 40 C.F.R. Part 19, 73 Fed. Reg. 75340 (Dec. 11, 2008).

### **THIRD CLAIM FOR RELIEF**

(PSD Violations at Homer City Unit 2)

78. Paragraphs 1 – 77 are realleged and incorporated herein by reference.

79. Homer City Unit 2 began operating in 1969. In or about August 1991, Defendants NYSEG and PENELEC commenced construction of one or more major modifications, as defined in the CAA and the Pennsylvania SIP, at the Homer City plant. These

modifications included one or more physical change or change in the method of operation at Homer City Unit 2, including, but not limited to: a project to replace the economizer on Unit 2, which included modification of the backpass gas ductwork to accommodate the new economizer and the installation of the new reheat temperature control dampers and internal boiler supports, and related work. These multi-million dollar modifications were described in the NOV's issued to Defendants. These modifications resulted in significant net emissions increases, as defined by the relevant PSD regulations, 40 C.F.R. § 52.21(b)(3)(i), of SO<sub>2</sub> and/or PM.

80. Defendants NYSEG, PENELEC, the OLS, and EME Homer City did not comply with the PSD requirements in the Act and Pennsylvania SIP with respect to the major modification(s) at Homer City Unit 2. Among other things, Defendants (i) undertook such major modification(s) and/or operated Homer City Unit 2 after the modifications without obtaining a PSD permit for the construction and operation of the modified unit, (ii) failed to undergo a BACT determination in connection with the major modification(s), (iii) failed to install and operate BACT for control of SO<sub>2</sub> and/or PM pursuant to such BACT determination, (iv) failed to operate in compliance with BACT emission limitations, and/or (v) continued to operate without meeting PSD requirements and without including PSD requirements in operating permits as required by the Act and the Pennsylvania SIP.

81. Defendants have violated and continue to violate Section 165(a) of the Act, 42 U.S.C. § 7475(a), and the PSD provisions of the Pennsylvania SIP (including 25 Pa. Code §§ 127.11, 127.25, 127.81 – 127.83, 127.441 – 127.444, and the federal regulations incorporated in the SIP) at Homer City Unit 2. Unless restrained by an order of this Court, these and similar violations of the Act will continue.

82. As provided in Section 113(b) of the Act, 42 U.S.C. § 7413(b), and Section 167 of the Act, 42 U.S.C. § 7477, the violations set forth above subject Defendants to injunctive relief and subject EME Homer City and the OLs to civil penalties of up to \$32,500 per day of each violation for violations occurring after March 14, 2004 but before January 12, 2009, and \$37,500 per day of each violation for violations occurring after January 12, 2009, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by 31 U.S.C. § 3701; see 40 C.F.R. Part 19, 73 Fed. Reg. 75340 (Dec. 11, 2008).

#### **FOURTH CLAIM FOR RELIEF**

(Title V Violations at Homer City Unit 2)

83. Paragraphs 1 – 82 are realleged and incorporated herein by reference.

84. As set forth above, Defendants NYSEG and PENELEC commenced construction of one or more major modifications at Homer City Unit 2, as defined under the PSD regulations and the Pennsylvania SIP. As a result, these modifications triggered the requirements to, *inter alia*, undergo a BACT determination, obtain a PSD permit establishing emissions limitations that meet BACT requirements pursuant to such determination, and operate in compliance with such limitations. Defendants failed to satisfy these requirements.

85. Subsequently, Defendants failed to submit a complete application for a Title V operating permit for Homer City Unit 2 that identifies all applicable requirements, accurately certifies compliance with such requirements, contains a compliance plan for all applicable requirements for which the source was not in compliance, including the requirement to meet BACT pursuant to a determination under PSD, and other specific information that may be

necessary to implement and enforce the applicable requirements of the Act, Title V, or to determine the applicability of such requirements.

86. Defendants have failed to obtain a proper or adequate Title V operating permit for Homer City Unit 2 that contains emission limitations for SO<sub>2</sub> and/or PM that meet BACT. Defendants thereafter have operated Homer City Unit 2 without meeting such limitations and without having an adequate operating permit that requires compliance with such limitations or that contains a compliance plan for all applicable requirements for which the source is not in compliance.

87. Defendants' conduct has violated and continues to violate Sections 502(a), 503(c), and 504(a) of the Act, 42 U.S.C. §§ 7661a(a), 7661b(c), and 7661c(a), and the Title V operating permit regulations including 40 C.F.R. §§ 70.5-70.6, and 25 Pa. Code §§ 127.411-127.412, 127.414, 127.441, 127.502-127.503, 127.505, 127.511-127.512, and 127.542. Unless restrained by an order of this Court, these and similar violations will continue.

88. As provided in Section 113(b) of the Act, 42 U.S.C. § 7413(b), the violations set forth above subject Defendants to injunctive relief and subject EME Homer City and the OLS to civil penalties of up to \$32,500 per day of each violation for violations occurring after March 14, 2004 but before January 12, 2009, and \$37,500 per day of each violation for violations occurring after January 12, 2009, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by 31 U.S.C. § 3701; see 40 C.F.R. Part 19, 73 Fed. Reg. 75340 (Dec. 11, 2008).

**PRAYER FOR RELIEF**

WHEREFORE, based upon all the allegations set forth above, the United States requests that this Court:

1. Permanently enjoin Defendants from operating Units 1 and 2 of the Homer City Plant, except in accordance with the Clean Air Act and any applicable regulatory requirements;
2. Order EME Homer City, the OLS, and/or the other Defendants (acting on behalf of EME Homer City and/or the OLS) to apply for permits that are in conformity with the requirements of the PSD program, the Title V program, and the Pennsylvania Operating Permit program;
3. Order Defendants to remedy their past violations by, among other things, requiring the Defendants to install and/or operate BACT, as appropriate, at Homer City Units 1 and 2, for each pollutant in violation of the new source review requirements of the Clean Air Act;
4. Order Defendants to conduct audits of their operations to determine if any additional modifications have occurred which would require them to meet the requirements of PSD and report the results of these audits to the United States;
5. Order Defendants to surrender emission allowances or credits to offset and mitigate the illegal emissions under the PSD and the Pennsylvania Operating Permits program;



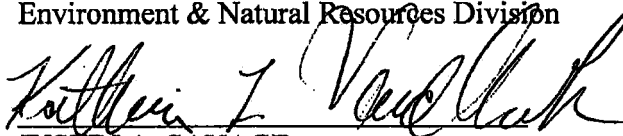
6. Order Defendants to take other appropriate actions to remedy, mitigate, and offset the harm to public health and the environment caused by the violations of the Clean Air Act alleged above;
7. Assess a civil penalty against EME Homer City and the OLs of up to \$32,500 per day for each such violation which occurred on or after March 15, 2004; and \$37,500 per day for each such violation which occurred on or after January 12, 2009;
8. Award the United States its costs of this action; and,
9. Grant such other relief as the Court deems just and proper.

Dated: 01/04/11

Respectfully submitted,



ROBERT G. DREHER  
Acting Assistant Attorney General  
Environment & Natural Resources Division



JUSTIN A. SAVAGE  
Senior Counsel  
KATHERINE L. VANDERHOOK  
Trial Attorney  
Environmental Enforcement Section  
Environment & Natural Resources Division  
U.S. Department of Justice  
P.O. Box 7611  
Washington, D.C. 20530  
(202)514-3900  
katherine.vanderhook@usdoj.gov

DAVID J. HICKTON  
UNITED STATES ATTORNEY

s/Paul E. Skirtich  
PAUL E. SKIRTICH  
Assistant U.S. Attorney  
Western District of Pennsylvania  
U.S. Post Office & Courthouse  
700 Grant Street, Suite 4000  
Pittsburgh, PA 15219  
(412) 894-7418  
PA ID No. 30440

OF COUNSEL:  
DONNA MASTRO  
Senior Assistant Regional Counsel  
Office of Regional Counsel  
United States Environmental  
Protection Agency, Region 3  
1650 Arch Street  
Philadelphia, PA 19103

SEEMA KAKADE  
Attorney Adviser  
United States Environmental  
Protection Agency  
1200 Pennsylvania Ave. NW  
Washington, D.C. 20460