

APPENDIX D

LEGAL AUTHORITY TO IMPLEMENT THE STATE PLAN **[40 CFR §60.26]**

A. Introduction

Pursuant to 40 CFR Section 60.26, State Plans must show that States have the legal authority to carry out the plan including, but not limited to, the authority to adopt emission standards and compliance schedules applicable to designated facilities and to enforce applicable laws, regulations, standards, compliance schedules and seek injunctive relief.

It is my legal opinion that the Pennsylvania Department of Environmental Protection (“Department”) has sufficient statutory and regulatory authority under its plan approval, State operating permit and Title V permit programs, and 25 Pa. Code §§ 123.201-215 (relating to mercury emissions) to implement applicable requirements adopted under Sections 111(d) of the Clean Air Act, (“CAA”) including those for the control of mercury emissions from existing coal-fired electric steam generating units. A copy of Annex A for 25 Pa. Code §§ 123.201-215 is attached as Appendix C. Furthermore, a copy of the Pennsylvania Air Pollution Control Act, 35 P.S. §4001 *et seq.* and applicable regulations in 25 Pa. Code Article III (relating to air resources) for the plan approval, State operating permit and Title V permit requirements are attached as Appendices E-1 and E-2 respectively.

B. Adoption of Emission Standards and Compliance Schedules

Pennsylvania’s Air Pollution Control Act (“APCA”) and regulations promulgated thereunder provide the Department with the authority to issue plan approvals, State operating permits and Title V permits to air contamination sources which incorporate “applicable requirements” and ensure compliance with “applicable requirements” of the CAA and its implementing regulations. The term “applicable requirements” as defined in 25 Pa. Code §121.1 includes requirements, which apply to a source at a Title V facility including a standard or other requirement under Section 111(d) of the CAA. The Emission Guidelines for the control of mercury emissions from existing coal-fired electric steam generating units promulgated under Section 111(d) of the CAA and adopted in their entirety and incorporated by reference under 25 Pa. Code Chapter 122, §122.3 (relating to adoption of standards) are applicable requirements under state law. However, the Department will not participate in the U.S. EPA-managed mercury cap and trade program under the Clean Air Mercury Rule, 70 Fed. Reg. 28606, (May 18, 2005) and has developed a Pennsylvania-specific mercury regulation for coal-fired EGUs, that will be codified in 25 Pa. Code §§123.201-123.215. This regulation establishes mercury emission standards for new coal-fired electric steam generating units, annual emission limitations for new and existing coal-fired electric steam generating units as part of a Statewide mercury nontradable allowance program and other requirements for the purpose of reducing mercury emissions from coal-fired EGUs. Except as otherwise noted, this regulation supercedes those requirements under 25 Pa. Code Chapter 122, §122.3. This regulation has been promulgated as

part of Pennsylvania's State Plan to fulfill the Commonwealth's requirements under 40 CFR Part 60 Subpart HHHH (relating to emission guidelines and compliance times for coal-fired electric steam generating units.) This regulation would be an "applicable requirement" for coal-fired electric steam generating units under the APCA and CAA.

In addition to the requirements of 25 Pa. Code §§ 123.201-215, the owner or operator of a new coal-fired electric steam generating unit shall also comply with the Standards of Performance for New Stationary Sources promulgated under 40 CFR Part 60 Subpart Da and adopted in their entirety and incorporated by reference in 25 Pa. Code Chapter 122 (relating to national standards of performance for new stationary sources.) This regulation would also be an "applicable requirement" for coal-fired electric steam generating units under the APCA and CAA.

Pursuant to Section 6.1(a) of the APCA, no person can construct, assemble, install or modify an air contamination source nor install thereon an air pollution control device unless the person has obtained written approval from the Department. 35 P.S. §4006.1(a). In addition, an applicant for a plan approval must demonstrate that the source will comply with applicable requirements of 25 Pa. Code Article III and requirements promulgated by the U.S. EPA under the CAA. These statutory and regulatory requirements provide the necessary authority to incorporate the applicable requirements for designated facilities including coal-fired electric steam generating units directly into plan approvals required under 25 Pa. Code §127.11 (relating to plan approvals).

Section 6.1(b) of the APCA provides that no person can operate any air contamination source unless the Department has issued to the source an operating permit in response to a written application to operate such sources. 35 P. S. §4006.1. This statutory requirement is implemented by the permitting requirements in 25 Pa. Code §§127.401-127.465 (relating to operating permit requirements) and 25 Pa. Code §§127.501-127.543 (relating to Title V Operating Permit requirements).

An applicant for a State operating permit or Title V permit must demonstrate that the source is complying with applicable requirements of 25 Pa. Code Article III (relating to air resources) and requirements promulgated under the CAA by the Administrator of the U.S. EPA. 25 Pa. Code §127.411(a)(5). Section 127.411(a)(12) requires that operating permit applications contain a completed compliance review form or the applicant must provide a reference for the most recent compliance review form for facilities submitting compliance review forms on a periodic basis. Each permit issued by the Department must, at a minimum, incorporate by reference the emission and performance standards and other requirements of the APCA, the CAA and the regulations promulgated under either act. The provisions of 25 Pa. Code Chapter 127, Subchapter F (relating to operating permit requirements) are incorporated into the Title V permit requirements in 25 Pa. Code Chapter 127, Subchapter G (relating to Title V operating permits). Section 127.501 provides that Subchapter G "... describes the additional operating permit program requirements applicable to Title V facilities which are in addition to the requirements in Subchapter F ...".

Section 6.1(b) of the APCA and implementing regulations authorize the Department to issue permits to noncomplying air contamination sources and to include in the plan approval or operating permit a schedule to achieve compliance with all applicable requirements of the CAA and the regulations promulgated under the CAA no later than the time frame specified by federal law. 35 P. S. §§4006.1(b)(3-4), 4007.2 and 25 Pa. Code §§127.403(c), 127.404, 127.411 and 127.445(a)-(f).

Additional statutory authority for the incorporation of applicable requirements into permits for designated facilities is derived from Section 6.1(k) of the APCA. 35 P. S. §4006.1(k). This provision authorizes the Department to revise any permit to incorporate applicable standards and regulations promulgated under the CAA after issuance of such permit. The implementing regulations are codified at 25 Pa. Code §§127.461, 127.463 and 127.542.

C. Enforcing Applicable Laws, Regulations, Standards, and Compliance Schedules

The Department has sufficient authority to enforce applicable requirements including any applicable provisions of the Emissions Guidelines enacted pursuant to Section 111(d) of the CAA and 25 Pa. Code §§ 123.201-215. Section 7.1 of the APCA establishes a mandatory bar to the issuance of plan approvals or permits if the Department finds that a permittee has been placed on the Department's compliance docket for violations of any requirement of the APCA and regulations adopted thereunder, any plan approval, permit or order of the Department. 35 P. S. §4007.1.

Section 7.2 of the APCA provides that permits issued to sources out of compliance with the APCA, the CAA or regulations promulgated under either act "must contain an enforceable schedule requiring the source to attain compliance." 35 P. S. §4007.2. If the permittee fails to achieve compliance by the final compliance date, the permit shall terminate.

Section 8 of the APCA provides that it shall be unlawful to fail to comply with the APCA or regulations adopted under the APCA or fail to comply with any order of the Department, or any term or condition of a plan approval or permit. 35 P. S. §4008.

In addition, Pennsylvania law provides civil and criminal enforcement authority for violations of the APCA or regulations including the assessment of penalties and fines under Sections 9 and 9.1 of the APCA. 35 P. S. §§4009, 4009.1. Under Section 9.1(a), the Department may assess a civil penalty of up to \$25,000 per day for each violation of applicable requirements.

Section 10.1 of the APCA also authorizes the Department to issue enforcement orders to aid in the enforcement of the provisions of the Act or its implementing regulations. Such orders shall include orders modifying, suspending, terminating, or revoking a plan approval or operating permit. 35 P. S. §4010.1.

D. Seeking Injunctive Relief

Section 13.6 of the APCA specifies that a violation of the act or regulations, any order, plan approval or permit is a public nuisance and allows for the abatement of public nuisances. 35 P.S. §4013.6. This section of the APCA further authorizes the Department to abate nuisances in the manner provided by law or equity for the abatement of public nuisances. When circumstances warrant or public health is endangered, a mandatory preliminary injunction, special injunction or temporary restraining order may be issued upon the terms of prescribed by the court. In such proceedings, upon a motion of the Commonwealth, the court shall issue a prohibitory or mandatory preliminary injunction if it finds that the defendant is engaged in unlawful conduct as defined by the APCA or is engaged in conduct, which is causing immediate or irreparable harm. The court may also levy penalties in accordance with Section 9.1 of the APCA.

E. Obtaining Information Necessary to Determine Whether Designated Facilities Are In Compliance with Applicable Requirements.

As required under 40 CFR §60.26(a)(3), the Department may obtain information necessary to determine compliance with applicable laws, regulations, standards and compliance schedules. Section 7.1 of the APCA requires the Department to withhold a plan approval or permit if the applicant, permittee or a general partner, parent or subsidiary corporation of the applicant or permittee is in violation of the APCA, regulations adopted thereunder, a plan approval, permit or order of the Department. 35 P. S. § 4007.1.

The owners or operators of designated facilities, including coal-fired electric steam generating units, must comply with the compliance review procedures established in 25 Pa. Code §127.412 and the compliance certification requirements established in 25 Pa. Code §§127.503, 127.512, and 127.513.

Section 127.412(c) requires that the compliance review form submitted to the Department include information related to compliance status of the applicant and “related parties.” The compliance review form must include a list of “documented conduct” and “deviations” by the plan approval or permit applicant or a “related party.” The applicant or related party is required to update the compliance review form. Subsection (e) provides that the Department may establish a supplemental review form that may be used to update information submitted to the Department on the compliance review form. 25 Pa. Code §127.412(e). In addition, subsection (k) requires the owners and operators of designated facilities to have reasonable procedures in place to insure that documented conduct and deviations are identified and made part of the compliance review information submitted to the Department. *See* 25 Pa. Code §127.412(k).

Compliance certification provisions established under §127.503 include:

(1) certification by a responsible official that the facility is in compliance with applicable requirements or certification of compliance with “applicable requirements;”

(2) a schedule for submission of compliance certifications during the permit term, to be submitted at least annually or more frequently if specified by the applicable requirement or by the Department. 25 Pa. Code §127.503(10).

Section 127.512(c)(5) provides that Title V permits shall require each permittee to furnish to the Department within a reasonable time, information that the Department may request in writing to determine whether cause exists for modifying, revoking and reissuing or terminating the permit or to determine compliance with the permit.

In accordance with §127.513, permits issued to Title V facilities must specify that upon presentation of credentials and other documents required by law, the permittee shall allow the Department or an authorized representative of the Department access to such facilities to inspect, at reasonable times, facilities and equipment including monitoring and air pollution control equipment. 25 Pa. Code §127.513(2)(iii). The Department also has authority to sample or monitor substances or parameters for the purpose of assuring compliance with the terms of the permit or applicable requirements as authorized under the CAA, the APCA, or the regulations adopted under the acts. 25 Pa. Code §127.513(2)(iv).

F. Requiring Owners or Operators to Install Maintain and Use Emission Monitoring Devices and Make Periodic Reports

In accordance with §127.12(a)(3), plan approval applications must show that the source will be equipped with reasonable and adequate facilities to monitor and record the emissions of air contaminants and operating conditions, which may affect the emissions of air contaminants. The applicant must also show that the records are being and will continue to be maintained and that the records will be submitted to the Department at specified intervals or upon request. 25 Pa. Code §127.12(a)(3).

Section 127.411(a)(4)(i) provides that an applicant for an operating permit must demonstrate that the source is equipped with reasonable and adequate facilities to monitor and record the emissions of air contaminants and the operating conditions which may affect the emissions of air contaminants. 25 Pa. Code §127.411(a)(4)(i).

Section 127.441(a) provides that a permit may contain terms and conditions that the Department deems necessary to assure the proper operation of the source. Subsection (c) specifies that “the operating permit shall incorporate the monitoring, recordkeeping and reporting requirements required by 25 Pa. Chapter 139 (relating to sampling and testing) and other requirements” of 25 Pa. Code Article III. This subsection also provides that operating permits shall incorporate additional requirements related to the monitoring, recordkeeping and reporting required by the Clean Air Act and the regulations thereunder.” 25 Pa. Code §127.441(c). These requirements must be included in both State operating permits and Title V permits issued by the Department. Therefore, Pennsylvania has adequate authority to include the monitoring, recordkeeping and reporting requirements for designated facilities in State operating permits and Title V permits.

In addition, Section 127.442 provides that the permittee shall submit reports to the Department containing information prescribed by the Department relative to the operation and maintenance of a source. At a minimum, each permit shall incorporate by reference the requirements of the APCA, the CAA, or applicable regulations adopted thereunder.

Pursuant to 25 Pa. Code §127.511(a), emission monitoring and analysis procedures or test methods required under applicable requirements, including procedures and methods under Sections 114(a)(3) or 504(b) of the CAA must be included as a condition in Title V permits. With respect to emission monitoring, the permittee must also comply with requirements concerning the use, maintenance and, when appropriate, installation of monitoring equipment or methods, as necessary. 25 Pa. Code §127.511(a)(3). At least every six months, the permittee must submit reports of required monitoring, certified by a responsible official of the designated facility. Instances of deviations from permit requirements shall be clearly identified in the reports. 25 Pa. Code §127.511(c).

The previously described statutory and regulatory provisions demonstrate that Department has adequate authority to require the owners and operators of designated facilities including coal-fired electric steam generating units to comply with any applicable provisions of the Emission Guidelines and 25 Pa. Code §§ 123.201-215. Furthermore, monitoring, recordkeeping and reporting provisions have been adopted as part of 25 Pa. Code §§ 123.201-215. Consequently, the monitoring, recordkeeping and reporting requirements applicable to the designated facilities including coal-fired electric steam generating units have the force and effect of Pennsylvania law.

G. Making Available to the Public Emission Data Correlated to Emission Standards

Section 13.2 of the APCA requires the Department to make all records, reports or information pertaining to emission data available to the public. 35 P.S. § 4013.2. As specified in 25 Pa. Code §127.411(c) records, reports or information obtained by the Department or referred to a public hearings shall be available to the public, except as provided in subsection (d). The exception in subsection (d), which does not apply to emissions data, provides for the confidential treatment of certain information that would “adversely affect the competitive position of that person.” Such information includes the production or sales figures, or methods, processes, trade secrets and intellectual property rights. Section 127.411(d) also provides that the Department will implement the requirements of this section consistent with the requirements in section 112(d) (relating to emission standards) and 114(c)(relating to availability of records, reports and information to public; disclosure of trade secrets). 25 Pa. Code §127.411(d).

In accordance with the requirements of 25 Pa. Code §§127.441(c) and 127.511 (b), State operating permits and Title V permits issued to designated facilities will incorporate the monitoring, recordkeeping or reporting requirements of Chapter 139 (relating to sampling and testing), 25 Pa. Code Article III and applicable emissions monitoring and analysis procedures or test methods required under the CAA including Sections 114(a)(3) or 504(b).

The owners or operators of designated facilities subject to Title V permit requirements must include the following emissions-related information in a Title V application, which shall be made available to the general public:

(1) Emissions of air contaminants for which the facility is a Title V facility and emissions of regulated pollutants. The permit application shall describe emissions of regulated air pollutants emitted from a stationary air contamination source. The Department may also require additional information related to the emissions of air contaminants necessary to verify which requirements are applicable to each source. 25 Pa. Code §127.503(3)(i).

(2) Emission rates in tons per year and in terms necessary to establish compliance consistent with the applicable emission limit and standard reference test method. 25 Pa. Code §127.503(3)(iii).

Under 40 CFR §60.25, the emissions data summarized in State Plans developed pursuant to Sections 111(d) of the CAA must be correlated to emission standards for designated pollutants. In Pennsylvania, emissions data correlated to emission standards are available to the general public. The correlated emission data will also be available for review by the general public when the Department provides notice and opportunity for comment on the proposed plans.

H. Legal Authority to Enforce the Pennsylvania-Specific Mercury Regulation and Any Applicable Provisions Developed Pursuant to Sections 111 of the CAA Prior to the Issuance of a Permit

The APCA and the regulations promulgated thereunder provide adequate authority for the Department to enforce the Pennsylvania-Specific Mercury Regulation requirements under 25 Pa. Code §§ 123.1 - 215, and any applicable provisions of the Emission Guidelines developed pursuant to Sections 111 of the CAA prior to the issuance of a permit. Section 6.1(k) of the APCA provides that the Department shall require revisions to any permit to incorporate applicable standards and regulations promulgated under the CAA after the issuance of a Title V permit. 35 P S. §4006.1(k). Therefore, the Department will revise existing State operating permits for designated facilities to incorporate “applicable requirements” including requirements in 25 Pa. Code §§ 123.201-515 in accordance with the provisions in 25 Pa. Code §127.463. Moreover, Section 127.463(e) also states that: “Regardless of whether a revision is required under this section, the permittee shall meet the applicable standards or regulations promulgated under the Clean Air Act within the time frame required by the standards or regulations.” Subsection(e) expressly authorizes the Department to require compliance with applicable requirements prior to the issuance of State operating permits or Title V permits to designated facilities. Failure to comply with 25 Pa. Code §§ 123.201-215 and any applicable provisions of the Emission Guidelines subjects the owners or operators of designated facilities to appropriate enforcement action including the issuance of departmental orders and the assessment of civil penalties. 35 P. S. §§4004(9)(i), 4009.1 and 4010.1.

I. Legal Authority to Enforce Applicable Requirements Following the Expiration of Operating Permits

Pennsylvania law provides the necessary authority to enforce applicable requirements including 25 Pa. Code §§ 123.201-215 and any applicable provisions of the Emission Guidelines following the expiration of an operating permit issued by the Department. In Pennsylvania, air contamination sources may not operate without a permit. Pursuant to §6.1(b.2) of the APCA and 25 Pa. Code §446(c), the terms and conditions of an expired permit are automatically continued pending the issuance of new permit if the permittee has submitted a timely and complete application and paid applicable fees. 35 P. S. §4006.1(b.2) and 25 Pa. Code §127.446(c). The continued effect of expired permits applies to both state operating permits and Title V permits.

In circumstances where the owner or operator of a designated facility violates terms and conditions of the expired permit, the Department may issue enforcement orders including requiring the cessation of operation of a designated facility or any air contamination source at such facilities. 35 P. S. §§4004(9)(i) and 4010.1.

In Pennsylvania, it is unlawful to any operate stationary air contamination source without a permit. Section 6.1(b)(1) of the APCA provides that “no person shall operate any stationary air contamination source unless the department shall have issued to such person a permit to operate such source ...in response to a written application ...”. 35 P. S. §4006.1(b)(1). Therefore, if the owner or operator of a designated facility fails to submit an application to renew a State operating permit or Title V permit, the Department can initiate appropriate enforcement action upon expiration of the permit if the permittee continues to operate the stationary air contamination source after the permit lapses.

Section 9.1 of the APCA provides that the Department may assess up to \$25,000 per day in civil penalties for violations of the act, regulations adopted under the act, departmental orders or terms and conditions of plan approvals and operating permits. 35 P. S. §4009.1.

The provisions described above provide sufficient authority to enforce applicable requirements prior to the renewal of state operating permits or Title V permits. Additionally, Section 7.1 of the APCA authorizes the Department to withhold plan approvals, state operating permits or Title V permits where an applicant or related party has shown a lack of ability or intention to comply with the APCA. 35 P. S. §4007.1. If the permittee fails to comply with 25 Pa. Code §§ 123.201-215, the Department may withhold plan approvals or operating permits until the owner or operator of a designated facility corrects violations of applicable requirements, including with 25 Pa. Code §§ 123.201-215.

J. Conclusion

Based upon the foregoing analysis, it is my legal opinion that the Department has sufficient statutory and regulatory authority under its plan approval, State operating permit and Title V permit programs, and 25 Pa. Code §§ 123.201-215 to implement applicable requirements adopted under Sections 111(d) of the CAA including those for the control of mercury emissions from existing coal-fired electric steam generating units.

Dated: 10/23/06

Signed: 

Susan Shinkman,
Chief Counsel,
Pennsylvania Department of Environmental Protection