

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2**

In the Matter of:

Puerto Rico Electric Power Authority and
Genera PR, LLC
Palo Seco Steam Power Plant
Toa Baja, Puerto Rico,

Respondents,

In a proceeding under
Section 113(a) of the Clean Air Act

NOTICE OF VIOLATION
CAA-02-2024-1306

The United States Environmental Protection Agency (“EPA”) Region 2’s Director of the Caribbean Environmental Protection Division (“CEPD Director”) issues this Notice of Violation (“NOV”) consistent with Sections 113(a)(1), and (a)(3) of the Clean Air Act (“CAA” or the “Act”), 42 U.S.C. §§ 7413(a)(1), (3). EPA finds that the Puerto Rico Electric Power Authority (“PREPA”) and Genera PR, LLC (“Genera”) (together, “Respondents”) have violated the Act at PREPA’s Palo Seco Steam Power Plant as follows:

STATUTORY AND REGULATORY BACKGROUND

1. Section 302(e) of the Act, 42 U.S.C. § 7602(e), provides that the term “person” includes an individual, corporation, partnership, association, state, municipality, political subdivision of a state, and any agency, department, or instrumentality of the United States and any officer, agent, or employee thereof.
2. Section 113(a)(1) of the Act, 42 U.S.C. § 7413(a)(1), provides, in relevant part, that whenever the EPA Administrator finds, on the basis of any information available to the Administrator, that any person has violated or is in violation of any requirement or prohibition of a State Implementation Plan (“SIP”), the Administrator shall notify the person and the state in which the

SIP applies of such finding. Section 113(a)(1) further states that 30 days after providing such notice, the EPA Administrator may take various actions to address the violation(s).

3. Section 113(a)(3) of the Act, 42 U.S.C. § 7413(a)(3), authorizes the Administrator to, among other actions, issue an administrative penalty order or bring a civil action against any person whenever, on the basis of any information available to EPA, the Administrator finds that such person has violated, or is in violation of, any requirement or prohibition of Title I of the Act.
4. Section 114 of the Act, 42 U.S.C. § 7414, authorizes the EPA Administrator to require sampling of emissions, monitoring, record-keeping, and reporting of information, among other things, to enable him or her to carry out any provision of the Act (except certain provisions in Title II) and to assess compliance with, among other requirements, any regulations promulgated under Section 112 of the Act, 42 U.S.C. § 7412.
5. The CEPD Director is authorized by the EPA Administrator through the EPA Region 2 Regional Administrator to make findings of violations, issue notices thereof, and gather information, pursuant to Sections 113 and 114 of the Act. *See* EPA Delegation of Authority 7-6-A; EPA Region 2 Delegation of Authority 7-6-A; EPA Delegation of Authority 7-8; EPA Region 2 Delegation of Authority 7-8.

New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants

6. Section 111 of the Act authorizes EPA to develop technology-based standards that apply to specific categories of stationary sources. These standards are referred to as the New Source Performance Standards (“NSPS”), which are promulgated under 40 C.F.R. Part 60. The Act provides that after the effective date of any emission limit or other standard promulgated pursuant to Section 111, it shall be unlawful for any owner or operator of a new source to operate that source in violation of the emission limit or standard. *See* 42 U.S.C. §§ 7411(e); 7411(h)(5).

A “new source” is one that is constructed or modified after the regulations are issued. *See id.* § 7411(a)(2).

7. 40 C.F.R. Part 60 Subpart KKKK regulates stationary combustion turbines constructed after February 2005 with a heat input at peak load of equal to or greater than 10 million British Thermal Units (“MMBtu”) per hour, imposing emission limits on nitrogen oxides (“NO_x”) and sulfur dioxide (“SO₂”).
8. Subpart KKKK, at 40 C.F.R. § 60.4400, requires a regulated entity to conduct annual performance testing (no more than 14 calendar months following the previous performance test) for demonstrating compliance with its NO_x limit.
9. Section 112(d) of the Act requires EPA to promulgate regulations establishing national emission standards for hazardous air pollutants (“NESHAPs”) for certain categories of major sources. NESHAPs promulgated under the CAA as amended in 1990 are set forth in 40 C.F.R. Part 63. Part 63 NESHAPs are sometimes known as maximum achievable control technology (“MACT”) standards, because Section 112(d) of the CAA, as amended in 1990, directs EPA to promulgate emissions standards based on the MACT. *See* 42 U.S.C. § 7412(d)(2).
10. 40 C.F.R. Part 63 Subpart YYYY establishes NESHAPs and operating limitations for stationary combustion turbines located at major sources of emissions of hazardous air pollutants. Sources must demonstrate initial and continuous compliance with the emission and operating limitations. *See* 40 C.F.R. § 63.6080.
11. 40 C.F.R. § 63.6110 explains when a regulated entity must conduct initial performance tests or other initial compliance demonstrations, and 40 C.F.R. § 63.7 provides performance testing requirements.

12. After initial performance testing is completed, annual performance testing must be completed pursuant to Table 3 of 40 C.F.R. Part 63 Subpart YYYY. *See* 40 C.F.R. § 63.6115.

Puerto Rico Regulations for the Control of Atmospheric Pollution

13. Pursuant to the Puerto Rico Environmental Public Policy Act Law No. 9 of June 18, 1970¹, the Puerto Rico Environmental Quality Board (“EQB”) developed the Puerto Rico Regulations for the Control of Atmospheric Pollution (“RCAP”).
14. Law 122 of December 18, 2017 established that EQB’s functions, services, programs and/or powers were transferred to the Puerto Rico Department of Natural and Environmental Resources (“DNER”).²
15. On January 22, 1997, EPA approved DNER’s RCAP, as submitted to EPA on September 29, 1995, as part of the federally approved SIP for the Commonwealth of Puerto Rico. 62 Fed. Reg. 3211.
16. RCAP Rule 102 establishes that “federally enforceable” means all limitations and conditions that are enforceable by the Administrator and citizens under the Act or that are enforceable under other statutes administered by the Administrator. Examples of federally enforceable limitations and conditions include, but are not limited to:
 - a. Emission standards, alternative emission standards, alternative emission limitations, and equivalent emission limitations established pursuant to Section 112 of the Act as amended in 1990;
 - b. New source performance standards established pursuant to Section 111 of the Act, and emission standards established pursuant to Section 112 of the Act before it was amended in 1990.

¹ Repealed and superseded by Act No. 416 of September 22, 2004.

² All actions taken by the EQB prior to December 18, 2017 will be referenced as actions taken by the DNER.

- c. All terms and conditions in a Title V permit, including any provisions that limit a source's potential to emit, unless expressly designated as not federally enforceable.
- d. All limitations and requirements under the applicable implementation plan for the Commonwealth of Puerto Rico.
- e. Limitations and conditions that are part of a federal construction permit issued under 40 C.F.R. § 52.21 or any construction permit issued under regulations approved by the EPA in accordance with 40 C.F.R. Part 51; and
- f. Limitations and conditions in a state rule or program that have been approved by the EPA under Subpart E of 40 C.F.R. Part 63 for the purposes of implementing and enforcing Section 112.

17. RCAP Rule 102 establishes that “responsible official” means the following:

- a. For a corporation: a president, secretary, treasurer, or vice-president of the corporation in charge of a principal business function, or any other person who performs similar policy or decision-making functions for the corporation, or a duly authorized representative of such person if the representative is responsible for the overall operation of one or more manufacturing, production, or operating facilities applying for or subject to a permit and either:
 - i. The facilities employ more than 250 persons or have gross annual sales lb* or expenditures exceeding \$25 million (in second quarter 1980 dollars); or
 - ii. The delegation of authority to such representatives is approved in advance by DNER.
- b. For a municipality: a state, federal, or other public agency, either a principal executive official or ranked elected official. For the purpose of the RCAP, a principal executive

officer of a federal agency includes the chief executive officer having responsibility for the overall operations of the principal geographic unit of the agency (*e.g.*, a Regional Administrator of EPA).

18. RCAP 602 establishes that an owner or operator of a Title V source shall submit to DNER a timely and complete permit application.
19. RCAP Rule 603(d) establishes that DNER may include a permit shield provision stating that compliance with the conditions of a permit shall be deemed compliance with any applicable requirements as of the date of permit issuance, provided that such applicable requirements are included and are specifically identified in the permit or DNER, in acting on the permit application or revision, determines in writing that other requirements specifically identified are not applicable to the source, and the permit includes the determination or concise summary thereof.
20. RCAP 605(b) establishes the requirements for issuing a Title V source permit, including that no Title V source may operate after the time that it is required to submit a timely and complete permit application. However, if the source submits a timely and complete application for permit issuance (including for renewal), the source's failure to have a Title V permit is not a violation of Rule 605(b) until DNER takes final action on the permit application.

FINDINGS OF FACT

21. PREPA, a public corporation and government instrumentality organized pursuant to the laws of the Commonwealth of Puerto Rico, owns a power generation plant (the “Plant” or “Palo Seco Power Complex”) located at State Road PR-165, Km. 30.8, Toa Baja, Puerto Rico.

22. On May 31, 2023, PREPA sent a letter to EPA (the “May 31, 2023 letter”) to notify EPA of an agreement whereby Genera would be the operator of PREPA’s “legacy generation assets,” while PREPA retained ownership of these assets.
23. Pursuant to the Puerto Rico Thermal Generation Facilities Operation and Maintenance Agreement, dated January 24, 2023 (the “O&M Agreement”), Genera assumed its operator status starting on July 1, 2023.
24. According to the May 31, 2023 letter, the Palo Seco MobilePacs (“MobilePacs”), which are part of the Palo Seco Power Complex, are among the “legacy generation assets” under the O&M Agreement.
25. On November 9, 2022, and pursuant to the RCAP, DNER issued a permit to construct an air emission source for the MobilePacs, bearing permit number PFE-70-0120-0010-I-II-C (the “November 2022 permit”).
26. On November 10, 2022, PREPA applied for a modification of the Palo Seco plant’s Title V Permit (bearing permit number PFE-TV-4911-70-0319-0239) to include the parameters established in the November 2022 permit.
27. On November 23, 2022, and pursuant to RCAP Sections 602 and 605, DNER deemed the Palo Seco plant’s Title V Permit modification application as complete and issued a “Title V permit modification application shield.”
28. Section IV.13 of the November 2022 permit establishes a fuel limit of 12,281,995 gallons of ultra-low sulfur diesel (defined as 15 ppm or 0.0015% by sulfur weight) during any consecutive 12-month rolling period.
29. On October 2, 2023, Genera sent a letter to EPA and DNER via email (the “October 2 email”), in which it requested an increase in the fuel consumption limit in its current permit, based on the

fact that emissions testing completed in July 2022 demonstrated that the MobilePacs' actual emissions are lower than the projected emissions listed in the permit.

30. The current limits in the permit are also the basis for EPA's issuance of a PSD non-applicability analysis.
31. Genera explained in the October 2 email that under the current circumstances facing Puerto Rico's electric grid, continued operation of the MobilePacs is critical, because repairs to baseload units such as Aguirre 1 and Palo Seco 4 are behind schedule, and Puerto Rico has lost approximately 650 MW from those two units.
32. On October 3, 2023, Genera sent an email to EPA which included a comparison between the MobilePacs permit emission limits and the results of the July 2022 performance testing. Genera reported that the MobilePacs consumed 15,111,109 gallons from November 2022 through September 2023.
33. The November 2022 permit requires that if a change in the "responsible official" at the Facility occurs, the new "responsible official" must submit a permit revision request no later than 30 days after the change, and include a sworn affidavit to comply with all the conditions established in the permit.
34. On October 19, 2023, DNER confirmed to EPA via email that no request to change the Palo Seco Power Complex's responsible official has been submitted by Genera or PREPA.
35. The November 2022 permit establishes the specific conditions applicable to the MobilePacs for complying with the NSPS Subpart KKKK and the NESHAP Subpart YYYY.
36. On July 30, 2022, a performance test was conducted on the MobilePacs to determining compliance with the emission limits contained in the NSPS Subpart KKKK and the NESHAP Subpart YYYY.

37. On October 31, 2023, Genera sent a letter to EPA via email which included performance testing schedules for several of the power generation units. According to the letter, performance testing for the MobilePacs is scheduled to be conducted from November 27 through December 1, 2023.

CONCLUSIONS OF LAW

Based on the Findings of Facts set forth above, EPA reaches the following conclusions of law:

38. Respondents are “persons” as defined by Section 302(e) of the CAA, 42 U.S.C. § 7602(e), and the Puerto Rico RCAP Rule 102.
39. PREPA is the “owner” and Genera is the “operator” of the Plant within the meaning of the Puerto Rico RCAP Rule 102.
40. Genera is the “responsible official” of the Plant within the meaning of the Puerto Rico RCAP Rule 102.
41. Respondents violated the fuel consumption limit for the MobilePacs established in the November 2022 Permit.
42. Respondents violated the November 2022 Permit condition that required them to request a revision of the permit no later than 30 days after a change of the Plant’s responsible official.
43. Respondents violated the NSPS, 40 C.F.R. part 60 subpart KKKK, because it failed to conduct annual testing of the MobilePacs by no later than September 30, 2023 (no more than 14 months after the previous annual test), in contravention of 40 C.F.R. § 60.4400.
44. Respondents violated the NESHAP, 40 C.F.R. part 63 subpart YYYY, by failing to conduct annual performance testing of the MobilePacs by no later than July 30, 2023, in contravention of 40 C.F.R. § 63.6115 and Table 3.

ENFORCEMENT AUTHORITY

Sections 113(a)(1) and (3) of the CAA, 42 U.S.C. §§ 7413(a)(1) and (3), provide that the Administrator may bring a civil action whenever, on the basis of any information available to the Administrator, the Administrator finds that any person has violated or is in violation of any requirement, rule, or permit issued under the provisions of Section 113. The Administrator shall notify the person and the state in which the plan applies of such a finding. At any time after the expiration of thirty days following the date this Notice of Violation is issued, the Administrator may, without regard to the period of violation (subject to section 2462 of title 28):

- a. issue an order requiring such person to comply with the requirements or prohibitions of a SIP or permit;
- b. issue an administrative penalty order in accordance with CAA Section 113(d); or
- c. bring a civil action in accordance with CAA Section 113(b) for civil penalties and/or injunctive relief.

The amount of civil penalties that may be recovered for violations under the CAA and its implementing regulations is set by statute at not more than \$25,000 per day for each violation, but has been adjusted over time as required by the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. § 2461 note; Pub. L. 101-410), as amended by the Debt Collection Improvement Act of 1996, and most recently, by the Federal Civil Penalties Inflation Act Improvements Act of 2015 (28 U.S.C. § 2461 note; Pub. L. 114-74, Section 701). For civil penalties for violations that occurred after November 2, 2015, and are assessed on or after January 6, 2023, this daily penalty maximum is adjusted to \$117,468 for judicial actions, and \$55,808 for administrative actions. *See* 40 C.F.R. Part 19, Table 1.

Furthermore, for any person who knowingly violates any requirements or prohibitions of an applicable SIP and permit for more than 30-days after the date of the issuance of an NOV, Section

113(c) of the Act provides for criminal penalties or imprisonment, or both. In addition, under Section 306 of the Act, the regulations promulgated thereunder (40 C.F.R. Part 15), and Executive Order 11738, facilities to be utilized in federal contracts, grants and loans must be in full compliance with the Act and all regulations promulgated pursuant thereto. Violation of the Act may result in the subject facility, or other facilities owned or operated by Respondents, being declared ineligible for participation in any federal contract, grant, or loan program.

PENALTY ASSESSMENT CRITERIA

Section 113(e)(1) of the Act provides that if a penalty is assessed pursuant to Section 113 of the Act, EPA or the court, as appropriate, shall, in determining the amount of the penalty to be assessed, take into consideration the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence (including evidence other than the applicable test method), payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, the seriousness of the violation, and other factors as justice may require.

Section 113(e)(2) of the Act allows EPA or the court, as appropriate, to assess a penalty for each day of violation. In accordance with Section 113(e)(2) of the Act, EPA will consider a violation to continue from the date the violation began until the date Respondents establish that they have achieved continuous compliance. If Respondents prove that there was an intermittent day of compliance or that the violation was not continuous in nature, EPA will reduce the penalty accordingly.

OPPORTUNITY FOR A CONFERENCE

Respondents may request a conference with EPA concerning the violations alleged in this NOV. This conference will allow Respondents an opportunity to advise the EPA of any further information it should consider with respect to the alleged violations and to present evidence bearing on the finding of

violations, on the nature of the violations, and on any efforts they may have taken or propose to take to achieve compliance. Respondents have the right to be represented by counsel. A request for a conference must be made within 10 days of receipt of this NOV. A request for a conference or other inquiries concerning the NOV should be made via electronic mail to:

Nancy Rodríguez, Chief, Enforcement and Compliance, CEPD
rodriguez.nancy@epa.gov

Alex Rivera, Enforcement Officer, CEPD
rivera.alex@epa.gov

Harish Patel, Air Compliance Branch, EPA Region 2
patel.harish@epa.gov

If you are represented by counsel, your counsel may contact:

Amanda Prentice, Assistant Regional Counsel, EPA Region 2
prentice.amanda@epa.gov

By offering the opportunity for a conference or participating in one, EPA does not waive or limit its right to any remedy available under the CAA. Also, notwithstanding this NOV and the opportunity for a conference, Respondents must comply with all applicable requirements of the CAA.

For United States Environmental Protection Agency, Region 2:

Date: 12-08-2023

HECTOR
VELEZ-CRUZ

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HECTOR VELEZ-CRUZ
Date: 2023.12.08
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Hector L. Velez Cruz, Esq
Acting Director
Caribbean Environmental Protection Division
U.S. Environmental Protection Agency - Region 2

To: Daniel Hernandez, Genera PR Vice President of Operations

daniel@genera-pr.com

Katiuska Bolaños-Lugo, Genera PR Chief Regulatory Officer

kbolanos@genera-pr.com

Ruth Dones-Ramos, PREPA Division Chief

ruth.dones@prepa.pr.gov

cc: Amarilys Rosario, Air Quality Area Manager

Puerto Rico Department of Natural and Environmental Resources

amarilysrosario@drna.pr.gov

Erick Rocher Vazquez, Genera PR Regulatory Department

erocher@genera-pr.com

Indira Mohip-Colón, Genera PR Environmental Compliance Department

indira.mohip@genera-pr.com