UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

IN THE MATTER OF:	)	
CINERGY SERVICES, INC.,	)	**Notice of Violation**
	)	**DOCKET NO. EPA-5-04-17-IN/OH**
	)	
Proceeding Pursuant to Section 113(a)(1) of	)	
the Clean Air Act, 42 U S.C.	)	
§7413(a)(1)	)	

NOTICE OF VIOLATION

The United States Environmental Protection Agency (EPA) is issuing this Notice of Violation (NOV) to Cinergy Services, Inc., (referred to as Cinergy Services) for violations of the Clean Air Act (Act), 42 U.S.C. §§ 7401-7671q, at the coal-fired power plants identified below. This NOV is issued to Cinergy Services for violations at the Cayuga Generating Station in Cayuga, Vermillion County, Indiana (Cayuga Plant), the Wabash River Generating Station in West Terre Haute, Vigo County, Indiana (Wabash River Plant), the Gallagher Generating Station in New Albany, Floyd County, Indiana (Gallagher Plant), the Gibson Generating Station in Gibson County, Indiana (Gibson Plant), the Miami Fort Generating Station in Hamilton County, Ohio, (Miami Fort Plant), and the Beckjord Generating Station in New Richmond, Clermont County, Ohio (Beckjord Plant). Collectively, the Cayuga, Wabash River, Gallagher, Gibson, Miami Fort and Beckjord Plants are hereinafter referred to as the Cinergy Plants.

At various times since March 1994, Cinergy Services has modified and/or operated the Cinergy Plants without obtaining Prevention of Significant Deterioration (PSD) and/or Non-attainment New Source Review (NNSR) permits authorizing those modifications or operations as required by the Act and by the Indiana and Ohio state implementation plans (SIPs). These permits would have required, among other things, the installation pollution control equipment able to achieve the Best Available Control Technology (BACT) and/or the Lowest Achievable Emission Rate (LAER) . These violations of the Act and the Indiana and Ohio SIPs have resulted in significant net increases in sulfur dioxide (SO_2), nitrogen oxide (NO_x) and particulate matter (PM) emissions which will continue unless these violations are corrected. Thus, these violations have resulted in massive amounts of SO_2, NO_x, and PM having been and still being released into the environment.

EPA is issuing this NOV pursuant to Section 113(a)(1) of the Act, 42 U.S.C. § 7413(a)(1). Section 113(a) requires the Administrator of EPA to issue a notice of violation to any person in violation of a SIP. The authority to issue this NOV has been delegated to the Director, Air and Radiation Division, EPA Region 5.

STATUTORY AND REGULATORY BACKGROUND

1. When Congress passed the Act, it exempted existing facilities from many of its requirements. However, Congress also made it quite clear that this exemption would not last forever. As the United States Court of Appeals for the D.C. Circuit explained in Alabama Power v. Costle, 636 F.2d 323 (D.C. Cir. 1979), "the statutory scheme intends to 'grandfather' existing industries; but...this is not to constitute a perpetual immunity from all standards under the PSD program." Rather, the Act requires grandfathered facilities to install modern pollution control devices when units are modified in such a way that their emissions may increase.

2. The New Source Review (NSR) provisions of Parts C and D of Title I of the Clean Air Act require preconstruction review and permitting for modifications of stationary sources. If a major stationary source is planning upon making a modification, then that source must obtain either a PSD permit or a NNSR permit, depending on whether the source is located in an attainment or a nonattainment area for the pollutant being increased above the significance level. To obtain this permit, the source must agree to put on BACT for an attainment pollutant or achieve LAER in a nonattainment area. These permits impose control technology requirements and/or emission limitations which a source must comply with prior to and during its operations.

3. Part C of Title I of the Act and the PSD regulations implementing Part C, at 40 C.F.R. § 52.21, prohibit a major stationary source from constructing a modification without first obtaining a PSD permit if the modification is major in that it will result in a significant net increase in emissions of a regulated pollutant and if the source is located in an area which has achieved the National Ambient Air Quality Standards (NAAQS) for that pollutant. Part C and its implementing regulations further require that a source subject to PSD regulations install BACT.

4. A major stationary source is defined at 40 C.F.R. § 52.21(b)(1)(i)(a) to include certain listed stationary sources of air pollutants which emit, or have the potential to emit, 100 tons per year or more of any pollutant subject to regulation under the Act. This list explicitly includes fossil fuel-fired steam electric plants of more than 250 mmBTU. See 40 C.F.R. § 52.21(b)(1)(i)(a).

5. 40 C.F.R. § 52.21(B)(3)(i) defines "net emissions increase" as "the amount by which the sum of the following exceeds zero:

   (a) Any increase in actual emissions from a particular physical change or change in method of operation at a stationary source (emphasis added); and
   (b) Any other increases and decreases in actual emissions at the source that are contemporaneous with the particular change and are otherwise creditable."

6. "Actual emissions" are defined at 40 C.F.R. § 52.21(b)(21). In general, actual emissions as of a particular date equal the average rate, in tons per year, at which the unit actually emitted the pollutant during a two-year period which precedes the particular date and which is representative of normal source operations. Actual emissions are calculated using the unit's actual operating hours, production rates, and types of materials processed, stored, or combusted during the time period. 40 C.F.R. § 52.21(b)(21)(ii).

7. 40 C.F.R. § 52.21(b)(21)(iii) allows the Administrator to presume that source specific allowable emissions for a unit are equivalent to the actual emissions of the unit.

8. EPA amended the PSD regulations in 1992 to allow an electric utility steam generating unit that is implementing a physical change or change in operation to determine whether the change will result in a significant emissions increase by equating actual emissions of the unit following the physical or operational change with representative actual annual emissions of the unit, provided the source owner or operator maintains and submits to the Administrator on an annual basis for a period of five years from the date the unit resumes regular operation, information demonstrating that the physical or operational change did not result in an emissions increase. 40 C.F.R. § 52.21(b)(21)(v).

9. Pursuant to Part C of the Act, the Indiana SIP requires that no construction or operation of a major modification of a major stationary source shall occur in an area designated as attainment without first obtaining a permit under 40 C.F.R. § 52.21 as incorporated into the Indiana SIP. The PSD regulations were incorporated by reference into the Indiana SIP on August 7, 1980. 40 C.F.R. § 52.793 (45 Fed. Reg. 52741).

10. Pursuant to Part D of the Act, the Indiana SIP requires that no construction or operation of a major modification of a major stationary source shall occur in an area designated as nonattainment without first obtaining a permit under APC 19, approved Feb. 16, 1982, 40 C.F.R. § 52.770(c)(24) and 326 Indiana Administrative Code (IAC) 2-1 and 2-3, approved Oct. 7, 1994, 40 C.F.R. § 52.770(c)(94).

11. Pursuant to Section 110(a)(2)(C) of the Act, the Indiana SIP requires that no person shall commence construction or modification of any source or facility without first applying for and obtaining a construction permit ("minor NSR"). APC 19 and 326 IAC 2-1.

12. Pursuant to Part C of the Act, the Ohio SIP requires that no construction or operation of a major modification of a major stationary source shall occur in an area designated as attainment without first obtaining a permit under 40 C.F.R. § 52.21 as incorporated into the Ohio SIP. The PSD regulations were incorporated by reference into the Ohio SIP on August 7, 1980. 40 C.F.R. § 52.1884 (45 Fed. Reg. 52741).

13. Pursuant to Part D of the Act, the Ohio SIP requires that no construction or operation of a major modification of a major stationary source shall occur in an area designated as

nonattainment without first obtaining a permit under the Ohio Administrative Code (OAC) 3745-31, approved Oct. 31, 1980 (45 Fed. Reg. 72119) and Sept. 8, 1993 (58 Fed. Reg. 47211).

14. Pursuant to Section 110(a)(2)(C) of the Act, the Ohio SIP requires that no person shall commence construction or modification of any source or facility without first applying for and obtaining a construction permit ("minor NSR"). OAC 3745-31.

15. The SIP provisions identified in this section are federally enforceable pursuant to Sections 110 and 113 of the Act, 42 U.S.C. §§ 7410 and 7413.

FACTUAL BACKGROUND

16. Since October 24, 1994, Cinergy Corporation (Cinergy) has owned and controlled PSI Energy, Incorporated (PSI), Cincinnati Gas & Electric Company (CG&E) and Cinergy Services as subsidiary corporations.

17. Since at least as early as October 24, 1994, Cinergy Services has directly participated in, controlled or supervised the conduct that led to the violations identified below.

18. At all times relevant to this NOV, PSI has directly participated in, controlled or supervised the conduct that led to the violations identified below for the Cayuga Plant, the Wabash River Plant, the Gibson Plant and the Gallagher Plant.

19. At all times relevant to this NOV, CG&E has directly participated in, controlled or supervised the conduct that led to the violations identified below for the Miami Fort Plant and the Beckjord Plant.

20. Cinergy and PSI own and/or operate the Gibson Generating Station, a fossil fuel-fired electric utility steam generating plant located at East Mount Carmel, Gibson County, Indiana 47670. The Gibson plant consists of five boiler units with 3340 megawatts (MW) total generating capacity. The plant began operating the first boiler unit in 1976, the second boiler unit in 1975, the third boiler unit in 1978, the fourth boiler unit in 1979, and the fifth boiler unit in 1982. Since at least as early as October 24, 1994, Cinergy Services has operated the Gibson Plant.

21. The Gibson Plant is located in an area that has been classified as follows:

    a. For NO_2 and Ozone, attainment or unclassifiable from 1980 to present;
    b. For SO_2, attainment or unclassifiable from 1980 to present;
    c. For PM, attainment or unclassifiable from 1980 to present.

22. Cinergy and PSI own and/or operate the Cayuga Plant, a fossil fuel-fired electric utility

steam generating plant located at P.O. Box 188, Cayuga, Vermillion County, Indiana 47928. The Cayuga Plant consists of two boiler units with 1,062 megawatts (MW) total generating capacity and began operating the first boiler unit in 1970 and the second boiler unit in 1972. Since at least as early as October 24, Cinergy Services has operated the Cayuga Plant.

23. The Cayuga Plant is located in an area that has the following attainment/nonattainment classifications from 1980 to the present:

    a. For NO_2 and Ozone, attainment or unclassifiable from 1980 to present;
    b For SO_2, attainment from 1980 to present,
    c. For PM, attainment or unclassifiable from 1980 to present.

24. Cinergy and PSI own and/or operate the Wabash River Plant, a fossil fuel-fired electric utility steam generating plant located at 450 Bolton Road, West Terre Haute, Vigo County, Indiana 47885. The Wabash River Plant consists of six boiler units with 974 MW total generating capacity and began operating the first boiler unit in 1953, the second boiler unit in 1953, the third boiler unit in 1954, the fourth boiler unit in 1955, the fifth boiler unit in 1956, and the sixth boiler unit in 1968. Since at least as early as October 24, 1994, Cinergy Services has operated the Wabash River Plant.

25. The Wabash River Plant is located in an area that has the following attainment/nonattainment classifications from 1980 to present:

    a. For NO_2 and Ozone attainment from 1980 to present;
    b. For SO_2, nonattainment from 1980 to Jan. 13, 1997 and attainment from Jan. 14 1997 to present;
    c. For PM, nonattainment from 1980 to 1982 and attainment from 1983 to present.

26. Cinergy and CG&E own and/or operate the Miami Fort Generating Station, a fossil fuel-fired electric utility steam generating plant located in North Bend, Hamilton County, Ohio 45052. The Miami Fort plant consists of four boiler units with 1478 megawatts total generating capacity. The plant began operating the first boiler unit in 1949, the second boiler unit in 1960, the third boiler unit in 1975, and the fourth boiler unit in 1978. Since at least as early as October 24, 1994, Cinergy Services has operated the Miami Fort Plant.

27. The Miami Fort plant is located in an area that has been classified as follows:

    a. For Ozone, nonattainment from Jan. 6, 1992 to present;
    b. For SO_2, attainment from 1980 to present;
    c. For PM, nonattainment from 1980 to May 2, 1983, and attainment from May 3, 1983 to present;
    4. For NO_2, attainment or unclassifiable from 1980 to present.

28. Cinergy and PSI own and/or operate the Gallagher Plant, a fossil fuel-fired electric utility steam generating plant located at 30 Jackson Street, New Albany, Floyd County, Indiana 47150. The Gallagher Plant consists of four boiler units with 600 MW total generating capacity and began operating the first boiler unit in 1959, the second boiler unit in 1958, the third boiler unit in 1960, and the fourth boiler unit in 1961. Since at least as early as October 24, 1994, Cinergy Services has operated the Gallagher Plant.

29. The Gallagher Plant is located in an area that has the following attainment/nonattainment classifications from 1980 to present:

    a. For Ozone, nonattainment from Jan. 6, 1992 to present;
    b. For SO_2, attainment from 1980 to present;
    c. For PM, attainment from 1980 to present;
    d. For NO_2, attainment or unclassifiable 1980 to present.

30. Cinergy and CG&E own and/or operate the Beckjord Plant, a fossil fuel-fired electric utility steam generating plant located at 757 U.S. Route 52 in New Richmond, Clermont County, Ohio 45157. The Beckjord Plant consists of six boiler units with 1,220 megawatts total generating capacity and began operating the first boiler unit in 1952, the second boiler unit in 1953, the third boiler unit in 1954, the fourth boiler unit in 1958, the fifth boiler unit in 1964, and the sixth boiler unit in 1968. Since at least as early as October 24, 1994, Cinergy Services has operated the Beckjord Plant.

31. The Beckjord plant is located in an area that has the following attainment/nonattainment classifications from 1980 to present:

    a. For Ozone, nonattainment from Jan. 6, 1992 to July 4, 2000;
    b. For SO_2, attainment from 1980 to present;
    c. For PM, attainment or unclassifiable from Dec. 28, 1981 to present;
    d. For NO_2, attainment or unclassifiable 1980 to present.

32. Each of the plants identified above emits or has the potential to emit at least 100 tons per year of NOx and SO_2 and is a major stationary source under the Act.

VIOLATONS

Cayuga Facility

33. On numerous occasions between 1984 and the date of this NOV, Cinergy or PSI, or both, commenced construction of "modifications" as defined by the Indiana SIP, 40 C.F.R. § 52.21(b), at the Cayuga Plant. These modifications included, but are not limited to, the following individual modifications or combinations of such modifications:

a. Unit 1

1) Replacement of the A & B forced draft fans (1988),
2) Replacement of the boiler reheater front pendants (1995);
3) Replacement of the high pressure heater (1995);
4) Replacement of the boiler lower slope tubes (1996);
5) Economizer replacement - upper section (1985).

b. Unit 2

1) Replacement of the A & B forced draft fans and the induced draft fan (1990);
2) Replacement of the boiler reheater front pendants (1994);
3) Economizer replacement - upper section (1984).

34. For each modification listed in Paragraph 33 which occurred after October 24, 1994, Cinergy Services commenced construction of that modification as defined by the Indiana SIP, 40 C.F.R. § 52.21(b) and has continued to operate the source as modified since October 24, 1994, and through the date of this NOV.

35. For each modification listed in Paragraph 33 which occurred prior to October 24, 1994, Cinergy Services has continued to operate the source as modified since October 24, 1994, and through the date of this NOV.

36. Each of the modifications at the Cayuga Plant resulted in a significant net emissions increase for NO_x, SO_2 and/or PM. 40 C.F.R. § 52.21(b)(3)(i).

37. For each of these modifications that occurred at the Cayuga Plant, neither Cinergy, PSI nor Cinergy Services obtained a PSD permit pursuant to 40 C.F.R. §52.21, nor a minor NSR permit pursuant to APC 19 and 326 IAC 2-1. In addition, for modifications after 1992, no documentation was provided to the permitting agency of actual emissions after the modification as required by 40 C.F.R. § 52.21(b)(21)(v).

38. None of the modifications at the Cayuga Plant fall within the "routine maintenance, repair and replacement" exemption found at 40 C.F.R. § 52.21(b)(2)(iii). Each of these changes was an expensive capital expenditure performed infrequently at the Cayuga Plant that constituted the replacement and/or redesign of a boiler component with a long useful life. In each instance, the change was performed to either regain lost capacity, extend the useful life of the unit, or both.

39. None of the modifications at the Cayuga Plant fall within the exemption found at 40 C.F.R. §52.21(b)(2)(iii)(f) and 326 IAC 2-3-1 for an "increase in the hours of operation or in the production rate." This exemption is limited to stand-alone increases in operating hours or production rates, not to construction activity which causes such increases to

occur. The utility industry has known that this exemption does not apply where the increases in hours of operation or in production rate is caused by construction activity, since at least 1988 when EPA issued a widely publicized applicability determination regarding utility modifications at a Wisconsin Electric Power Co. ("WEPCO") facility. EPA's interpretation of this exemption was upheld by the court of appeals in 1990. Wisconsin Electric Power Co. v. Reilly, 893 F.2d 901 (7th Cir. 1990).

40. None of the modifications at the Cayuga Plant fall within the "demand growth" exemption found at 40 C.F.R. § 52.21(b)(33)(ii) because for each modification, a physical change was performed which resulted in an emissions increase.

41. Therefore, Cinergy Services violated and continues to violate 40 C.F.R. § 52.21, APC 19 and IAC 2-1 by constructing and/or operating modifications at the Cayuga Plant without the necessary permit required by the Indiana SIP.

42. Each of the Cinergy Services violations at the Cayuga Plant exists from the start date of the construction of the modification or October 24, 1994, whichever is later, until the time that Cinergy, PSI, or Cinergy Services obtain the appropriate permit and operate the necessary pollution control equipment to satisfy the Indiana SIP.

Gallagher Facility

43. On numerous occasions between 1986 and the date of this NOV, Cinergy or PSI, or both, commenced construction of "modifications" as defined by the Indiana SIP, 40 C.F.R. § 52.21, APC 19 and IAC 2-3 at the Gallagher Plant. These modifications included, but are not limited to, the following individual modifications or combinations of such modifications:

a. Unit 1
   1) Replacement of the radiant superheat tubes (1992);
   2) Replacement of the high temperature superheat section (1994); and
   3) Replacement of the pulverizers (1998).

b. Unit 2
   1) Replacement of the high temperature superheat outer pendant sections (1986);
   2) Replacement of the radiant superheat tubes (1992); and
   3) Complete replacement of the condenser tubes (1990).

c. Unit 3
   1) Replacement of the high temperature superheat pendant sections (1987); and
   2) Replacement of the pulverizers (1999).

d. Unit 4

1) Replacement of the high temperature superheat outer pendant sections (1986).

44. For each modification listed in Paragraph 43 which occurred after October 24, 1994, Cinergy Services commenced construction of that modification as defined by the Indiana SIP, 40 C.F.R. § 52.21(b) and has continued to operate the source as modified since October 24, 1994, through the date of this NOV.

45. For each modification listed in Paragraph 43 which occurred prior to October 24, 1994, Cinergy Services has continued to operate the source as modified since October 24, 1994, and through the date of this NOV

46. Each of the modifications at the Gallagher Plant resulted in a significant net emissions increase for NO_x, SO_2 and/or PM. 40 C.F.R. § 52.21(b)(3)(i), APC 19 and IAC 2-3.

47. For each of these modifications that occurred at the Gallagher Plant, neither Cinergy, PSI nor Cinergy Services obtained a PSD permit pursuant to 40 C.F.R. § 52.21, a NNSR permit pursuant to APC 19 and IAC 2-1, nor a minor NSR permit pursuant to APC 19 and IAC 2-1. In addition, for modifications after 1992, no documentation was provided to the permitting agency of actual emissions after the modification as required by 40 C.F.R. § 52.21(b)(21)(v).

48. None of the modifications at the Gallagher Plant fall within the "routine maintenance, repair and replacement" exemption found at 40 C.F.R. § 52.21(b)(2)(iii), APC 19 and IAC 2-3. Each of these changes was an expensive capital expenditure performed infrequently at the Gallagher Plant that constituted the replacement and/or redesign of a boiler component with a long useful life. In each instance, the change was performed to either regain lost capacity, extend the useful life of the unit, or both.

49. None of the modifications at the Gallagher Plant fall within the exemption found at 40 C.F.R. §52.21(b)(2)(iii)(f) and 326 IAC 2-3-1 for an "increase in the hours of operation or in the production rate." This exemption is limited to stand-alone increases in operating hours or production rates, not to construction activity which causes such increases to occur. The utility industry has known that this exemption does not apply where the increases in hours of operation or in production rate is caused by construction activity, since at least 1988 when EPA issued a widely publicized applicability determination regarding utility modifications at a Wisconsin Electric Power Co. ("WEPCO") facility. EPA's interpretation of this exemption was upheld by the court of appeals in 1990. Wisconsin Electric Power Co. v. Reilly, 893 F.2d 901 (7th Cir. 1990).

50. None of the modifications at the Gallagher Plant fall within the "demand growth"

exemption found at 40 C.F.R. § 52.21(b)(33)(ii) because for each modification, a physical change was performed which resulted in an emissions increase.

51. Therefore, Cinergy Services violated and continues to violate 40 C.F.R. § 52.21, APC 19, and IAC 2-1 by constructing and operating modifications at the Gallagher Plant without the necessary permit required by the Indiana SIP.

52. Each of the Cinergy Services violations at the Gallagher Plant exists from the start date of the construction of the modification or October 24, 1994, whichever is later, until the time that Cinergy, PSI, or Cinergy Services obtain the appropriate permit and operate the necessary pollution control equipment to satisfy the requirements of the Indiana SIP.

Wabash River Facility

53. On numerous occasions between 1987 and the date of this NOV, Cinergy or PSI, or both, commenced construction of "modifications" as defined by the Indiana SIP, 40 C.F.R. § 52.21(b), APC-19 and IAC 2-3, at the Wabash River Plant. These modifications included, but are not limited to, the following individual modifications or combinations of such modifications:

a. Unit 1
   1) Replacement of radiant superheater tubes, intermediate and finishing superheater sections, and the upper reheater (1989);

b. Unit 2
   1) Replacement of radiant superheater tubes (1989);
   2) Replacement of high temperature/finishing superheater and upper reheater assemblies (1992);
   3) Replacement of the reheater and superheater outlet sections (1997).

c. Unit 3
   1) Replacement of the finishing superheater, intermediate superheater, radiant superheater, upper reheater and missing lower reheater tube bundles (1989).

d. Unit 4
   1) Replacement of the superheater radiant front wall (1991);
   2) Replacement of the finishing superheater tubes (1995);
   3) Replacement of the outlet reheater tube assemblies (1996).

e. Unit 5
   1) Replacement of the upper economizer boiler tube hangers and hanger rods; and repair of the boiler structural work and realignment of the steam

headers (1990).

f. Unit 6

1) Purchase and installation of new stainless steel tubed feedwater heaters (1987).
2) Replacement of two induced draft fan wheels (1989);
3) Replacement of bottom ash hopper (1994).

54. For each modification listed in Paragraph 53 which occurred after October 24, 1994, Cinergy Services commenced construction of that modification as defined by the Indiana SIP, 40 C.F.R. § 52.21(b) and has continued to operate the source as modified since October 24, 1994, through the date of this NOV.

55. For each modification listed in Paragraph 53 which occurred prior to October 24, 1994, Cinergy Services has continued to operate the source as modified since October 24, 1994, and through the date of this NOV.

56. Each of the modifications at the Wabash River Plant resulted in a significant net emissions increase for NO_x, SO_2 and/or PM. 40 C.F.R. § 52.21(b)(3)(i) and IAC 2-3.

57. For each of these modifications that occurred at the Wabash River Plant, neither Cinergy, PSI nor Cinergy Services obtained a PSD permit pursuant to 40 C.F.R. § 52.21, a NNSR permit pursuant to APC 19 and IAC 2-1, nor a minor NSR permit pursuant to APC 19 and IAC 2-1. In addition, for modifications after 1992, no documentation was provided to the permitting agency of actual emissions after the modification as required by 40 C.F.R. § 52.21(b)(21)(v).

58. None of the modifications at the Wabash River Plant fall within the "routine maintenance, repair and replacement" exemption found at 40 C.F.R. § 52.21(b)(2)(iii), APC 19 and IAC 2-3. Each of these changes was an expensive capital expenditure performed infrequently at the Wabash River Plant that constituted the replacement and/or redesign of a boiler component with a long useful life. In each instance, the change was performed to either regain lost capacity, extend the useful life of the unit, or both.

59. None of the modifications at the Wabash River Plant fall within the exemption found at 40 C.F.R. §52.21(b)(2)(iii)(f) and 326 IAC 2-3-1 for an "increase in the hours of operation or in the production rate." This exemption is limited to stand-alone increases in operating hours or production rates, not to construction activity which causes such increases to occur. The utility industry has known that this exemption does not apply where the increases in hours of operation or in production rate is caused by construction activity, since at least 1988 when EPA issued a widely publicized applicability determination regarding utility modifications at a Wisconsin Electric Power Co. ("WEPCO") facility. EPA's interpretation of this exemption was upheld by the court of

appeals in 1990. Wisconsin Electric Power Co. v. Reilly, 893 F.2d 901 (7th Cir. 1990).

60. None of the modifications at the Wabash River Plant fall within the "demand growth" exemption found at 40 C.F.R. § 52.21(b)(33)(ii) because for each modification, a physical change was performed which resulted in an emissions increase.

61. Therefore, Cinergy Services violated and continues to violate 40 C.F.R. § 52.21, APC 19 and IAC 2-1 by constructing and operating modifications at the Wabash River Plant without the necessary permit required by the Indiana SIP.

62. Each of the Cinergy Services violations at the Wabash River Plant exists from the start date of the construction of the modification or October 24, 1994, whichever is later, until the time that Cinergy, PSI or Cinergy Services obtain the appropriate permit and operate the necessary pollution control equipment to satisfy the Indiana SIP.

Beckjord Facility

63. On numerous occasions between 1985 and the date of this NOV, Cinergy and CG&E commenced construction of "modifications" as defined by § 52.21(b) and OAC 3745-31 at the Beckjord Plant. These modifications included, but are not limited to, the following individual modifications or combinations of such modifications:

a. Unit 1

1) A boiler unit life extension project that included replacement of wall tubes, the superheater, the economizer, the reheater header and the coal bunker (1987-88).

b. Unit 2

1) A boiler unit life extension project that included replacement of furnace wall tubes, the superheater, the reheater header, and the coal bunker (1987).

c. Unit 3

1) A boiler plant life extension project that included replacement of the superheater, the reheater, boiler tubing, waterwalls, and coal bunker (1985);

d. Unit 4

1) Replacement of major boiler unit components including waterwall tubing and insulation, the superheater, turbine blades and other turbo-generator equipment (1989).

e. Unit 5

1) Replacement of the economizer outlet duct and the economizer (1989); and
2) Replacement of the reheater, retubing of the condenser, and replacement of turbo-generator equipment (1990-1991).

f. Unit 6
1) Replacement of the feedwater heaters (1987); and
2) Replacement of the turbine blades, the condenser, and condenser tubing (1994-1995).

64. For each modification listed in Paragraph 63 which occurred after October 24, 1994, Cinergy Services commenced construction of that modification as defined by the Indiana SIP, 40 C.F.R. § 52.21(b) and has continued to operate the source as modified since October 24, 1994, through the date of this NOV.

65. For each modification listed in Paragraph 63 which occurred prior to October 24, 1994,, Cinergy Services has continued to operate the source as modified since October 24, 1994, and through the date of this NOV.

66. Each of the modifications that occurred at the Beckjord Plant resulted in a significant net emissions increase for NO_x, SO_2 and/or PM. 40 C.F.R. § 52.21(b)(3)(i) and OAC 3745-31.

67. For each of these modifications that occurred at the Beckjord Plant, neither Cinergy, CG&E nor Cinergy Services obtained a PSD pursuant to 40 C.F.R. § 52.21(i), a NNSR permit pursuant to OAC 3745-31, nor a minor NSR permit pursuant to OAC 3745-31. In addition, for modifications after 1992, no documentation was provided to the permitting agency of actual emissions after the modification as required by § 52.21(b)(21)(v).

68. None of the modifications that occurred at the Beckjord Plant fall within the "routine maintenance, repair and replacement" exemption found at 40 C.F.R. § 52.21(b)(2)(iii) and OAC 3745-31. Each of these changes was an expensive capital expenditure performed infrequently at the Beckjord Plant that constituted the replacement and/or redesign of a boiler component with a long useful life. In each instance, the change was performed to either regain lost capacity, extend the useful life of the unit, or both.

69. None of the modifications at the Miami Fort plant fall within the exemption found at 40 C.F.R. §52.21(b)(2)(iii)(f) and OAC 3745-31-01 for an "increase in the hours of operation or in the production rate." This exemption is limited to stand-alone increases in operating hours or production rates, not to construction activity which causes such increases to occur. The utility industry has known that this exemption does not apply where the increases in hours of operation or in production rate is caused by construction activity, since at least 1988 when EPA issued a widely publicized applicability

determination regarding utility modifications at a Wisconsin Electric Power Co. ("WEPCO") facility. EPA's interpretation of this exemption was upheld by the court of appeals in 1990. Wisconsin Electric Power Co. v. Reilly, 893 F.2d 901 (7th Cir. 1990).

70. None of the modifications that occurred at the Beckjord Plant fall within the "demand growth" exemption found at 40 C.F.R. § 52.21(b)(33)(ii) because for each modification, a physical change was performed which resulted in an emissions increase.

71. Therefore, Cinergy Services violated and continues to violate 40 C.F.R. § 52.21 and OAC 3745-31 by constructing and operating modifications at the Beckjord Plant without the necessary permits required by the Ohio SIP.

72. Each of the Cinergy Services violations at the Beckjord Plant exists from the start date of the construction of the modification or October 24, 1994, whichever is later, until the time that Cinergy, CG&E or Cinergy Services obtain the appropriate permit and operate the necessary pollution control equipment to satisfy the Ohio SIP.

Gibson Facility

73. Between 1997 and the present, Cinergy or PSI or both "modified" the Gibson plant as defined at 40 C.F.R. § 52.21(b). These modifications included, but are not limited to, the following projects: (1) replacement of the reheater in Unit 1 in 1997; and (2) replacement of the east and west sidewalls of Unit 2 in 1997, and (3) replacement of the reheater in Unit 2 in 2001.

74. For each modification listed in Paragraph 73, Cinergy Services commenced construction of that modification as defined by the Indiana SIP, 40 C.F.R. § 52.21(b) and has operated the source as modified through the date of this NOV.

75. Each of these modifications resulted in a "significant net increase" in NOx emissions, SO_2 emissions, or both, as defined at 40 C.F.R. § 52.21(b)(3) and (23).

76. Neither Cinergy, PSI nor Cinergy Services obtained a PSD permit prior to constructing these modifications to the Gibson plant as required by 40 C.F.R. §52.21 and by the Indiana SIP. In addition, no documentation was provided to the permitting agency of actual emissions after the modifications as required by 40 C.F.R. § 52.21(b)(21)(v).

77. The modifications at the Gibson plant did not constitute "routine maintenance, repair and replacement" and therefore were not exempt from PSD requirements pursuant to 40 C.F.R. § 52.21(b)(2)(iii). Each of these changes constituted replacement of a boiler component with a long useful life and involved a substantial capital expenditure. Each modification was performed to increase capacity, regain lost capability, and/or extend the useful life of the unit. The utility industry has known that the "routine maintenance,

repair and replacement" exemption does not apply to capital expenditures of this nature since at least 1988 when EPA issued a widely publicized applicability determination regarding utility modifications at a Wisconsin Electric Power Co. ("WEPCO") facility. EPA's interpretation of this exemption was upheld by the court of appeals in 1990. Wisconsin Electric Power Co. v. Reilly, 893 F.2d 901 (7th Cir. 1990).

78. None of the modifications at the Gibson Plant fall within the exemption found at 40 C.F.R. §52.21(b)(2)(iii)(f) for an "increase in the hours of operation or in the production rate." This exemption is limited to stand-alone increases in operating hours or production rates, not to construction activity which causes such increases to occur. The utility industry has known that this exemption does not apply where the increases in hours of operation or in production rate is caused by construction activity, since at least 1988 when EPA issued a widely publicized applicability determination regarding utility modifications at a Wisconsin Electric Power Co. ("WEPCO") facility. EPA's interpretation of this exemption was upheld by the court of appeals in 1990. Wisconsin Electric Power Co. v. Reilly, 893 F.2d 901 (7th Cir. 1990).

79. None of the modifications at the Gibson plant qualify for the "demand growth" exemption found at 40 C.F.R. § 52.21(b)(33)(ii) because the emissions increases which occurred after each modification resulted from the modification.

80. Therefore, Cinergy Services violated and continues to violate 40 C.F.R.§ 52.21 and the Indiana SIP by constructing and operating major modifications at the Gibson plant without first obtaining PSD permits.

81. Each of the Cinergy Services violations has continued from the start of construction of the modification and will continue until Cinergy, PSI or Cinergy Services obtain the appropriate permit and install and operate the necessary pollution control equipment to satisfy the Indiana SIP.

Miami Fort Facility

82. Between 1990 and the present, Cinergy and CG&E "modified" the Miami Fort plant as defined by § 52.21(b). These modifications included, but are not limited to, the following projects: (1) replacement of the boiler slope tubes and lower headers on the Unit 5 boiler in 1995; 2) a 3-phase replacement of the primary superheater on Unit 7 boiler in 1990, 1992, and 1995; and (3) replacement of the boiler upper water wall on Unit 7 in 1990.

83. For each modification listed in Paragraph 82 which occurred after October 24, 1994, Cinergy Services commenced construction of that modification as defined by the Ohio SIP, 40 C.F.R. § 52.21(b) and has continued to operate the source as modified since October 24, 1994, through the date of this NOV.

84. For each modification listed in Paragraph 82 which occurred prior to October 24, 1994, Cinergy Services has continued to operate the source as modified since October 24, 1994, and through the date of this NOV.

85. Each of the modifications at the Miami Fort plant resulted in a "significant net increase" in NOx emissions, SO2 emissions, or both, as defined at 40 C.F.R. § 52.21(b)(3) and (23).

86. Neither Cinergy, CG&E nor Cinergy Services obtained a PSD permit prior to constructing these modifications to the Miami Fort plant as required by 40 C.F.R. §52.21 and by the Ohio SIP nor obtained an NNSR permit as required by the Act and the Ohio SIP. In addition, no documentation was provided to the permitting agency of actual emissions after the modifications as required by 40 C.F.R. § 52.21(b)(21)(v).

87. The modifications at the Miami Fort plant did not constitute "routine maintenance, repair and replacement" and therefore were not exempt from PSD requirements pursuant to 40 C.F.R. § 52.21(b)(2)(iii). Each of these changes constituted replacement of a boiler component with a long useful life and involved a substantial capital expenditure. Each modification was performed to increase capacity, regain lost capability, and/or extend the useful life of the unit. The utility industry has known that the "routine maintenance, repair and replacement" exemption does not apply to capital expenditures of this nature since at least 1988 when EPA issued a widely publicized applicability determination regarding utility modifications at a Wisconsin Electric Power Co. ("WEPCO") facility. EPA's interpretation of this exemption was upheld by the court of appeals in 1990. Wisconsin Electric Power Co. v. Reilly, 893 F.2d 901 (7th Cir. 1990).

88. None of the modifications at the Miami Fort plant fall within the exemption found at 40 C.F.R. §52.21(b)(2)(iii)(f) and OAC 3745-31-01 for an "increase in the hours of operation or in the production rate." This exemption is limited to stand-alone increases in operating hours or production rates, not to construction activity which causes such increases to occur. The utility industry has known that this exemption does not apply where the increases in hours of operation or in production rate is caused by construction activity, since at least 1988 when EPA issued a widely publicized applicability determination regarding utility modifications at a Wisconsin Electric Power Co. ("WEPCO") facility. EPA's interpretation of this exemption was upheld by the court of appeals in 1990. Wisconsin Electric Power Co. v. Reilly, 893 F.2d 901 (7th Cir. 1990).

89. None of the modifications at the Miami Fort plant fall within the "demand growth" exemption found at 40 C.F.R. § 52.21(b)(33)(ii) because the emissions increase which occurred after each modification resulted from the modification.

90. Therefore, Cinergy Services violated and continues to violate 40 C.F.R.§ 52.21 and the Ohio SIP by constructing and operating major modifications at the Miami Fort plant

without first obtaining PSD permits.

91. Each of the Cinergy Services violations has continued from the start of construction of the modification or October 24, 1994, whichever is later, and will continue until Cinergy, CG&E or Cinergy Services obtain the appropriate permit and install and operate the necessary pollution control equipment to satisfy the Ohio SIP.

ENFORCEMENT

Section 113(a)(1) of the Act provides that at any time after the expiration of 30 days following the date of the issuance of this NOV, the Regional Administrator may, without regard to the period of violation, issue an order requiring compliance with the requirements of the SIP or permit, or bring a civil action pursuant to Section 113(b) for injunctive relief and/or civil penalties of not more than $25,000 per day for each violation before January 30, 1997, not more than $27,500 per day for each violation after January 30, 1997, and not more than $32,500 per day for each violation after March 15, 2004. See 31 U.S.C. § 3701 and 40 C.F.R. Part 19.

OPPORTUNITY FOR CONFERENCE

Respondents may, upon request, confer with EPA The conference will enable Respondents to present evidence bearing on the finding of violation, on the nature of violation, and on any efforts it may have taken or proposes to take to achieve compliance. Respondent has a right to be represented by counsel. A request for a conference must be made within 10 days of receipt of this NOV, and the request for a conference or other inquiries concerning the NOV should be make in writing to:

Sarah Marshall
U.S. Environmental Protection Agency
Region 5
77 West Jackson Boulevard (AE-17J)
Chicago, Illinois 60604
(312) 886-6797

3/31/2004
Date

Stephen Rothblatt, Director
Air and Radiation Division

CERTIFICATE OF MAILING

I, Betty Williams, certify that I sent a Notice of Violation, No. EPA-5-04-17-IN/OH, by Facsimile on 03/31/04 and by Certified Mail, Return Receipt Requested, to:

Mr. James Rogers, CEO
Cinergy Corporation
PSI Energy, Inc.
Cincinnati Gas & Electric Co.
139 East Fourth Street
Cincinnati, Ohio 45201

I also certify that I sent copies of the Notice of Violation by first class mail to:

Felicia Robinson, Assistant Commissioner
Office of Enforcement
Indiana Department of Environmental Management
100 North Senate Avenue, Room 1001
Indianapolis, Indiana 46206-6015

Robert Hodanbosi, Chief
Division of Air Pollution Control
Ohio Environmental Protection Agency
Lazarus Government Center
122 South Front Street
Columbus, Ohio 46216-1049

Bernard L. Huff, PhD, Manager
Operational Compliance
Environmental Service Department
139 East Fourth Street
P.O. Box 960
Cincinnati, Ohio 45201

Barbara Gambill
Cinergy Corporation
PSI Energy, Inc.
Cincinnati Gas & Electric Co.
139 East Fourth Street
Cincinnati, Ohio 45201

Julie Ezell
Cinergy Services, Inc.
1000 East Main Street
Plainfield, Indiana 46168-1782

on the 1st day of April, 2004.

Betty Williams, Secretary
AECAS (IL/IN)

CERTIFIED MAIL RECEIPT NUMBER: 7001 0320 0006 0178 4377