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August 29, 2016

Mr. David S. Small, Secretary  
State of Delaware  
Department of Natural Resources and Environmental Control  
89 Kings Highway  
Dover, DE 19901

Re: Harrison Power Station;  
Section 126 Petition.

Dear Secretary Small:

Your August 8, 2016, petition pursuant to Section 126 of the federal Clean Air Act (CAA) regarding the Harrison Power Station includes several matters that are of significant concern to the Midwest Ozone Group (MOG). While MOG will defer to the owner of the Harrison Power Station on matters specific to that plant, we respectfully disagree with the position of your agency that the State of Delaware is entitled to pursue additional NOx emission reductions on any upwind source when all of Delaware's monitors have three year measured design values below the 2008 and 2015 ozone National Ambient Air Quality Standard (NAAQS).

MOG is an affiliation of companies, trade organizations, and associations which have drawn upon their collective resources to advance the objective of seeking solutions to the development of a legally and technically sound national ambient air quality program. The primary goal of MOG is to work with policy makers in evaluating air quality policies through the use of sound science. MOG has been actively engaged in a variety of issues and initiatives of the United States Environmental Protection Agency (USEPA) related to the development and implementation of air quality policy including not only the development of transport rules, but also related NAAQS standards, petitions under §§176A and 126 of the CAA and the development of state-based alternatives to USEPA transport rules. MOG members and participants<sup>1</sup> operate approximately 85,000 MW of coal-fired and coal refuse-fired generation in

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<sup>1</sup> The members of and participants in the Midwest Ozone Group include: American Electric Power, American Forest & Paper Association, Ameren, Alcoa, ARIPPA, Citizens Energy Group, Council of Industrial Boiler Owners, Duke Energy, East Kentucky Power Cooperative,

more than ten states and are concerned about the impact of interstate air pollution rules on their facilities, their employees, their contractors, and the consumers of their electric power.

MOG's concerns regarding the Delaware petition go to the fundamental premise behind CAA §126 – to provide a carefully crafted mechanism by which states can resolve disputes related to the interstate transport of air pollutants as they relate to significant contribution to a nonattainment or maintenance problem. The basic premise of CAA §126 as applied in this case is that Delaware must first demonstrate that it has any ozone non-attainment or maintenance problems before it can assert a claim against an upwind source. See CAA §§126(b) and 110(a)(2)(D)(ii). As we will point out in this letter, there is no legitimate basis for Delaware to make a claim under CAA §126 and, therefore, this petition, and others like it, filed on behalf of the State of Delaware must fail.

The following are some, but certainly not all, of the deficiencies in Delaware's CAA §126 petition filed against the Harrison Power Station that render it fatally defective.

**1. Delaware's current ozone air quality is already measuring attainment of the 2008 (75 ppb) and 2015 (70 ppb) ozone NAAQS.**

On July 29, 2016, USEPA released its latest compilation of 8-hour ozone design values and the annual 4<sup>th</sup> highest maximum values for all monitors in the U.S. for recent years.<sup>2</sup>

The most recent USEPA (2013-2015) design values for the Delaware monitoring stations when compared to either the 2008 (75 ppb) or 2015 (70 ppb) ozone NAAQS, show that all design values are significantly below both the 2008 and 2015 ozone NAAQS. Of the seven monitors, two have indication of data completeness issues but still show attainment of both NAAQS. These two values are denoted with an asterisk (\*) in the table below.

Specifically, the following are the 2013-2015 design values for all Delaware monitors compared to the 2008 and 2015 ozone NAAQS:

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FirstEnergy, Indiana Energy Association, LGE / KU, Ohio Utility Group, Olympus Power, and the Springfield (IL) City Water P&L.

<sup>2</sup> [https://www.epa.gov/sites/production/files/2016-07/ozone\\_designvalues\\_20132015\\_final\\_07\\_29\\_16.xlsx](https://www.epa.gov/sites/production/files/2016-07/ozone_designvalues_20132015_final_07_29_16.xlsx)

Monitor	2013-2015 Design Values (ppb)	2008 NAAQS (ppb)	2015 NAAQS (ppb)
Kent (100010002)	65	75.9	70.9
New Castle (100031007)	66	75.9	70.9
New Castle (100031010)	69*	75.9	70.9
New Castle (100031013)	68	75.9	70.9
New Castle (100032004)	69*	75.9	70.9
Sussex (100051002)	64	75.9	70.9
Sussex (100051003)	69	75.9	70.9

Without exception the 2013-2015 design values for all monitors in Delaware are significantly lower than both the 2008 (75 ppb) and 2015 (70 ppb) NAAQS standards.<sup>3</sup>

**2. USEPA projects that in 2017 all Delaware monitors will also attain and maintain both the 2008 75 ppb and 2015 70 ppb ozone NAAQS.**

Data generated by USEPA in support of its CSAPR Update<sup>4</sup> projects the following design values for all Delaware monitors in 2017:

Monitor	2017 Design Values (ppb)
Kent (100010002)	65.3
New Castle (100031007)	65.9
New Castle (100031010)	68.8
New Castle (100031013)	68.3
New Castle (100032004)	65.9
Sussex (100051002)	67.3
Sussex (100051003)	69.7

Again, all of Delaware’s monitors have predicted 2017 design values that are well below the attainment levels for both the 2008 (75 ppb) and 2015 (70 ppb) ozone NAAQS.

**3. USEPA itself has determined that Delaware does not have any ozone nonattainment or maintenance areas.**

USEPA’s CSAPR Update made specific determinations about those portions of the

<sup>3</sup> In fact, based upon these data, Delaware can classify the entire state as being in attainment of both the 2008 and 2015 ozone NAAQS. A recommendation from Delaware to USEPA on the designations for the 2015 ozone NAAQS must be accomplished by October 1, 2016. USEPA will then make final designations by October 1, 2017.

<sup>4</sup> [https://www.epa.gov/sites/production/files/2016-07/ozone\\_designvalues\\_20132015\\_final\\_07\\_29\\_16.xlsx](https://www.epa.gov/sites/production/files/2016-07/ozone_designvalues_20132015_final_07_29_16.xlsx)

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country that have either nonattainment or maintenance concerns that USEPA believes are entitled to be addressed under CAA §110(a)(2)(D)(ii) – which sets the criteria for relief under both transport rules and CAA §126 petitions.

USEPA found that Delaware has neither nonattainment nor maintenance areas that would qualify it for relief under CAA§110(a)(2)(D)(ii). See 80 Fed. Reg. 75726 (December 3, 2015).

Moreover, USEPA determined that there was no linkage between the totality of all sources of emissions from West Virginia – where the Harrison Power Station is located – and any monitor in Delaware. 80 Fed. Reg. 75729 (December 3, 2015).<sup>5</sup>

**4. The 2015 70 ppb ozone NAAQS does not provide a basis for the petition.**

The 2015 70 ppb ozone NAAQS was, of course, finally adopted by USEPA on October 1, 2015. A memorandum of Acting Assistant Administrator McCabe also dated October 1, 2015, specifically notes that:

“Formal attainment plans for the 2015 standards are not anticipated to be due until 2020 or 2021 ...<sup>6</sup>

The memorandum goes on to explain the plan for addressing interstate ozone transport as follows:

The “Good Neighbor” provision of the CAA, section 110(a)(2)(D)(i)(I), requires upwind states to develop SIPs that prohibit emissions of pollutants in amounts that will contribute significantly to non-attainment, or interfere with maintenance of, a NAAQS in another state. These Good Neighbor SIPs are due within 3 years of promulgation of a new or revised NAAQS, meaning that transport SIPs for the 2015 ozone NAAQS will be due by October 2018.

A petition filed now under CAA §126 is clearly a premature action as it relates to the 2015 ozone NAAQS given the careful framework by which any new NAAQS is to be implemented as well as the circumstance that all measured ozone design values in Delaware show measured attainment of that standard.

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<sup>5</sup> On page 11 of its petition, Delaware asserts that West Virginia is one of 13 states whose NOx emissions significantly impact Delaware; however, the data cited by Delaware is from a 2012 base case – as is plainly stated on the USEPA data being cited – and does not reflect current conditions.

<sup>6</sup> [https://www.epa.gov/sites/production/files/2015-10/documents/implementation\\_memo.pdf](https://www.epa.gov/sites/production/files/2015-10/documents/implementation_memo.pdf), p. 2.

**5. Delaware's air quality is improving and will continue to improve with nothing more than implementation of existing regulatory programs.**

It is not an accident that Delaware's air quality already measures attainment of both the 2008 and 2015 ozone NAAQS. Delaware's ozone air quality has steadily improved over recent years. In a July 2013 report prepared at the request of MOG,<sup>7</sup> Alpine Geophysics and Environ documented this trend for Delaware for the years 1999 through 2011.

In the July 2016 USEPA report previously discussed,<sup>8</sup> all Delaware monitors (\* denotes values based on incomplete monitoring data) are shown to be continuing this significant improvement in air quality between 2012 and 2015:

Monitor	2010-2012 Design Values (ppb)	2013-2015 Design Values
Kent (100010002)	78	65
New Castle (100031007)	80	66
New Castle (100031010)	78	69
New Castle (100031013)	80	68
New Castle (100032004)	*	69*
Sussex (100051002)	81	64
Sussex (100051003)	81	69

Further, improvements in Delaware's ozone air quality are also likely to occur as the result of regulatory programs that are already on-the-books, but not yet implemented. These include:

- Pennsylvania RACT II;
- Connecticut RACT;
- OTC Model Rules;
- High Energy Demand Day (HEDD) controls;
- Tier 3 gasoline; and
- Boiler MACT implementation.<sup>9</sup>

<sup>7</sup> [http://midwestozonegroup.com/files/AQTrendsSummary\\_Delaware\\_2.ppt](http://midwestozonegroup.com/files/AQTrendsSummary_Delaware_2.ppt)

<sup>8</sup> [https://www.epa.gov/sites/production/files/2016-07/ozone\\_designvalues\\_20132015\\_final\\_07\\_29\\_16.xlsx](https://www.epa.gov/sites/production/files/2016-07/ozone_designvalues_20132015_final_07_29_16.xlsx)

<sup>9</sup> <http://midwestozonegroup.com/files/MOGCommentsOnProposedCSAPRUpdate-Final.pdf>

**6. Any remaining non-attainment or maintenance concerns by Delaware can be addressed under CAA §179B by accounting for international emissions.**

There can be no question but that international emissions are an extraordinarily large contributor to ozone air quality across the nation. It can be seen in USEPA's analysis of this issue, that "but for" international emissions there would be no monitor in the US with a design value greater than 66 ppb.<sup>10</sup>

Should Delaware choose to recognize the significance of these international emissions, consideration should be given to the provisions of CAA §179B which reads as follows:

*Notwithstanding any other provision of law, an implementation plan or plan revision required under this chapter shall be approved by the Administrator if—*

(1) such plan or revision meets all the requirements applicable to it under the chapter other than a requirement that such plan or revision demonstrate attainment and maintenance of the relevant national ambient air quality standards by the attainment date specified under the applicable provision of this chapter, or in a regulation promulgated under such provision, and

(2) the submitting State establishes to the satisfaction of the Administrator that the implementation plan of such State would be adequate to attain and maintain the relevant national ambient air quality standards by the attainment date specified under the applicable provision of this chapter, or in a regulation promulgated under such provision, but for emissions emanating from outside of the United States. (Emphasis added)."

**Conclusion.**

Inasmuch as Delaware's ozone air quality is currently achieving, and will continue to achieve, ambient concentrations of ozone sufficient to classify the entire state as attaining and maintaining both the 2008 and 2015 ozone NAAQS, there is no legal or technical basis for this or any other CAA §126 petition seeking to address Delaware's ozone air quality.

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<sup>10</sup> [http://www.epa.gov/sites/production/files/2015-11/2017\\_ozone\\_contributions\\_transport\\_noda.xlsx](http://www.epa.gov/sites/production/files/2015-11/2017_ozone_contributions_transport_noda.xlsx)

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Accordingly, the Midwest Ozone Group urges that Delaware withdraw this petition. In the alternative, MOG is filing this letter with USEPA with a request that USEPA deny the petition.

Very truly yours,

A handwritten signature in blue ink that reads "David M. Flannery". The signature is written in a cursive style with a large, sweeping initial "D".

David M. Flannery  
Legal Counsel for the  
Midwest Ozone Group