



June 7, 2024

**Via e-mail to** [Taylor.Dailey@dnr.iowa.gov](mailto:Taylor.Dailey@dnr.iowa.gov)

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**Re: Comments on DNR's Proposal to Renew the Title V Operating Permit for MidAmerican Energy Company – George Neal South, Permit No. 97-TV-003R4 DRAFT**

Dear DNR Representative Dailey:

The Environmental Law and Policy Center, Iowa Environmental Council, and Sierra Club (collectively, "Environmental Commenters") respectfully submit these comments regarding the draft Title V Operating Permit for MidAmerican Energy Company – George Neal South ("Draft Permit"), published by the Iowa Department of Natural Resources ("DNR") on May 9, 2024. The Draft Permit does not include clear conditions governing compliance with the new mercury and air toxics standard, does not plainly indicate how compliance with particulate matter emissions limits generally is achieved, and contains an unlawful affirmative defense to liability for exceedances of technology-based limits. We respectfully request that DNR revise the permit to fix these deficiencies.

## **I. Governing Law and Regulations**

The Clean Air Act is intended to protect and enhance the public health and public welfare of the nation.<sup>1</sup> On May 7, 2024, the U.S. Environmental Protection Agency ("EPA") published a final rule to strengthen and update the National Emission Standards for Hazardous Air Pollutants for Coal- and Oil-Fired Electric Utility Steam Generating Units, otherwise known as the Mercury and Air Toxics Standards ("MATS") for power plants.<sup>2</sup> Among other changes, the revised MATS reduces the emission standard for filterable particulate matter (fPM) and requires regulated sources like the

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<sup>1</sup> See 42 U.S.C. § 7401(b)(1).

<sup>2</sup> U.S. EPA, National Emission Standard for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units Review of the Residual Risk and Technology Review, 89 Fed. Reg. 38,505 (May 7, 2024), available at: <https://www.federalregister.gov/documents/2024/05/07/2024-09148/national-emission-standards-for-hazardous-air-pollutants-coal--and-oil-fired-electric-utility-steam>

George Neal South plant to demonstrate compliance with the fPM standard by using PM continuous emission monitoring systems (CEMS).<sup>3</sup> Timely compliance with the MATS is necessary to prevent adverse public health impacts. For example, uncontrolled releases of mercury from coal-burning power plants can damage children’s developing nervous systems, reducing their ability to think and learn.<sup>4</sup> Releases of other toxic air pollutants from these plants can cause a range of dangerous health problems in adults, from cancer to respiratory illnesses.<sup>5</sup>

State air quality agencies that are delegated implementation authority under the Clean Air Act (such as DNR) develop and implement plans by which they ensure attainment of the federal National Ambient Air Quality Standards and other standards. The air quality standards contained in each implementation plan are applied to specific major emissions sources through the “Title V” permitting program.<sup>6</sup> Major stationary sources of air pollution are prohibited from operating except in compliance with an operating permit issued under Title V of the Act.<sup>7</sup> Title V permits must require compliance with all applicable federal, state, and local regulations in one legally enforceable document, thereby ensuring that all Clean Air Act requirements are applied to the facility.<sup>8</sup> These permits must include emission limitations and other conditions necessary to assure a facility’s continuous compliance with all applicable requirements.<sup>9</sup> Title V permits must also contain monitoring, recordkeeping, reporting, and other requirements to assure continuous compliance by sources with emission control requirements.<sup>10</sup>

As EPA explained in the preamble to its Title V Program rule, “regulations are often written to cover broad source categories,” leaving it “unclear which, and how, general regulations apply to a source.”<sup>11</sup> Title V permits bridge this gap by clarifying and making more readily enforceable a source’s pollution control requirements, thus, providing an easy way “to establish whether a source is in compliance.”<sup>12</sup> To this end, the provisions of a Title V permit must be sufficiently clear and specific to ensure that all applicable requirements are enforceable as a practical matter. An interested person should be able to understand from the permit how much pollution the plant is legally authorized to emit and how the source is monitored for compliance.

EPA delegated to Iowa the authority to administer the Title V operating permit program within the State. Accordingly, Title V permits issued by DNR must include

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> See 42 U.S.C. §§ 7410, 7661.

<sup>7</sup> 42 U.S.C. § 7661a(a); 40 C.F.R. § 70.5(a).

<sup>8</sup> See 42 U.S.C. §§ 7661a(a) and 7661c(a); 40 C.F.R. § 70.6(a)(1).

<sup>9</sup> See *id.*

<sup>10</sup> See 40 C.F.R. Part 70.

<sup>11</sup> U.S. EPA, Operating Permit Program, 57 Fed. Reg. 32,250, 32,251 (July 21, 1992).

<sup>12</sup> *Id.*

enforceable emission limitations and standards and such other conditions as are necessary to assure compliance with all applicable requirements at the time of permit issuance.<sup>13</sup> “Applicable requirements” include standards or other requirements of the Clean Air Act that are codified in state or federal laws such as regulations that have been promulgated or approved by EPA through rulemaking at the time of permit issuance but that have future effective compliance dates, as well as standards that are effective at the time of permit issuance.<sup>14</sup>

## **II. The Draft Permit Fails to Include Clear Conditions Governing Compliance with the New Mercury and Air Toxics Standard.**

As discussed above, Title V permits are the mechanisms by which regulators consolidate and clarify all Clean Air Act requirements for a particular source. Accordingly, a Title V permit must contain sufficient information to allow a reader to compare the permit to the compliance reports for a facility and determine if there are any violations. Specifically, it must contain more than mere citations to applicable requirements; it must provide the substance of each requirement and serve as an “easy way to establish whether a source is in compliance with regulations under the Act.”<sup>15</sup>

Here, the Draft Permit fails to satisfy these requirements. Despite EPA’s new rule governing the emission of mercury and other air toxics from power plants, the Draft Permit does not appear to incorporate any additional restrictions on the operation of the George Neal South plant that are designed to achieve compliance with the new MATS standard, nor does it identify any retrofits that are needed to meet the new standard. While the Draft Permit does refer to the relevant regulatory provision, it does not identify any specific compliance options that George Neal South intends to utilize in order to meet the new standard.

The final permit must allow the public to understand how MidAmerican will comply with the new standard and to rely on enforceable permit conditions that specify emission limits and monitoring options. As noticed for public comment, the Draft Permit does not incorporate the revised MATS requirements explicitly; instead, Page 18 of the Draft Permit references 40 CFR 63 Subpart UUUUU, which is insufficient. Given its lack of detail regarding MATS compliance and monitoring, the Draft Permit should be revised to include the specific, enforceable limits necessary to ensure compliance with the MATS rule.

## **III. The Draft Permit’s Particulate Matter Compliance Method Lacks Practical Enforceability**

The Draft Permit must be sufficiently clear and specific to ensure that all

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<sup>13</sup> See 42 U.S.C. § 7661c(a); 40 C.F.R. § 70.6(a)(1).

<sup>14</sup> See 40 C.F.R. § 70.2.

<sup>15</sup> 57 Fed. Reg. at 32,251.

applicable requirements are enforceable as a practical matter. As stated by EPA, the requirement of "practical enforceability" can be described as follows:

A permit is enforceable as a practical matter (or practically enforceable) if permit conditions establish a clear legal obligation for the source [and] allow compliance to be verified. Providing the source with clear information goes beyond identifying the applicable requirement. It is also important that permit conditions be unambiguous and do not contain language which may intentionally or unintentionally prevent enforcement.<sup>16</sup>

It is not clear in the Draft Permit how the permittee shall comply with the particulate matter limits generally. For example, Page 13 of the Draft Permit documents that sulfur dioxide and nitrogen dioxide emissions limits shall be measured by CEMS, along with the relevant averaging period, but there is no similar documentation regarding the compliance demonstration method for PM. The Draft Permit should be revised accordingly to avoid this vague status quo, which inhibits practical enforceability.

#### **IV. The Draft Permit Contains an Unlawful Affirmative Defense to Liability for Exceedances of Technology-Based Limits.**

The Draft Permit provides an unlawful "affirmative defense" to liability in an enforcement action "non-compliance with technology based limitations" if the violation is due to an "emergency."<sup>17</sup> The Draft Permit defines emergency broadly to include "unforeseeable events beyond the control of the source," such as malfunction periods.<sup>18</sup> This affirmative defense is identical to EPA's now-repealed affirmative defense,<sup>19</sup> and would preclude a federal court in an enforcement action from finding liability and ordering penalties, if the relevant factors are met. The Draft Permit's affirmative defense provision is contrary to the Clean Air Act, which provides federal district courts—not states or EPA—with exclusive jurisdiction to "apply any appropriate civil penalties" after

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<sup>16</sup> EPA Region 9 Title V Permit Review Guidelines, Sept. 9, 1999, p. 111-46, quoted in: *In the Matter of Midwest Generation LLC, Joliet Generating Station*, EPA Administrator Order (June 24, 2005) at 17-18, available at [https://www.epa.gov/sites/default/files/2015-08/documents/midwest\\_generation\\_joliet\\_decision2004.pdf](https://www.epa.gov/sites/default/files/2015-08/documents/midwest_generation_joliet_decision2004.pdf).

<sup>17</sup> Draft Permit at 85 (citing 567 IAC 22.108(16)).

<sup>18</sup> Draft Permit at 85.

<sup>19</sup> See 40 C.F.R. §§ 70.6(g), 71.6(g) (2014), *repealed by* U.S. EPA, Removal of Title V Emergency Affirmative Defense Provisions from State Operating Permit Programs and Federal Operating Permit Program, 88 Fed. Reg. 47,054 (July 21, 2023).

considering the mandatory statutory factors in citizen suits brought to enforce applicable emission limits and standards.<sup>20</sup>

In July 2023, EPA confirmed this interpretation when the agency finalized its removal of an identical affirmative defense for emergencies from EPA’s federal Title V regulations.<sup>21</sup> In doing so, EPA made clear that affirmative defense provisions in Title V permits are “inconsistent with the enforcement structure of the [Clean Air Act] and thus legally impermissible,” because they “operate to limit a court’s authority or discretion to determine the appropriate remedy in an enforcement action.”<sup>22</sup> In the final rule removing affirmative defense provisions from EPA’s federal operating permit regulations, EPA made clear that states “must also remove title V-based affirmative defense provisions contained in individual operating permits.”<sup>23</sup> EPA further explained that:

any impermissible affirmative defense provisions within individual operating permits that are based on a title V authority and that apply to federally-enforceable requirements will need to be removed. As explained in the 2016 proposal, the EPA expects that any necessary permit changes should occur in the ordinary course of business, such as during periodic permit renewals or revisions. *At the latest*, states would be expected to remove affirmative defense provisions from individual permits by the next periodic permit renewal that occurs following either (1) the effective date of this rule (for permit terms *based on* 40 CFR 70.6(g) or 71.6(g)) or (2) the EPA’s approval of state program revisions (for permit terms based on a state affirmative defense provision).<sup>24</sup>

Moreover, in that rulemaking, EPA specifically identified 567 IAC 22.108(16)—DNR’s cited authority for the Draft Permit—as being an impermissible affirmative defense.<sup>25</sup>

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<sup>20</sup> 42 U.S.C. § 7604(a); *id.* § 7413(e)(1) (providing mandatory factors for court to consider “[i]n determining the amount of any penalty to be assessed under this section or section 7604(a)”); *see also Nat. Res. Def. Council v. EPA*, 749 F.3d 1055, 1063 (D.C. Cir. 2014) (holding that § 7604(a) “creates a private right of action, and as the Supreme Court has explained, ‘the Judiciary, not any executive agency, determines “the scope”—including the available remedies—“of judicial power vested by” statutes establishing private rights of action’”) (*quoting City of Arlington v. FCC*, 133 S.Ct. 1863, 1871 n.3 (2013)).

<sup>21</sup> 88 Fed. Reg. 47,054 (July 21, 2023).

<sup>22</sup> *Id.* at 47,032, 47,039.

<sup>23</sup> *Id.* at 47,046.

<sup>24</sup> *Id.* at 47,031 (emphasis added); *see also id.* at 47,041 (“It is also important to reiterate that the EPA is basing the current action on its interpretation of the CAA in light of relevant caselaw indicating that these affirmative defense provisions must be removed because they are inconsistent with the enforcement structure of the CAA.”)

<sup>25</sup> Ex. 1, Removal of Title V Emergency Affirmative Defense Provisions from State Operating Permit Programs and Federal Operating Permit Program, Proposed Rule, EPA-HQ-OAR-2016-0186 (*attached*).

Here, DNR must remove the emergency affirmative defense from the Draft Permit now, rather than waiting for EPA to approve any state revision to the Iowa permitting program, because 567 IAC 22.108(16) is based on EPA's now-repealed affirmative defense at 40 C.F.R. § 71.6(g). Indeed, Iowa's affirmative defense provision is identical to EPA's now-defunct federal affirmative defense.<sup>26</sup> The Draft Permit's emergency affirmative defense provision, like the federal counterpart, is unlawful and must be removed.

## V. Conclusion

Environmental Commenters respectfully request that DNR modify the Draft Permit such that it (a) incorporates the revised MATS requirements, (b) clearly demonstrates the George Neal South plant's PM emissions limits and compliance methods to foster practical enforceability, and (c) removes the unlawful affirmative defense provision. We appreciate DNR's consideration of these comments. Please do not hesitate to contact the undersigned if you would like to discuss them further.

Sincerely,

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<sup>26</sup> Compare 567 IAC 22.108(16), with 40 C.F.R. § 71.6(g) (2014).

**Removal of Title V Emergency Affirmative Defense Provisions from  
State Operating Permit Programs and Federal Operating Permit Program  
Proposed Rule  
EPA-HQ-OAR-2016-0186**

**Title V Affirmative Defense Provisions in State, Local, and Tribal Part 70 Programs**

Table 1 of this document contains a tentative list of state, local, and tribal regulations and statutes that may be affected by the EPA’s proposed rulemaking identified above. This list is intended to encompass all affirmative defense provisions contained within EPA-approved part 70 (title V) operating permit programs.<sup>1</sup> Table 2 of this document contains a tentative list of state, local, and tribal EPA-approved title V programs that do not appear to explicitly establish an affirmative defense contrary to the EPA’s interpretation of the Clean Air Act (CAA), as reflected in this proposed rulemaking. These lists do ***not*** constitute any type of determination as to the adequacy or inadequacy of any specific program provisions.

As indicated in the proposed rule identified above, the EPA is requesting comment on whether the provisions identified in Table 1 of this document, as well as any additional title V affirmative defense provisions that are not currently identified in Table 1 of this document, may be affected if the proposed rule is finalized. The EPA is presenting and soliciting comment on these lists *for informational purposes only*. For further information, see Section V.A of the preamble to the proposed rule.

**Table 1. Part 70 Programs that Appear to Contain Title V Affirmative Defense Provisions**

<b>EPA Region</b>	<b>Permitting Authority</b>	<b>Affirmative Defense Provision</b>
1	Connecticut	RCSA § 22a-174-33(p)(2)
	Maine	06-096 CMR 140(2)(AA)
	Massachusetts	310 CMR 7.00: Appendix C(16)
	Rhode Island	APCR § 29.6.11

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<sup>1</sup> This list is *not* intended to include any affirmative defense provisions contained in state regulations or statutes that are not part of an EPA-approved title V program (including state-only regulations, SIP provisions that are not included within a state’s EPA-approved title V program, or statutes that are not included within a state’s EPA-approved title V program).

**Title V Affirmative Defense Provisions in State, Local, and Tribal Part 70 Programs**

<b>EPA Region</b>	<b>Permitting Authority</b>	<b>Affirmative Defense Provision</b>
2	New Jersey	NJAC 7:27-22.3(nn); NJAC 7:27-22.16(l)
	New York	6 NYCRR 201-1.5; 6 NYCRR 201-6.5(c)
	Puerto Rico	Regla 603, Reglamento para el Control de la Contaminacion Atmosferica
	U.S. Virgin Islands	12 Virgin Islands R. & Regs. § 206-71(d)
3	Delaware	7 DAC 1130.6.7
	District of Columbia	DCMR 20-302.7
	Maryland	COMAR 26.11.03.24
	Virginia	9 VAC 5-80-250
	West Virginia	W. Va. CSR § 45-30-5.7
4	Alabama	ADEM Admin. Code r. 335-3-16-.11(2)
	AL—Huntsville	Huntsville Air Pollution Control R. & Regs. § 3.3.8(b)
	AL—Jefferson Co.	Jefferson Co. Air Pollution Control R. & Regs. § 18.11.2
	Florida	F.A.C. 62-213.440(1)(d)5
	Kentucky	401 KAR 52:020, § 24
	Kentucky—Louisville	LMAPCD Regulation 2.16 § 4.7
	Mississippi	11 Miss. Admin. Code Pt. 2, R. 6.3.G
	South Carolina	S.C. Code Regs. 61-62.70 § 70.6(g)
	Tennessee	Tenn. Comp. R. & Regs. 1200-03-09-.02(11)(e)7
	TN—Chattanooga-Hamilton Co.	Chattanooga City Code § 4-57(g)
	TN—Knox Co.	Knox Co. Air Quality Mgmt. Regs. § 25.70.F.7
	TN—Nashville-Davidson Co.	Metropolitan Health Dept., Div. Pollution Control Regs. § 13-3(g)
	TN—Memphis-Shelby Co.	City of Memphis § 16-77; Shelby County § 3-5



**Title V Affirmative Defense Provisions in State, Local, and Tribal Part 70 Programs**

<b>EPA Region</b>	<b>Permitting Authority</b>	<b>Affirmative Defense Provision</b>
5	Illinois	415 ILCS 5/39.5.7.k
	Indiana	326 IAC 2-7-16
	Michigan	MCL 324.5527
	Minnesota	Minn. R. 7007.1850
	Ohio	OAC 3745-77-07(G)
6	Arkansas	ACA 014.01.93-001 Reg. 26.707
	Louisiana	LAC 33.III.507.J
	New Mexico	20.2.70.304 NMAC
	NM--Albuquerque	20.11.42.12(E) NMAC
	Oklahoma	OAC 252:100-8-6(e)
7	Iowa	567 IAC 22.108(16)
	Kansas	KAR 28-19-512(d)
	Missouri	10 CSR 10-6.065(6)(C)7
	Nebraska	129 NAC Ch. 11
	NE—Lincoln-Lancaster Co.	Lincoln-Lancaster Co. Air Pollution Control Program Art. 2 § 11
	NE—City of Omaha	Omaha Municipal Code § 41-2
8	Colorado	5 CCR 1001-5, Part C, § VII
	Montana	ARM 17.8.1214(5) to (8)
	North Dakota	N.D.A.C. 33-15-14-06.5.g
	South Dakota	ARSD 74:36:05:16.01(18)
	Southern Ute Tribe	Reservation Air Code § 2-117
	Utah	Utah Admin. Code R307-415-6g
	Wyoming	WAQSR Ch. 6, § 3(l)

**Title V Affirmative Defense Provisions in State, Local, and Tribal Part 70 Programs**

<b>EPA Region</b>	<b>Permitting Authority</b>	<b>Affirmative Defense Provision</b>
9	Arizona	A.A.C. R18-2-306.E
	AZ—Maricopa Co.	Maricopa Co. Air Pollution Control Regs. Rule 130
	AZ—Pima Co.	Pima Co. Code §§ 17.12.180.E, 17.12.185.D
	AZ—Pinal Co.	Pinal Co. AQCD Reg. 3-1-081.E
	CA—Sacramento Metropolitan	Sacramento Metropolitan AQMD Rule 207 § 414
	CA—San Joaquin Valley	San Joaquin Valley Unified APCD Rule 2520 § 13.4
	CA—San Luis Obispo Co.	San Luis Obispo Co. APCD Rule 216 § L.5
	CA—Santa Barbara Co.	Santa Barbara Co. APCD Rule 1303 § F
	CA—South Coast	South Coast AQMD Rule 3002(g)
	CA—Ventura Co.	Ventura Co. APCD Rule 33.9 § D
	CA—Yolo-Solano	Yolo-Solano AQMD Rule 3.8 § 314
	Hawaii	HAR § 11-60.1-16.5
Nevada	NAC 445B.326	
10	Alaska	18 AAC 50.235
	Idaho	IDAPA 58.01.01.332
	Oregon	OAR 340-214-0360
	OR—Lane Regional	LRAPA § 36-040
	Washington (including local air authorities)	WAC 173-401-645
	WA—EFSEC	WAC 463-78-005(2)

**Title V Affirmative Defense Provisions in State, Local, and Tribal Part 70 Programs**

**Table 2. Part 70 Programs that Do Not Appear to Contain Title V Affirmative Defense Provisions**

<b>EPA Region</b>	<b>Permitting Authority</b>
1	New Hampshire
	Vermont
3	Pennsylvania
	PA—Allegheny Co.
	PA—Philadelphia Co.
4	Georgia
	North Carolina
	NC—Forsyth Co.
	NC—Mecklenburg Co.
	NC—Western
5	Wisconsin
6	Texas

<b>EPA Region</b>	<b>Permitting Authority</b>
9	CA—Amador Co.
	CA—Amador Co.
	CA—Antelope Valley
	CA—Bay Area
	CA—Butte Co.
	CA—Calaveras Co.
	CA—Colusa Co.
	CA—El Dorado Co.
	CA—Feather River Co.
	CA—Glenn Co.
	CA—Great Basin
	CA—Imperial Co.
	CA—Eastern Kern Co.
	CA—Lake Co.
	CA—Lassen Co.
	CA—Mariposa Co.

<b>EPA Region</b>	<b>Permitting Authority</b>
9	CA—Mendocino Co.
	CA—Modoc Co.
	CA—Mojave Desert
	CA—Monterey Bay
	CA—North Coast
	CA—Northern Sierra
	CA—Northern Sonoma Co.
	CA—Placer Co.
	CA—San Diego Co.
	CA—Shasta Co.
	CA—Siskiyou Co.
	CA—Tehama Co.
	CA—Tuolumne Co.
	NV—Clark Co.
NV—Washoe Co.	