



MARYLAND DEPARTMENT OF THE ENVIRONMENT

Water and Science Administration
Wastewater Permits Program
1800 Washington Boulevard, Suite 455
Baltimore, MD 21230-1708

Response to Public Comments

Regarding

GenOn Chalk Point, LLC
(Chalk Point Generating Station)

and

GenOn Mid-Atlantic, LLC
(Morgantown and Dickerson Generating Stations)

State Discharge Permit Application Numbers

14-DP-0627A (Chalk Point)

14-DP-0841A (Morgantown)

14-DP-0048A (Dickerson)

NPDES Permit Numbers

MD0002658 (Chalk Point)

MD0002674 (Morgantown)

MD0002640 (Dickerson)

Last Revised: July 21, 2020

INTRODUCTION

The Department has been processing three modification requests, one from each of GenOn's in-state generating stations. Due to the similarity in nature of the requests, the Department's tentative determinations on those requests, and the Department's final responses, it is most practical to respond to all three requests in this single document. Unless otherwise noted, all comments and responses apply to all three applications. In the event of any inconsistencies between the respective factsheets and this document, this document shall take precedence.

Chalk Point (14-DP-0627A)

The Department has been processing a request from GenOn Chalk Point, LLC to modify the NPDES permit for the Chalk Point Generating Station, located at 25100 Chalk Point Road, Aquasco, MD, and discharging to the Patuxent River and Swanson Creek (both Use II waters). The modification application requests that the date for compliance with the federal EPA effluent limitation guidelines (ELGs) for bottom ash transport water and flue gas desulphurization wastewater be extended from November 1, 2020 until December 31, 2023.

Notice of a tentative determination regarding this permit was published in *The Prince George's County Extra* on April 23, 2020, and April 30, 2020 and in *The Recorder* (Calvert County) and *The Maryland Independent* (Charles County) on April 24, 2020 and May 1, 2020. The public comment period concluded on May 26, 2020. Substantive comments which were received during the public comment period and the Department's responses to those comments have been summarized in this document, below.

Morgantown (14-DP-0841A)

The Department has been processing a request from GenOn Mid-Atlantic, LLC to modify the NPDES permit for the Morgantown Generating Station, located at 12620 Crain Highway, Newburg, MD, and discharging to the Potomac River and Pasquahanza Creek (both Use II waters). The modification application requests that the date for compliance with the federal EPA effluent limitation guidelines (ELGs) for flue gas desulphurization wastewater be extended from November 1, 2020 until December 31, 2023.

Notice of a tentative determination regarding this permit was published in *The Maryland Independent* on April 24, 2020 and May 1, 2020. The public comment period concluded on May 26, 2020. Substantive comments which were received during the public comment period and the Department's responses to those comments have been summarized in this document, below.

Dickerson (14-DP-0048A)

The Department has been processing a request from GenOn Mid-Atlantic, LLC to modify the NPDES permit for the Dickerson Generating Station, located at 21200 Martinsburg Road, Dickerson, MD, and discharging to the Potomac River (Use I-P waters). The modification application requests that the date for compliance with the federal EPA effluent limitation guidelines (ELGs) for bottom ash transport water and flue gas desulphurization wastewater be extended from November 1, 2020 until December 31, 2023.

Notice of a tentative determination regarding this permit was published in *The Montgomery County Extra* on April 23, 2020 and April 30, 2020. The public comment period concluded on May 26, 2020. Substantive comments which were received during the public comment period and the Department's responses to those comments have been summarized in this document, below.

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SUMMARY OF CHANGES FROM THE TENTATIVE DETERMINATION DRAFT

1. The final permit will reflect the permittee's election to participate in the Voluntary Incentives Program for flue gas desulphurization (FGD) wastewater. At each facility, updated limits for arsenic (daily maximum of 4 µg/L), selenium (daily maximum of 5 µg/L), mercury (monthly average of 0.024 µg/L, daily maximum of 0.039 µg/L), and total dissolved solids (monthly average of 24 mg/L, daily maximum of 50 mg/L) shall become effective at Monitoring Point 801 on December 31, 2023.
2. Each of the permits will be automatically reopened upon issuance of this modification to address legacy FGD wastewater.

RESPONSES TO SPECIFIC COMMENTS

1. Topic of Multiple Comments: GenOn's Election to Participate in the Voluntary Incentive Program for FGD Wastewater

Letter (May 4, 2020) from Mark Gouveia, SVP of Operations, GenOn Mid-Atlantic, LLC, and GenOn Chalk Point, LLC:

Pursuant to special conditions in each permit (X.2 for Chalk Point, V.2 for Dickerson, V for Morgantown), GenOn elects to comply with the voluntary effluent limitation guidelines at 40 CFR §423.13(g)(3)(i) at Chalk Point Generating Station, Dickerson Generating Station, and Morgantown Generating Station.

Letter (May 26, 2020) from Greg Staggers, General Manager, on behalf of GenOn Mid-Atlantic, LLC and GenOn Chalk Point, LLC:

MDE does not have the authority to remove the VIP provision from the permits as part of these permit modifications. GenOn did not seek a modification to or removal of the VIP provision in the submitted modification requests, so MDE's proposed deletion was on its own initiative. MDE can only modify a permit on its own initiative for specific "causes" identified in 40 CFR §122.62. Also, because the VIP provisions were required to be incorporated into the permits in the first instance, MDE lacks any legal basis to remove those at any time (80 Fed. Reg. at 67882). By issuing the tentative determinations, MDE has accelerated GenOn's election of the program despite the fact that EPA has proposed different technology for the incentive program with new compliance limits and deadlines.

Since GenOn did not seek modification of the VIP provisions, MDE did not have the authority to modify the provisions on its own initiative, and GenOn has now elected the VIP, GenOn requests that MDE withdraw its tentative determinations as to the VIP .

Letter (May 26, 2020) from EIP, Potomac Riverkeeper, Patuxent Riverkeeper, Sierra Club, CCAN:

GenOn's VIP letters are a transparent and disingenuous attempt to delay new compliance obligations and MDE should not credit them without requiring GenOn to demonstrate that it is serious about compliance with the VIP program.

In its tentative determinations, MDE has proposed to "remove the option for the permittee to elect participation in the voluntary incentives program for FGD wastewater." Despite almost two years of litigation over a different set of FGD wastewater limits and GenOn's submission of multiple ELG compliance progress reports, GenOn did not, to the Commenters' knowledge, purport to opt into the VIP program until May 4, 2020.

As noted by MDE, EPA's stated expectation in 2015 was that any facility opting into the VIP program would do so promptly, prior to issuance of its next NPDES permit following the effective date of the rule. That was five years ago. Since then (until earlier this month), MDE found that GenOn "provided no information suggesting that they have investigated or considered the use of an evaporative treatment system, the technology corresponding to the VIP." On the contrary, GenOn's own actions and words, as described below, over the last

two years show that the May 4 VIP notice letters are not good faith commitments to meet the VIP limits in their permits by December 31, 2023.

- On May 15, 2020, eleven days after the May 4 VIP notices, GenOn filed a deactivation notice with PJM for the Dickerson Generating Station, seeking approval to deactivate the coal units at that plant on August 13, 2020. The deactivation notice strongly suggests that, as of May 4 when it submitted its VIP notices, GenOn never intended to actually comply with the VIP limits for Dickerson, and the chronology calls into question GenOn's intentions for the other facilities as well.
- GenOn is required under its existing permits to file semiannual reports on its progress toward meeting the requirements of EPA's 2015 ELG Rule, including new FGD wastewater limits. In these reports and other filings with MDE, GenOn describes taking steps toward implementing an entirely different treatment system for the purpose of meeting the less stringent set of FGD wastewater limits scheduled to take effect on November 1, 2020, as described in the fact sheets accompanying MDE's proposed determinations. Opting into the VIP program would be a late-stage, abrupt change of course, yet the VIP letters provide no explanation or substantiation of GenOn's new intentions.
- In its 2015 rulemaking, EPA assumed that it would not be possible to install thermal evaporation systems by 2018 (within three years of the 2015 Rule) and did not require compliance until 2023 (eight years post-promulgation). GenOn now implies that it can install in three years a technology for which EPA contemplated eight years. MDE must require GenOn to substantiate how it intends to achieve compliance.
- Opting into the VIP program at this point is economically irrational. The technology basis for the current VIP program - thermal evaporation - is quite expensive. As EPA recently observed, "[d]ue to the higher costs of thermal systems compared to chemical precipitation followed by LRTR [biological treatment], the EPA does not expect that any facility would install a new thermal system under the 2015 rule VIP as the least cost technology." This is particularly true where, as here, the permittee has already invested resources into the installation of chemical and biological treatment.
- Over the past year and a half, GenOn has expended significant resources in litigation seeking an extension of the November 1, 2020 deadlines to meet the bottom ash transport water requirement and less stringent FGD wastewater limits. GenOn has even continued the litigation after submitting the May 4 VIP letters. GenOn submitted VIP letters to MDE on the morning of May 4, 2020 and then participated in oral arguments in the Maryland Court of Special Appeals on GenOn's consolidated appeals. Thus, even after GenOn supposedly committed to meeting a new pollution control strategy, GenOn's attorneys continued to argue in favor of seeking additional time to comply with the old pollution control strategy.

MDE and the public cannot afford to simply rely on GenOn's one paragraph VIP notices. GenOn has had almost five years to implement simpler chemical/biological systems without success yet they now purport to intend a much larger and more complex investment in the same facilities over a shorter period of three years. GenOn's VIP letters should not be viewed by MDE as serious notices of intent to comply with the VIP limits for FGD wastewater by December 31, 2023. Specifically, MDE should not credit GenOn's letters without requiring GenOn to demonstrate by a specific, near-term date that GenOn has made a significant investment towards compliance with the VIP limits. If GenOn fails to do so by the identified date, the less stringent FGD wastewater limits should automatically and immediately revert to being in effect at the facility.

RESPONSE

The effective Effluent Limitation Guidelines (ELGs), often referred to as the 2015 ELGs¹, for steam electric power plants does not require the submission of any documentation in support of a facility opting into the Voluntary Incentives Program (VIP). Furthermore, the currently active permit for each of the three facilities (14DP0048 for Dickerson, 14DP0627 for Chalk Point, and 14DP0841 for Morgantown) contains language which allows the permittee to elect compliance with the VIP program and stipulates that the associated limitations and a deadline of December 31, 2023, automatically supersede the limitations and deadline (November 1, 2020) expressed for the less restrictive FGD wastewater limitations.

While the Department acknowledges the concerns expressed by commenters, the Department must take GenOn at its word that it will meet the VIP limitations by December 31, 2023, as required by the rule. The Department views this election as an obligation to adhere to the VIP under the 2015 ELGs. The EPA recognized a significant environmental benefit for facilities to elect compliance with the VIP limitations and the installation of that corresponding technology, which will likely lead to a significant decrease in the volume of discharges, in addition to more restrictive numerical limitations on regulated pollutants. In exchange for agreeing to meet the additional restrictions, the rule allotted a definite timeframe until December 31, 2023.² The Department also recognizes the benefits of enhanced treatment for FGD wastewater and does not want to discount GenOn's voluntary commitment to meeting the 2015 VIP rule by December 31, 2023.

As part of the reopener for "legacy" wastewater (discussed further in the response to Comment #9), the Department will collect and review information regarding GenOn's VIP election and plan to meet the limitations by December 31, 2023. This information will be needed to properly assess appropriate "legacy" wastewater requirements. In response to the comment that MDE should not credit GenOn's VIP letters if GenOn fails to demonstrate a significant investment, it is noteworthy that General Condition II.C.6 already includes authority for the Department to address any misrepresentation or failure by the permittee to disclose fully all relevant facts. See the response to Comment #9 for additional details.

As specified in the 2015 ELG and the existing permit, the Department accepts the election of participation in the VIP for FGD wastewater. Correspondingly, the final determination will include updated limits for Monitoring Point 801, which will become effective on December 31, 2023. This includes changing the permit limitations for arsenic, mercury, and selenium and adding a limitation for total dissolved solids to match those in Table 1 (below) as well as removing limitations for nitrate-nitrite. The permittee will still be required to report monthly average and daily maximum concentrations for nitrate-nitrite in support of their calculations for total nitrogen. The narrative special condition (Special Condition X for Chalk Point, Special Condition V for Morgantown and Dickerson) shall also be updated to reflect the selection of VIP and establish a date for compliance of December 31, 2023 with the more restrictive ELG limitations specified in Table 1, below. Note that this does not actually constitute a change from the previous permit, but simply implements the terms of the active permit resulting from the permittee opting into the VIP program. Explicitly incorporating these changes

¹ The "2015 ELGs" refers to the effluent limitation guidelines for steam electric power generating facilities which were promulgated on November 3, 2015 (80 Fed. Reg. 67,637) and codified at 40 CFR Part 423. The earliest dates for compliance for some sources under the 2015 ELGs were changed by the "2017 Postponement Rule" promulgated on September 18, 2017 (82 Fed. Reg. 43,494). When the Department refers to the "2015 ELGs," that reference assumes inclusion of the updated dates from the 2017 Postponement Rule.

² Section XVI.A.1 of the Preamble to the 2015 ELG reads "Where a discharger chooses to participate in the voluntary incentives program and be subject to effluent limitations for FGD wastewater based on evaporation, the permitting authority must allow the plan up to December 31, 2023 to meet those limitations" (80 Fed. Reg. at 67,883)

into this final determination does not change the actual requirements of the active permit, but will increase clarity of the effective permit requirements for the public, the permittee, and the Department's planning and compliance programs.

Table 1: VIP Limitations for FGD Wastewater

PARAMETER	MONTHLY AVERAGE	DAILY MAXIMUM
Arsenic	Report	4 µg/L
Mercury	0.024 µg/L	0.039 µg/L
Selenium	Report	5 µg/L
Total Dissolved Solids	24 mg/L	50 mg/L

The Department believes it was justified in the actions taken in the tentative determination with respect to its proposed removal of the VIP provisions. GenOn has requested that MDE "withdraw" its tentative determinations to remove VIP because VIP has been elected at all three facilities. While the Department cannot "withdraw" a tentative determination which has already been issued, it need not finalize its tentative determination in its final action on the modification request. As noted above, the final permit will not contain language from the tentative determination which removed the VIP provisions, as those proposed changes have been rendered moot by GenOn's election to participate in the VIP at all three facilities subject to provisions in the currently active permit for each facility (14DP0048 for Dickerson, 14DP0627 for Chalk Point, and 14DP0841 for Morgantown).

With respect to Dickerson's request "that the entire tentative determination as to Dickerson be withdrawn since compliance dates related to FGD wastewater and BATW discharges are no longer applicable" because of an announcement that GenOn will retire Dickerson prior to November 1, 2020, the Department has determined that it would not yet be appropriate to remove the ELG compliance dates from the permit. While the Department acknowledges the plans to retire the coal-fired units at Dickerson before November 1, 2020, the information received to date is not specific enough for the Department to cease discharge authorization by any certain date. In particular, GenOn submitted an addendum to their VIP election for Dickerson which provided additional certification language on June 4, 2020, which was after the announcement of the retirement plants.

Per usual practices, the Department does not intend to terminate permit coverage or requirements until it can certify that those discharges have permanently ceased. There is no harm to the permittee in maintaining discharge limitations and compliance deadlines of November 1, 2020 (for ceasing discharges bottom ash transport water) and December 31, 2023 (for meeting VIP limitations for FGD wastewater) for the sources which are anticipated to retire because the facility can comply with the permit by either operating within the permit terms, or by ceasing the permitted discharges. If the facility terminates a permitted discharge, it may report "no discharge" on the required discharge monitoring reports until the corresponding permits can be modified or terminated, as appropriate.

CHANGES FOR THE FINAL PERMIT

The Department will update permit language in the three permits to reflect that the VIP limitations from Table 1 (above) will become effective on December 31, 2023. This will result in updating the following Special Conditions:

Table 2: Special Conditions Impacted by Selection of VIP

Facility	Permit Number	Special Conditions Impacted
Chalk Point	14-DP-0627A	I.A.5, I.A.6, X
Morgantown	14-DP-0841A	I.A.7, I.A.8, V
Dickerson	14-DP-0048A	I.A.6, I.A.7, V

The specific language which will be included in the monitoring tables special conditions has not been reprinted here due to formatting.

The specific language which will be included in the narrative special condition (X or V) for each permit is reprinted below:

The permittee has elected to participate in the Voluntary Incentives Program for FGD wastewater. Therefore, the permittee must comply with the limits for arsenic, mercury, selenium, and total dissolved solids reprinted in the table below (see Special Condition I.A.7) no later than December 31, 2023. On December 31, 2023 the limits for Monitoring Point 801 will change from those in section I.A.6 of this permit to those in section I.A.7*, as also identified in those sections. Prior to December 31, 2023, the permittee shall submit an update regarding the facility's progress toward meeting the limitations of section I.A.7* at least once every six months.*

VIP Limitations for FGD Wastewater

PARAMETER	MONTHLY AVERAGE	DAILY MAXIMUM
Arsenic	Report	4 µg/L
Mercury	0.024 µg/L	0.039 µg/L
Selenium	Report	5 µg/L
Total Dissolved Solids	24 mg/L	50 mg/L

NOTE: The Department recognizes that the final completion date of December 31, 2023 extends beyond the expiration date of this permit. This condition does not infer any intent of the Department to fail to renew this permit prior to its expiration date; rather, it ensures that the completion date for FGD wastewater cannot extend beyond that which is allowed.

(*Note that the section numbers will differ for each facility, as identified in Table 2 of this Response Document)

2. Comment from GenOn - "As Soon As Possible" Does Not Have to Be Based on BAT

Letter (May 26, 2020) from Greg Staggers, General Manager, on behalf of GenOn Mid-Atlantic, LLC and GenOn Chalk Point, LLC:

In its rationale for the tentative determinations, MDE states that "the definition of an 'as soon as possible' deadline must be based on the treatment system that is regarded as BAT" and that "selection and investigation of alternate technologies;...should not extend the 'as soon as possible' timeframe which could be achieved through use of the available and economically achievable technologies upon which the ELG is based." However, MDE provides no regulatory support for its position that the "as soon as possible" date must be based on installation of BAT. In addition, through this rationale, MDE is essentially requiring GenOn to install specific BAT to meet the ELG for FGD wastewater. But, this is contrary to MDE's regulatory authority. As

MDE noted when permitting a similarly situated entity in the state [Fort Smallwood Complex], "it is not appropriate for the Department to instruct the permittee how they should comply with the ELGs."

RESPONSE

As entailed in Comment #1 (above), the permittee has elected to participate in the VIP for FGD wastewater under the 2015 ELGs pursuant to 40 CFR § 423.13(g)(3) and comply with corresponding stricter limitations by December 31, 2023. Accordingly, the Department is no longer obligated to make an "as soon as possible" determination pursuant to 40 CFR § 423.13(g)(1), and instead, must implement a VIP compliance date of December 31 2023. Therefore, the Department considers any comments on the derivation of an "as soon as possible" date for compliance with the less stringent FGD wastewater limitations made in the tentative determination to be moot. Nevertheless, the Department provides the following additional response to Comment #2.

The preamble to the 2015 ELGs states "[t]his rule identifies treatment using chemical precipitation followed by biological treatment as the BAT technology basis for control of pollutants discharged in FGD wastewater. More specifically, the technology basis for BAT is a chemical precipitation system that employs hydroxide precipitation, sulfide precipitation (organosulfide), and iron coprecipitation, followed by an anoxic/anaerobic fixed film biological treatment system designed to remove heavy metals, selenium, and nitrates."³ The limitations in the ELG for arsenic and mercury were derived based on plants using precisely those technologies for chemical precipitation and the limitations in the ELG for selenium and nitrate-nitrite were derived based on plants using precisely those technologies for their biological system.

When determining the date which represents "as soon as possible," the Department found it only appropriate to consider implementation of a system that, based on the methodology for derivation of the limits, would ensure compliance. Hence, the Department's Best Professional Judgment (BPJ) was to establish that date based on the technology prescribed as BAT in the preamble and the Technical Development Document⁴ (TDD), as outlined above in this response.

The Department does not require the permittee to select any specific treatment system(s) in the permits. The permittee is free to pursue alternate treatment methods that do not meet the description of BAT, but they remain bound by a date which represents "as soon as possible" for compliance. The references to Suez and Frontier systems are because the timelines proposed by GenOn specifically named those two vendors as options for additional technologies. However, the Department also notes that the Suez and Frontier systems are generally regarded as the most proven means to comply with the ELGs.

Furthermore, in the comment letter submitted by GenOn for this tentative determination, GenOn states "GenOn facilities only operate a portion of BAT technology (i.e. FGD chemical precipitation)...installation of additional selenium specific biological treatment systems would be required to meet the FGD wastewater 2015 ELG discharge limitations" (see Comment #3, below). Within the same comment letter, GenOn notes that additional equipment is necessary to meet the ELGs. Therefore, the Department determined it would be inappropriate to make an "as soon as possible" determination which included a dedicated time-period for GenOn to attempt to meet the ELG limits solely through use and optimization of the facility's existing equipment.

³ 80 Fed. Reg. at 67,850

⁴ U.S. EPA. Office of Water. (2015, September) *Technical Development Document for the Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category* (Report No. EPA-821-B-15-007) at Page 8-7 ("TDD")

In addition, EPA collected data from the Dickerson Generating Station when developing the ELG limits. It is notable that, at the time of the data collection for ELG development, the treatment systems at all three GenOn plants were essentially identical (additional items and operational control requirements have since been required at Dickerson and Chalk Point pursuant to a consent decree entered on August 26, 2016). The data from the Dickerson Generating Station was not used in development of the arsenic and mercury limits because the facility's biological treatment plant did not include sulfide precipitation as part of its chemical precipitation stage. The data was also not used in development of the selenium and nitrate-nitrite limitations because Dickerson's biological treatment system is a sequencing batch reactor (SBR) designed for nutrient removal and it is not designed for effective removal of selenium.⁵ Based on this, it is clear that the current treatment systems could not have been reasonably expected to meet the ELG limitations, further supporting the Department's rationale that an "as soon as possible" date should not allow for the proposed use of existing equipment. This decision is also supported in the comments received from Dr. Ranajit Sahu who regards the optimization of existing equipment as "uncertain" and "poorly-conceived" and offers the opinion that proven technology (i.e. Suez, Frontier systems) is a better alternative.⁶

CHANGES FOR THE FINAL PERMIT

No changes are required for this comment.

3. Comment from GenOn - It Was Not Appropriate for MDE to Apply a Standard Based on GenOn Already Operating the Majority of BAT Treatment

Letter (May 26, 2020) from Greg Staggers, General Manager, on behalf of GenOn Mid-Atlantic, LLC and GenOn Chalk Point, LLC:

GenOn acknowledges that the preamble to the 2015 ELGs does state that "[i]n cases where the plant is already operating...the majority of the BAT technology basis (e.g., FGD chemical precipitation and biological treatment, without sulfide addition)...it would not generally be appropriate to allow additional time beyond" the earliest compliance date. However, the GenOn facilities only operate a portion of the BAT technology (i.e., FGD chemical precipitation) as major investments and installation of additional selenium specific biological treatment systems would be required to meet the FGD wastewater 2015 ELG discharge limitations.

RESPONSE

As entailed in Comment #1 (above), the permittee has elected to participate in the VIP for FGD wastewater under the 2015 ELGs pursuant to 40 CFR § 423.13(g)(3) and comply with corresponding stricter limitations by December 31, 2023. Accordingly, the Department is no longer obligated to make an "as soon as possible" determination pursuant to 40 CFR § 423.13(g)(1), and instead, must implement a VIP compliance date of December 31 2023. Therefore, the Department considers any comments on the derivation of an "as soon as possible" date for compliance with the less stringent FGD wastewater limitations made in the tentative determination to be moot. Nevertheless, the Department provides the following additional response to Comment #3.

⁵ See TDD at Pages 13-5 and 13-6

⁶ Sahu, Dr. Ranajit (Ron). *Comments on Maryland Department of the Environment's Proposed Denial of GenOn's June 6, 2019 Applications to Extend ELG Compliance Deadlines for Its Maryland Coal Plants* at 1-2.

Prior to the 2015 ELGs, federal technology-based limitations for FGD wastewater were equivalent to the limitations for Best Practicable Control Technology Currently Available (BPT) for "low volume waste sources," which was based on lagoon settling. After promulgation of the 2015 ELG, a number of plants with FGD wastewater across the country needed to upgrade from settling pond treatment to a robust chemical precipitation and biological treatment system. It is only logical that this would take more time than a facility which has already installed a number of components which could meet some of the technology-based limits recognized as BAT under the 2015 ELG; hence EPA's statements referenced by GenOn (restated in Comment #3).

The Department's tentative determination as to an "as soon as possible" compliance date recognized that GenOn's plants were not attempting to transition to ELG compliance from a baseline consisting of lagoon settling technologies. To the contrary, the plants had already installed, in GenOn's own words, "state of the art wastewater treatment system[s]" which have "done much already" to meet the FGD limits. Considering that GenOn's own proposal was to optimize the technology currently in use at the sites and that it included the potential piloting of a Frontier or ABMet system in their submitted anticipated schedule,⁷ the Department assumed the new equipment could potentially be used in conjunction with existing equipment. Despite that, the Department's analysis in the tentative determination fact sheet provides a full timeline analysis assuming the installation of a Frontier or ABMet system would be required to meet the ELG limitations. The reference to the preamble (as stated in Comment #3) was offered to provide additional support for the timeline established, not as the sole or even primary justification for the timeline.

CHANGES FOR THE FINAL PERMIT

No changes are required for this comment.

4. Comment from GenOn - MDE Should Have Considered Regulatory Uncertainty in Determining "As Soon As Possible" Date

Letter (May 26, 2020) from Greg Staggers, General Manager, on behalf of GenOn Mid-Atlantic, LLC and GenOn Chalk Point, LLC:

One of the reasons GenOn sought an extension of the compliance deadlines was because of the regulatory uncertainty surrounding the 2015 ELGs. As early as April 2017, EPA expressed its intent to revise the regulations. EPA has also expressed its desire that regulated entities like GenOn not expend funds complying with the 2015 ELGs while EPA was contemplating a new rule. GenOn sought an extension of the compliance deadlines because, with the uncertainty surrounding the 2015 ELGs, it was difficult to predict what technology would be needed to meet a new rule and any costs expended to meet the 2015 ELGs may be rendered unnecessary by a new rule. EPA has now proposed a new ELG rule for FGD wastewater and BATW, and, as GenOn feared, the proposed rule includes revised ELG limits and schedules for compliance as well as new BAT.

However, MDE claims that it cannot consider regulatory uncertainty when setting an "as soon as possible" date. This is incorrect. 40 C.F.R. § 423.11 (t) allows MDE to consider "other factors" when determining an "as soon as possible" date. The enumerated factors, while also referencing equipment or operational changes, specifically reference anticipated changes in response to new performance standards, guidelines, and

⁷ See NPDES Major Permit Modification Application, Chalk Point, at 10-11 (June 6, 2019); NPDES Major Permit Modification Application, Dickerson, at 10-11 (June 6, 2019); NPDES Major Permit Modification Application, Morgantown at 8-9 (June 6, 2019).

regulations---in other words, changing law. In addition, the EPA specifically told the Fifth Circuit that, "in response to the uncertainty pending reconsideration, permitting authorities may continue to require compliance with the 2015 Rule as to these wastestreams while extending the deadlines." The new proposed ELG rule also recommends that "[i]n cases where a facility's final NPDES permit is issued before these ELGs are finalized, and includes limitations for BA transport water and/ or FGD wastewater from the 2015 rule,...such a permit be reopened as soon as practicable, and modified consistent with any new rule provisions."

MDE could have and should have considered the fact that EPA issued a proposed rule in November 2019, five months before issuing this draft determination. The proposed rule significantly changes both the technology and limits applicable to GenOn's facilities, and also provides additional compliance options. Furthermore, EPA's regulatory agenda indicates that the final ELG rule will be issued in August 2020, two months prior to earliest compliance date. Insisting on the earliest compliance with the 2015 ELGs when new regulations have been proposed and a final rule is three months away, irrationally limits GenOn's compliance options.

RESPONSE

As entailed in Comment #1 (above), the permittee has elected to participate in the VIP for FGD wastewater under the 2015 ELGs pursuant to 40 CFR § 423.13(g)(3) and comply with corresponding stricter limitations by December 31, 2023. Accordingly, the Department is no longer obligated to make an "as soon as possible" determination pursuant to 40 CFR § 423.13(g)(1), and instead, must implement a VIP compliance date of December 31 2023. Therefore, the Department considers any comments on the derivation of an "as soon as possible" date for compliance with the less stringent FGD wastewater limitations made in the tentative determination to be moot. Nevertheless, the Department provides the following additional response to Comment #4.

The Department continues to reject regulatory uncertainty as an appropriate factor for extension of an "as soon as possible" date. As previously noted, 40 CFR § 423.13(g)(1) and (k)(1) leave it to the judgment of the permitting authority, in this case the Department, to establish on a case-by-case basis a date for compliance which is "as soon as possible." The term "as soon as possible" is defined in 40 CFR § 423.11(t) as the earliest compliance date (i.e. November 1, 2020) unless the permitting authority establishes a later date, after receiving information from the discharger, which reflects a consideration of certain specific factors (described in (t)(1) through (4)).

None of the factors identified in that definition specifically identify regulatory uncertainty as an appropriate cause for delay. The Department acknowledges GenOn's comment that regulatory uncertainty could arguably fall within § 423.11(t)(4), a broad catch-all which allows the Department to consider "other factors as appropriate." However, the statutory language of that catch-all leaves that determination to the agency's discretion. To that regard, the Department continues to find that it is appropriate for the agency to apply the normal and ordinary meaning of the term "as soon as possible" (i.e. at the earliest possible time any impending obstacle can be overcome). "Regulatory uncertainty" does not fall within the scope of that ordinary meaning. As stated in the tentative determination fact sheet, "[n]either the possibility of regulation changes nor the Department's potential extension of a date via permit modification have an effect on the permittee's efforts to truly meet the permit requirements 'as soon as possible'."⁸ In other words, a discharger's ability to meet current

⁸ Draft Fact Sheet, Tentative Determination, Morgantown, State Permit No. 14-DP-0841A (March 18, 2020) at 8 ("Morgantown FS"); Draft Fact Sheet, Tentative Determination, Chalk Point, State Permit No. 14-DP-0627A (March 18, 2020) at 9 ("Chalk Point FS"); Draft Fact Sheet, Tentative Determination, Dickerson, State Permit No. 14-DP-0048A (March 12, 2020) at 9 ("Dickerson FS")

regulatory requirements is not prevented by the possibility of future changes to those regulations. Similarly, a discharger's obligation to comply with its current permit terms is not stayed by the filing of a modification request, and therefore, the Department's normal review of a request for modification cannot reasonably be said to have prevented or otherwise delayed legitimate compliance efforts.

The Department continues to find that "appropriate" considerations for an extension under § 423.11(t)(4) must involve the discharger's ability to comply with the new effluent limits. This interpretation is supported by the ELG's regulatory and preamble text. First, each of the specifically enumerated factors in § 423.11(t)(1) through (3) involves equipment or operational changes that will physically affect a facility's ability to comply with the new FGD or bottom ash transport water limits. That suggests that "other factors as appropriate" for an extension under § 423.11(t)(4) should also involve the discharger's ability to comply with the new effluent limits. Second, when delaying the initial FGD and bottom ash transport water compliance dates from November 1, 2018 to November 1, 2020, EPA explained that a determination of the "as soon as possible date" may "consider the need for a facility to make integrated planning decisions *regarding compliance with the requirements for all wastestreams currently subject to new, more stringent requirements in the 2015 [ELG]*, as well as the other rules identified in § 423.11(t) *to the extent that a facility demonstrates such a need.*"⁹ The citation provided by GenOn within the above comment from a August 28, 2019 ruling from the United States Court of Appeals for the Fifth Circuit¹⁰ does not indicate otherwise. Rather, that citation indicates EPA's position that permitting authorities were expected to implement the ELG, and that permitting authorities *may* extend the deadlines for compliance when doing so - not that they *must*.

In its comment, GenOn asserts that the Department should have delayed its decisions because of a proposed rule from November 2019 and EPA's regulatory agenda indicating that the final rule will be issued in August 2020. It should be noted that the proposed rule for what is now recognized as the 2015 Final Rule was published on June 7, 2013 and a consent decree stipulated that the promulgation of the 2015 Final Rule was originally to occur by January 31, 2014, which was delayed until April 28, 2014, delayed again until May 22, 2014, and delayed a third time until September 30, 2015.¹¹ The 2015 Rule was finally published on November 3, 2015.¹² So while the permittee contends that the Department would only be delaying its decision by a few months, that timeline is far from certain. Moreover, there is no guarantee that EPA will finalize any applicable change to the current regulations following completion of its notice and comment proceedings. Until new regulations are promulgated, the Department is obligated to implement the currently effective ELG consistent with its reasoned interpretation of those federal regulations.

CHANGES FOR THE FINAL PERMIT

No changes are required for this comment.

⁹ 82 Fed. Reg. at 43,498 (emphasis added)

¹⁰ *Clean Water Action v. EPA*, 936 F.3d 308,312 n.7 (5th Cir. 2019)

¹¹ *Defenders of Wildlife and Sierra Club vs. EPA. Joint Stipulated Extension and Consent Decree Modification*. U.S. District Court for the District of Columbia. *Case No. 10-cv-1915(RWR)*. (April 9, 2015)

¹² 80 Fed. Reg. at 67,837-67,903

5. Comment from GenOn - MDE's Basis of Compliance Timeline Starting From July 2018 Was Unreasonable

Letter (May 26, 2020) from Greg Staggers, General Manager, on behalf of GenOn Mid-Atlantic, LLC and GenOn Chalk Point, LLC:

MDE described its responsibility as determining the "as soon as possible" date by which the facilities "*could* comply with the effluent limitations guidelines." It then concluded that November 1, 2020 is "the 'as soon as possible' timeframe by which the permittee *could* have met the limitations" if work described in the permit modification requests had begun at permit issuance.

Calculating when the GenOn facilities *could* have met the 2015 ELGs from the date of permit issuance is unreasonable. GenOn submitted its permit modification requests in June 2019 explaining its proposed process moving forward. It took MDE almost a year to respond. That response rejected GenOn's proposed process and ordered installation of specific technology. Requiring GenOn to have begun installing the specific technology in July 2018, is essentially permitting GenOn into noncompliance.

RESPONSE

As entailed in Comment #1 (above), the permittee has elected to participate in the VIP for FGD wastewater under the 2015 ELGs pursuant to 40 CFR § 423.13(g)(3) and comply with corresponding stricter limitations by December 31, 2023. Accordingly, the Department is no longer obligated to make an "as soon as possible" determination pursuant to 40 CFR § 423.13(g)(1), and instead, must implement a VIP compliance date of December 31 2023. Therefore, the Department considers any comments on the derivation of an "as soon as possible" date for compliance with the less stringent FGD wastewater limitations made in the tentative determination to be moot. Nevertheless, the Department provides the following additional response to Comment #5.

The Department based its "as soon as possible" decision on installation of a system which met the definition of BAT in the 2015 ELG Rule because such system was proven with respect to compliance with the specified limitations. While GenOn was (and continues to be) free to determine its course of action to comply with the regulations, the Department contends that GenOn must do so within the confines of a timeline which represents compliance "as soon as possible." Further details in support of this response are outlined in the response to Comments #2 and #6, as well as in the fact sheet for each permit modification.

CHANGES FOR THE FINAL PERMIT

No changes are required for this comment.

6. Comment from GenOn - MDE is Inconsistent in Its Rationale Between GenOn Facilities and Other Maryland Coal-Fired Power Plants

Letter (May 26, 2020) from Greg Staggers, General Manager, on behalf of GenOn Mid-Atlantic, LLC and GenOn Chalk Point, LLC:

MDE's reasoning behind its denial of GenOn's modification requests is inconsistent with its rationale for allowing additional time for compliance at the Fort Smallwood Complex, a similarly situated entity in the state.

MDE claims that "additional economic benefit" to the permittee is not an appropriate consideration to extend the "as soon as possible" date. However, MDE considered cost savings when setting an "as soon as possible" date of February 1, 2022 for compliance with BATW at the H.A. Wagner Generating Station. MDE also rejects GenOn's proposed schedule because the facilities' "inconsistent run time will present significant challenges in completing the evaluation of its attempts to optimize the current treatment systems in a timely manner." However, MDE proposed to extend the compliance deadline for FGD wastewater to February 1, 2023 and include additional flexible language in the Fort Smallwood permit because "[t]he permittee has expressed concern that the current power generation market has frequently caused a lack of run time at Brandon Shores and that optimization may be delayed as a result."

MDE is proposing to allow the Fort Smallwood Complex until January 31, 2022 to convey BATW to their FGD system as makeup water that would ultimately be treated at the FGD wastewater treatment plant and discharge to Brandon Shores Generating Station. The H.A. Wagner Station plans to add a surge tank to their BATW system. The Fort Smallwood Complex permit expired more than six years ago on April 30, 2014. Considering Raven Power Fort Smallwood, LLC provided MDE with an Evaluation of Factors in November of 2017, MDE has allowed Fort Smallwood more than 4 years to achieve compliance with the 2015 ELGs.

RESPONSE

As entailed in Comment #1 (above), the permittee has elected to participate in the VIP for FGD wastewater under the 2015 ELGs pursuant to 40 CFR § 423.13(g)(3) and comply with corresponding stricter limitations by December 31, 2023. Accordingly, the Department is no longer obligated to make an "as soon as possible" determination pursuant to 40 CFR § 423.13(g)(1), and instead, must implement a VIP compliance date of December 31 2023. Therefore, the Department considers any comments on the derivation of an "as soon as possible" date for compliance with the less stringent FGD wastewater limitations made in the tentative determination to be moot. Nevertheless, the Department provides the following additional response to Comment #6.

The Department was not inconsistent in its rationales between the three GenOn permits and the recent tentative determination published for Fort Smallwood. As noted in response to Comment #4, the selection of an "as soon as possible" date is to be established on a case-by-case basis. Each of the "inconsistencies" raised by GenOn were a result of different circumstances between Fort Smallwood and the GenOn facilities.

Comment regarding economic benefit - In its assessment of bottom ash transport water for Fort Smallwood, the Department examined "as soon as possible" dates for multiple scenarios at their facility, including new pumps with existing containment capacity, addition of a new surge tank, and/or addition of an evaporator. Ultimately, the Department established the final date for compliance based on the installation of a major piece of equipment such as a surge tank or evaporator, while providing 2-3 additional months to allow for optimization of the current treatment system. The rationale for this decision was the "significant benefit from the ongoing system trials...a successful result would result in the timeline for compliance being significantly shortened."¹³ The Department determined that the potential benefit of the Ft. Smallwood facility being able to comply with the ELG 18 months or more sooner in the event of a successful optimization trial was worth providing an additional 2-3 months for that trial in the overall timeline. The Department also noted that additional preparation steps for alternate technologies could be completed during the additional 2-3 months. Those concurrent benefits provide

¹³ Draft Fact Sheet, Tentative Determination, Fort Smallwood, State Permit No. 13-DP-0194 (Feb. 18, 2020) at 25 ("Fort Smallwood FS")

additional support for the overall 24 month deadline for compliance. Because the preparation time (to be run concurrently) would have been needed even if the Department had denied time for the Ft. Smallwood optimization trials, the Department may have ultimately arrived at a similar deadline.

While the Department does note that "the cost for compliance would also be significantly decreased,"¹⁴ it is evident that this was not the primary criteria. The Department did not consider additional economic benefit appropriate to extend the "as soon as possible" date for FGD wastewater at GenOn's facilities because the resulting extension would have been several years longer and the Department did not regard the cost savings efforts of utilizing existing equipment as a reasonable basis for defining "as soon as possible" (see response to Comment #2 for additional details).

Comment regarding extension for inconsistent runtime - According to 40 CFR §423.11(t)(3), an "as soon as possible" deadline may be extended from the earliest compliance deadline in consideration of "an initial commissioning period for the [FGD] treatment system to optimize installed equipment." At Fort Smallwood, the permittee noted that a lack of run time could potentially prevent it from optimizing the Frontier system it was proposing to install at the site. Fort Smallwood's proposal was different from GenOn's in several material respects.

First, Fort Smallwood proposed a timeline for optimization of newly-installed equipment (i.e. a Frontier system) which contained all the technology features upon which EPA based the ELG's BAT limitations for FGD wastewater. To the contrary, GenOn proposed a robust set of trials to optimize its existing equipment, which did not represent EPA's definition of BAT, and which GenOn itself described as insufficient to achieve compliance with the ELG's discharge limits. As described above, the Department has determined that appropriate considerations under an "as soon as possible" analysis must relate to the facility's technical capabilities (e.g. a system capable of meeting the BAT limitations, as further discussed in the response to Comment #2). Finally, it is worth noting that GenOn has been studying the optimization of its current system for ELG compliance purposes since before February 2019 (according to court filings). Therefore, the Department has determined that it would not be appropriate to entertain additional extensions to account for insufficient runtime to optimize GenOn's current equipment.

Second, the optimization trials proposed by GenOn were to take at least 38 months. The commissioning period allotted in the Fort Smallwood "as soon as possible" determination was 3 months. Allowing for delays due to insufficient runtime at each of GenOn's proposed testing stages over a 38 month period would be unreasonable, and does not represent "as soon as possible."

Third, GenOn proposed a timeline for compliance with the FGD wastewater limitations that included a period for "Commissioning, Startup, Performance Testing, & Station Turnover"¹⁵ of 2 months. At no time did GenOn suggest that its proposed commissioning period might require additional extension for insufficient runtime or request flexibility in the permit language for that purpose. Because extensions of the "as soon as possible" date are to be based on information provided by the discharger (see 40 CFR § 423.11(t)), the Department did not consider additional extension for insufficient runtime. To the contrary, Fort Smallwood specifically proposed that the Department should provide some latitude to allow for an extension of the 3-month commissioning period for optimizing their newly-installed equipment to account for potentially insufficient run time.

¹⁴ Fort Smallwood FS at 25

¹⁵ See NPDES Major Permit Modification Application, Chalk Point, at 11 (June 6, 2019); NPDES Major Permit Modification Application, Dickerson, at 11 (June 6, 2019); NPDES Major Permit Modification Application, Morgantown at 9 (June 6, 2019).

Comment regarding timeframes for compliance at Fort Smallwood vs. Genon - While the Department considered that facilities should have been working towards compliance beginning on the date the 2015 ELGs were promulgated (November 3, 2015), the Department has based its timelines for "as soon as possible" on the initial notice of the requirements being presented to the permittee during the renewal process. While it is true that the Fort Smallwood permit has been administratively extended for some time, the GenOn permits were similarly administratively extended at the time of issuance, and the Department was compelled to complete the renewal process for those facilities pursuant to a consent decree entered on August 26, 2016 pertaining to the Chalk Point and Dickerson Generating Stations. As part of the terms of that consent decree, the Department agreed to publish tentative determinations for the NPDES permit renewals at Chalk Point, Dickerson, and Morgantown. Further, some terms of the consent decree, such as limitations and narrative operational controls for the FGD WWTP required issuance of the NPDES permits to implement and improve enforcement capabilities.

CHANGES FOR THE FINAL PERMIT

No changes are required for this comment.

7. CHALK POINT ONLY - Comment from GenOn - Deadline for Bottom Ash Transport Water at Chalk Point Should Be Extended to 3/21/21

Letter (May 26, 2020) from Greg Staggers, General Manager, on behalf of GenOn Mid-Atlantic, LLC and GenOn Chalk Point, LLC:

This comment is relevant to the modification request for Chalk Point Generating Station only.

MDE should extend the compliance deadline for BATW at Chalk Point to March 31, 2021. The installation of the remote submerged flight conveyor (SFC) system at Chalk Point is significantly more complex than installing pumps, surge tanks, and piping and will eliminate the discharge of BATW until Station retirement, which was the basis for GenOn's request to extend the BATW applicability date until December 31, 2023.

GenOn initiated work on the remote SFC on an expedited basis in early 2019, submitted requests to vendors for proposals in Q2 of 2019, selected United Conveyor in September 2019, and entered into a contract in October 2019. Demolition of existing equipment and piping within the building for installation of the SFC system was initiated in February 2020. Due to the National Emergency for COVID-19, our demolition contractors stopped work and left the site on March 20, 2020. On May 5, 2020, new contractors were engaged and mobilized to Chalk Point to continue the equipment demolition and begin re-routing piping. Upcoming activities include demolition of current foundation/installation of new concrete foundation; installation of ash hopper and large equipment which is onsite; installation of electrical and controls; installation of bottom ash bunker foundation and access; completion of the mechanical installation, and commissioning and testing.

Efforts are being made to complete all BATW work at Chalk Point by November 1, 2020. However, recognizing that other coal-fired power stations will have until 2022 and new final ELG rules may be issued in August eliminating the requirement for this system, we request a modest extension to complete this work until March 1, 2021. We also request that MDE retain the ability to extend this compliance deadline in one month increments in the event additional delays are encountered due to COVID-19 related restrictions.

RESPONSE

The Department rejects GenOn's reference to the "as soon as possible" date for a different facility and the potential for new ELG rules as appropriate reasons to adjust the date for compliance with the requirement to cease BATW discharges at Chalk Point. Each determination of an "as soon as possible" date is based upon case-specific factors and timelines provided by the respective permittee, and the Department has determined each "as soon as possible" date using its best professional judgment accordingly. The determination that a compliance date of 2022 has been justified for a different facility has no bearing on the determination for this facility. Discussion about the rejection of "regulatory uncertainty" as cause for delay is found in the draft fact sheet for the tentative determination of the permit modification¹⁶ and in the response to Comment #4, above.

With regard to COVID-19, the Department agrees that additional time may be warranted if a permittee can demonstrate that the COVID-19 pandemic has caused or is causing an unpreventable delay in meeting a deadline. However, the Department views this similar to a natural disaster, such as a hurricane. In those situations, the Department generally addresses the issue through use of its inherent enforcement discretion, discrete compliance action, or a major permit modification. Permit modification due to a superseding act of God is not permitted as a minor permit modification under 40 CFR §122.63.

While GenOn has provided some information suggesting that COVID-19 impacted its progress to meeting the deadline for cessation of BATW, there is not enough detail to justify relief in comparison with the Department's recent assessment of potential impact of COVID-19 on non-compliance in other matters. Essentially, the Department would need to complete a full investigation into this issue before adjusting a permit deadline. The Department does not believe it would be appropriate to delay finalizing this permit modification while conducting such an investigation. Should the permittee wish to pursue additional time based on a showing that COVID-19 impacted their ability to meet the compliance date for BATW, they would either need to engage the Water and Science Administration Compliance Program or apply for separate major permit modification to allow for the full investigation to be completed.

Therefore, the Department has maintained the November 1, 2020 date for compliance for the cessation of bottom ash transport water discharges in the final permit for Chalk Point.

CHANGES FOR THE FINAL PERMIT

No changes are required for this comment.

8. Comment from EIP, et al - MDE Must Finalize Its Proposal to Deny GenOn's Modification Requests

Letter (May 26, 2020) from EIP, Potomac Riverkeeper, Patuxent Riverkeeper, Sierra Club, CCAN:

MDE must finalize its proposal to deny GenOn's modification requests. Commenters submitted comments multiple times during the renewal of these permits and now for the modification requests which provide assessments from Dr. Ranajit Sahu which show that compliance is achievable for the current "as soon as possible" dates.

¹⁶ Chalk Point FS at 9

Specific to bottom ash transport water (BATW), the commenters and Dr. Sahu do not believe it is appropriate to tie the cessation of BATW into the timeline for completion of the FGD system as proposed by GenOn. Further, Dr. Sahu believes that it is not necessarily too late for the plants to cease discharging BATW by November 1, 2020.

Additionally, were MDE to grant GenOn's modification requests, this would also have the effect of allowing GenOn to continue to operate under the vacated legacy limits (for both FGD wastewater and bottom ash transport water) until December 31, 2023.

RESPONSE

As detailed in the response to Comment #1, GenOn has elected participation in the VIP for FGD wastewater and the final permit will reflect this selection. The response to Comment #1 also notes that the permit for Dickerson shall continue to maintain regulation of its waste streams until GenOn has shown the Department that discharges have ceased and reasonable potential of future discharges no longer exists. This includes maintaining the November 1, 2020 date for compliance with the cessation of bottom ash transport water discharges.

As detailed in the response to Comment #7, the Department has maintained the November 1, 2020 date for compliance for the cessation of bottom ash transport water discharges at Chalk Point.

The response to Comment #9 (below) addresses legacy wastewater.

CHANGES FOR THE FINAL PERMIT

No changes are required for this comment.

9. Comment from EIP, et al - MDE Must Establish BAT Limits for "Legacy" FGD Wastewater

Letter (May 26, 2020) from EIP, Potomac Riverkeeper, Patuxent Riverkeeper, Sierra Club, CCAN:

On May 4, 2020, GenOn submitted a letter to MDE which opted them into the Voluntary Incentive Program (VIP) at all three plants. The effect of crediting GenOn's VIP letters would be to allow GenOn to operate under the currently effective FGD wastewater limits in its permit under December 31, 2023. MDE may not allow this as these limits have been struck down in court and do not reflect best available technology economically achievable, as required.

The federal ELGs found at 40 CFR §423 specify "legacy" limitations (perhaps better termed as "interim" limitations) which are to be in effect for the time period between November 1, 2020 and the date determined by MDE for the 2015 ELG limits to become effective (December 31, 2023 for VIP limits). In April 2019, the U.S. Court of Appeals for the 5th Circuit vacated the legacy limitation guidelines, finding that these limits were too lenient to constitute the "best available technology economically achievable" (BAT).

Where ELGs do not apply, permit writers such as MDE must impose "case-by-case" limits pursuant to 40 CFR §125.3(d)(3). It is worth noting that the 5th Circuit explicitly recognized this requirement when it vacated the guidelines for legacy limits. For toxic and nonconventional pollutants, the case-by-base limits must represent BAT. When deriving case-by-case BAT limits, permit writers must consider six factors: the age of equipment

and facilities involved; the process employed; the engineering aspects of the application of various types of control techniques; process changes; the cost of achieving such effluent reduction; and non-water quality environmental impact (including energy requirements).

The 5th Circuit decision makes it clear that the legacy limits currently found in the three GenOn permits do not represent BAT, which is why the 5th Circuit vacated those limitation guidelines. MDE may not allow GenOn to operate under legally invalid FGD wastewater limits until December 31, 2023. If MDE chooses to credit GenOn's VIP letters, which it should not do without additional information, then MDE must set case-by-case BAT limits for the "legacy" FGD wastewater category that will apply until December 31, 2023 or water quality-based limits if warranted. MDE already has sufficient site-specific information from GenOn allowing it to consider the above-referenced factors and should proposed case-by-case FGD wastewater limits immediately, if it credits GenOn's VIP letters.

RESPONSE

The Department acknowledges the ruling of the U.S. Court of Appeals for the 5th Circuit which vacated the guidelines for legacy limitations in the 2015 ELGs. Because the selection of VIP pushes the date for compliance with FGD wastewater limitations back to December 31, 2023, the Department agrees that it must provide an additional assessment of "legacy" FGD wastewater discharges for the period of November 1, 2020 through December 31, 2023. This is a new issue for these facilities because the previous date for compliance was November 1, 2020, thus leaving no period for generation of "legacy" wastewater.

If this final determination were to include a decision regarding "legacy" wastewater, it would not have afforded the permittee or public the ability to comment on that decision. Furthermore, an assessment of the "legacy" wastewater issue may take significant review time, the length of which cannot be determined in advance. The Department has concluded that it is not appropriate to delay issuance of the final determination for this permit modification for assessment and reopening of permit conditions for public comment. Therefore, the Department shall issue the final determination with an automatic permit reopener which will allow for the assessment of "legacy" FGD wastewater and consideration of appropriate permit requirements.

As part of the assessment on "legacy" FGD wastewater, the Department will collect and review information regarding GenOn's VIP election and plan to meet the limitations by December 31, 2023. After review of the information provided and consideration of an appropriate timeline, the Department may consider schedules with enforceable deliverables as part of its "legacy" wastewater determination.

While the Department fully intends to complete the reopener process as expeditiously as possible, it is relevant to note that some level of controls beyond BPT are already in place while a complete assessment of the legacy discharges is being completed. Specifically, it is notable that in the 2015 ELGs, EPA established BAT for "legacy" FGD wastewater equivalent to BPT for "low-volume waste sources." The technology upon which the BPT limitations were based consists of sedimentation lagoons only. The three GenOn facilities contain physical, chemical, and biological treatment systems already, which while not being robust enough to meet BAT for FGD wastewater under the 2015 ELGs, far surpass the BPT level of treatment which was vacated by the 5th Circuit as BAT for "legacy" wastewater. The Department has established annual loading limitations on total nitrogen in all three GenOn permits, as well as annual concentration-based loading limitations and narrative operational requirements in the permits for Chalk Point and Dickerson (pursuant to an August 26, 2016 Consent Decree), all of which require efficient operation of the current treatment systems.

CHANGES FOR THE FINAL PERMIT

The final determination will include language in the narrative special condition regarding the ELGs (Special Condition X for Chalk Point, Special Condition V for Morgantown and Dickerson) which automatically reopens the permit upon the effective date of Modification A.

The specific language which will be included in the narrative special condition (X or V) for each permit is reprinted below:

"Legacy" FGD wastewater is defined as all FGD wastewater generated after November 1, 2020 but before the VIP limitations become effective on December 31, 2023. Upon the effective date of Permit Modification A, this permit is automatically reopened for the purposes of evaluating "legacy" FGD wastewater to determine if additional limitations or enforceable milestones are appropriate. As part of this evaluation, the Department will consider additional requirements to ensure progress on the planned elimination of "legacy" FGD wastewater (by meeting the VIP requirements identified above).