

BEFORE THE ADMINISTRATOR  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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In the Matter of the Clean Air Act Title V Operating Permit Issued to	Citizen Petition to Reopen an Operating Permit Issued to a Power Plant That is Operating in Violation of SIP, NSR, and PSD Requirements
Conesville Power Plant (Facility ID 06-16-00-0000)	
by the State of Ohio Environmental Protection Agency	

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This petition is submitted pursuant to the Clean Air Act, 42 U.S.C. § 7401 *et seq.* and the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* on behalf of Ohio Citizen Action, Inc., The Ohio Environmental Council, Inc., Ohio Public Interest Research Group, Inc., The Buckeye Forest Council, Inc., Save Our County, Inc., Tri-State Environmental Council, Robert M. Estell, Sandra Estell, Robert A. Estell, Jr., Robert J. Love, Sarah B. Love, Kevin D. Love, Alonzo Spencer, and Teresa J. Swearingen (collectively “Petitioners”).

Petitioners request that the Administrator of the United States Environmental Protection Agency (“U.S. EPA”) reopen the final Title V operating permit issued to the Conesville Power Plant (“the Conesville Plant”) to incorporate a compliance schedule that will assure the plant’s prompt compliance with all applicable requirements under the Clean Air Act. In particular, this compliance schedule must establish enforceable milestones by which the plant will come into full compliance with Prevention of Significant Deterioration (“PSD”) provisions<sup>1</sup>, nonattainment

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<sup>1</sup> The Clean Air Act’s PSD requirements are set forth at 42 U.S.C. §§ 7470-92. 42 U.S.C. §§ 7410(a) and 7471 requires each state to adopt a state implementation plan (“SIP”) that contains measures to prevent significant deterioration in areas that are in attainment for national ambient air quality standards (“NAAQS”). U.S. EPA’s PSD regulations, published at 40 C.F.R. §§52.21(b) through (w), are incorporated into Ohio’s SIP at 40 C.F.R. § 52.1884. U.S. EPA delegated to Ohio the authority to implement the federal PSD program incorporated into the Ohio SIP. 46 Fed. Reg. 9580 (Jan. 29, 1981).

New Source Review (“NSR”) provisions<sup>2</sup>, and the general permitting requirements of Ohio’s State Implementation Plan (“SIP”).<sup>3</sup> The compliance schedule must require the submission of a complete NSR/PSD permit application within a time frame that is sufficient for the agency to make a final decision regarding PSD/NSR permit issuance by January 1, 2002. The schedule must mandate full compliance with PSD, nonattainment NSR, and SIP requirements (collectively, “new source requirements”) by no later than January 1, 2004. Petitioners believe that sixty (60) days is a reasonable time period for U.S. EPA to determine whether to grant this petition.<sup>4</sup> Thus, Petitioners expect the Administrator’s response to this petition no later than February 26, 2001.

## I. PETITIONERS

Ohio Citizen Action, Inc. is a statewide consumer and environmental organization with 150,000 dues-paying members. The organization campaigns on issues from public health and pollution prevention to campaign finance reform and energy policies. Founded in 1975, Ohio

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<sup>2</sup> Part D of Title I of the Clean Air Act, 42 U.S. C. §§ 7501-7515 sets forth provisions for New Source Review “NSR” requirements for areas designated as nonattainment for purposes of meeting the NAAQS standards. Under Section 172(c)(5) of the Nonattainment NSR provisions of the Clean Air Act, 42 U.S.C. § 7502(c)(5), a state is required to adopt Nonattainment NSR SIP rules that include provisions that require that all permits for the construction and operation of modified major stationary sources within nonattainment areas conform to the requirements of Section 173 of the CAA, 42 U.S.C. § 7503. On May 14, 1973, U.S. EPA approved revisions to Ohio’s SIP that require NSR preconstruction permits for new or modified sources. 38 Fed. Reg. 12711, 12712 (May 14, 1973). The approved provisions of the Ohio SIP were codified in the administrative rules for the Ohio Air Pollution Control Board at AP 9-02. In October 1980, U.S. EPA conditionally approved revisions of Ohio’s nonattainment NSR SIP rules. 45 Fed. Reg. 72119, 72122 (October 31, 1980), which were codified at Chapters 3745-31-01 through 3745-31-08. On September 8, 1993, U.S. EPA approved certain revisions to Ohio’s Nonattainment NSR SIP Rules. 58 Fed. Reg. 47211 (Sept. 8, 1993); see 40 C.F.R. §§ 52.1870(c)(83) and 1879 (1999). The SIP rules, as amended are codified in the Ohio Administrative Code at Chapter 3745-31-08. See 40 C.F.R. §§ 52.1870(c)(83) and 1879 (1999).

<sup>3</sup> Ohio’s general permit requirements were originally approved by U.S. EPA on May 31, 1972, 37 Fed. Reg. 10842, 10886 and are codified at Ohio Administrative Code (“OAC”) Chapter 3745-31 (previously AP 9-02).

<sup>4</sup> The Clean Air Act establishes a sixty (60) day timeframe for U.S. EPA to respond to a citizen petition to object to a Title V permit, but does not explicitly establish a timeframe by which U.S. EPA must respond to a citizen petition to reopen a Title V permit. Since U.S. EPA already agrees with the basic contention that the Conesville Plant is currently operating in violation of PSD, NSR and SIP requirements, this petition requires much less analysis on the part of U.S. EPA than a typical citizen petition filed under CAA § 505(b). Thus, 60 days provides U.S. EPA with ample time to grant or deny this petition.

Citizen Action is a non-profit, non-partisan organization with offices in Cleveland, Columbus, Toledo, Akron, and Cincinnati. The organization's headquarters are located at 614 West Superior Avenue, #1200, Cleveland, OH 44113.

The Ohio Environmental Council, Inc. ("OEC") is a statewide network of more than a hundred group members (local and state environmental and conservation organizations) and more than seven hundred individual members. The OEC's mission is to inform, unite, and empower all Ohio citizens to protect the environment and to conserve natural resources. For the past four years, the OEC has been pushing for clean up of Ohio's fleet of coal-burning power plants. The OEC is also the co-publisher of two major reports citing the health and environmental impacts in Ohio of power plant pollution and led the successful effort to secure three clean energy initiatives to promote knowledge of and access to cleaner, renewable energy sources and technology. The organization's headquarters are located at 1207 Grandview Ave. Suite 301, Columbus, OH 43212-3449.

Ohio Public Interest Research Group, Inc. ("Ohio PIRG") is a statewide nonprofit, nonpartisan, consumer, environmental, and good government advocacy organization with offices in Cleveland and Oberlin. Ohio PIRG has over 10,000 members throughout the state. Ohio PIRG engages in persistent, result-oriented public interest activism that protects our environment, encourages a fair, sustainable economy, and fosters responsive, democratic government. Ohio PIRG's office is located at 2460 Fairmount Boulevard, Suite C, Cleveland Heights, OH 44106.

The Buckeye Forest Council, Inc. ("BFC") works for the protection of Ohio's native forests and their inhabitants. The BFC has nearly 500 members, many of whom reside in eastern Ohio. The BFC's office is located at 8 North Court Street, Athens, OH 45701.

Save Our County, Inc. (“SOC”) is a non-profit, citizen organization that is dedicated to raising public awareness about air emissions from all sources, including power plants. SOC works to protect the health and safety of citizens living in the tri-state area of Ohio, Pennsylvania, and West Virginia. SOC has been particularly active in advocating for the shutdown of the Von Roll/WTI facility in East Liverpool, Ohio because of concerns about hazardous air emissions. SOC’s office is located at 1233 Pennsylvania Avenue, East Liverpool, OH 43920.

Tri-State Environmental Council (“TSEC”) is a non-profit, citizen organization that was formed in 1991 to coordinate the activities of a dozen environmental organizations in the tri-state region of Ohio, Pennsylvania, and West Virginia. TSEC focuses on human and environmental health issues pertaining to air emissions. TSEC’s office is located at RD #1 Box 365, Chester, WV 26034.

Robert M. Estell and Sandra Estell live downwind of the Conesville Power Plant. Mr. Estell suffers from asthma and allergies and believes that his symptoms are aggravated by air pollution. Robert and Sandra Estell reside at 1410 Etruria Street, East Liverpool, OH 43920.

Robert A. Estell, Jr. also lives downwind of the Conesville Power Plant. He suffers from sinus problems that he believes are aggravated by air pollution. He resides at 1410A Etruria Street, East Liverpool, OH 43920.

Robert J. Love, Sarah B. Love, and Kevin D. Love live in Waterford, Ohio, southeast of the Conesville Power Plant. Robert and Sarah suffer from year-round coughing, sneezing, and shortness of breath, and must take medication to help them breathe. Kevin is very susceptible to pneumonia. All three believe that their respiratory problems are exacerbated by air pollution. They reside at Rt. 2, Box 291, Waterford, OH 45786.

Alonzo Spencer lives downwind of the Conesville Power Plant and is concerned about possible human health impacts from plant emissions that may migrate on prevailing winds to his neighborhood. He resides at 1233 Pennsylvania Avenue, East Liverpool, OH 43920.

Teresa J. Swearingen lives downwind of the Conesville Power Plant. She is a registered nurse who suffers from frequent upper respiratory infection, including bronchitis, pneumonia, and sinusitis. Ms. Swearingen believes that air pollution may aggravate her health problems. She resides at RD #1 Box 365, Chester, WV 26034.

## **II. THE FINAL OPERATING PERMIT ISSUED TO THE CONESVILLE PLANT MUST BE REOPENED TO INCLUDE A COMPLIANCE SCHEDULE**

### **A. The Conesville Plant is Currently Operating in Violation of Clean Air Act Prevention of Significant Deterioration Provisions, Nonattainment New Source Review Provisions, and the Ohio State Implementation Plan**

According to the formal findings of the United States Environmental Protection Agency (“U.S. EPA”), the Conesville Plant is currently operating in violation of new source requirements. U.S. EPA issued a notice of violation to the plant in 1999 and is currently pursuing an enforcement action against the plant in federal court.

Violations at the Conesville Plant are set out in detail in an amended complaint filed on March 1, 2000 in the United States District Court for the Southern District of Ohio, U.S. v. American Electric Power Service Corp., Civil Action No. C2-99-1182 (“AEP Complaint”). In the complaint, U.S. EPA alleges that American Electric Power Service Corp. (“AEP”), Columbus Southern Power Company (“CSPC”), and others modified the Conesville Plant and thereafter operated the plant without obtaining appropriate construction permits and without installing legally-required pollution control technology to control emissions of nitrogen oxides (NO<sub>x</sub>), sulfur dioxide (SO<sub>2</sub>), and particulate matter (PM). U.S. EPA specifically identifies several major modifications performed at the Conesville Plant that trigger new source

requirements, including, among other modifications, (1) replacement of 4 cyclones, primary burners, and re-entrant throats at Units 1 and 2 during approximately 1987; (2) replacement of furnace floor tubing at Units 1 and 2 during approximately 1990 and 1989; (3) replacement of the economizer bank at unit 3 during approximately 1988; and (4) replacement of secondary superheater outlet head at Unit 3 during approximately 1993. AEP Complaint, ¶ 193.

According to the complaint, AEP and CSPC violated and continue to violate PSD requirements by undertaking such modifications at the Conesville Plant and continuing to operate the plant without obtaining a PSD permit and without installing and operating Best Available Control Technology (“BACT”) for control of NO<sub>x</sub>, SO<sub>2</sub>, and PM. AEP Complaint, ¶ 194. In addition, AEP and CSPC violated and continue to violate nonattainment NSR requirements because they failed to obtain a Nonattainment NSR permit prior to making the modifications and have not (1) installed and operated at the Lowest Achievable Emissions Rate (“LAER”) for control of SO<sub>2</sub>; (2) obtained and operated in compliance with federally enforceable emission offsets at least as great as the modified source’s emissions; (3) certified that all other major sources that they own and operate within Ohio are in compliance with the Clean Air Act; and (4) demonstrated that the benefits of the modifications significantly outweigh the environmental and social costs imposed as a result of the modifications. AEP Complaint, ¶ 199. Finally, AEP and CSPC violated and continue to violate the Ohio SIP General Permit provisions by modifying the Conesville Plant and continuing to operate the plant without obtaining a Permit to Install, without installing “best available technology,” and without demonstrating that the modifications do not interfere with the attainment or maintenance of a NAAQS as required by the Ohio SIP. AEP Complaint, ¶ 204.

The March 1, 2000 AEP Complaint is hereby incorporated into this petition and is attached as Exhibit A.

B. An Operating Permit Issued to a Facility That is Currently Violating an Applicable Requirement Must Include a Compliance Schedule Designed to Bring the Facility Into Compliance With the Requirement Within a Reasonable Timeframe

Under federal regulations adopted pursuant to Title V of the Clean Air Act, each facility that is subject to Title V permitting requirements must obtain a permit that “assures compliance by the source with all applicable requirements.”<sup>5</sup> Applicable requirements include, among others, the requirement to obtain a preconstruction permit that complies with applicable preconstruction review requirements under the Clean Air Act, U.S. EPA regulations, and state implementation plans (“SIPs”).<sup>6</sup>

If a facility is in violation of an applicable requirement at the time that it receives an operating permit, the facility’s permit must include a compliance schedule.<sup>7</sup> The compliance schedule must contain “an enforceable sequence of actions with milestones, leading to compliance with any applicable requirements for which the source will be in noncompliance at

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<sup>5</sup> 40 C.F.R. § 70.1(b). See also Clean Air Act § 504(a) (“Each permit issued under this subchapter shall include enforceable emission limitations and standards, a schedule of compliance, a requirement that the permittee submit to the permitting authority, no less often than every 6 months, the results of any required monitoring, and such other conditions as are necessary to assure compliance with applicable requirements of this chapter, including the requirements of the applicable implementation plan”).

<sup>6</sup> 40 C.F.R. § 70.2 explains that applicable requirements include “any standard or other requirement provided for in the applicable implementation plan approved or promulgated by EPA through rulemaking under Title I of the [Clean Air] Act . . . .”

<sup>7</sup> See 42 U.S.C. § 7661b(b)(1) (stating that “[t]he regulations required by section 7661a(b) of this title shall include a requirement that the applicant submit with the permit application a compliance plan describing how the source will comply with all applicable requirements under this chapter. The compliance plan shall include a schedule of compliance . . . .” 42 U.S.C. § 7661(3) defines “schedule of compliance” as “a schedule of remedial measures, including an enforceable sequence of actions or operations, leading to compliance with an applicable implementation plan, emission standard, emission limitation, or emission prohibition.”) See also 40 C.F.R. § 70.6(c)(3) (stating that all operating permits shall contain “[a] schedule of compliance consistent with § 70.5(c)(8) of this part.” § 70.5(c)(8)(iii)(C) explains, in part, that a facility’s permit application must include “[a] schedule of compliance for sources that are not in compliance with all applicable requirements at the time of permit issuance.”)

the time of permit issuance.”<sup>8</sup> Thus, if a power plant is in violation of PSD, Nonattainment NSR, or SIP requirements, the plant’s operating permit must include an enforceable compliance schedule designed to bring the plant into compliance with those requirements. The plant is then bound to comply with that schedule or risk becoming the target of an enforcement action for violating the terms of its permit. (This violation would be in addition to the original violation resulting from the plant’s failure to obtain a PSD permit). Such an enforcement action could be brought by the permitting authority (usually the state or local environmental agency), U.S. EPA, or the public.

C. U.S. EPA Must Reopen the Final Operating Permit Issued to the Conesville Plant to Include a Compliance Schedule as Mandated by the Clean Air Act and Federal Regulations

Under the Clean Air Act and 40 C.F.R. Part 70, U.S. EPA is charged with the responsibility of overseeing implementation state Title V Operating Permit Programs. An important aspect of U.S. EPA’s oversight responsibility is ensuring that each operating permit complies with all Clean Air Act-based air quality requirements and the requirements of 40 C.F.R. Part 70.<sup>9</sup> If the U.S. EPA Administrator determines that an operating permit does not comply with applicable requirements or the requirements of 40 C.F.R. Part 70, he or she must object to issuance of the permit. Once the Administrator objects to a permit proposed by a state permitting authority, the state may not issue the permit until all objection issues are resolved.<sup>10</sup>

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<sup>8</sup> 40 C.F.R. § 70.5(c)(8)(iii)(C).

<sup>9</sup> See 40 C.F.R. § 70.8(c)(1) (“The Administrator will object to the issuance of any proposed permit determined by the Administrator not to be in compliance with applicable requirements or requirements under this part.”).

<sup>10</sup> See 40 C.F.R. § 70.8(c)(1) (“No permit for which an application must be transmitted to the Administrator under paragraph (a) of this section shall be issued if the Administrator objects to its issuance in writing within 45 days of receipt of the proposed permit and all necessary supporting information.”).



Even after a final operating permit is issued to a facility, U.S. EPA has ongoing responsibility for making sure that the permit assures the facility's compliance with all applicable requirements over the course of the permit term. If, at any point after the permit is issued, the U.S. EPA Administrator determines that the final permit contains a material mistake, that "inaccurate statements were made in establishing the emission standards or other terms or conditions of the permit" or that the permit "must be revised or revoked to assure compliance with the applicable requirements," U.S. EPA must ensure that the permit is reopened and that the problem is corrected.<sup>11</sup> All three of the above justifications for reopening an operating permit apply to the permit issued to the Conesville Plant.

If the Conesville operating permit is modified to include an appropriate compliance schedule, the plant may not be operated unless it is equipped with modern pollution control technology in accordance with the schedule. The fact that the permit issued to the Conesville Plant lacks such a compliance schedule constitutes a "material mistake" under 40 C.F.R. § 70.7(f)(1)(a)(iii). In addition, this mistake was most likely based on "inaccurate statements [that] were made in establishing the emission standards or other terms or conditions of the permit."<sup>12</sup> And, clearly, a permit that omits applicable PSD, Nonattainment NSR, and SIP requirements does not "assure compliance with the applicable requirements."<sup>13</sup>

U.S. EPA has already determined that the Conesville Plant is operating in violation of new source requirements. In the absence of an appropriate compliance schedule, the final

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<sup>11</sup> See 40 C.F.R. § 70.7(f)(1)(a) (permit shall be reopened and revised under any of the following circumstances: . . . (iii) The permitting authority or U.S. EPA determines that the permit contains a material mistake or that inaccurate statements were made in establishing the emission standards or other terms or conditions of the permit; (iv) The Administrator or the permitting authority determines that the permit must be revised or revoked to assure compliance with the applicable requirements.

<sup>12</sup> Id.

<sup>13</sup> 40 C.F.R. § 70.7(f)(1)(iv).

operating permit issued to this plant violates the requirements of 40 C.F.R. Part 70 and the Clean Air Act. Thus, U.S. EPA must exercise its oversight authority and reopen the Conesville operating permit to include an enforceable compliance schedule.

D. U.S. EPA Must Not Wait Until the Ongoing Civil Enforcement Action is Complete to Reopen the Conesville Operating Permit to Incorporate a Compliance Schedule

Any decision on the part of U.S. EPA to wait until the ongoing enforcement action is complete before adding a compliance schedule to the Conesville operating permit is legally unjustified. Under the Clean Air Act and 40 C.F.R. Part 70, a facility that is operating in violation of an applicable requirement must be made subject to a Title V compliance schedule, even if the facility is not currently subject to a judicial consent decree or administrative order.<sup>14</sup> Moreover, every facility subject to Title V permitting requirements must be covered by an operating permit within three years after the effective date of the state or local Title V program.<sup>15</sup> Facilities that are currently defendants in U.S. EPA enforcement actions are subject to the same deadlines and requirements under Title V as any other facility; Congress made no exceptions for facilities that are currently contesting enforcement actions in court. To continue operating, any facility subject to the Title V program must obtain an operating permit, regardless of its compliance status. A facility that is determined by U.S. EPA to be operating in violation of an applicable requirement must be made subject to a compliance schedule that will bring the facility into compliance within a reasonable timeframe. A permitting authority may not issue a final

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<sup>14</sup> 40 C.F.R. § 70.5(c)(8)(iii)(C) provides that “[t]his compliance schedule shall resemble and be at least as stringent as that contained in any judicial consent decree or administrative order to which the source is subject.” There is no indication in Part 70 or the Clean Air Act that a facility must be subject to a judicial consent decree or administrative order prior to being made subject to a Title V compliance schedule. The only apparent relationship between a compliance schedule and a consent decree/administrative order is that the compliance schedule cannot be more lenient than an existing consent decree or administrative order.

<sup>15</sup> 42 U.S.C. § 7661b(c); 40 C.F.R. § 70.4(b)(6).

operating permit to a facility that is violating an applicable requirement without including an appropriate compliance schedule in the permit.

Since U.S. EPA has already determined that the Conesville Plant is in ongoing violation of applicable requirements, the Clean Air Act requires that the plant be made subject to a Title V compliance schedule that mandates prompt compliance with PSD, Nonattainment NSR, and the general permit requirements contained in Ohio's SIP. If AEP or SMSC disagree with the inclusion of such a schedule in the Conesville operating permit, they can challenge the permit through administrative and judicial procedures.

Informal U.S. EPA Guidance endorses the view that a facility must be made subject to a Title V compliance schedule even under circumstances where the facility disagrees with imposition of the schedule. As explained by U.S. EPA, "if a source submits an unacceptable compliance schedule, the permitting authority may deny the permit. Alternatively the permitting authority may issue a permit with a compliance schedule with which the source does not agree. The source would then have the option of challenging the compliance schedule in state court."<sup>16</sup>

### **Conclusion**

For more than a decade, Ohio residents have suffered the public health and environmental consequences of the failure by AEP and SMSC to install modern air pollution control technology at the Conesville Plant. Despite the fact that the Conesville Plant is currently targeted by U.S. EPA for enforcement based on the refusal by AEP and SMSC to comply with modern pollution control standards, the Conesville Plant holds an operating permit issued by the Ohio Environmental Protection Agency that gives the plant permission to operate without meeting such standards. This is unacceptable.

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<sup>16</sup> United States Environmental Protection Agency, *Questions and Answers on the Requirements of the Operating Permits Program Regulations*, July 7, 1993, at 5-4.

The Clean Air Act requires U.S. EPA to reopen and modify a Title V operating permit once the agency determines that the permit does not assure compliance with Clean Air Act-based requirements. Given that U.S. EPA already alleged in federal court that the Conesville Plant is operating in violation of PSD, Nonattainment NSR, and SIP requirements, it is obvious that U.S. EPA does not believe that the Conesville operating permit assures the plant's compliance with all applicable requirements. Thus, U.S. EPA is obligated to reopen this operating permit to include an enforceable compliance schedule that requires the Conesville Plant to install modern pollution control technology within a reasonable timeframe.

Dated: December 27, 2000  
New York, New York

Respectfully submitted,

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