SIERRA CLUB PETITION

EXHIBIT 5

BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF: WE ENERGIES OAK CREEK POWER PLANT ADMINISTRATOR	)	ORDER RESPONDING TO PETITIONER'S REQUEST THAT THE
	)	OBJECT TO ISSUANCE
	)	OF STATE OPERATING
Permit No. 241007690-P10 Proposed by the Wisconsin Department of Natural Resources	)	PERMIT

ORDER GRANTING IN PART AND DENYING IN PART PETITION FOR OBJECTION TO PERMIT

On July 3, 2007, pursuant to its authority under the State of Wisconsin implementing statute, Wis. Stat. Ann. 285.62-285.64, and regulations, Wis. Admin. Code NR 407, title V of the Clean Air Act (Act or CAA), 42 U.S.C. §§ 7661-7661f, and the U.S. Environmental Protection Agency's implementing regulations at 40 C.F.R. part 70 (part 70), the Wisconsin Department of Natural Resources (WDNR) proposed a title V renewal operating permit for the WE Energies[1] Oak Creek Power Plant (Oak Creek Plant). The Oak Creek Plant primarily consists of four coal fired boilers.

On August 24, 2007, EPA received a petition from David Bender of the Garvey McNeil & McGillivray, SC, Law Offices, on behalf of the Sierra Club (Petitioner), requesting, pursuant to section 505(b)(2) of the Act and 40 C.F.R. § 70.8(d), that EPA object to issuance of the Oak Creek Plant title V permit.

The Petitioner alleges that the permit is not in compliance with the requirements of the Act. Specifically, the Petitioner alleges that: (1) the permit must include a compliance schedule; (2) the permit application contains a false certification of compliance; (3) the permit application does not contain sufficient information to determine the applicability of the Prevention of Significant Deterioration (PSD) program; (4) physical changes to the boilers at units 5 and 6 are subject to lower particulate matter (PM) emissions limits than are contained in the permit; (5) the permit must establish compliance demonstration requirements that ensure continuous compliance with emissions limits; (6) the facility's Compliance Assurance Monitoring (CAM) plan is deficient; (7) the facility's CAM plan ignores condensable particulate matter (PM); (8) the permit illegally

[1] WE Energies was known formerly as Wisconsin Electric Power Company (WEPCO).

exempts the Oak Creek Plant from applicable limits during start-up, shutdown, and malfunction; (9) plans referenced in the permit must be included in the permit and made available for public comment; and (10) the permit must require that the source submit all monitoring data and recordkeeping to the WDNR.

EPA has reviewed these allegations pursuant to the standard set forth in section 505(b)(2) of the Act, which requires the Administrator to issue an objection if the Petitioner demonstrates to the Administrator that the permit is not in compliance with the requirements of the Act. *See also* 40 C.F.R. § 70.8(d); *New York Public Interest Research Group v. Whitman*, 321 F.3d 316, 333 n.11 (2nd Cir. 2002). Based on a review of the available information, including the petition, the permit record, and relevant statutory and regulatory authorities and guidance, I grant the Petitioner's request in part and deny it in part, for the reasons set forth in this Order.

STATUTORY AND REGULATORY FRAMEWORK

Section 502(d)(1) of the Act requires each state to develop and submit to EPA an operating permit program to meet the requirements of title V. EPA granted final full approval of the Wisconsin title V operating permit program effective November 30, 2001. 66 *Fed. Reg.* 62946 (December 4, 2001).

All major stationary sources of air pollution and certain other sources are required to apply for title V operating permits that include emission limitations and such other conditions as are necessary to assure compliance with applicable requirements of the CAA, including the requirements of the applicable State Implementation Plan (SIP). *See* CAA §§ 502(a) and 504(a), 42 U.S.C. §§ 7661a(a) and 7661c(a). The title V operating permit program does not generally impose new substantive air quality control requirements (referred to as "applicable requirements"), but does require permits to contain monitoring, recordkeeping, reporting, and other requirements to assure compliance by sources with existing applicable emission control requirements. 57 Fed. Reg. 32,250, 32,251 (July 21, 1992) (EPA final action promulgating the part 70 rule). One purpose of the title V program is to "enable the source, states, EPA, and the public to better understand the requirements to which the source is subject, and whether the source is meeting those requirements." *Id.* Thus, the title V operating permits program is a vehicle for ensuring that existing air quality control requirements are appropriately applied to facility emission units and that compliance with these requirements is assured.

Under section 505(a), 42 U.S.C. § 7661d(a), of the CAA and the relevant implementing regulations (40 C.F.R. § 70.8(a)), states are required to submit each proposed title V operating permit to EPA for review. Upon receipt of a proposed permit, EPA has 45 days to object to final issuance of the permit if it is determined not to be in compliance with applicable requirements or the requirements under title V. 40 C.F.R. § 70.8(c). If EPA does not object to a

permit on its own initiative, section 505(b)(2) of the Act provides that any person may petition the Administrator, within 60 days of expiration of EPA's 45-day review period, to object to the permit. 42 U.S.C. § 7661d(b)(2), *see also* 40 C.F.R. § 70.8(d). The petition must "be based only on objections to the permit that were raised with reasonable specificity during the public comment period provided by the permitting agency (unless the petitioner demonstrates in the petition to the Administrator that it was impracticable to raise such objections within such period or unless the grounds for such objection arose after such period)." Section 505(b)(2) of the Act, 42 U.S.C. § 7661d(b)(2). In response to such a petition, the CAA requires the Administrator to issue an objection if a petitioner demonstrates that a permit is not in compliance with the requirements of the CAA. 42 U.S.C. § 7661d(b)(2). *See also* 40 C.F.R. § 70.8(c)(1); *New York Public Interest Research Group (NYPIRG) v. Whitman*, 321 F.3d 316, 333 n.11 (2nd Cir. 2003). Under section 505(b)(2), the burden is on the petitioner to make the required demonstration to EPA. *Sierra Club v. Johnson*, 541 F.3d. 1257, 1266-1267 (11th Cir. 2008); *Citizens Against Ruining the Environment v. EPA*, 535 F.3d 670, 677-678 (7th Cir. 2008); *Sierra Club v. EPA*, 557 F.3d 401, 406 (6th Cir. 2009) (discussing the burden of proof in title V petitions); *see also NYPIRG*, 321 F.3d at 333 n.11. If, in responding to a petition, EPA objects to a permit that has already been issued, EPA or the permitting authority will modify, terminate, or revoke and reissue the permit consistent with the procedures set forth in 40 C.F.R. §§ 70.7(g)(4) and (5)(i) – (ii), and 40 C.F.R. § 70.8(d).

BACKGROUND

WE Energies submitted to WDNR an application to renew the title V permit for the Oak Creek Plant on May 31, 2002. WDNR provided the public notice of the draft title V permit on April 20, 2007 and proposed the title V renewal permit on July 3, 2007. During the public comment period, WDNR received comments on the draft permit, including comments from the Petitioner. WDNR issued the final permit on September 5, 2007.

WDNR notified the public that September 3, 2007 was the deadline, under the statutory timeframe in section 505(b)(2) of the Act, to file a petition requesting that EPA object to the issuance of the final Oak Creek Plant permit. Petitioner submitted its petition to object to the issuance of the Oak Creek Plant permit to EPA on August 23, 2007. Accordingly, EPA finds that Petitioner timely filed this petition.

ISSUES RAISED BY THE PETITIONER

1 The Oak Creek Plant is in violation of prevention of significant deterioration program (PSD) and nonattainment new source review (NSR) requirements

The Petitioner states that 40 C.F.R. § 70.5(c)(8) provides that, "[f]or sources that are not in compliance with applicable requirements at the time of permit issuance, compliance schedules must include 'a schedule of remedial measure, including an enforceable sequence of actions with milestones, leading to compliance.' 40 C.F.R. § 70.5(c)(8)(iii)(C)." Petition at 2-3 (citing *In the matter of Onyx Environmental Services*, Petition No. V-2005-1 at 6-7 (Feb 1, 2006)). The Petitioner alleges that the Oak Creek Plant has repeatedly violated, and continues to violate, the PSD and nonattainment NSR requirements of the Act. Petition at 3. As described below, Petitioner provides extensive argument drawing from several sources of information – including an EPA enforcement complaint, an EPA enforcement memorandum, the source's responses to EPA's requests for information under CAA section 114, and the source's applications to the Wisconsin Public Services Commission (WPSC) – regarding alleged modifications triggering PSD and nonattainment NSR beginning in 1982, and also asserts that the State's response to comments regarding these alleged modifications was inadequate.

The Petitioner states that "a facility is 'modified,' and must comply with PSD permitting and [Best Available Control Technology (BACT)] pollution control requirements when it: (1) undergoes a physical change or change in the method of operation; and (2) the change results in an increase in air pollution." Petition at 4-5. The Petitioner discusses extensively the breadth of the definition of the term "physical change," and concludes that each of the projects at the Oak Creek Plant described in the Petition fall within the definition. Petition at 5-6. The Petitioner further alleges that modifications to the Oak Creek Plant triggered PSD requirements, because each resulted in an increase in annual operating time and increased emissions that exceeded the "significance" threshold. Petition at 7-8.

The Petitioner alleges that, without applying for the required PSD permits, WEPCO undertook a number of "historic changes" at the Oak Creek Plant that constitute major modifications. Petition at 14-15. The Petitioner lists numerous modifications made to the Oak Creek Plant between 1982 and 2002 which, Petitioner claims, WEPCO disclosed in response to EPA's 114 request. Petition at 15-19. The Petitioner alleges that the "modifications should have been projected at the time they were commenced, to result in significant net emission increases [of SO_2 and NOx] due to regaining annual operating hours." Petition at 20. The Petitioner concludes that the modifications should have undergone an air quality analysis, been subject to BACT, and been permitted.

In addition, the Petitioner states that EPA filed a lawsuit against WEPCO, *U.S. v. Wisconsin Electric*, Case No. 03-C-0371 (E.D. Wis., filed April 29, 2003), in which EPA alleged that "Wisconsin Electric violated and continues to violate Section 165(a) of the Act, 42 U.S.C. § 7475(a), and the PSD regulations set forth in 40 C.F.R. § 52.21, as incorporated into the Wisconsin [State Implementation Plan], by, inter alia, undertaking such major modifications at units located at the Oak Creek Plant...." Petition at 8-9. The Petitioner also cites a February 23, 2001, memorandum from George Czerniak, Chief of Air Enforcement and Compliance Assurance for EPA, Region 5. In the memorandum, based upon WEPCO's response to an information request issued pursuant to section 114 of the Act, Region 5 summarized seven projects at the Oak Creek Plant and characterized them as "potential major modifications." Petition at 9-10. The Petitioner asserts that EPA's findings "conclusively demonstrate non-compliance for the purposes of the title V review process." Petition at 10 (citing *New York Public Interest Group v. Johnson*, 427 F.3d 172, 180 (2d Cir. 2005)). The Petitioner contends that the "filing of a civil action is EPA's official finding that the [Oak Creek Plant] is in violation of PSD preconstruction permitting requirements." Petition at 11, citing *NYPIRG* at 181 and 42 U.S.C. § 7413(a)(1), which, according to Petitioner, provides that EPA may file a civil complaint only after finding that the person has violated, or is in violation of an applicable implementation plan. The Petitioner concludes that a "failure to require compliance with PSD requirements that were triggered by unpermitted major modifications, and as determined by EPA prior to its Complaint filed against WEPCO, is a deficiency in the title V permit." Petition at 11.

Further, the Petitioner alleges that the Oak Creek Plant committed additional PSD violations when it replaced the high-pressure turbine main steam stop and control valves on Units 5 and 6. Petition at 11. The Petitioner alleges that, by making these replacements, the Oak Creek Plant sought to reduce its outages, which had averaged more than 330 hours per year over the last five years, and to increase annual operating hours. Petition at 12-13. The Petitioner claims that these modifications to Units 5 and 6 allow WEPCO to regain sufficient generating time to result in a significant net emission increase of PM, NOx, SO_2, and other pollutants, thus triggering PSD. The Petitioner concludes that, based on WEPCO's "own statements to the Wisconsin Public Services Commission, WEPCO intends to regain sufficient generating time due to this project to result in a significant net emission increase." Petition at 14. Finally, the Petitioner alleges that WEPCO has not demonstrated that its turbine steam stop and control valve replacement projects are routine maintenance, repair or replacement projects. The Petitioner argues that the projects are not routine. In support, the Petitioner cites to the WEPCO Response to WPSC Data Request to show that WEPCO itself never had replaced similar parts on any other unit, and that the company could find only one similar replacement at any plant. Petition at 14.

The Petitioner notes that it commented that the WDNR must include a compliance schedule in the title V permit. Petitioner claims, however, that WDNR rejected its comments for illegal reasons. Petitioner quotes WDNR's response to comments, in which WDNR stated that it had not made a finding that the facility has violated PSD requirements and noted that Wisconsin Electric denied in the draft consent decree between the company and EPA that it had violated the Act. Petition at 20. The Petitioner asserts that WDNR "cannot refuse to make a determination of whether the plant is in compliance and then refuse to issue a compliance schedule based on the fact that [WDNR] has not made a determination." Petition at 21. Petitioner states that, "where there is nothing in the record contradicting [its] comments demonstrating violations and EPA's findings of violation, [WDNR] must find a violation and include a compliance schedule" in the permit. Petition at 21. The Petitioner concludes that the Administrator must object to the Oak Creek Plant permit because the title V permit does not require WEPCO to comply with the PSD requirements to which it is subject. Petition at 22.

Response

All of the modifications alleged in the petition are covered by a consent decree (CD) settling an enforcement case brought by the United States against WEPCO. Amended Consent Decree (paragraphs 123 and 124, at 40) entered in *United States v. Wisconsin Electric Power Company*, 522 F.Supp. 2d. 1107 (E.D. Wisc. 2007). On April 29, 2003, the United States (acting at the request of the Administrator of the EPA) initiated an enforcement action against WEPCO, alleging that WEPCO undertook several modifications, including modifications at the Oak Creek Plant, triggering PSD requirements. *WEPCO,* 522 F.Supp. 2d. at 1110. On the same day, the parties to the enforcement action lodged with the court a proposed CD that "would resolve claims of the EPA against WEPCO for alleged violations of the . . . PSD. . . provisions in Part C of Subchapter I of the Act, *42 U.S.C. §§ 7470-92*, the nonattainment . . . NSR . . . provisions in Part D of Subchapter I of the Act, *42 U.S.C. §§ 7501-7515*, and the federally-enforceable State Implementation Plans developed by Michigan and Wisconsin." *Id.* at 1109. On July 10, 2003, the United States lodged with the court a proposed amended CD, which, among other things, reflected the addition of the State of Michigan as a plaintiff-intervenor. *Id.* at 1110. The public comment period on the proposed amended CD closed on September 2, 2003. *Id.* The court later granted the motions of several other parties to intervene in the case, including the Sierra Club. *Id.* at 1111. On September 30, 2007, after holding a hearing and considering briefs filed regarding the proposed consent decree, the court entered the proposed CD, bringing it into effect. *Id.*

This "system-wide" CD covers five WEPCO coal-fired power plants in Wisconsin and Michigan. The court summarized the CD, and the court's approval of the CD, as follows:

> This settlement at issue appears to offer considerable benefits to human health and the environment. WEPCO must implement technology improvements to reduce emissions at the Presque Isle plant in Michigan and the Valley plant in Milwaukee, Wisconsin, and there are declining system-wide emission limits that apply to all five plants. In addition, WEPCO must pay a civil penalty of $ 3.1 million to the United States, $100,000 to the State of Michigan, and implement a $ 20 - $ 25 [million] TOXECON project at Presque Isle, which is designed to achieve a 90% removal of all species of mercury. Overall, this court is satisfied that the settlement is reasonable, fair, and consistent with the statutory purposes of the Clean Air Act. Consequently, the court will grant plaintiffs' motion to enter the proposed amended consent decree.

Id. at 1110. The CD does not contain an admission or finding that PSD or NSR requirements are applicable, or that there has been any violation of these requirements.

The CD requires, at paragraph 172, that "[w]ithin ninety (90) days of entry of this Consent Decree, Wisconsin Electric shall amend any applicable title V permit application, or apply for amendments of its title V permits, to include a schedule for all performance, operational, maintenance, and control technology requirements established by this Consent Decree, including, but not limited to, emission rates, removal efficiencies, limits on fuel use, and the requirement in Paragraph 80 pertaining to surrender of SO_2 allowances." To that end, on April 4, 2008, WDNR issued construction permit #07-SDD-247, which purports to include the terms of the CD applicable to the Oak Creek Plant. The WDNR put out for public comment, and, on April 27, 2009, proposed to EPA, title V permit modification #241007690-P12 (P12), which purports to include the terms from construction permit #07-SDD-247 that were initially agreed upon in the CD. *See*, WDNR's March 19, 2009 *Analysis, Preliminary Determination and Draft Permit for the Significant Revision of Operation Permit 241007690–P12 for WE Energies, Oak Creek Station*, at 3.

Further, paragraphs 123 and 124 of the CD provide that entry of the CD shall resolve all civil claims of the United States against WEPCO:

> 123. . . . [U]nder either: (i) Parts C or D of subchapter I of the Clean Air Act or (ii) 40 C.F.R. Section 60.14, that arose from any modifications that commenced at any Wisconsin Electric System Unit prior to the date of lodging of this Decree, including but not limited to those modifications alleged in the Complaint filed by the United States in this civil action.
>
> [and]
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> 124. . . . [F]or pollutants regulated under Parts C or D of Subchapter I of the Clean Air Act, and under regulations promulgated as of the date of

> lodging of this Decree, where such claims are based on a modification completed before December 31, 2015 and:
> (a) commenced at any Wisconsin Electric System Unit after lodging of this Decree; or
> (b) that this Consent Decree expressly directs Wisconsin electric to undertake.

CD paragraphs 123 and 124. Some of the modifications alleged in the petition are alleged to have commenced before lodging of the CD; the remaining modifications are alleged to have commenced after lodging. Petition at 2-22. All alleged modifications are addressed by this CD.

As the petition raises the same issues EPA has resolved in the consent decree, this petition requires EPA to address the relationship between two distinct, but related parts of the CAA – the enforcement provisions of the Act (in this case, sections 113 and 167), and EPA's obligation to respond to petitions to object to state permits issued under title V. Congress did not directly address how EPA must handle title V petitions that raise the same issues EPA has resolved through an enforcement settlement. The enforcement provisions of the Act do not address how EPA must treat a title V petition on an issue EPA has settled in an enforcement case. See CAA sections 113(b) and 167.

Similarly, title V does not directly answer this question. Title V provides that "[t]he Administrator shall issue an objection ... if the petitioner demonstrates to the Administrator that the permit is not in compliance with the requirements of this chapter...." CAA § 505(b)(2). On the one hand, this language could be read to say that, if a petitioner demonstrates that a permit is not in compliance with Act's requirements, EPA must object to the permit, even if EPA (and the United States) has reached a resolution in an enforcement case on the same issue. On the other hand, the language requires the petitioner to "demonstrate to the Administrator that the permit is not in compliance" with the Act as a whole. Where EPA has entered into a CD specifically designed to address a source's compliance with the Act, and the CD has been given the force of law by a court, it is not clear that Congress intended the Administrator to accept a contrary demonstration that could potentially force EPA to require a State to add additional permit terms and potentially undermine the CD in the title V context. A review of the legislative history does not further elucidate congressional intent on this matter.

As Congress has not directly spoken to this precise question at issue, EPA may adopt a reasonable interpretation to fill the gap. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984). EPA adopts the approach that, once EPA has resolved a matter through enforcement resulting in a CD approved by a court, the Administrator will not determine that a demonstration of noncompliance with the Act has been made in the title V context. This approach is reasonable for several reasons, including: (1) it avoids

conflicts between settlements of enforcement cases and responses to title V petitions (including potentially competing court proceedings); (2) it does not create disincentives for sources to agree to reasonable terms in settling enforcement matters; (3) it does not require EPA to revisit complex applicability issues in the short 60 day timeframe for EPA to respond to title V petitions;[2] (4) it does not unfairly prejudice sources that settled enforcement actions in good faith; and (5) EPA should not be forced to re-litigate issues of compliance with the Act where EPA and the source have settled. Further, the public is afforded an opportunity to comment on CDs, see 28 C.F.R. § 50.7.

In approving the CD, the district court in the enforcement case considered several factors, including:

> (1) the nature and extent of potential hazards; (2) the availability and likelihood of alternatives to the consent decree; (3) whether the decree is technically adequate to accomplish the goal of cleaning the environment; (4) the extent to which the consent decree furthers the goals of the statutes which form the bases of the litigation; (5) the extent to which approval of the consent decree is in the public interest; and (6) whether the consent decree reflects the relative strength or weakness of the Government's **[**29]** case against the Defendants.

WEPCO, at 1118 (citing *United States v. Akzo Coatings of America, Inc*, 949 F.2d 1409, 1436 (6th Cir. 1991); *United States v. Cannons Engineering Corp,* 899 F.2d 79, 89-90 (1st Cir. 1990); *United States v. Seymour Recycling Corp.*, 554 F. Supp. 1334, 1339 (S.D. Indiana 1982). The court concluded that the CD:

> Is fair, reasonable, adequate, and consistent with the policies underlying the CAA. The parties, the citizens of Wisconsin and Michigan, and the environment will realize benefits from the proposed amended decree. While the intervenors have raised valid critiques of a particular sections, [sic] as a whole, the agreement is fair, just and reasonable when scrutinized under the appropriate standard of review.

WEPCO, at 1121.

EPA notes that all CAA-related requirements in CDs settling actions brought by EPA to enforce applicable requirements of the Act must be included in title V permits. See *In the Matter of CITGO Refining and Chemicals Company LP, Texas*, Petition VI-2007-01, at 12-14 (May 28, 2009). In this case, as noted above, the State has sought to place requirements of the CD into permits issued

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[2] As the court noted in *WEPCO*, "no one can dispute the protracted nature of this type of litigation, where similar cases have been pending for years and the parties have devoted tens of thousands of hours. The proposed amended consent decree appears to be a careful assessment of litigation risks based on extensive experience with this type of litigation." *WEPCO,* 522 F.Supp. 2d at 1118.

under the SIP, and has proposed a title V permit seeking to include these requirements into the title V permit for the Oak Creek Plant.[3]

In light of the circumstances described above, EPA determines that the Petitioner has not "demonstrate[d] to the Administrator that the permit is not in compliance with the requirements of [the Act]." CAA § 505(b)(2). The petition is denied on this issue.

As noted above, the Petitioner also claims that the State did not adequately respond to comments on these alleged modifications triggering PSD. WDNR responded to these comments by asserting that WDNR had not made a finding that the facility has violated PSD requirements, and noting the draft CD in which the source had denied these allegations. EPA has made clear in several title V orders that permitting authorities have a responsibility to respond to significant comments. *See, e.g., In the Matter of Onyx Environmental Services,* Petition V-2005-1 (February 1, 2006), cited in *In the Matter of Kerr-McGee, LLC, Frederick Gathering Station,* Petition-VIII-2007 (February 7, 2008) *(Kerr-McGee Final Order)* ("it is a general principle of administrative law that an inherent component of any meaningful notice and opportunity for comment is a response by the regulatory authority to significant comments"). EPA acknowledges that WDNR's response to comments on this issue was somewhat cursory, and, in other contexts, EPA generally would expect a more robust response. Nonetheless, one key factor the State did cite in its response was the existence of the draft CD. EPA has resolved this matter through enforcement resulting in a CD finalized by a court. For the reasons stated above, EPA determines that the Petitioner has not demonstrated to the Administrator that the permit is not in compliance with the requirements of the Act. I therefore deny the petition on this issue.

II. The permit application falsely certifies compliance and omits the required compliance schedule

Citing to the section 503(b) of the CAA, EPA's title V permit application requirements at 40 C.F.R.§ 70.5, and the State operating permit application requirements at NR 407.05, the Petitioner asserts that each title V permit application must disclose all applicable requirements and any violations at the facility. The Petitioner further asserts that, for applicable requirements with which the source will not be in compliance at the time of permit issuance, the application must contain a narrative description of how the source intends to come into compliance with the requirements and a proposed compliance schedule. Petition at 22. Citing to 40 C.F.R. § 70.5(b) and NR 407.05(9), the Petitioner argues that the applicant has a duty to supplement and correct the application if any statements were incorrect or if the application omits relevant facts. *Id.* The Petitioner alleges that neither the May 29, 2002 permit application for the Oak

[3] Petitioner did not ask EPA to object to the title V permit that is subject to this petition to ensure that these CD or SIP-permit terms are placed in the title V permit. At the time the permit that is the subject of this petition was issued, the CD had yet to be finalized by the court.

Creek Plant permit nor the June 5, 2002 application for revision discloses NSR violations or proposes a compliance schedule. The Petitioner notes that neither certification has been supplemented or corrected. The Petitioner alleges that the compliance certifications in the Oak Creek Plant's applications are false, and the permit is deficient because it fails to ensure compliance. Petition at 23. The Petitioner asserts that WEPCO knew of the violations at the Oak Creek Plant before it made the false compliance certifications in its 2002 title V permit applications, because it had provided sworn responses to EPA's section 114 information requests on February 16, 2001 and January 30, 2003. Petitioner claims that, in those responses, WEPCO admits undertaking a number of projects at the Oak Creek Plant. Petition at 23. Petitioner contends that each of the projects constitutes a major modification subject to PSD requirements, but that WEPCO nevertheless failed to certify its noncompliance or to propose a compliance schedule in its application. Petition at 24. Petitioner states that it had commented on this issue, but that WDNR did not respond to the comment, and concludes that the Administrator must object to the permit to prevent the continuing operation of the Oak Creek Plant in violation of applicable requirements. Petition at 24.

Response

For the reasons discussed above in Issue I, EPA determines that the Petitioner has not demonstrated to the Administrator that the permit is not in compliance with the requirements of the Act. Thus, I deny the petition on this issue.

III. The permit application fails to provide sufficient information to determine applicability of the Prevention of Significant Deterioration program for planned projects

The Petitioner alleges that WEPCO sought to undertake the replacement project for the steam stops and control valves at units 5 and 6 of the Oak Creek Plant, a project that cost $14.9 million, with the express intent of regaining lost generation. Petition at 24-25. The Petitioner maintains that the project will result in a significant net emission increase of PM, NOx, SO_2, and other pollutants, and is therefore subject to PSD. The Petitioner alleges that the Oak Creek Plant title V application did not disclose this information, even though PSD is an "applicable requirement." Petition at 25. The Petitioner further claims that this information was required to be included in the permit application as "information that may be necessary to implement and enforce other applicable requirements of the Act or of [part 70] or to determine the applicability of such requirements." Petition at 25 (citing to 40 C.F.R § 70.5(c)(5) and State's operating permit requirements at NR 407.05(4)(c)7 and NR 407.05(4)(e)). The Petitioner claims that, even though WEPCO's title V application preceded its requests to the WPSC for approval to undertake the above-mentioned project, WEPCO had an ongoing duty to supplement its permit application. Petition at 25-26 (citing to WDNR's operating

permit application requirement at NR 407.05(9)). The Petitioner alleges that, because the Oak Creek Plant application was deficient, WDNR could not determine whether PSD applies to the source or whether the Oak Creek Plant is in compliance with PSD. The Petitioner concludes that the result is a deficient permit to which the Administrator must object. Petition at 26.

Response

In support of its claim, the Petitioner cites to the State operating permit requirement at NR 407.05(9), which mirrors the language in 40 C.F.R. § 70.5(b). 40 C.F.R. § 70.5(b), which governs title V permit applicants' duty to supplement permit applications, requires that "any applicant who fails to submit any relevant facts or who has submitted incorrect information in a permit application shall, upon becoming aware of such failure or incorrect submittal, promptly submit such supplementary facts or corrected information." The regulation further requires that the applicant "shall provide additional information as necessary to address any requirements that become applicable to the source after the date it filed a complete application but prior to release of a draft permit."

The Petitioner failed to demonstrate that WEPCO's permit application omitted "any relevant fact" or included "incorrect information." 40 C.F.R. § 70.5(b). The information at issue, i.e., WEPCO's application to the WPSC regarding certain Units 5 and 6 projects, was dated October 21, 2005. Exhibit H to the Petition. The information did not exist at the time WEPCO submitted its title V permit application and revision in 2002.

Further, Petitioner failed to demonstrate that WEPCO's 2005 application to WPSC is "additional information . . . necessary to address any requirements that became applicable to the source after the date it filed a complete application but prior to release of a draft permit." See 40 C.F.R. § 70.5(b). As discussed above in Issue I, EPA determines that the Petitioner has not demonstrated to the Administrator that the permit is not in compliance with the requirements of the Act as it pertains to PSD. Further, even assuming for purposes of this analysis that the projects identified in WEPCO's 2005 application to WPSC had triggered PSD, these projects did not take place until May 2008 for Unit 5 and July 2007 for Unit 6, after WDNR issued the draft operating permit on May 16, 2006. Therefore, PSD would not have become an applicable requirement prior to the release of the draft permit, thus triggering the duty to supplement the permit application under 40 C.F.R. § 70.5(b).

For the reasons stated above, the Petitioner has failed to demonstrate that the facility was required to supplement its application with the additional information at issue. I therefore deny the petition on this issue.

IV. Boilers at units 5 and 6 are subject to lower particulate matter (PM) emission limits

The Petitioner maintains that the PM emissions limit of 0.15 lb/mmBTU established in the Oak Creek Plant permit for boilers B25 and B26 is incorrect. The Petitioner states that Wis. Admin. Code NR 415.06(1)(c)2, which the permit cites as the authority for the 0.15 lb/mmBTU PM emissions limit, applies to sources that were constructed or last modified on or before April 1, 1972. The Petitioner contends that these boilers have been modified since April 1, 1972, and, thus, the PM limit of 0.10 lb/mmBTU in NR 415.06(2)(c) applies instead. Although the Petitioner raised this issue in its comments, it asserts that the WDNR did not respond to the comment because WDNR simply stated that it had not determined that the boilers had been modified. The Petitioner states that WDNR's response to comments "contains no basis for rejecting the preponderance of evidence in the record demonstrating that modifications did occur – including EPA's own determinations." Petition at 26. The Petitioner asserts that WDNR cannot avoid its obligation to include all applicable requirements in the permit by failing to determine whether requirements apply to the source, "especially when public comments demonstrate that the requirements apply." Petition at 26-27. The Petitioner concludes that the Administrator must object to the permit because it fails to require compliance with all applicable requirements. Petition at 27.

Response

Petitioner identifies two different PM limits in the Wisconsin SIP. NR 415.06(1)(c) of the Wisconsin SIP establishes a PM limit of 0.15 pounds per million Btu heat input for all installations of more than 250 million Btu per hour located in the Southeastern Wisconsin Intrastate Air Quality Control Region and on which construction or modifications was commenced before April 1, 1972. NR 415.06(2)(c) of the Wisconsin SIP establishes a PM limit of 0.10 pounds per million Btu heat input for all installations of more than 250 million Btu per hour on which construction or modification is commenced after April 1, 1972. Petitioner claims that because Units 5 and 6 have been modified since April 1, 1972, NR 415.06(2)(c) applies instead of NR 415.06(1)(c). NR 400.02 (99) of the Wisconsin SIP defines the term "modification." Although the term appears broadly defined to include any physical change that increases emissions, it specifically excludes changes identified in section NR 406.04(4) of the Wisconsin SIP from the definition of modification.

Petitioner raised this issue during the public comment period for the Oak Creek draft permit. WDNR responded that "[t]he Department has not made a finding that the facility has violated PSD requirements nor has the facility reported to the Department that such violation have occurred." *Addendum to the Preliminary Determination for WE Energies, Oak Creek Station, Permit 241007690-P10* (April 13, 2007) ("Addendum to the Preliminary Determination"), at 1. However, it is not clear from the SIP that a finding of PSD applicability is the prerequisite for meeting Wisconsin's SIP definition for

modification for purposes of determining the PM limit. WDNR's response did not mention the SIP definition for modification in section NR 400.02(99) or identify any exclusion in section NR 406.04(4) that would apply.

Section 502(b)(6) of the Act requires that all title V permit programs include adequate procedures for public notice regarding the issuance of title V operating permits, "including offering an opportunity for public comment." *See also* 40 C.F.R. § 70.7(h). It is a general principle of administrative law that an inherent component of any meaningful notice and opportunity for comment is a response by the regulatory authority to significant comments. *Home Box Office v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977) ("the opportunity to comment is meaningless unless the agency responds to significant points raised by the public."). Accordingly, WDNR has an obligation to respond to significant public comments. *See, e.g., In the Matter of: Louisiana Pacific Corporation*, Petition V-2006-3, at pages 4-5 (Nov. 5, 2007). Petitioner's comment about the applicable PM limit was a significant comment because it raised an issue that the Oak Creek title V permit may have failed to incorporate an applicable PM limit. WDNR's response does not allow EPA to determine which of the two SIP PM limits discussed above applies. EPA concludes that WDNR failure to respond to this significant comment may have resulted in one or more deficiencies in the Oak Creek title V permit. Therefore, I grant the petition on this issue and order WDNR to adequately address Petitioner's assertion that, because the units have been modified since April 1, 1972, the applicable PM requirement is NR 415.06(2)(c) and not NR 415.06(1)(c).[4]

V. The permit must contain compliance demonstration requirements that ensure continuous compliance with emission limits

The Petitioner asserts that the Administrator must object to the permit because it does not require sufficient monitoring to demonstrate continuous compliance with applicable PM limits. Petition at 27. The Petitioner claims that the underlying limit for PM in the Wisconsin SIP at section NR 415 of the Wisconsin Administrative Code does not include a monitoring requirement. Therefore, the Petitioner alleges, the WDNR must include in the Oak Creek Plant permit sufficient compliance demonstration provisions to yield continuous data from which the source's compliance can be determined at any time. Petition at 28. The Petitioner asserts that the WDNR failed to include a correlation between the measurements required by the permit, the monitoring of the Electrostatic Precipitator ("ESP") for primary voltage, secondary voltage, primary current in

[4] A permit must include all applicable emission limits and standards. 40 C.F.R. § 70.6(a)(1). On April 30, 2009, WDNR submitted a proposed revised Oak Creek title V permit, #241007690-P12, to EPA for review. The proposed permit identifies a PM limit of 0.10, 0.15 and 0.03 pounds of particulate matter per million Btu heat input for Units 5 and 6 under various circumstances. WDNR may adopt the most stringent limit as the required PM limit in the permit, which would assure compliance with any less stringent applicable PM limit. However, the permit must reference all applicable PM emission standards, and WDNR must explain in the statement of basis how the limit in the permit assures compliance with all other applicable limits.

amps, and secondary current in amps, and the PM limit. Petition at 28-29. The Petitioner claims that WDNR mischaracterized and failed to respond to its comments. Petition at 29.

The Petitioner states that EPA has determined that if ESP parameters are monitored as the basis for determining compliance with PM limits, the permit must specify the upper and/or lower range for each parameter that establishes compliance with the PM limit. Petition at 29 (citing *In the Matter of Midwest Generation, LLC, Waukegan Generation Station*, Order Responding to Petitioner's Request That the Administrator Object to Issuance of a State Operating Permit (Sept. 22, 2005)). Additionally, Petitioner states that in *In the Matter of Oxy Vinyls, LP, Louisville, Kentucky*, Objection to Proposed Part 70 Operating Permit No. 212-99-TV (Feb. 1, 2001), EPA stated that "[t]he permit must specify the parametric range or procedure used to establish that range, as well as the frequency for re-evaluating the range." Petitioner concludes that WDNR failed to comply with the requirement to include continuous monitoring and an enforceable parametric range in the permit, as required by prior Administrator decisions, and, therefore, the Administrator must object to the permit. Petition at 29-30.

Response

The title V permit must contain sufficient monitoring to assure compliance with the terms and conditions of the permit. 40 C.F.R. § 70.6(c)(1); see also 40 C.F.R. § 70.6(a)(3)(i)(B). The statement of basis (SOB) for the original title V permit, which is referenced in the SOB for the permit at issue,[5] discusses three methods for demonstrating compliance with the PM emissions limit. The SOB states that compliance will be demonstrated by performing compliance emission testing as required by NR 439.075(2) (which requires biennial testing, unless a waiver is granted); by requiring that only coal be used as the primary fuel type; and by operating an ESP whenever the boilers are in operation and by monitoring the primary and secondary voltage, primary and secondary current, and sparking rate. It appears that WDNR may be relying on these three requirements to ensure compliance with the applicable PM limit. However, it is not clear from the permit or the permit record how this monitoring scheme will ensure compliance.

The above referenced SOB provides worst case calculations (using the heating value of coal, the maximum hourly consumption, and the fraction emitted) that seek to demonstrate that the PM limit of 0.15 lb/mmBTU will be met. However, WDNR's calculations appear to be relying on the ESP's achieving a certain control efficiency. The SOB lists the efficiency of the ESP for each of the boilers, (e.g., 98.6% for B25), and states that efficiencies are based on either

[5] "The permitting authority shall provide a statement that sets forth the legal and factual basis for the draft permit conditions (including references to the applicable statutory or regulatory provisions)." 40 C.F.R. § 70.7(a)(5). WDNR provides with the Oak Creek title V permit the SOB referenced above that seeks to explain the bases for the terms and conditions in the permit.

manufacturer's guarantee, or a stack test. If that is the case (which would require parametric monitoring of the ESP to assure that the ESP will achieve the efficiency necessary to assure compliance with the applicable emissions limits), then it is not clear why there are no parameter indicator ranges in the permit that establish the correlation between the ESP operating efficiency and the parameters being measured.

Petitioner commented on the inadequacy of PM monitoring in the permit during the public comment period on the draft permit. WDNR did not directly respond to this specific comment. WDNR responded only that "[t]he Department disagrees that a violation of a compliance demonstration requirement is automatically a violation of an emission limit." *Addendum to the Preliminary Determination*, at 2. As discussed in the previous sections above, WDNR has an obligation to respond to significant public comments. Petitioner's comment was a significant comment because it raised an issue that the permit may not have monitoring sufficient to assure compliance with an applicable PM limit. Because WDNR's response does not explain how the PM monitoring in the permit is adequate, EPA concludes that WDNR's failure to respond to this significant comment may have resulted in one more deficiencies in the Oak Creek title V renewal permit. I therefore grant the permit on this issue. WDNR must explain how the permit provides adequate monitoring or modify the permit accordingly to ensure it contains monitoring sufficient to assure compliance with the PM limit. *See CITGO Order* at 5-8.

VI. The Compliance Assurance Monitoring (CAM) plan is deficient

The Petitioner asserts that the CAM plan proposed by WEPCO is defective because it establishes a PM "excursion" only if opacity exceeds 20% for "any three consecutive one-hour average periods, except during periods of startup, shutdown or malfunction." Petition at 31 (emphasis in original). The Petitioner claims that this permit term would allow, for example, opacity at 100% for two consecutive one-hour periods and at 19% for the third one-hour period, or average opacity readings of 100% during a three-hour startup period, without recording an "excursion." Id. The Petitioner further claims that this permit limitation does not correlate to the underlying limit in section NR 415.06, an instantaneous limit that does not exclude periods of startup. The Petitioner contends that the opacity-to-PM correlation which WEPCO uses to support its CAM plan supports, at most, using 20% opacity as an indicator of instantaneous compliance with an instantaneous limit, but not an indicator range that requires greater than 20% opacity for three consecutive hours, or even an average over a single hour. Id. The Petitioner alleges that, "by adopting an indicator range of 3-consecutive one our (sic) periods of opacity greater than 20%, [WDNR] has effectively rewritten the applicable limit as if it were a 3 hour block average." Id. The Petitioner concludes that, since the underlying limit is instantaneous, and exceedances over any averaging time must be reported, the continuous opacity monitoring system indicator value and excursion range should also be instantaneous. Petition at 32.

Additionally, the Petitioner claims that WDNR's response to its comment on the draft permit was not sufficient. The Petitioner notes that WDNR responded to the comment by stating that "[c]onsidering the operational realities of a power plant, using a longer averaging time (3 hours) to define an excursion rather than a lower opacity threshold is reasonable." Petition at 31-32. The Petitioner claims that it is unclear where WDNR's two options -- longer averaging time or lower opacity threshold -- originated. Petitioner further claims that it is not apparent how the "operational realities" of a plant require the use of 3-hour average to define excursion of an instantaneous limits. Petition at 32. Finally, the Petitioner asserts that the CAM plan must contain indicator ranges that "provide a reasonable assurance of ongoing compliance with emission limitations...." Petition at 32 (quoting 40 C.F.R. § 64.3(a)(2)). The Petitioner contends that monitoring "must be averaged consistent with the characteristics and typical variability of the pollutant-specific emissions unit, based on the amount of time that it would take the source to bring the control devise back into normal operating range." Petition at 32. The Petitioner maintains that, because the opacity COMS indicator range averaging time must also meet the "period of reporting exceedances" in the underlying instantaneous particulate matter limit and exceedances over any averaging time must be reported, the COMS indicator value and excursion range also should be instantaneous. The Petitioner concludes that there is no correlation between the CAM plan indicator range averaging times and the applicable limits. Id.

Response

As required by EPA's Compliance Assurance Monitoring (CAM) Rule at 40 C.F.R. part 64, WEPCO has developed a CAM plan to assure compliance with the applicable PM emission limits at its Oak Creek facility. WEPCO establishes in the CAM plan an indicator range to provide a reasonable assurance of ongoing compliance. See 40 C.F.R. § 64.3(a)(2). Specifically, the CAM plan sets an indicator range of greater than 20% opacity for three consecutive hours as the trigger point for initiating corrective action. Petitioner alleges that the CAM plan is defective because this indicator range does not assure compliance with the PM limits. Petitioner commented on this issue regarding the indicator range in the CAM plan during the public comment period for the Oak Creek draft permit. In its April 13, 2007 response to comments, WDRN stated that "[c]onsidering the operational realities of a power plant, using a longer averaging time (3 hours) to define an excursion rather than a lower opacity threshold is reasonable." *Addendum to the Preliminary Determination,* at 2. Although in its June 27, 2007 response to comments WDNR briefly discussed the correlation between opacity and PM emissions, WDNR did not specifically explain how this opacity indicator range assures compliance with the PM limits. *Second Addendum to the Preliminary Determination for WE Energies, Oak Creek Station, Permit 241007690-P10* (June 27, 2007) (Second Addendum to the Preliminary Determination"), at 2.

As previously explained, WDNR has a responsibility to respond to significant comments. The Petitioner's comments are significant because they raise the issue of the ability of the CAM Plan terms to assure compliance with emissions limits. WDNR's response to Petitioner's significant comment does not allow EPA to determine whether the indicator range and therefore the CAM plan are appropriate. WDNR's failure to respond to this significant comment may have resulted in one or more deficiencies in the permit. Therefore, I grant the petition on this issue. WDNR must explain how the indicator range in the CAM plan provides a reasonable assurance of ongoing compliance with the underlying PM limits in accordance with 40 C.F.R. § 64.3(a)(2).

VII. The CAM Plan Ignores Condensable PM

The Petitioner claims that the proposed CAM plan is based on the use of Method 17 to test PM. The Petitioner notes that Method 17 does not measure condensable fraction PM, but the limits in section NR 415.06 of the Wisconsin SIP apply to total PM (filterable and condensable). Petitioner alleges that, as a result, the proposed CAM plan is not correlated to the underlying limit. The Petitioner further asserts that the CAM indicator range is supposed to be based on operating parameter data obtained during the conduct of the applicable compliance or performance test conducted under conditions specified by the applicable rule. The Petitioner states that the permit requires compliance tests for PM that include both Method 17 and "Wisconsin's Modified Method 5 Test Method for Condensable Particulate for determining backhalf." Petition at 33. Thus, the Petitioner concludes, the Administrator must object to the permit because the CAM indicator range is based on only part of the total PM emissions limited by the underlying limitation, and fails to account for the emission test applicable to the facility. Petition at 33. The Petitioner states, however, that section NR 439 of the Wisconsin Administrative Code does not contain a subsection NR 439.07(8)(n), which is referenced in the permit as the authority for "Wisconsin's Modified Method 5 Test Method for Condensable Particulate for determining backhalf." Petitioner further notes that "Wisconsin Modified Method 5" does not appear to be an approved test method. Petition at 33, footnote 13.

Response

Permit Condition I.A.1.c.(3), which specifies, among other things, the reference test methods for the permit's PM limit, provides that, "whenever a stack test for particulate matter emissions including backhalf is required, the permittee shall use Method 5 or Method 17 in 40 C.F.R. Part 60, Appendix A, incorporated by reference in Section NR 484.04, Wis. Adm. Code, for determining particulate emissions and Wisconsin's Modified Method 5 Test Method for Condensable Particulate for determining backhalf." This permit condition identifies NR 439.06(1) and 439.07(8)(n) of the Wisconsin SIP as the authority. However, as noted by the Petitioner, there is no NR 439.07(8)(n) in Chapter NR 439 of the Wisconsin SIP; that section was renumbered to NR 439.07(8)(b)(7) in October

2003. Under NR 439.07(8)(b)(7), WDNR may require sources that are capable of emitting condensable PM to analyze the back half of the stack sampling train catch in the total particulate catch for any emission test (i.e. requires analysis using a test method that measures condensable). NR 439.07(8)(b)(7) specifies that the analysis must be performed using Method 202 in 40 C.F.R. part 51, Appendix M. Method 202 requires measurement of condensable emissions. Thus, although WDNR invoked its authority under NR 439.06(1) and 439.07(8)(b)(7) of the Wisconsin SIP to require that condensable PM be measured, WDNR failed to fully incorporate that requirement into the permit by failing to reference NR 439.07(8)(b)(7) as an authority for that requirement or specifying the test method required by NR 439.07(8)(b)(7) for measuring condensable PM. WDNR must revise the permit to include NR 439.07(8)(b)(7) as the appropriate authority for Permit Condition I.A.1.c.(3) and specify in that permit condition the test method required by NR 439.07(8)(b)(7) for measuring condensable PM.

The CAM indicator range must be based on operating parameter data obtained during the applicable compliance or performance test conducted under conditions specified by the applicable rule, in this case the Wisconsin SIP. See 40 C.F.R. § 64.4(c)(1). As described above, pursuant to NR 439.06(1) and 439.07(8)(b)(7) of the Wisconsin SIP, WDNR requires performance test to include testing of condensable PM. Noting that the CAM plan states that "[e]ach test consisted of three runs using EPA Reference Method 17," which does not measure condensable PM, Petitioner alleges that EPA must object to the permit because the CAM indicator range is based on only part of the total PM emissions limited by the underlying limit and fails to account for the emission test applicable to the facility.

Petitioner commented on this issue during the public comment period for the draft Oak Creek permit. As previously explained, WDNR has an obligation to respond to significant comments. Petitioner's comment was significant because it raised the issue that the CAM plan indicator range might not have been established consistent with the Wisconsin SIP. In its response to this comment, WDNR states, "Because condensable emissions at a power plant typically represent a small fraction of total PM emissions, developing the CAM plan based on tests using Method 17 (filterable PM) is reasonable." *Addendum to the Preliminary,* at 2. This response by WDNR acknowledges that the CAM plan ranges are based on a test method that does not include condensable PM even though the applicable PM limit includes both filterable and condensable PM. WDNR's response failed to explain how the CAM plan indicator range is therefore consistent with the Wisconsin SIP. WDNR's failure to adequately respond to this comment may have resulted in one or more deficiencies in the Oak Creek permit. I therefore grant the petition on this issue. WDNR must clarify whether the performance test used to establish the CAM plan indicator range measured or otherwise accounted for condensable PM emissions. In addition, if the performance test used to establish the CAM indicator range did in fact

measure condensable PM based on the appropriate reference methods, WDNR must direct the facility to correct the CAM plan to add the reference test method for measuring condensable PM. If condensable PM was not measured in establishing the CAM indicator range, then WDNR must explain why/how the CAM plan indicator range is consistent with the Wisconsin SIP that requires measurement of condensable PM using Method 202 when testing of condensable PM is required.

VIII. The permit illegally exempts the Oak Creek Plant from applicable limits during startup, shutdown, and malfunction periods

The Petitioner states that Permit Conditions I.A.2.a.(l) and I.B.5.a.(l), which reference NR 431.04(2) and 436.03(2)(b) of the Wisconsin SIP as their authority, exempt excess opacity emissions during periods of normal start-up and shut-down, "which are defined 'in the start-up and shut-down plan.'" Petition at 33. The Petitioner asserts that normal startup and shutdown periods are not exempted from the emission limit in NR 431.04(2). Petition at 33. The Petitioner alleges that only the exemptions provided in section NR 431.05, which is referenced in NR 431.04(2), apply to the facility. According to the Petitioner, section NR 431.05 states that the opacity during startup cannot exceed 80% for more than 6 minutes and startup cannot occur more than 3 times per day. The Petitioner states that NR 431.05 does not contain an exception from the opacity limit for shutdown periods. Petition at 34.

The Petitioner states that the permit cites to section NR 436.03(2)(b) for the startup/shutdown exemption. NR 436.03(2)(b) identifies certain exceptions to the general prohibition against exceeding emission limits. The Petitioner asserts, however, that section NR 436.03(2), (and its prior version in NR 154.09) was never incorporated into the Wisconsin SIP. Therefore, Petitioner concludes, section NR 436.03(2) is invalid to exempt emissions that otherwise are prohibited under the Wisconsin SIP. Petition at 34.

The Petitioner alleges that the *Federal Register* notices to which WDNR cites for the permit exceptions do not incorporate the entire text of NR 154.09 into the Wisconsin SIP. The Petitioner claims that, although the *Federal Register* discusses NR 154.09, including the startup and shutdown exemption, it specifically distinguishes between the entire rule (which EPA did not propose to adopt), and the amendments to the rule (which EPA proposed to adopt). Petition at 35-36. The Petitioner asserts that the startup and shutdown exemption is part of the former. Further, Petitioner contends that 40 C.F.R. § 52.2570(c)(22) clarifies that EPA adopted only the "'revisions to Regulation NR 154.09' that were submitted on July 12, 1979." Petition at 36 (emphasis in original).[6] The Petitioner asserts that EPA would not have approved NR 154.09 into the

[6] The Petitioner states at page 36 of the petition that "the startup and shutdown provision was a revision that was submitted on July 12, 1979." EPA believes that Petitioner meant that the provision was not a revision that was submitted on July 12, 1979.

Wisconsin Sip because it violates EPA's policy against such exemption provisions. Petition at 36. The Petitioner contends that WDNR's response to its comments are inconsistent with its prior decision on the Weston Generating Station, and that, even if section NR 436.03(2) was approved into the Wisconsin SIP, WDNR cannot ignore important parts of the rule. Petition at 37. The Petitioner notes that NR 436.03(2) exempts emissions in excess of the limits when they are "temporary and due to scheduled maintenance, startup or shutdown of operations carried out in accord with a plan and schedule approved by the department." Petition at 38. The Petitioner emphasizes that "it is not every startup and shutdown that is exempted but only 'scheduled' startups and shutdowns, and only when carried out in accordance with both a plan and a schedule approved by the department." Petition at 38 (emphasis in original). The Petitioner contends that section NR 439.03(2) provides only a very limited exemption for startup and shutdown periods where the source notifies WDNR of the startup or shutdown in advance. The Petitioner concludes that the Administrator must object to the permit because section NR 436.03(2) is not part of the Wisconsin SIP, and because the permit unlawfully grants exemptions from applicable limits. Petition at 38.

Response

The permit cites to sections NR 431.04(2), and 436.03(2)(b) of the Wisconsin Administrative Code as origin and authority for the startup and shutdown provisions. NR 431.04(2) provides, "No owner or operator of a direct or portable source ... may, after July 31, 1975, cause or allow emissions of shade or density greater than number 1 of the Ringlemann chart or 20% opacity. Exceptions listed in s. NR 431.05 shall apply." The exceptions in NR 431.05 provide that the opacity during startup cannot exceed 80% for more than 6 minutes and startup cannot occur more than 3 times per day.

The permit also cites to NR 436.03(2)(b), which provides, "Emissions in excess of the emission limitations set in chs. NR 400 to 499 may be allowed in the following circumstances: ... (b) When emissions in excess of the limits are temporary and due to scheduled maintenance, startup or shutdown of operations carried out in accord with a plan and schedule approved by the department. [History: Cr. (2) (intro.), renum. from NR 154.09 (1) and am., Register, September, 1986, No. 369, eff. 10–1–86; am. (1), Register, May, 1992, No. 437, eff. 6–1–92; am. (1), Register, October, 1999, No. 526, eff. 11–1–99.]"

The Petitioner alleges that the exemption under NR 436.03(2) is not part of the Wisconsin SIP. However, as WDNR explained in its response to this comment on the draft Oak Creek permit, NR 436.03(2)(b) is part of the approved SIP. Addendum to the Preliminary Determination, at 3. In its response, WDNR explained that:

The provision regarding allowing emissions in excess of the emission limit

due to normal startup or shutdown carried out in accord with the approved startup and shutdown plan was approved in the state SIP as s. NR 154.09, Wis. Adm. Code, and later included as the renumbered s. NR 436.03(2)(b), Wis. Adm. Code. In a proposed SIP revision rule, EPA specifically cites the exemption from emissions limitations due to startup or shutdown (page 41816, FR 8/18/1981) before finalizing the revision to s. NR 154.09, Wis. Adm. Code (FR 11/27/1981).

Id.

As WDNR correctly noted, EPA approved NR 154.09 into the Wisconsin SIP as part of the initial Wisconsin SIP submittal in 1972, and again as part of a package of amendments approved on November 27, 1981. (46 Fed. Reg. 57893). The 1972 version of 154.09(1)(b) read: "(b) Emissions in excess of the limits shown which are temporary and due to scheduled maintenance, breakdown of equipment or start-up or shutdown of operations shall not be considered a violation provided that the department is immediately notified of such unusual occurrence and it considers the requested period of time necessary for correction to be reasonable." The amended 154.09(1)(b) allowed excess emissions during startup and shutdown: "(b) When emissions in excess of the limits are temporary and due to scheduled maintenance, startup or shutdown of operations carried out in accord with a plan and schedule approved by the department." Because this exemption is allowed by the SIP, I deny the petition on the allegation that NR 436.03(2)(b) is not part of the EPA-approved SIP.

However, EPA agrees with the Petitioner the permit fails to correctly incorporate the exception criteria prescribed in the Wisconsin SIP. As mentioned above, NR 436.03(2)(b) allows excess emissions only if they are temporary and due to startup and shutdown operations carried out in accord with a plan and schedule approved by the department. The exception in NR 431.05 provides that the opacity during startup cannot exceed 80% for more than 6 minutes and startup cannot occur more than 3 times per day. Permit Conditions I.A.2.a.(1) and I.B.5.a.(1) do not specify the exception criteria in NR 436.03(2)(b) and 431.05. Instead, these two permit conditions state that the opacity limit apply except during normal startup and shutdown and require only that normal startup and shutdown be defined in a startup and shutdown plan. The permit does not require that the SIP exception criteria described above be included in an approved startup and shutdown plan, nor does it require compliance with either these exception requirements or with an approved startup and shutdown plan during start and shutdown operations that exceed the opacity limit. I therefore grant the petition on the issue that the permit fails to incorporate the SIP criteria for exceeding the opacity limit. WDNR must revise the permit to make the permit exemption language for the opacity limit consistent with the Wisconsin SIP, as described above.

IX. The startup and shutdown plan (SSP), the malfunction prevention and abatement plan (MPAP), the Quality Control and Quality Assurance Plan (QCQAP), and the fugitive dust control plan must be incorporated in the permit and made available for public comment[7]

The Petitioner alleges that the permit is deficient because it does not incorporate into the permit the MPAP, the SSP and the QCQAP upon which WDNR relied to determine that the Oak Creek Plant will meet applicable requirements. The Petitioner contends that WDNR not only requires the plans to be submitted, but relies on MPAP and QCQAP as bases for finding that the plant will comply with applicable requirements, and on a startup and shutdown plan to define terms in the permit. Citing to EPA's regulations at 40 C.F.R. § 70.5(a)(2), 70.5(c), and 70.5(c)(3)(vi), the Petitioner asserts that, because WDNR relies on the plans to assure compliance and to define permit terms, the plans must be provided in the title V permit application. Petition at 39. The Petitioner claims that the plans were not included with the application or the public review documents, and that the public, therefore, had no opportunity to review the plans to determine whether they were sufficient to ensure compliance, or to determine the definition of permit terms. Petition at 39-40. The Petitioner contends that the plans cannot be approved by WDNR separate from, and later than, the title V permit. Petition at 40.

The Petitioner further alleges that, because WDNR is relying on the plans to assure compliance with applicable requirements, the plans must be part of the title V permit and must be reviewed with the title V permit. Petition at 40, citing to 40 C.F.R. § 70.6(a)(1), and 70.7(a)(iv). The Petitioner asserts that it is not possible for WDNR to rely on the plans to conclude that the Oak Creek Plant will comply with all applicable requirements when it has not reviewed the plans. Petition at 40, citing *Environmental Defense Center, Inc. v. EPA*, 344 F.3d 832, 855-56 (9th Cir. 2003), *In Re RockGen Energy Center*, 8 E.A.D. 536, 553-54 (EAB 1999). The Petitioner further argues that, because compliance with the plans constitutes a permit requirement and defines whether startup and shutdown excess emissions are exempt, the plans must be subject to public notice and comment. The Petitioner contends that the public cannot comment on the sufficiency of the permit unless the plans are subject to public notice and comment. Petition at 40-41, citing *Waterkeeper Alliance v. EPA*, 399 F.3d 486,

[7] Except in the issue heading, there is no mentioning of the fugitive dust plan in the petition, much less an explanation for the claim that such plan must be incorporated into the permit and made available for public comment. To the extent that Petitioner intended to include the fugitive dust plan in this issue, Petitioner has failed to demonstrate that the permit is not incompliance with any applicable requirement of the Act by not incorporating the fugitive dust plan into the permit and/or making it available for public comment. I therefore deny the petition on this issue with respect to the fugitive dust plan.

503-04 (2d Cir. 2005), *RockGen Energy Center*, 8 E.A.D. at 553-54.

Finally, the Petitioner claims that WDNR's response to its comment was incorrect. The Petitioner asserts that WDNR incorrectly states that its handling of the plans in the permit is typical, and the EPA has not identified the procedures as a problem. Petitioner contends that EPA identified WDNR's practice as a problem in *RockGen Energy Center*, 8 E.A.D. at 553-54. The Petitioner asserts that, in any event, WDNR is required to follow the law. The Petitioner concludes that the Administrator must object to the permit because the MPAP, SSP and QCQAP were not available with the application and public review documents, and because WDNR did not review the plans before proposing the permit, despite the fact that WDNR relied on them in issuing the permit. Petition at 41.

Response

As discussed below, the SSP, MPAP, and QCQAP must be included in the permit application as well as in the permit. As part of the permit and permit application, these plans must be made available for review during the title V public comment process. 40 C.F.R. 70.7(h)(2). For these reasons, which are explained in more detail below, I grant the petition on this issue.

SSP: As mentioned above, the Petitioner claims that plans that define permit terms must be provided in the title V permit application. The Petitioner identifies various EPA title V regulations, including 40 C.F.R. §§ 70.5(a)(2) and 70.5(c), to support this claim. 40 C.F.R. § 70.5(a)(2) states that a complete application must contain information "sufficient to . . . determine all applicable requirements." Further, 40 C.F.R. § 70.5(c) states that "[a]n application may not omit information needed to determine the applicability of, or impose, any applicable requirement. . . ."

The Petitioner cites Permit condition I.A.2.a.(1) as an example of this claim. I.A.2.a.(1) provides, "Opacity may not exceed 20% except during periods of normal startup and shutdown. Normal startup and shutdown shall be defined in the startup and shutdown plan." The Wisconsin SIP at NR 436.03(2)(b), which is identified as an authority for Permit Condition I.A.2.a.(1), provides that "Emissions in excess of the emission limitations ... may be allowed ... (b) when emissions in excess of the limits are temporary and due to scheduled maintenance, startup, or shutdown of operations carried out in accord with a plan and schedule approved by the department."

NR 436.03(2)(b) exempts the facility from the opacity limit during startup and shutdown if such operations are carried out in accord with a WDNR approved SSP. The SSP therefore contains information necessary to determine the applicability of, or the exemption from, the opacity limit. Because the SSP

contains information needed to determine and impose the opacity limit, it must be included in the permit application pursuant to 40 C.F.R. §§ 70.5(a)(2) and 70.5(c).

The Petitioner further alleges that the SSP must be part of the title V permit and cites to various EPA regulations, including 40 CFR § 70.6(a)(1), to support its claim. 40 C.F.R. § 70.6(a)(1) requires that each permit include "emission limitations and standards, including those operational requirements and limitations that assure compliance with all applicable requirement." The WDNR-approved SSP contains operational requirements and limitations applicable to startup and shutdown operations that exceed the opacity limit. Therefore, the plan must be included in the permit.

Finally, because the SSP must be included in the permit application and the permit, it must be available for review during the title V public comment process. 40 C.F.R. § 70.7(h)(2). For the reasons stated above, I grant the petition on this issue as it pertains to the SSP.

MPAP: Citing to permit condition I.A.1.b.(5), the Petitioner alleges that the permit relies on the MPAP to assure compliance with applicable requirements. This permit condition provides, "The permittee shall perform inspections of each electrostatic precipitator in accordance with an approved malfunction prevention and abatement plan to ensure that the control equipment is operating properly." The permit condition cites to WDNR's operating permit requirement at NR 407.09(4)(a)3.b[8] as the authority or this permit requirement. Although not cited as an authority for Permit Condition I.A.1.b.(5) (but cited for Condition I.B.1.b.(5) which contains the same requirement as Condition I.A.1.b.(5)), Construction Permit 01-RV-103, issued on October 9, 2001, pursuant to Wisconsin's SIP-approved construction permit program, requires, "The permittee shall perform inspections of each electrostatic precipitator in accordance with an approved malfunction prevention and abatement plan to ensure that the control equipment is operating properly. The Permittee shall submit an updated malfunction prevention and abatement plan for Department approval within 90 days." Construction Permit 01-RV-103, Condition I.A.1.b.(5).

As mentioned above, the construction permit requires compliance with an MPAP approved by WDNR. Construction Permit 01-RV-103, Condition I.A.1.b.(5). As the facility must comply with an approved MPAP, the content of the MPAP is information necessary to impose this applicable requirement. Therefore, the MPAP must be in the title V permit application pursuant to 40 C.F.R. § 70.5(c).[9] Furthermore, along with the construction permit requirement to

[8] NR 407.09(4)(a)3.b is a general requirement that all operation permits shall contain "means for assessing or monitoring the compliance of the source with its emissions limitations, standards, and work practices..." It does not specifically require ESP inspection in accordance with an approved MPAP.

[9] However, we reject Petitioner's contention that the plans, including MPAP, cannot be approved by WDNR separate from the title V permit. Petition at 40. Petitioner provides no legal authority

comply with an MPAP approved by WDNR, the permit also requires ESP inspection in accordance with an approved MPAP as a means of demonstrating and monitoring compliance with the PM limit, see, e.g., Permit Condition I.A.1.b.(5), referencing NR 407.09(4)(a)3.b as its authority. Because compliance with the approved MPAP is required, the plan must be included in the permit pursuant to 40 C.F.R. § 70.6(a)(1).

Lastly, because the WDNR-approved MPAP must be included in the permit application as well as the permit, it must be available for review during the title V public comment process. 40 C.F.R. § 70.7(h)(2). For the reasons stated above, I grant the petition on this issue as it pertains to the MPAP.

QCQAP: Permit condition I.A.3.b.(5)[10], provides, "The permittee shall submit to the Department a quality control and quality assurance plan for the continuous carbon dioxide emission monitor, and comply with the plan." This permit condition cites as authority the Wisconsin SIP NR 439.09(8) and NR 439.095(6). NR 439.09(8) requires that "[t]he owner or operator of a continuous emissions monitoring system shall comply with the quality control and quality assurance plan submitted by the owner or operator of the source and approved by the department." NR 439.095(6), requires, in part, that "[t]he owner or operator of the source shall submit a quality control and quality assurance plan for approval by the department. The monitor shall follow the plan, as approved by the department." The content of the QCQAP is information necessary to impose these applicable requirements, i.e., the facility must submit and comply with an approved QCQAP. Therefore, the QCQAP must be in the Oak Creek title V permit application pursuant to 40 C.F.R. § 70.5(c). Furthermore, because the Wisconsin SIP requires compliance with a WDNR-approved QCQAP, the QCQAP must be included in the permit pursuant to 40 C.F.R. § 70.6(a)(1).

Lastly, because the WDNR-approved QCQAP must be included in the permit application as well as the permit, it must be available for review during the title V public comment process. 40 C.F.R. § 70.7(h)(2). For the reasons stated above, I grant the petition on this issue as it pertains to the QCQAP.

During our review of this petition issue, EPA determined that permit condition I.A.3.b.(5) does not fully incorporate the SIP requirement at NR 439.095(6) because it requires compliance with a QCQAP, not one that is approved by WDNR. When WDNR reopens the permit in response to this order, WDNR should also revise Condition I.A.3.b.(5) to accurately incorporate the requirement at NR 439.095(b), i.e., to require compliance with a QCQAP approved by WDNR.

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to support this claim.

[10] To support its claim regarding QCQAP, the Petitioner cites to section I.B.2.b.(3) of the permit. We believe the citation is an error because the cited permit condition does not address QCQAP. We respond to this allegation based on our assessment of the permit condition identified above that address QCQAP instead of condition I.B.2.b.(3).

Finally, the Petitioner claims that WDNR's response to its comment was incorrect. In its response, WDNR states, "The Department disagrees. These procedures for handling such plans in permits are typical for any permit issued by the Department. Permits are routinely submitted to EPA for review and the Department's title V permit program has been audited by EPA. EPA has not identified this issue as a problem." Addendum to the Preliminary Determination, at 3. As discussed above, the SSP, MPAP, and QCQAP must be included in a title V permit application and permit; as a result, these plans must be available for public comment during the title V public comment process. Because our conclusions are based on the title V regulations, it is not necessary to address Petitioner's claim regarding WDNR's practices or procedures for handling these plans.

X. All monitoring data and recordkeeping must be submitted to the WDNR

The Petitioner alleges that the permit does not require sufficient reporting. The Petitioner claims that Permit Condition A.1.H.1.a(3) fails to explicitly require the source to submit all records of monitoring results to WDNR and, instead, allows the monitoring results to be maintained at the facility. Petition at 42. The Petitioner asserts that NR 439.03(1)(b) of the Wisconsin SIP expressly requires the source to "submit the results of monitoring required by the permit... no less often than every 6 months...." Petition at 42 (emphasis in original). The Petitioner contends that this requirement applies to any monitoring required by the permit, including parametric monitoring. The Petitioner further argues that, while the applicable SIP regulation provides that WDNR may require summary reporting, the SIP regulation points out the minimum information necessary in summary reporting: "sufficient data for the department to determine whether the source is in compliance with the applicable requirements...." Petition at 42 (citing to Wis. Admin. Code §§ NR 407.09(1)(c)3.a, NR 439.03(1)(a)(b)). The Petitioner states that "a generic certification of compliance with applicable limits is not data, and is not sufficient for [WDNR] to independently determine whether the source is, in fact, in compliance." Petition at 42.

The Petitioner further asserts that WDNR incorrectly interpreted its comment when Petitioner raised this issue during the public comment period on the draft Oak Creek Title V permit. Petitioner quotes from its comment the statement " [t]hroughout the permit, [WDNR] only requires that monitoring results be maintained at the facility, but fails to require such results to be provided to [WDNR]." Petition at 43, quoting Sierra Club's June 14, 2006 comment at 36. The Petitioner also quotes WDNR's response to this comment, which states that:

> The Department disagrees that the permit needs modification. The requirement to submit monitoring results under [NR 439.03(1)(b)] is already in the permit at I.H.1.a.(1) and 1.H.1.b.(1). The comment reads more like

> [Sierra Club] disagrees with what the Department has accepted as a summary of data at another facility, and disagrees with the option provided under s. NR 439.03(1)(b) to allow submission of a summary in lieu of all monitoring results.

Petition at 43 (quoting Addendum to the Preliminary Determination, at 3).

The Petitioner contends that its comment stated that the permit fails to require sufficient reporting, not that the Petitioner disagrees with WDNR's practice of accepting "deficient reporting."[11] Petition at 42-43. The Petitioner claims that, "unless the compliance records are required by the title V permit, the public's right to review the documents and enforce the Act are hampered. The public my (sic) have no way to determine whether violations occurred unless the permittee, itself, identifies them." Petition at 43.

Response

The Petitioner points to Permit Condition I.H.1.a.(3) for allowing Oak Creek to maintain monitoring results at the facility. This permit condition cites to sections NR 439.04 (Recordkeeping) and 439.05 (Access to records; inspection) of the Wisconsin SIP as the origin and authority for this permit term. Consistent with these SIP provisions, this permit condition provides: "The records required under this permit shall be retained for at least five (5) years and shall be made available to department personnel upon request during normal business hours."

The Petitioner and WDNR (in its response to comments) both note that the applicable reporting requirement in the Wisconsin SIP is NR 439.03(1)(b),[12] which provides:

> The responsible official for a source which has been issued an operation permit under s. 285.62, Stats., or an order under s. 285.13 (2), Stats., shall submit the results of monitoring required by the permit or order no less often than every 6 months, or more frequently if required by the department. In lieu of submission of all monitoring results, a summary of the monitoring results may be submitted to the department. The summary shall include sufficient data for the department to determine whether the source is in compliance with the applicable requirements to which the monitoring relates. ...

NR 439.03(1)(b) (emphasis added).

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[11] The Petitioner notes, however, that it does disagree with WDNR's practice of accepting what it characterizes as "deficient reporting." Petition at 43.

[12] We disagree with the Petitioner that WDNR incorrectly interpreted Petitioner's comment that the permit fails to include adequate reporting requirement. In its response to comments, WDNR noted that the Wisconsin SIP reporting requirement at NR 439.03(1)(b) is incorporated into the permit in Condition I.H.1.b.(1).

This SIP reporting requirement is incorporated into the permit in Permit Condition I.H.1.b.(1), not Condition 1.H.1.a(3) cited by the Petitioner. Consistent with NR 439.03(1)(b), Permit Condition 1.H.1.b.(1) allows the permittee to submit a summary of monitoring results. Further, Permit Condition I.H.1.b.(3) specifically requires that deviations from and violations of applicable requirements be clearly identified. These reporting requirements in the permit are also consistent with EPA's title V implementing regulations at 40 C.F.R. § 70.6(a)(3)(iii), which provides:

> With respect to reporting, the permit shall incorporate all applicable reporting requirements and require the following:
>
> (A) Submittal of reports of any required monitoring at least every 6 months. All instances of deviations from permit requirements must be clearly identified in such reports. All required reports must be certified by a responsible official consistent with Section 70.5(d) of this part. ... [13]

40 C.F.R. § 70.6(a)(3)(iii).

Although the Petitioner acknowledges that NR 439.03(1)(b) allows summary reporting in lieu of submission of all monitoring results, it appears to argue that the "sufficient data" criterion in NR 439.03(1)(b) (i.e., the summary shall include "sufficient data" for determining compliance) can only be satisfied if all monitoring results or compliance records are submitted. Petitioner's interpretation of the term "sufficient data" is at odds with the plain language of NR 439.03(1)(b) that explicitly allows summary reporting. Further, Petitioner has not demonstrated that compliance with any applicable requirement cannot be determined based on the required reporting in the permit. For the reasons stated above, I deny the petition on this issue.

CONCLUSION

For the reasons set forth above, and pursuant to section 505(b)(2) of the Clean Air Act, I am granting in part and denying in part the petition filed by David Bender on behalf of the Sierra Club. Because this permit has been issued, EPA or the permitting authority will modify, terminate, or revoke and reissue the permit consistent with the procedures in 40 C.F.R. § 70.7(g)(4) or (5)(i) and (ii), and 40 C.F.R. § 70.8(d). WDNR shall have 90 days from receipt of this Order to resolve the objections identified above and to terminate, modify, or revoke and reissue the Oak Creek Plant title V renewal permit accordingly.

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[13] In *Sierra Club v. Johnson*, 436 F.3d 1269, 1283 (11th Cir. 2006), the Court of Appeals for the Eleventh Circuit held that EPA's interpretation of 40 C.F.R. 70.6(a)(3)(iii) as not requiring reporting of all monitoring data is a reasonable interpretation of this regulation.

Dated: JUN 12 2009

Lisa P. Jackson
Administrator