

State of New York

ELIOT SPITZER
Attorney General

DENISE M. SHEEHAN
Commissioner
Department of Environmental Conservation

October 11, 2006

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

James P. Laurito
President and Chief Executive Officer
89 East Avenue
Rochester, NY 14649

Wesley W. von Schack
Chairman, President, and Chief Executive Officer
Energy East Corporation
52 Farm View Drive
New Gloucester, Maine 04260-5116

RE: Notice of Intent to Sue Pursuant to Clean Air Act § 7604

Dear Sirs:

Pursuant to Section 304 of the Clean Air Act, 42 U.S.C. § 7604 (the "Act"), the State of New York and the New York State Department of Environmental Conservation (collectively, "the State") hereby notify Rochester Gas & Electric Corporation ("RG&E")¹ and the U.S. Environmental Protection Agency ("EPA") of the State's intent to file a Complaint against RG&E in federal district court for violations at Russell Station ("Russell"), a power plant located in the Town of Greece, Monroe County, New York. The purpose of today's letter is to provide advance notice of the State's intent to file a Complaint unless the alleged violations are addressed.

In its Complaint, the State intends to assert claims alleging that RG&E modified Russell in violation of the Prevention of Significant Deterioration ("PSD") provisions of the Clean Air Act (the "Act") and that RG&E has operated Russell in violation of conditions of federally and

¹ RG&E is a wholly-owned subsidiary of RGS Energy Group, Inc. which, in turn, is a wholly-owned subsidiary of Energy East Corporation.

state enforceable operating permits, which requires that the plant be operated in compliance with all requirements applicable under the Act. As a result of these violations, Russell has emitted and continues to emit excess amounts of nitrogen oxides (NO_x) and sulfur dioxide (SO₂), thereby damaging the environment and contributing to endangerment of public health in New York.

Statutory Background

The PSD program requires major sources of air pollution located in areas that meet the national ambient air quality standards (“NAAQS”) to (i) undergo pre-construction permit review prior to construction of a major modification at the source, and (ii) install more effective emission controls. To implement the PSD program, EPA requires major sources of air pollution to obtain pre-construction approval prior to commencing construction of a major modification. 40 C.F.R. § 52.21 *et seq.* Sources subject to PSD review must install and operate Best Available Control Technology (“BACT”). 42 U.S.C. § 7475(a). BACT is the maximum degree of emission reduction achievable for each pollutant regulated under the Act, taking into consideration energy, environmental, and economic impacts of the emission reductions. 40 C.F.R. § 52.21(b)(12).

Title V of the Clean Air Act, 42 U.S.C. §§ 7661 *et seq.*, requires that certain specified categories of stationary sources apply for, and obtain, an operating permit. 42 U.S.C. § 7661a(a). Among the sources required to obtain an operating permit are any major sources, as defined in 42 U.S.C. § 7661(2), and any sources required to have a PSD permit. *See* 42 U.S.C. § 7661a(a) (listing the sources required to have a Title V permit as including “any other source required to have a permit under parts C or D of subchapter I” of the Act).

Pursuant to section 501 of the Act, 42 U.S.C. § 7661, the Title V operating permit must include conditions necessary to assure compliance with “applicable requirements” under Title V. 42 U.S.C. § 7661c(a). *See also* 40 C.F.R. § 70.3(c) (all “applicable requirements” shall be included in the Title V permit). For those sources that are required to have a permit under the PSD requirements of 42 U.S.C. § 7470 *et seq.*, the “applicable requirements” include the PSD requirements. *See* 40 C.F.R. § 70.2(2) (“applicable requirements” include “any term or condition of any preconstruction permits issued pursuant to regulations approved or promulgated through rulemaking under Title I, including parts C or D, of the Act.”). *See also* 6 NYCRR § 201-2.1(b)(21).

New York State Department of Environmental Conservation (NYSDEC) administers the Title V permitting program under 6 NYCRR Part 201. In New York, PSD permits and state facility permits have also been issued under the authority of Part 201. 6 NYCRR 201-1.2 provides that “[i]f an existing source was subject to the permitting requirements of 6 NYCRR Part 201 at the time of construction or modification, and the owner and/or operator failed to apply for a permit for such emissions source then . . . [t]he emission source or facility is subject

to all regulations that were applicable to it at the time of construction or modification and any subsequent requirements applicable to existing sources or facilities.”

Prior to Title V becoming effective, the New York SIP prohibited any person from operating an air contamination source without having a valid certificate to operate issued by DEC. 6 NYCRR § 201.2(b) (“No person shall operate an air contamination source without having a valid certificate to operate issued by the commissioner”). Pursuant to 6 NYCRR §§ 201.3 and 201.4, a certificate to operate was required to include conditions to ensure compliance with applicable federal requirements, including a condition requiring that the source achieve an emission rate that meets BACT.

Description of Violations

The information available to us indicates that RG&E has undertaken a number of “major modifications” within the meaning of 40 C.F.R. § 52.21(b)(2) at Russell. These modifications triggered the applicability of PSD requirements to Russell, including the obligation to obtain a PSD permit and implement BACT for control of emissions of NO_x and SO₂ from Russell. Based on these modifications, the State will allege the following violations:

1. PSD Violations

- In or about 1984, RG&E modified Russell Unit 1 when it replaced the unit’s turbine shell, at a cost of approximately \$1.9 million, allowing the unit to operate at a higher capacity. The information available to us indicates that Russell should have projected a net emissions increase (as defined at 40 C.F.R. § 52.21(b)(23)(i)) of more than 40 tons per year (tpy) of NO_x and SO₂, triggering the PSD requirements for those pollutants.
- In or about 1986, RG&E modified Russell Unit 2 when it replaced the unit’s secondary superheater pendants, at a cost of approximately \$367,000. The information available to us indicates that Russell should have projected a net emissions increase (as defined at 40 C.F.R. § 52.21(b)(23)(i)) of more than 40 tpy of SO₂, triggering the PSD requirements for that pollutant.
- In or about 1981, RG&E modified Russell Unit 3 when it replaced the unit’s economizer, at a cost of approximately \$150,000. The information available to us indicates that Russell should have projected a net emissions increase (as defined at 40 C.F.R. § 52.21(b)(23)(i)) of more than 40 tpy of SO₂, triggering the PSD requirements for that pollutant.

2. Violation of Title V operating permit for Russell

In accordance with the Title V provisions described above, RG&E was required to obtain an operating permit incorporating all applicable requirements. DEC issued a Title V operating permit for Russell on February 23, 2000. Condition 5 of that permit is based on 6 NYCRR 201-1.2. As relevant here, that Condition of RG&E's Title V permit provides:

If an existing source was subject to the permitting requirements of 6 NYCRR Part 201 at the time of construction or modification, and the owner and/or operator failed to apply for a permit for such emissions source then. . . [t]he emission source or facility is subject to all regulations that were applicable to it at the time of construction or modification and any subsequent requirements applicable to existing sources or facilities.

Because RG&E failed to apply for PSD permits for Russell, that facility is now subject to the PSD requirements applicable at the time of modification in accordance with RG&E's Title V permit. These requirements include, *inter alia*, (a) the requirement that a permit be obtained under 6 NYCRR Part 201 for each modified unit that contains an emission limitation for each applicable pollutant that reflects BACT (40 C.F.R. § 52.21(i)), and (b) the requirement that the owner/operator comply with BACT (40 C.F.R. § 52.21(j)).² By not complying with the PSD requirements applicable to Russell at the time it was modified, RG&E is operating it in violation of its Title V operating permit. Those violations began on February 23, 2000, the effective date of the Title V permit, and continue through the date of this notice.

3. Operating with a deficient operating permit

The State will also allege that RG&E violated the Act and New York's SIP by operating each applicable Russell unit without operating permits and/or certificates to operate that include all applicable requirements, including the requirements to implement BACT and meet emission limitations that reflect the implementation of BACT.

Subsequent to undertaking each of the modifications alleged above, RG&E was obligated by 6 NYCRR § 201.2(b), approved as part of New York's SIP, to obtain certificates to operate

² Effective November 7, 1996, the date of EPA approval of DEC's Title V permitting program, "subsequent requirements" became applicable to each modified unit at the Facilities, including the obligation under 40 C.F.R. § 70.1(b) and the relevant provision of the New York SIP (6 NYCRR § 201-6.5(a)(1)) to have an operating permit that assures compliance by the source with all applicable requirements. Under 40 C.F.R. § 70.2(2) and 6 NYCRR § 201-2.1(b)(21), "applicable requirements" are defined to include "any term or condition" of a PSD permit.

that contained emission limitations for NO_x and SO₂ that reflect BACT. *See* 6 NYCRR §§ 201.3 and 201.4 (requiring certificates to operate to include conditions that ensure compliance with applicable federal requirements). Subsequent to EPA's approval of New York's Title V permitting program effective November 7, 1996, RG&E was required by 42 U.S.C. § 7661c(a) and 6 NYCRR § 201-6.5(a)(1) to obtain an operating permit with necessary conditions to assure compliance with all "applicable requirements" (as defined above). Notwithstanding these obligations, RG&E continued to operate each modified unit without having a certificate to operate that contained emission limitations for NO_x and SO₂ (where applicable) that reflect BACT and that required implementation of BACT. Accordingly, RG&E has violated 42 U.S.C. § 7661c(a) and provisions of the New York SIP (6 NYCRR § 201.2 and, subsequently, 6 NYCRR § 201-6.5).

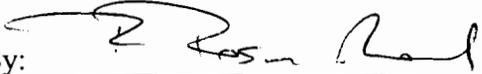
Jurisdiction for each of these additional claims is provided by section 304(a)(1) of the Act, which provides the United States District Courts with jurisdiction over any claims for violation of "an emission standard or limitation under this chapter," a phrase which is defined by section 304(f)(4) of the Act to include any requirement to obtain an operating permit, and any conditions of such a permit.

Conclusion

As you are aware, DEC issued a Notice of Violation, dated May 25, 2000, to RG&E concerning alleged PSD violations at Russell. To date, the parties have been unable to resolve those violations. Accordingly, the State intends to file a Complaint against RG&E in federal court pursuant to 42 U.S.C. § 7604(a)(1) for injunctive relief and penalties unless a settlement is reached within 60 days. If you have any questions about the foregoing, please contact Robert Rosenthal at (518) 402-2260.

Sincerely,

THE STATE OF NEW YORK AND NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL
CONSERVATION

By: 

Robert Rosenthal
Assistant Attorney General
Environmental Protection Bureau
Office of the Attorney General
The Capitol
Albany, NY 12224

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cc: Stephen L. Johnson, Administrator (by certified mail)
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