

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
Eastern Division

SIERRA CLUB, and  
MARILYN WALL,

Plaintiffs,

vs.

DAYTON POWER & LIGHT, Inc.,  
CINCINNATI GAS AND ELECTRIC COMPANY, and  
COLUMBUS SOUTHERN POWER Co.,

Defendants.

**COMPLAINT**

**I. INTRODUCTION**

1. Plaintiffs Sierra Club and Marilyn Wall bring this suit under the Clean Air Act against Dayton Power & Light, Inc. (“DP&L”), Cincinnati Gas and Electric Company (“CG&E”), and Columbus Southern Power Co. (“CSP”) for causing tens of thousands of tons of sulfur dioxide, nitrogen oxides, and particulate matter to be emitted from their J.M. Stuart Generating Station (“Stuart Station”), a 2600 megawatt coal-fired power plant in Adams County, Ohio, in violation of the Clean Air Act. Stuart Station is the largest source of particulate matter emissions in Ohio. Stuart Station’s illegal pollution has caused, and unless this Court orders it to be reduced, will continue to cause severe adverse health and economic impacts in Ohio. In addition, Stuart Station enjoys an unfair competitive advantage over other Ohio power plants which have already been found liable the Clean Air Act’s New Source Review Program.

2. DP&L, CG&E, and CSP [hereinafter collectively “Defendants”] have violated and continue to violate the Clean Air Act’s New Source Review provisions because they “modified” Stuart Station numerous times and these modifications resulted in increases in pollutant emissions, without installing Best Available Control Technology (“BACT”) and without obtaining a Prevention of Significant Deterioration (“PSD”) permit. DP&L is also in violation of the Clean Air Act’s New Source Performance Standards (“NSPS”) Subpart D because it has operated and continues to operate Stuart Station’s Boiler Unit 004 (“Unit 4”) in violation of NSPS Subpart D’s emission limits for sulfur dioxide and particulate matter. Also, DP&L is in violation of NSPS Subpart Da because it has operated and continues to operate Stuart Station’s Boiler Units 001, 002, and 003 (“Units 1, 2, and 3”) in violation of Subpart Da’s emission limits for sulfur dioxide and particulate matter. Finally, DP&L is in violation of the Ohio SIP, Stuart Station’s Title V operating permit, and a consent order issued by the United States Environmental Protection Agency because of DP&L’s ongoing violations of its opacity limit, which is a surrogate for particulate matter emissions.

## **II. JURISDICTION, VENUE AND NOTICE**

3. In this case, Plaintiffs allege violations of the Clean Air Act, 42 U.S.C. § 7401 et seq., which is a federal law, and the Clean Air Act’s implementing regulations. Thus, this Court has subject matter jurisdiction pursuant to 42 U.S.C. § 7604(a) (citizen suit provision of Clean Air Act) and 28 U.S.C. § 1331 (federal question statute). See General Motors Corp. v. United States, 496 U.S. 530, 533-34 (1989). The relief requested is authorized pursuant to 28 U.S.C. §§ 2201(a) and 2202, and 42 U.S.C. § 7604.

4. Stuart Station is located in Adams County, Ohio. Thus, pursuant to 42 U.S.C. § 7604(c) venue lies in the Southern District of Ohio.

5. CSP's principal place of business is 1 Riverside Plaza, Columbus, Ohio 43215, which is in Franklin County. Thus, pursuant to S.D. Ohio Civ. R. 82.1, venue lies in the Eastern Division of the Southern District of Ohio, sitting at Columbus.

6. In compliance with 42 U.S.C. § 7604(b)(1)(A), to the extent it was necessary, on July 21, 2004, Sierra Club and Marilyn Wall notified in writing the Administrator of the United States Environmental Protection Agency ("US EPA" or "EPA"), the Ohio Environmental Protection Agency Division of Air Pollution Control, the Governor of Ohio, DP&L, Cinergy, CSP and their corporate agents of the violations alleged in this Complaint and of Plaintiffs' intent to sue.

7. More than sixty days have passed since the above notices were served by U.S. mail. Defendants have violated, and continue to violate the Clean Air Act. Neither U.S. EPA nor the Ohio Environmental Protection Agency ("Ohio EPA") have commenced and diligently prosecuted a court action to redress these violations.

### **III. PARTIES**

8. Plaintiff, Sierra Club is a national non-profit conservation organization with approximately 700,000 members. Sierra Club has approximately 20,000 members in Ohio and approximately 4,900 members in Kentucky. Sierra Club's Ohio Chapter Office is located at 36 West Gay Street, Columbus, Ohio 43215. For over 111 years, the Sierra Club has been dedicated to protecting our national natural heritage and natural resources, including clean air and water. The Sierra Club advocated for passage of the Clean Air

Act and its 1990 Amendments, and continues to seek full enforcement of the Clean Air Act's provisions to ensure clean air for all Americans.

9. Sierra Club, on behalf of its members, works to protect and enhance the quality of air throughout the country, including the areas impacted by the excessive emissions from Stuart Station.

10. Sierra Club members live, recreate, work, own real estate, grow crops, and study in and near areas affected by the air pollution from Stuart Station, and will continue to do so on a regular basis. The air quality of these areas affects the health, recreational, aesthetic, spiritual and economic interests of these members. The interests of these members have been, are being, and will continue to be adversely affected by illegal pollution from Stuart Station because pollutants emitted from Stuart Station degrade air quality. This reduction in air quality injures and/or damages human health, wildlife, vegetation, visibility, and real estate in areas used by these members, and harms the aesthetic enjoyment of these areas by these members. The interests of these members that are directly injured by Stuart Station's excessive and illegal discharge of pollutants include, but are not limited to: (1) breathing air free from Stuart Station's excessive pollutant discharges; (2) paying for the health care and other economic damages caused or contributed to by Stuart Station's excessive pollutant discharges; (3) viewing natural scenery and wildlife unimpaired by pollution that is caused, in whole or in part, by Stuart Station's emissions; and (4) protecting the natural ecology of the region from air pollution related impacts. The interests of Sierra Club have been, and unless the relief requested herein is granted, will continue to be, adversely affected by Stuart Station's

violations of the Clean Air Act. Sierra Club brings this action on its own behalf and on behalf of its adversely affected members.

11. Plaintiff Marilyn Wall is an individual who works at 515 Wyoming Avenue, Cincinnati, Ohio 45215. Marilyn Wall also lives and recreates in southern Ohio and experiences the effects of Stuart Station's pollutant emissions. Marilyn Wall's aesthetic, recreational, spiritual, economic, and health-related interests have been injured by Stuart Station's illegal and excessive emissions of pollutants into the Ohio River Valley. Marilyn Wall's interests that are directly injured by Defendants' illegal discharge of pollutants from Stuart Station include, but are not limited to: (1) breathing air in the Ohio River Valley and surrounding mountains free from excessive pollutant discharges; (2) viewing natural scenery and wildlife unimpaired by pollution that is caused, in whole or in part, by Stuart Station's emissions; and (3) protecting the natural ecology of the region from air pollution-related impacts.

12. The interests of Marilyn Wall have been, and unless the relief requested herein is granted, will continue to be, adversely affected by Defendants' violations of the Clean Air Act.

13. Defendant Dayton Power & Light ("DP&L") is a corporation existing under the laws of Ohio. DP&L is a wholly owned subsidiary of DPL, Inc. DP&L is a "person" within the meaning of 42 U.S.C. § 7602(e). DP&L operates and owns an interest in Stuart Station and has operated and owned an interest in Stuart Station at all times relevant to this complaint. DP&L's principal place of business is 1065 Woodman Drive, Dayton, Ohio, 45432.

14. DPL, Inc. (“DPL”) is a corporation that wholly owns DP&L. DPL is a publicly owned corporation organized and existing under the laws of Ohio. DPL’s principal place of business is also 1065 Woodman Drive, Dayton, Ohio, 45432.

15. Defendant Cincinnati Gas and Electric (“CG&E”) is a corporation organized and existing under the laws of Ohio. CG&E’s principal place of business is 139 East Fourth Street, Cincinnati, Ohio 45202. CG&E owns an interest in Stuart Station and has owned an interest in Stuart Station at all times relevant to this complaint. Cinergy is a corporation organized and existing under the laws of Delaware. Cinergy’s principal place of business is 139 East Fourth Street, Cincinnati, Ohio 45202. CG&E is a wholly owned subsidiary of Cinergy.

16. Defendant Columbus Southern Power Company (“CSP”) is a corporation organized and existing under the laws of Ohio. It is a subsidiary of American Electric Power, a publicly owned corporation organized and existing under the laws of New York. Both CSP and American Electric Power have their principal places of business at 1 Riverside Plaza, Columbus, Ohio 43215. CSP owns an interest in Stuart Station and has owned an interest in Stuart Station at all times relevant to this complaint.

#### **IV. STATEMENT OF FACTS**

##### **STATUTORY AND REGULATORY FRAMEWORK**

17. The objective of the federal Clean Air Act (“Act”) is “to protect and enhance the quality of the nation’s air resources so as to promote the public health and welfare and the productive capacity of its population.” 42 U.S.C. § 7401(b). The Clean Air Act reflects Congress’ recognition of the “urgency of establishing air pollution controls.” General Motors Corp. v. United States, 496 U.S. 530, 533 (1990).

18. The Act establishes various programs to meet its objective. Four of the Act's programs are relevant to this case: (1) Prevention of Significant Deterioration ("PSD"); (2) New Source Performance Standards ("NSPS"); (3) State Implementation Plans ("SIPs"); and (4) Title V permits.

#### PSD

19. Pursuant to the Act, the U.S. EPA has established National Ambient Air Quality Standards ("NAAQS") to protect human health and the environment for seven "criteria pollutants." 42 U.S.C. § 7602(e); 40 C.F.R. § 50. Areas designated as meeting the NAAQS for a particular criteria pollutant are deemed in "attainment" for that pollutant. 42 U.S.C. § 7407(d). At all times relevant to the complaint, Adams County, Ohio was designated attainment or unclassifiable for all criteria pollutants.

20. The Clean Air Act's Prevention of Significant Deterioration ("PSD") program applies to the "construction" of new major sources and to the "major modification" of existing major sources in areas designed as attainment or unclassifiable. A major modification means "any physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the Act." 40 C.F.R. § 52.21(b)(2)(1996). There are, however, several regulatory exceptions to what constitutes a modification. These include routine maintenance, repair, and replacement. 40 C.F.R. § 52.21(b)(2)(iii)(a).

21. A major source is prohibited from commencing construction on a major modification until the major source complies with all applicable Best Available Control Technology ("BACT") requirements, demonstrates that it will not cause or contribute to a

violation of a NAAQS or increment, and obtains a major source PSD permit that has been issued following the proper public participation requirements. Commencing construction of a major modification before the major source satisfies all applicable BACT requirements, before the source has demonstrated that it will not cause or contribute to a violation of a NAAQS or increment, and before a major source PSD permit has been issued is a violation of the Clean Air Act and its regulations. 42 U.S.C. §§ 7604(a)(3), 7475(a).

22. On August 7, 1980, EPA disapproved Ohio's proposed PSD program. 45 Fed. Reg. 52,676, 52,741 (August 7, 1980). Accordingly, the EPA promulgated the PSD regulations of 40 C.F.R. §§ 52.21(b) through (w) into the Ohio SIP at 40 C.F.R. § 52.1884, and delegated to Ohio the authority to implement the federal PSD program incorporated into the Ohio SIP. 46 Fed. Reg. 9580 (Jan. 29, 1981). Prior to August 7, 1980, the EPA administered the PSD program in Ohio, applying the regulations at 40 C.F.R. § 52.21, originally promulgated on December 5, 1974 and as amended thereafter. The regulations appearing at 40 C.F.R. § 52.21 were incorporated and made a part of Ohio's SIP. 40 C.F.R. § 52.1884 (1998). Ohio submitted a request to the EPA for approval of Ohio Administrative Code section 3745-31-01 through 3745-31-20 into the Ohio SIP on March 1, 1996 as its PSD program. Ohio subsequently submitted to the EPA additional revisions to the Ohio SIP. On October 10, 2001, Ohio's PSD program was conditionally approved by the EPA. 66 Fed. Reg. 51,570 (Oct. 10, 2001). Further revisions to Ohio Administrative Code Chapter 3745-31 were submitted by Ohio on July 18, 2002. On January 22, 2003, the EPA approved Ohio's PSD SIP provisions, 3745-31-

01 through 3745-31-20, which became effective on March 10, 2003. 68 Fed. Reg. 2909 (Jan. 22, 2003).

### NSPS

23. Pursuant to Section 111 of the Act, 42 U.S.C. § 7411, EPA is required to publish a list of categories of major air pollution sources that cause or contribute significantly to air pollution which may reasonably be anticipated to endanger the public health or welfare and to promulgate standards of performance for new stationary sources within those categories. These standards are known as the New Source Performance Standards (“NSPS”).

24. Under Section 111(e) of the Act, 42 U.S.C. § 7411(e), after the effective date of an NSPS, it is unlawful for any owner or operator of any new unit to operate such unit in violation of any performance standard applicable to such source.

25. Under 40 C.F.R. § 60.14(a), any physical or operational change to an existing facility which results in an increase in the emission rate to the atmosphere of any pollutant to which a standard applies shall be considered a modification within the meaning of Section 111 of the Act. Upon modification, an existing unit shall become an affected facility for each pollutant to which a standard applies and for which there is an increase in the emission rate to the atmosphere.

26. Pursuant to Section 111(b)(1)(A) of the Act, 42 U.S.C. § 7411(b)(1)(A), EPA identified electric utility steam generating units for which construction or modification commenced after August 17, 1971 and which are capable of firing or producing more than 73 megawatts, as one category of stationary sources that cause, or contribute significantly to, air pollution that may reasonably be anticipated to endanger public health

and welfare. The NSPS regulations applicable to such units are set forth in NSPS Subpart D, 40 C.F.R. §§ 60.40 – 60.46 (“NSPS Subpart D”).

27. The owner or operator of a unit which is subject to NSPS Subpart D is required to comply with emission standards for sulfur dioxide (“SO<sub>2</sub>”), nitrogen oxides (“NO<sub>x</sub>”), particulate matter (“PM”), and opacity, 40 C.F.R. §§ 60.42, 60.43, 60.44, 60.45(g)(1).

28. Pursuant to Section 111(b)(1)(A) of the Act, 42 U.S.C. § 7411(b)(1)(A), EPA subsequently identified electric utility steam generating units for which construction or modification commenced after September 18, 1978 as a category of stationary sources that cause, or contribute significantly to, air pollution that may reasonably be anticipated to endanger public health and welfare, and imposed a new set of emission standards for these newer facilities. The NSPS regulations applicable to such units are set forth in NSPS Subpart Da, 40 C.F.R. §§ 60.40(a) – 60.49(a) (“NSPS Subpart Da”).

29. The owner or operator of a unit which is subject to NSPS Subpart Da is required to comply with emission standards for SO<sub>2</sub>, NO<sub>x</sub>, PM, and opacity. 40 C.F.R. §§ 60.42(a)-60.44(a).

### SIP

30. In order to maintain compliance with NAAQS in attainment areas, the Act requires states to prepare and submit to the EPA for approval State Implementation Plans (“SIPs”). 42 U.S.C. § 7410(a). SIP provisions are federally enforceable. See General Motors Corp. v. United States, 496 U.S. 530, 533-34 (1989).

31. The Ohio SIP sets a maximum opacity limit of 20% for emissions from a coal-fired power plant with certain exceptions in order to maintain the particulate matter NAAQS. See 59 Fed. Reg. 27,464, 27,465 (May 27, 1994).

#### TITLE V PERMIT

32. The Act also provides that major sources of air pollution must obtain Title V operating permits. 42 U.S.C. § 7661a(a). A violation of a condition in a Title V permit is a federally enforceable violation of the Clean Air Act. Id.; 42 U.S.C. § 7604(a)(1).

33. Stuart Station's Title V permit also sets a maximum opacity limit of 20% with certain exceptions. See Final Title V Permit for Facility No. 07-01-00-0007, Condition Part III.A.I.1.

#### J.M. Stuart Generating Station

34. The J.M. Stuart Generating Station ("Stuart Station") is a fossil fuel-fired electricity generating facility. The plant generates electricity by burning coal to create steam in four main boiler units, and then passes that steam through a turbine to drive a generator that ultimately produces electricity. Construction on the first of these units began in the late 1960's. Stuart Station is situated along U.S. Highway 52 near the town of Aberdeen, about fifty miles northeast of Cincinnati, and near the banks of the Ohio River.

35. The current generating capacity of Stuart Station is well over 2,400 megawatts making it one of the biggest power plants in the world. Stuart Station is capable of burning over 5,000,000 tons of coal each year.

#### Impacts of Stuart Station's Pollution

36. Stuart Station is the largest source of particulate matter (“PM”) pollution in the State of Ohio, according to Ohio EPA. PM pollution causes a variety of adverse health effects, including premature death, heart attacks, strokes, birth defects, and asthma attacks. According to a recent study, the pollution from Stuart Station is responsible for 296 deaths every year. See <http://cta.policy.net/dirtypower/map.html>.

37. The PM Stuart Station emits includes heavy metals such as mercury. Particulate mercury can deposit onto land and waterways, either via precipitation or dry deposition, causing significant damage to human health and ecosystems.

38. PM emissions also impair visibility and thus decrease residents’ and tourists’ ability to appreciate natural scenery.

39. Stuart Station is also a very large source of sulfur dioxide pollution. Sulfur dioxide (“SO<sub>2</sub>”) pollution is “a medically recognized threat to human health,” particularly but not exclusively the health of elderly people, infants, and people with other health problems. Ohio Power Co. v. US EPA, 729 F.2d 1096-98 (6th Cir. 1984). Sulfur dioxide reacts with oxygen and other substances in the atmosphere to form sulfate aerosols, which are dangerous to human health. When ambient levels of sulfate aerosols are high, people inhale aerosol particles and suffer increased rates of sickness and mortality from asthma, bronchitis, and other pulmonary conditions. Scientists believe that sulfate pollution remains airborne for days and can have significant detrimental health effects at large distances downwind from the smokestack where it was released.

40. In addition, SO<sub>2</sub> emissions from coal-fired power plants contribute to acid deposition. Airborne SO<sub>2</sub> reacts with other atmospheric chemicals to form sulfuric acid, which falls to earth via acidic rain, snow, fog, and other precipitation, as well as through

dry deposit processes. Forest ecosystems throughout the eastern United States are suffering extensive damage due to deposition of sulfuric acid resulting from SO<sub>2</sub> pollution. Acid deposition also accelerates the decay of building materials and paints, thus destroying buildings, statues, and other irreplaceable parts of our nation's cultural heritage and infrastructure. Sulfuric acid and other sulfate compounds in the atmosphere also contribute to visibility degradation.

#### Modifications

41. At various times since June 1, 1975, DP&L, CG&E and CSP and/or their predecessors or subsidiaries have constructed "major modifications," as defined in 40 C.F.R. § 52.21(b) (1999), to Stuart Station without obtaining Prevention of Significant Deterioration ("PSD") permits, without installing Best Available Control Technology ("BACT"), without complying with BACT emission limits, and without demonstrating that Stuart Station will not cause or contribute to a violation of a NAAQS or increment. These modifications comprise physical changes and changes in the method of operation, each of which has significantly increased Stuart Station's net emissions of PM, PM<sub>10</sub>, SO<sub>2</sub>, and/or NO<sub>x</sub>. Failure to install BACT and meet BACT emission limits has resulted in the emission of thousands of tons of excess pollution which have caused and will continue to cause damage to human health, wildlife, and economic interests unless these violations are corrected.

42. On information and belief, DP&L, CG&E, and CSP's major modifications to Stuart Station include, but are not limited to: replacement of pulverizers, replacement of economizers, replacement of secondary superheaters, replacement of water wall panels and/or tubes, and installation of a new coal handling system.

43. Additionally, DP&L, CG&E, and CSP constructed major modifications to Stuart Station's Boiler Unit 1 without obtaining PSD permits, without installing BACT, without adhering to BACT emission limits, and without demonstrating that Stuart Station will not cause or contribute to a violation of a NAAQS or increment. On information and belief, these major modifications included activities related to the overhaul of the turbine in the fall of 1980, replacement of the #6, 1A3, and 1B3 heaters with reconditioning of all dump valves, replacement of the economizer in 1997, and replacement of the pendant reheat tubes.

44. Additionally, DP&L, CG&E, and CSP constructed major modifications to Stuart Station's Boiler Unit 2 without obtaining PSD permits, without installing BACT, without adhering to BACT emission limits, and without demonstrating that Stuart Station will not cause or contribute to a violation of a NAAQS or increment. On information and belief, these modifications included redesign and replacement of the horizontal reheater and activities related to the overhaul of the turbine.

45. Additionally, DPL, CG&E, and CSP constructed major modifications to Stuart Station's Boiler Unit 3 without obtaining PSD permits, without installing BACT, without adhering to BACT emission limits, and without demonstrating that Stuart Station will not cause or contribute to a violation of a NAAQS or increment. On information and belief, these modifications included replacement of secondary superheater inlet sections and replacement of the economizer.

46. Finally, DP&L, CG&E, and CSP constructed major modifications to Stuart Station's Boiler Unit 4 without obtaining PSD permits, without installing BACT, without adhering to BACT emission limits, and without demonstrating that Stuart Station will not

cause or contribute to a violation of a NAAQS or increment. On information and belief, these modifications included alteration of thermal treatment mechanics, installation of a new furnace hopper floor, complete replacement of the secondary superheater outlet bank and header, replacement of boiler tubes in Spring 1989, Fall 1991, and Spring 1993, removal of gas recirculation, replacement of the secondary superheater inlet section, and complete overhaul of the entire boiler unit during the spring of 1991.

#### Violation of the 20% Opacity Limit

47. Condition Part III of Stuart Station's Title V operating permit limits the opacity of the emissions from Stuart Station's coal fired units to 20% except under certain circumstances described in OAC 3745-17-07. See, e.g. Condition Part III.A.I.1. This 20% opacity limit is also a requirement of the Ohio SIP. See 59 Fed. Reg. 27,464. It is also a requirement of EPA's Consent Order EPA-5-93-AE-3, Para. 9.

48. Stuart Station's coal fired boilers, Boiler Units 1, 2, 3, and 4, have repeatedly violated the 20% opacity limit of its Title V permit, the Ohio SIP and the EPA Consent Order. These violations are listed in Exhibit 1 as exceedances. DP&L is responsible for these violations.

49. Upon information and belief, DP&L has additional violations of the opacity limit at Stuart Station in the past 5 years. In addition, DP&L will continue to repeatedly violate Stuart Station's opacity limit unless enjoined by this court.

50. Upon information and belief, the opacity violations in Exhibit 1, which are herein incorporated by reference, which are indicated as occurring during startup, shutdown, or malfunction did not have satisfactory reporting, which is also an additional independent violation of Condition Part 1, A.1.(c)iii and III.A.IV.1 of Stuart Station's

Title V permit. The violations occurred when the inlet temperature to the electrostatic precipitator was above 250 degrees F, the equipment was not properly operated and maintained prior to breakdown, shutdown of the source or operation during the period of maintenance or breakdown was or had become practicable, the breakdown period was unreasonable, the shutdown or breakdown was or had become avoidable, and the emissions endangered or tended to endanger the health or safety of the public. All of the conditions mentioned above are affirmative defenses for which DP&L would bear the burden of proof and persuasion.

## **V. CLAIMS FOR RELIEF**

### First Cause of Action

(Major Modifications in violation of 42 U.S.C. § 7604(a)(3) and 42 U.S.C. § 7475(a))

51. Plaintiffs incorporate by reference and reallege the allegations contained in Paragraphs 1 through 50.

52. DP&L, CG&E and CSP are “persons” as that term is used in 42 U.S.C. § 7604(a)(3).

53. Stuart Station is a major emitting facility, as that term is defined in 42 U.S.C. § 7479(1) and a major stationary source, as that term is defined in 40 C.F.R. § 52.21(b)(1) (1999).

54. DP&L, CG&E and CSP have repeatedly constructed a modified major emitting facility at Stuart Station without a PSD permit, which is a permit required under Part C of subchapter I of the Act. See 42 U.S.C. § 7604(a)(3).

55. DP&L, CG&E and CSP have made physical changes to Stuart Station that constitute “major modifications” as that term is defined in 40 C.F.R. § 52.21(b)(2)

(1999). These major modifications included, but were not limited to, replacement of CR-77 pulverizers with replacement MPS-89 pulverizers, replacement of economizers, replacement of secondary superheaters, replacement of water wall panels and/or tubes, and installation of a new coal handling system.

56. Additional major modifications specific to Stuart Station's Boiler Unit 1 include activities related to overhaul of the turbine in the fall of 1980, replacement of the #6, 1A3, and 1B3 heaters with reconditioning of all dump valves, replacement of the economizer in 1997, and replacement of the pendant reheat tubes.

57. Major modifications specific to Boiler Unit 2 include replacement and redesign of the horizontal reheater and activities related to the overhaul of the turbine.

58. Major modifications specific to Boiler Unit 3 include replacement of secondary superheater inlet sections and replacement of the economizer.

59. Major modifications specific to Boiler Unit 4 include modification of thermal treatment mechanics, installation of a new furnace hopper floor, complete replacement of the secondary superheater outlet bank and header, replacement of boiler tubes in Spring 1989, Fall 1991, and Spring 1993, removal of gas recirculation, replacement of the secondary superheater inlet section, and complete overhaul of the entire boiler unit during the spring of 1991.

60. Each one of the major modifications described above would result in a significant net emissions increase of pollutants subject to regulation under the Act. DP&L, CG&E and CPS performed these major modifications without first obtaining a PSD permit, without performing the requisite air quality analysis, and without installing the required BACT. DP&L has operated Stuart Station without a required PSD permit,

without having performed the requisite air quality analysis, without using BACT technology, and without continuously meeting a BACT emission limit.

61. Thus, DP&L, CG&E, and CSP have violated and continue to violate the Act, by making “major modifications” and operating Stuart Station without obtaining a PSD permit, without performing the requisite air quality analysis, and without installing BACT for SO<sub>2</sub>, PM, PM<sub>10</sub>, and NO<sub>x</sub>. Each of these several violations has existed since the start of the construction of the relevant modifications and will continue until DP&L, CG&E, and CSP obtain the appropriate PSD permit and come into compliance with BACT emission limits.

Second Cause of Action:  
Modifications in Violation of the Ohio SIP, 40 C.F.R. § 52.1884

62. Plaintiffs incorporate by reference and reallege the allegations contained in Paragraphs 1 through 61.

63. DP&L, CG&E, and CSP have repeatedly violated the Ohio SIP by failing to obtain appropriate permits before conducting major modifications of Stuart Station. See 40 C.F.R. § 52.1884.

64. Stuart Station is a major stationary source, as that term is defined in 40 C.F.R. § 52.21(b)(1) (1999).

65. DP&L, CG&E, and CSP have made physical changes to Stuart Station that constitute “major modifications” as that term is defined in 40 C.F.R. § 52.21(b)(2) (1999). These major modifications included, but were not limited to, replacement of CR-77 pulverizers with replacement MPS-89 pulverizers, replacement of economizers, replacement of secondary superheaters, replacement of water wall panels and/or tubes, and installation of a new coal handling system.

66. Additional major modifications specific to Stuart Station's Boiler Unit 1 include activities related to overhaul of the turbine in the fall of 1980, replacement of the #6, 1A3, and 1B3 heaters with reconditioning of all dump valves, replacement of the economizer in 1997, and replacement of the pendant reheat tubes.

67. Major modifications specific to Boiler Unit 2 include replacement and redesign of the horizontal reheater and activities related to the overhaul of the turbine.

68. Major modifications specific to Boiler Unit 3 include replacement of secondary superheater inlet sections and replacement of the economizer.

69. Major modifications specific to Boiler Unit 4 include modification of thermal treatment mechanics, installation of a new furnace hopper floor, complete replacement of the secondary superheater outlet bank and header, replacement of boiler tubes in Spring 1989, Fall 1991, and Spring 1993, removal of gas recirculation, replacement of the secondary superheater inlet section, and complete overhaul of the entire boiler unit during the spring of 1991.

70. Each one of the major modifications described above would result in a significant net emissions increase of NO<sub>x</sub>, SO<sub>2</sub>, PM, and PM<sub>10</sub>.

71. DP&L, CG&E, and CPS performed these major modifications without first obtaining a PSD permit, without performing the requisite air quality analysis, and without installing the required BACT. DP&L has operated Stuart Station without a required PSD permit, without having performed the requisite air quality analysis, without using BACT technology, and without continuously meeting a BACT emission limit.

72. Thus, DP&L, CG&E, and CSP have violated and continue to violate the Ohio SIP by making "major modifications" and operating Stuart Station without

obtaining a PSD permit, without performing the requisite air quality analysis, and without installing BACT for SO<sub>2</sub>, PM, PM<sub>10</sub>, and NO<sub>x</sub>.

73. Each of these several violations has existed since the start of the construction of the relevant modifications and will continue until DP&L, CG&E, and CSP obtain the appropriate PSD permit and come into compliance with BACT emission limits.

Third Cause of Action:  
(Violations of NSPS Subpart D at Unit 4)

74. Plaintiffs incorporate by reference and reallege the allegations contained in paragraphs 1 through 73.

75. “Construction” commenced on Stuart Station’s Boiler Unit 4 after August 17, 1971 but before September 18, 1978. Boiler Unit 4 is an electric utility steam generator capable of producing more than 73 megawatts.

76. On August 17, 1971, no one had undertaken a continuous program of construction of Boiler Unit 4 and no one had entered into a contractual obligation to undertake and complete, within a reasonable time, a continuous program of construction of Boiler Unit 4 that would impose significant liability on the owners for cancellation or delay.

77. DP&L has repeatedly violated NSPS Subpart D by operating Boiler Unit 4 in violation of the 1.2lb/MMBtu three-hour average emission limit for SO<sub>2</sub> required by 40 C.F.R. § 60.43(a), for every three-hour period that Boiler Unit 4 has operated, excluding periods of startup, shutdown or malfunction, during the five-year period prior to the date of this Complaint, and will continue to operate in violation of this SO<sub>2</sub> limit unless enjoined.

78. In the alternative, if it is determined that a thirty-day rolling average is the appropriate averaging time, then DP&L has operated Boiler Unit 4 in repeated violation of the 1.2 lbs/MM Btu SO<sub>2</sub> emission limit for every day Boiler Unit 4 has operated in the five years preceding the date of this Complaint and will continue to operate in violation of this SO<sub>2</sub> limit unless enjoined.

Fourth Cause of Action:  
(Violations of NSPS Subpart Da at Units 1, 2, 3, and 4)

79. Plaintiffs incorporate by reference and reallege the allegations contained in paragraphs 1 through 78.

80. Stuart Station's Boiler Units 1, 2, 3, and 4 are electric utility steam generators, each capable of producing more than 73 megawatts. DP&L has made physical changes that constitute "modifications" to Boiler Units 1, 2, 3, and 4 as that term is defined by Section 111 of the Act, 42 U.S.C. § 7411(a)(2), and the NSPS regulations, 40 C.F.R. §§ 60.2 and 60.14, and these changes resulted in an increase of Stuart Station's atmospheric emission rates of SO<sub>2</sub> and PM.

81. These major modifications included, but were not limited to, replacement of CR-77 pulverizers with replacement MPS-89 pulverizers, replacement of economizers, replacement of secondary superheaters, replacement of water wall panels and/or tubes, installation of a new coal handling system.

82. Additional major modifications specific to Stuart Station's Boiler Unit 1 include activities related to overhaul of the turbine in the fall of 1980, replacement of the #6, 1A3, and 1B3 heaters with reconditioning of all dump valves, replacement of the economizer in 1997, and replacement of the pendant reheat tubes.

83. Major modifications specific to Boiler Unit 2 include replacement and redesign of the horizontal reheater and activities related to the overhaul of the turbine.

84. Major modifications specific to Boiler Unit 3 include replacement of secondary superheater inlet sections and replacement of the economizer.

85. Major modifications specific to Boiler Unit 4 include modification of thermal treatment mechanics, installation of a new furnace hopper floor, complete replacement of the secondary superheater outlet bank and header, replacement of boiler tubes in Spring 1989, Fall 1991, and Spring 1993, removal of gas recirculation, replacement of the secondary superheater inlet section, and complete overhaul of the entire boiler unit during the spring of 1991.

86. Construction commenced on these modifications to Boiler Units 1, 2, 3, and 4 after September 18, 1978.

87. As a consequence of the modifications DP&L made subsequent to September 18, 1978, Stuart Station's Boiler Units 1, 2, and 3 became subject to Subpart Da of the Clean Air Act's New Source Performance Standards ("NSPS"). 40 C.F.R. §§ 60.2, 60.14, 60.40 *et seq.* Moreover, if Boiler Unit 4 is not subject to NSPS Subpart D, in the alternative, as a consequence of the modifications DP&L made subsequent to September 18, 1978, Stuart Station's Boiler Unit 4 became subject to Subpart Da of the Clean Air Act's New Source Performance Standards ("NSPS"). 40 C.F.R. §§ 60.2, 60.14, 60.40 et seq.

88. DP&L has repeatedly violated NSPS Subpart Da by operating Boiler Units 1, 2, 3, and 4 in violation of the 90% reduction in thirty-day rolling average emission limit for SO<sub>2</sub> required by 40 C.F.R. § 60.43a for every day that these Boiler Units have

operated, excluding periods of startup, shutdown or malfunction, during the five-year period prior to the date of this Complaint, and will continue to operate in violation of this SO<sub>2</sub> limit unless enjoined.

89. DP&L has repeatedly violated NSPS, Subpart Da, by operating Boiler Units 1, 2, 3, and 4 in violation of the PM thirty-day rolling average emission limit of 0.03lbs/mmBTU required by 40 C.F.R. § 60.42a(a)(1) for every day that Boiler Units 1, 2, 3, and 4 have operated, excluding periods of startup, shutdown or malfunction, during the five-year period prior to the date of this Complaint, and will continue to operate in violation of this PM limit unless enjoined..

Fifth Cause of Action:  
(Violations of opacity limits)

90. Plaintiffs incorporate by reference and reallege the allegations contained in Paragraphs 1 through 89.

91. Stuart Station's Title V operating permit limits the opacity of the emissions from Stuart Station's coal-fired units to 20% with certain exceptions. .

92. The Ohio SIP also includes an emission standard or emission limit which restricts opacity from Stuart Station to 20% with certain exceptions. See 59 Fed. Reg. 27,464.

93. The EPA's Consent Order EPA-5-93-AE-3, which is an order issued by the Administrator with respect to an emission standard or emission limit, also includes a provision limiting opacity from Stuart Station to 20% with certain exceptions.

94. Each value above 20% and marked as an Exceedance in Exhibit 1, hereby incorporated by reference, shows the dates and times that DP&L has repeatedly operated Stuart Station's Boiler Units 1, 2, 3, and 4 in violation of the 20% opacity limit contained

in the Ohio SIP, in Stuart Station's Title V permit, and in EPA's Consent Order EPA-5-93-AE-3.

95. Upon information and belief, DP&L has committed additional violations not shown in Exhibit 1.

96. DP&L, as operator of Stuart Station, has violated Stuart Station's Title V permit, the Ohio SIP, and EPA's Consent Order EPA-5-93-AE-3 by allowing excessive opacity from Stuart Station's emissions.

97. DP&L will continue repeatedly violating Stuart Station's opacity limit unless enjoined by this court.

## **VII. RELIEF REQUESTED**

WHEREFORE, Sierra Club and Marilyn Wall respectfully request this Court grant the following relief to correct DP&L's, CG&E's, and CSP's significant and ongoing violations of law:

A. Declare that DP&L, CG&E and CSP have violated the Act, its regulations, and the Ohio SIP by constructing major modifications to Stuart Station's Boiler Units 1, 2, 3, and 4 without obtaining a PSD permit, without installing BACT, without operating in compliance with BACT limits, and without demonstrating that Stuart Station will not cause or contribute to the violation of a NAAQS or increment.

B. Order DP&L, CG&E and CSP to comply with BACT emission limits for NO<sub>x</sub>, SO<sub>2</sub>, PM<sub>10</sub>, and PM for Boiler Units 1, 2, 3, and 4.

C. Order DP&L, CG&E and CSP to apply for a PSD permit for Stuart Station and include in its application a demonstration that Stuart Station will not cause or contribute to a violation of a NAAQS or increment.

D. Order DP&L, CG&E and CSP to pay a civil penalty of up to \$27,500 per day for each violation of the PSD and Ohio SIP requirements that has occurred within five years of the filing of this Complaint.

E. Declare that NSPS Subpart D is applicable to Boiler Unit 4 and that DP&L has operated and continues to operate Boiler Unit 4 in violation of NSPS Subpart D's SO<sub>2</sub> emission limit.

F. Order DP&L to operate Boiler Unit 4 in compliance with NSPS Subpart D's SO<sub>2</sub> emission limit.

G. Order DP&L to pay a civil penalty of up to \$27,500 per day for each violation of the NSPS Subpart D's SO<sub>2</sub> emission limit that has occurred within five years of the filing of this Complaint.

H. Declare that NSPS Subpart Da is applicable to Boiler Units 1, 2, 3, and (in the alternative) 4 and that DP&L has operated and continues to operate these boilers in violation of NSPS Subpart Da's SO<sub>2</sub> and PM emission limits.

I. Order DP&L to operate Boiler Units 1, 2, 3, and (in the alternative) 4 in compliance with NSPS Subpart Da's SO<sub>2</sub> and PM emission limit.

J. Order DP&L to pay a civil penalty of up to \$27,500 per day for each violation of the NSPS Subpart Da's SO<sub>2</sub> and PM emission limits that has occurred within five years of the filing of this Complaint.

K. Declare that DP&L has operated and continues to operate Boiler Units 1, 2, 3, and 4 in violation of the opacity limit contained in the Ohio SIP, in Stuart Station's Title V permit and in EPA Order EPA-5-93-AE-3.

L. Order DP&L to operate Boiler Units 1, 2, 3, and 4 in compliance with its opacity limits and take the necessary steps to ensure that it can operate in compliance with its opacity limits.

M. Order DP&L to pay a civil penalty of up to \$27,500 per day for each violation of its opacity limit that has occurred within five years of the filing of this Complaint.

N. Order Defendants to take action to remediate their past illegal air pollution.

O. Order Defendants to pay up to \$100,000 for beneficial mitigation projects, as provided for by 42 U.S.C. § 7604(g)(2), consistent with the purposes of the Clean Air Act;

P. Order Defendants to pay Plaintiffs their costs of litigation, including but not limited to reasonable attorney and expert witness fees, 42 U.S.C. § 7604(d); and

Q. Grant such other relief as the Court deems necessary and proper.

Respectfully submitted,

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Trial Attorney and Counsel for All Plaintiffs

DATED: September 21, 2004.

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CERTIFICATE OF SERVICE

Pursuant to 42 U.S.C. § 7604(c)(3), a copy of this complaint was served on the following by U.S. mail:

Honorable Michael O. Leavitt  
Administrator  
U.S. Environmental Protection Agency  
Ariel Rios Building  
1200 Pennsylvania Ave, NW  
Washington, DC 20460.

Honorable John Ashcroft  
Attorney General  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, D.C. 20530-0001

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Richard C. Salhi