UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2

In the Matter of :
Puerto Rico Electric Power Authority,
San Juan Plant
P. O. Box 363549
San Juan, PR 00936-3549

Respondent

In a proceeding under
Section 113(d) of the Clean Air Act
42 U.S.C. § 7413(d)

COMPLAINT
and
NOTICE OF OPPORTUNITY
TO REQUEST A HEARING

Index No. CAA-02-2009-1221

Statutory Authority

The United States Environmental Protection Agency (EPA) issues this Complaint and Notice of Opportunity for a Hearing (Complaint) to the Puerto Rico Electric Power Authority (Respondent) for violations of the Clean Air Act, 42 U.S.C. § 7401 *et seq.* (CAA or the Act). The Complaint is being issued pursuant to Section 113(d) of the Act, 42 U.S.C. § 7413(d), and proposes the assessment of penalties in accordance with the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, 40 C.F.R. Part 22 (Consolidated Rules of Practice). The Complainant in the matter, the Director of the Caribbean Environmental Protection Division (Director), is duly delegated the authority to issue administrative complaints for violations that occur in the Commonwealth of Puerto Rico.

In this Complaint, EPA alleges that Respondent's facility (Facility), an electric generating plant located on Mercado Central Street, Lot #28, Portuary Zone, San Juan, Puerto Rico, violated requirements of the "Standards of Performance for Stationary Gas Turbines," 40 C.F.R. Part 60, Subpart GG, 40 C.F.R. §§ 60.330-60.335 (NSPS Subpart GG).

On September 25, 2009, the Department of Justice (DOJ) granted EPA's request for a waiver of the twelve (12) month period limitation provided in Section 113(d) of the Act.

Statutory, Regulatory and Permitting Background

1. Section 111(b)(1)(B) of the Act requires the Administrator to promulgate regulations establishing federal standards of performance for "new sources," referred to as New Source Performance Standards (NSPS), within each category or subcategory listed pursuant to Section 111(b)(1)(A).

2. Section 111(a) of the Act defines a "stationary source" as any building, structure, facility or installation which emits or rnay emit any air pollutant.

3. Section 111(a)(2) of the Act defines a "new source" as any stationary source, the construction or rnodification of which is commenced after the publication of regulations promulgating an NSPS (or the proposal of such regulations) which will be applicable to the source.

4. Section 111(d) of the Act requires the Administrator to promulgate regulations establishing NSPS for any existing source that has not been included on a list pursuant to Section 111 but to which a standard of performance would apply if such source were a new source.

5. Section 113(a)(3) of the Act authorizes the Administrator of EPA to issue an administrative penalty order, in accordance with Section 113(d) of the Act, against any person that has violated or is in violation of the Act.

6. Section 114(a)(1) of the Act authorizes the Administrator to require owners or operators of emission sources to submit specific information regarding facilities, establish and maintain records, make reports, sample emission points, and to install, use and maintain such monitoring equipment or methods in order to determine whether any person is in violation of the Act.

7. Section 302(e) of the Act defines the term "person" as an individual, corporation, partnership, association, state, municipality, political subdivision of a State, and any agency, department, or instrumentality of the United States and any officer, agent, or employee thereof.

8. Pursuant to Section 111 and 114 of the Act, on November 17, 1975, EPA promulgated the Standards of Performance for New Stationary Sources, 40 C.F.R. Part 60, Subpart A, Sections 60.1-60.19 (General NSPS), which was later amended.

9. Pursuant to 40 C.F.R. § 60.1(a), except as provided in Subparts B and C, the provisions of Part 60, Subpart A, apply to the owner or operator of any stationary source that contains an affected facility, the construction or modification of which is commenced after the date of publication in Part 60 of any standard (or, if earlier, the date of publication of any proposed standard) applicable to that facility.

10. Pursuant to 40 C.F.R. § 60.2, the following terms used in this enforcement action are defined as follows:

a) opacity: the degree to which emissions reduce the transmission of light and obscure the view of an object in the background;

b) owner or operator: person who owns, leases, operates, controls, or supervises an affected facility or a stationary source of which an affected facility is a part;

c) affected facility: with reference to a stationary source, any apparatus to which a standard is applicable;

d) construction: fabrication, erection, or installation of an affected facility; and

e) startup: the setting in operation of an affected facility for any purpose.

11. Pursuant to 40 C.F.R. § 60.7(a)(1), an owner or operator of an affected facility must provide EPA with a notification of the date of construction of an affected facility, no later than thirty (30) days after the date of construction.

12. Pursuant to 40 C.F.R. § 60.7(a)(3), an owner or operator of an affected facility must provide notice to EPA of the actual date of initial startup of an affected facility within fifteen (15) days after the actual date of initial startup.

13. Pursuant to 40 C.F.R. § 60.8(a), within 60 days after achieving the maximum production rate at which the affected facility will be operated, but not later than 180 days after initial startup of such facility and at such other times as may be required by the Administrator under Section 114 of the Act, the owner or operator of such facility shall conduct performance test(s) and furnish the Administrator a written report of the results of such performance test(s).

14. Pursuant to 40 C.F.R. § 60.8(a)(1), "[i]f a force majeure is about to occur, occurs, or has occurred for which the affected owner or operator intends to assert a claim of force majeure, the owner or operator shall notify the Administrator, in writing as soon as practicable following the date the owner or

operator first knew, or through due diligence should have known that the event may cause or caused a delay in testing beyond the regulatory deadline, but the notification must occur before the performance test deadline unless the initial force majeure or a subsequent force majeure event delays the notice, and in such cases, the notification shall occur as soon as practicable."

15. Pursuant to Section 111 and 114 of the Act, EPA promulgated the NSPS Subpart GG.

16. Pursuant to 40 C.F.R. § 60.330(a), NSPS Subpart GG is applicable to all stationary gas turbines with a heat input at peak load equal to or greater than 10.7 gigajoules per hour, based on the lower heating value of the fuel fired.

17. Pursuant to 40 C.F.R. § 60.330(b), NSPS Subpart GG applies to any facility under paragraph (a) of 40 C.F.R. § 60.330 that commences construction, modification, or reconstruction after October 3, 1977, is subject to the requirements of this part except as provided in paragraphs (e) and (j) of § 60.332.

18. Pursuant to 40 C.F.R. § 60.331(d), "combined cycle gas turbine" is any stationary gas turbine that recovers heat from the gas turbine exhaust gases to heat water or generate steam.

19. Pursuant to 40 C.F.R. § 60.331(q), "electric utility stationary gas turbine" is any stationary gas turbine constructed for the purpose of supplying more than one-third of its potential electric output capacity to any utility power distribution system for sale.

20. Pursuant to 40 C.F.R. § 60.335, the owner or operator shall conduct the performance tests required in § 60.8, using either: (1) EPA Method

20; (2) ASTM D6522–00 (incorporated by reference, see § 60.17); or (3) EPA Method 7E and either EPA Method 3 or 3A in appendix A to Part 60, to determine NO_X and diluent concentration.

21. Pursuant to 40 C.F.R. § 60.46b(a), the particulate matter (PM) emission standards and opacity limits under § 60.43b apply at all times except during periods of startup, shutdown, or malfunction. Section 60.46b(a) also states that the NO_X emission standards under § 60.44b apply at all times.

Findings of Facts

Paragraphs 1-21 are realleged and incorporated herein by reference.

22. Respondent is a government-owned utility duly organized under the laws of the Commonwealth of Puerto Rico.

23. Respondent is the owner and/or operator of a combined cycle turbine electric generating station located in its plant in San Juan, Puerto Rico.

24. On April 1, 2004, EPA issued a final Prevention of Significant Deterioration (PSD) permit (PSD Permit) to PREPA to install and operate a 476 megawatt (MW) combined cycle turbine electric generating station at the Facility. The permitted electric generating units consist of two No. 2 fuel oil fired combustion turbines and two steam turbines driven by two unfired Heat Recovery Steam Generators (HRSGs). Each combined cycle turbine [stationary gas turbine No. 5 (CT-5) and stationary gas turbine No. 6 (CT-6)] have a power output of 238 MW. In its PSD permit, PREPA indicated it would use these units to provide new electrical generating capacity to maintain adequate system reliability throughout the island. The PSD permit allows PREPA to provide instantaneous generating capacity during periods of high daily demand, and to

minimize the number of black-outs and brown-outs that may occur to the PREPA electrical system.

25. The PSD permit provides that combustion emissions shall be controlled by the use of low sulfur fuel oil (0.05% sulfur by weight maximum), good combustion practices and air pollution control equipment. The PSD Permit covers the two new combustion turbines and existing boiler Units 7, 8, 9 and 10 at the Facility. As a result of the newly permitted unit, the total electrical output will increase from 400 MW to 876 MW. In addition, PREPA installed two 2.5 MW auxiliary diesel generators, two new fixed roof storage tanks and six new cooling towers.

26. Each combined cycle turbine, CT-5 and CT-6, is subject to NSPS Subpart GG.

27. In a letter dated July 19, 2007, PREPA informed the Puerto Rico Environmental Quality Board (PREQB) and EPA that the newly permitted CT-6 started operation on July 16, 2007, with the initial firing of No. 2 fuel oil in the combine cycle turbine.

28. EPA and PREPA representatives had a conference call on August 1, 2007, in which PREPA agreed that, in accordance with 40 C.F.R. § 60.8, the firing of diesel fuel constituted the initial startup date of CT-6 and that the NSPS regulation stated that PREPA had to complete the performance tests for CT-6 within 180 days of this event or no later than January 12, 2008.

29. On September 14, 2007, Respondent submitted to EPA for review and approval the Final Stack Protocol for NOx, CO and VOC, as well as the "wet

chemistry testing" for PM, PM10, lead, acid mist (H2SO4) and SO2 (Final Stack Protocol) as required by the PSD Permit.

30. In a letter dated November 14, 2007, EPA requested PREPA to modify the Final Stack Protocol. In a letter dated November 19, 2007, PREPA submitted a revised Final Stack Protocol (Revised Protocol) addressing EPA's concerns.

31. In a letter dated December 26, 2007, PREPA requested EPA togrant a 90 day extension of the original 180 day period to complete the performance tests claiming that the contractor encountered a series of problems that prevented CT-6 from achieving maximum production rate during its operation. EPA did not grant this request.

32. In a letter dated February 29, 2008, PREPA informed EPA that by March 16, 2008, it planned to commence the performance evaluation tests of the Continuous Opacity Monitor (COM), Continuous Emission Monitor (CEM), and Continuous Monitoring Systems (CMS) for CT-6 in accordance with the PSD permit and that it planned to conduct the performance stack emission tests by April 16, 2008.

33. On April 1, 2008, EPA and PREPA representatives met at the EPA's Caribbean Environmental Protection Division Office in San Juan to follow-up on the progress of the performance tests. During the meeting, PREPA representatives expressed their concerns about meeting the PREPA requested revised deadline and informed EPA that an additional 60-day period would be requested to complete the tests for CT-6. During the conference EPA requested PREPA to submit additional information in order to evaluate PREPA's request.

34. In a letter dated April 4, 2008, Respondent explained to EPA its reasons for not completing the performance tests on CT-6 by April 12, 2008, and requested an additional 60-day period to complete the performance stack emission tests for CT-6. As, detailed in paragraph 38 below, this request was denied.

35. In a letter dated May 14, 2008, EPA approved the Revised Protocol.

36. In a letter dated June 24, 2008, PREPA informed EPA that the initial performance tests for CT-6 would begin on July 14, 2008.

37. In a letter dated July 2, 2008, EPA indicated it had reviewed PREPA's letters and communications and determined that the reasons provided by Respondent in its December 2007 and April 2008 requests did not constitute "force majeure" as defined in the NSPS regulations and denied PREPA's request for an extension of time.

38. On July 2, 2008, under the authority of Section 113(a) of the Act, EPA issued a Compliance Order (Order) to PREPA in which it requested PREPA to conduct the initial performance tests for CT-6, and to submit the results and a written report of the results of the tests to EPA and the PREQB, as specified in the PSD Permit and the NSPS regulations, by August 4, 2008.

39. PREPA conducted the initial performance tests for CT-6 during the periods of July 19-20, September 12-14, and October 21, 2008.

40. On September 30, 2008, PREPA submitted partial results of the initial performance test and a written report of the results to EPA and PREQB. EPA reviewed the results of the performance tests and the written report and

determined that PREPA did not conduct the initial performance tests in accordance with the PSD Permit and the applicable NSPS regulations.

41. In May 2009, Respondent submitted to EPA and PREQB a written report, which included the final results for CT-6's March 2009 performance test conducted at its maximum production rate (100%). The results demonstrated that CT-6 was in compliance with the standards established pursuant to the NSPS Subpart GG and the PSD Permit for NOx, CO and VOC, as well as the "wet chemistry testing" for PM, PM10, lead, acid mist (H2SO4) and SO2.

Count 1

42. Paragraphs 1-42 are repeated and re-alleged as if set forth fully herein.

43. Respondent is a "person" within the meaning of Section 302(e) of the Act.

44. Respondent's Facility is subject to the Standards of Performance for Stationary Gas Turbines set forth in NSPS Subpart GG, promulgated pursuant to Sections 111 and 114 of the Act.

45. Respondent is an owner and/or operator of CT-6, a stationary gas turbine, which is an affected facility within the meaning of 40 C.F.R. § 60.670(a) and (e).

46. Respondent's failure to conduct initial performance tests for CT-6 no later than 180 days after its initial startup is a violation of 40 C.F.R. § 60.8.

47. Respondent's violation of 40 C.F.R. § 60.8 is a violation of NSPS Subpart GG and Sections 111 and 114 of the Act, for which Respondent is

subject to administrative penalties under Section 113(d) of the Act.

Proposed Civil Penalty

Section 113(d) of the Act provides that the Administrator may assess a civil administrative penalty of up to $25,000 per day for each violation of the Act. The Debt Collection Improvement Act of 1996 (DCIA) requires EPA to periodically adjust its civil monetary penalties for inflation. Pursuant to the DCIA, on December 31, 1996, February 13, 2004, and December 11, 2008, EPA adopted regulations entitled Civil Monetary Penalty Inflation Adjustment Rule, 40 C.F.R. Part 19 (Part 19). Part 19 provides that the maximum civil penalty per day, pursuant to Section 113(d) of the CAA, should be adjusted up to $27,500 for violations that occurred from January 30, 1997 through March 15, 2004, up to $32,500 for violations that occurred after March 15, 2004 through January 12, 2009, and up to $37,500 for violations that occurred after January 12, 2009. Consistent with Part 19, EPA has amended its civil penalty policies, for example, its CAA Stationary Source Civil Penalty Policy, to increase the initial gravity component of the penalty calculation by 10% for violations which occurred on or after January 30, 1997, increase the gravity component by an additional 17.23% for violations which occurred March 15, 2004 through January 12, 2009, for a total increase of 28.95%, and further increase it by an additional 9.83% for violations that occurred after January 12, 2009.

In determining the amount of penalty to be assessed, Section 113(e) of the Act requires that the Administrator consider the size of the business, the economic impact of the penalty on the business, the violator's full compliance

history and good faith efforts to comply, the duration of the violation as established by any credible evidence, the payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, the seriousness of the violation and other factors as justice may require.

Respondent's violation alleged in Count 1 results in Respondent being subject to the assessment of administrative penalties pursuant to Section 113(d) of the Act. The proposed penalty has been prepared in accordance with the criteria in Section 113(e) of the Act, and in accordance with the guidelines set forth in EPA's "Clean Air Act Stationary Source Civil Penalty Policy" (CAA Penalty Policy), which reflects EPA's application of the factors set forth in Section 113(e) of the Act.

EPA proposes a total penalty of $65,742 for the count alleged in this Complaint. Below is a brief narrative explaining the reasoning behind the penalty proposed, along with the reasoning behind various general penalty factors and adjustments that were used in the calculation of the total penalty amount.

Preliminary Deterrence Component of Proposed Penalty

The CAA Penalty Policy indicates that the preliminary deterrence amount is determined by combining the gravity component and the economic benefit component of the penalty calculated. The gravity component includes, as applicable, penalties for actual harm, importance to the regulatory scheme, size of violator and adjustments to the gravity component for degree of willfulness or negligence, degree of cooperation, prompt reporting, correction, history of non-

compliance and environmental damage. Actual harm is calculated, where applicable, in accordance with the level of the violation, the toxicity of pollutant, the sensitivity of the environment, and the length of time of violation.

Gravity Component

Count 1: Violation of 40 C.F.R. § 60.8

Respondent failed to timely conduct the required initial performance test, which is a testing violation. The CAA Penalty Policy directs that the proposed initial gravity component of the penalty be $5,000 for late performance tests. Therefore, for this Count, EPA proposes a gravity component of $5,000 for Respondent's penalty associated with the importance to the regulatory scheme.

The CAA Penalty Policy also directs that a penalty be assessed, where appropriate, for the length of time of a violation. The affected unit (CT-6) started operations in July 16, 2007 and was required to conduct the initial tests no later than January 12, 2008. The tests were conducted and completed on March 27, 2009, 14 months and 15 days after the latest allowable compliance date. The CAA Penalty Policy directs that a $20,000 penalty be proposed for the length of violation where the length of violation is between thirteen and eighteen months. Therefore, for this Count, EPA proposes a penalty of $20,000 for the length of violation component of the penalty.

Inflation Adjustment

Pursuant to the Debt Collection Improvement Act (DCIA), 31 U.S.C. §§ 3701 *et seq.*, and 40 C.F.R. Part 19, the regulation promulgated pursuant to

the DCIA, and the associated amendments to EPA's CAA Penalty Policy, the CAA Penalty Policy "preliminary deterrence" amount should be adjusted 10% for inflation for all violations occurring January 30, 1997 through March 15, 2004, further adjusted an additional 17.23% for all violations occurring on March 15, 2004 until January 12, 2009, and further adjusted an additional 9.83% for all violations occurring after January 12, 2009. The gravity component, which includes the penalties proposed for Count 1 unadjusted for inflation, is $25,000. Inflation adjustments for violations were done in accordance with the DCIA requirements. Twelve months of the violation alleged in this Complaint occurred prior to January 13, 2009, therefore, the total inflation adjustment applied for the violation was 28.95%, which resulted in a total inflation adjustment of $5,790. Three months of the violation alleged in the Complaint occurred after January 12, 2009, which resulted in a total inflation adjustment for that period of $2,081, resulting in a total proposed penalty of $32,871 for the gravity component of the penalty.

Size of the Violator

The CAA Penalty Policy directs that a penalty be proposed that takes into account the size of violator, determined by the violator's net worth. Respondent's net worth is estimated at more than $1,000,000,000. The CAA Penalty Policy directs EPA to propose a penalty of $70,000, plus $25,000 for every additional $30,000,000 or fraction thereof for violators with this net worth. However, the CAA Penalty Policy states that where the size of the violator figure represents more than 50% of the total preliminary deterrence amount, the litigation team

may reduce the size of the violator figure to 50% of the preliminary deterrence amount. The preliminary deterrence amount includes the penalties for the importance to the regulatory scheme, the length of time a violation continues and the size of violator. In this case EPA is using the discretion provided in the policy and is proposing a $32,871 penalty for the size of violator component of the penalty.

Economic Benefit Component

In addition to a penalty for the gravity component, the CAA Penalty Policy directs that EPA determine and propose a penalty for the economic benefit derived from non-compliance. The policy explains that the economic benefit component of the penalty should be derived by calculating the amount the violator benefited from delayed and/or avoided costs. EPA determined that Respondent was required to conduct initial performance tests for NOx, CO and VOC, as well as the "wet chemistry testing" for PM, PM10, lead, acid mist (H2SO4) and SO2on the affected unit. EPA estimates that such tests should cost approximately $100,000, and that delaying the tests from January 12, 2008, to March 27, 2009, represented an economic benefit to Respondent of $4,683. The CAA Penalty Policy indicates that EPA has the discretion not to seek the economic benefit component where it is less than $5,000. EPA is using the discretion provided it in the policy and is not seeking a penalty for Economic Benefit.

Total Proposed Penalty for Violations Alleged in this Complaint

EPA proposes a total penalty of $65,742 for the violations alleged in this Complaint.

Notice of Opportunity to Request a Hearing

The hearing in this matter is subject to the Administrative Procedure Act, 5 U.S.C. § 552 *et seq*. The procedures for this matter are found in EPA's Consolidated Rules of Practice, a copy of which is enclosed with the transmittal of this Complaint. References to specific procedures in this Complaint are intended to inform you of your right to contest the allegations of the Complaint and the proposed penalty and do not supersede any requirement of the Consolidated Rules of Practice.

You have a right to request a hearing: (1) to contest any material facts set forth in the Complaint; (2) to contend that the amount of the penalty proposed in the Complaint is inappropriate; or (3) to seek a judgment with respect to the law applicable to this matter. In order to request a hearing you must file a written Answer to this Complaint along with the request for a hearing with the EPA Regional Hearing Clerk within thirty (30) days of your receipt of this Complaint. The original and a copy of the Answer and request for a hearing must be filed at the following address:

Karen Maples
Regional Hearing Clerk
U.S. Environmental Protection Agency - Region 2
290 Broadway - 16th Floor
New York, New York 10007-1866

A copy of the Answer and the request for a hearing, as well as copies of all other papers filed in this matter, are to be served on EPA to the attention of EPA counsel at the following address:

Héctor L. Vélez Cruz
Assistant Regional Counsel
Office of Regional Counsel, Caribbean Team
U.S. Environmental Protection Agency - Region 2
Centro Europa Building, Suite 417
1492 Ponce de León Avenue
San Juan, Puerto Rico 00907

Your Answer should, clearly and directly, admit, deny, or explain each factual allegation contained in this Complaint with regards to which you have any knowledge. If you have no knowledge of a particular factual allegation of the Complaint, you must so state and the allegation will be deemed to be denied. The Answer shall also state: (1) the circumstances or arguments which you allege constitute the grounds of a defense; (2) whether a hearing is requested; and (3) a concise statement of the facts which you intend to place at issue in the hearing.

If you fail to serve and file an Answer to this Complaint within thirty (30) days of its receipt, Complainant may file a motion for default. A finding of default constitutes an admission of the facts alleged in the Complaint and a waiver of your right to a hearing. The total proposed penalty becomes due and payable without further proceedings thirty (30) days after the issue date of a Default Order.

Settlement Conference

EPA encourages all parties against whom the assessment of civil penalties is proposed to pursue the possibilities of settlement by informal conferences. However, conferring informally with EPA in pursuit of settlement does not extend the time allowed to answer the Complaint and to request a hearing. Whether or not you intend to request a hearing, you may confer informally with the EPA concerning the alleged violations or the amount of the proposed penalty. If settlement is reached, it will be in the form of a written Consent Agreement which will be forwarded to the Regional Administrator with a proposed Final Order. You may contact EPA counsel, Héctor L. Vélez Cruz at (787) 977-5850 or at the address listed above, to discuss settlement. If Respondent is represented by legal counsel in this matter, Respondent's counsel(s) should contact EPA.

Payment of Penalty in lieu of Answer, Hearing and/or Settlement

Instead of filing an Answer, requesting a hearing, and/or requesting an informal settlement conference, you may choose to pay the full amount of the penalty proposed in the Complaint. Such payment should be made by a cashier's or certified check payable to the Treasurer, United States of America, marked with the docket number and the name of the Respondents which appear on the first page of this Complaint. The check must be mailed to:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
PO Box 979077
St. Louis, MO 63197-9000

A copy of your letter transmitting the check and a copy of the check must be sent simultaneously to EPA counsel assigned to this case at the address provided under the section of this Complaint entitled Notice of Opportunity to Request a Hearing. Payment of the proposed penalty in this fashion does not relieve one of responsibility to comply with any and all requirements of the Clean Air Act.

Dated: 09-29-09

Carl Axel-P. Soderberg, Director
Caribbean Environmental Protection Division

To: Eng. Miguel Cordero
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