BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF:	)	
LOUISIANA PACIFIC CORPORATION,	)	
TOMAHAWK, WISCONSIN	)	ORDER RESPONDING TO
	)	PETITIONER'S REQUEST
	)	THAT THE ADMINISTRATOR
Petition number V-2006-3	)	OBJECT TO ISSUANCE
Permit No. 735057950-P10	)	OF STATE OPERATING
Proposed by the Wisconsin	)	PERMIT
Department of Natural Resources	)	

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

On January 30, 2006, pursuant to its authority under the Wisconsin Title V operating permit program, Title V of the Clean Air Act ("Act"), 42 U.S.C. §§ 7661-7661f, and the U.S. Environmental Protection Agency's implementing regulations in 40 C.F.R. part 70 ("part 70"), the Wisconsin Department of Natural Resources (WDNR) proposed a Title V operating permit for the Louisiana Pacific Corporation ("Louisiana Pacific") facility in Tomahawk, Wisconsin, where Louisiana Pacific owns and operates an oriented strand board manufacturing facility. Oriented strand board is a particular type of wafer board used for home building and general industry construction.

On May 15, 2006, the EPA received from David Bender of Garvey McNeil & McGillivray, S.C., on behalf of the Sierra Club (Petitioner), a petition requesting that EPA object to issuance of the Louisiana Pacific, Tomahawk facility permit, pursuant to section 505(b)(2) of the Act and 40 C.F.R. § 70.8(d).

Petitioner alleges that the permit is not in compliance with the requirements of the Act, 40 C.F.R. part 70, EPA policy, and requirements applicable to Louisiana Pacific. Petitioner specifically alleges that the permit (1) fails to require sufficient monitoring for visible emissions; (2) fails to require sufficient monitoring to demonstrate compliance with the applicable particulate matter (PM) emission limits; (3) fails to contain all applicable visible emission limits for boiler B03; (4) contains conditions that violate the credible evidence rule; and (5) contains conditions that violate EPA policy requiring a permit to be practically enforceable.

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 applicable 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 all

available information, including the petition, the proposed permit, the preliminary determination (Wisconsin's statement of basis accompanying the draft permit), additional information provided by the permitting authority in response to EPA's inquiries, the information provided by Petitioner in its petition, 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).

Sections 502(a) and 504(a) of the Act make it unlawful for major stationary sources of air pollution and other sources subject to Title V to operate except in compliance with an operating permit issued pursuant to Title V that includes emission limitations and such other conditions necessary to assure compliance with applicable requirements of the Act.

A Title V operating permit program generally does not authorize permitting authorities to establish new substantive air quality control requirements (referred to as "applicable requirements"), but does require permits to contain monitoring, recordkeeping, reporting, and other compliance requirements to assure compliance by sources with existing applicable requirements. One purpose of the Title V program is to enable the source, EPA, states, and the public to better understand the applicable requirements to which the source is subject and to determine whether the source is meeting those requirements. See 57 *Fed. Reg.* 32250, 32251 (July 21, 1992). Thus, the Title V operating permit program is a vehicle for ensuring that existing air quality control requirements are appropriately applied to facility emission units in a single document and that compliance with these requirements is assured. Id.

Section 505(a) of the Act, 42 U.S.C. § 7661d(a), and 40 C.F.R. § 70.8(a), through the state Title V programs, require states to submit all operating permits proposed pursuant to Title V to EPA for review. EPA may comment on and object to permits determined by the Agency not to be in compliance with applicable requirements or the requirements of part 70. If EPA does not object to a permit on its own initiative, section 505(b)(2) of the Act, 42 U.S.C. § 7661d(b)(2), and 40 C.F.R. § 70.8(d) provide that any person may petition the Administrator, within 60 days of the expiration of EPA's 45-day review period, to object to the permit. Section 505(b)(2) requires the Administrator to object to a permit if a petitioner demonstrates that the permit is not in compliance with the requirements of the Act, including the requirements of part 70 and the applicable implementation plan. Petitions must be based on objections to the permit that were raised with reasonable specificity during the public comment period, unless the petitioner demonstrates that it was impracticable to raise the objection within the public comment period, or unless the grounds for the objection arose after the close of the public comment period. If the permitting authority has not yet issued the permit, it may not do so unless it revises the permit and issues it in accordance with

section 505(c) of the Act, 42 U.S.C. § 7661d(c). However, a petition for review does not stay the effectiveness of the permit or its requirements if the permitting authority issued the permit after the expiration of EPA's 45-day review period and before receipt of the objection. If, in response to a petition, EPA objects to a permit that 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).

BACKGROUND

Louisiana Pacific submitted an application for a Title V permit renewal for its Tomahawk facility to WDNR on January 24, 2005. WDNR issued the draft Title V permit on May 3, 2005, and the proposed Title V permit on January 30, 2006. During the public comment period, WDNR received comments on the draft permit, including comments from the Petitioner. WDNR issued the final permit on March 20, 2006.

WDNR had notified the public that, under the statutory timeframe in section 505(b)(2) of the Act, May 15, 2006 was the deadline to file a petition requesting that EPA object to the issuance of the final Louisiana Pacific permit, based on the dates of the draft and proposed permits. Petitioner submitted its petition to object to the issuance of the Louisiana Pacific permit to EPA on May 15, 2006. Accordingly, EPA finds that Petitioner timely filed this petition.

ISSUES RAISED BY THE PETITIONER

I. Monitoring for Visible Emissions

Petitioner states that visible emissions from the facility are regulated by the general visible emission limits in section NR 431 of the Wisconsin State Implementation Plan (SIP) and by specific New Source Performance Standard (NSPS) limits in NR 440, both of which prohibit visible emissions of greater than 20% opacity. Petitioner claims that the Wisconsin SIP requires one of the following two methods specified in NR 439.06(9) of the Wisconsin SIP for monitoring compliance with the opacity limits: (1) Method 9 in 40 C.F.R. part 60, Appendix A, incorporated by reference in s. NR 484.04 (13); or (2) [i]nstall, calibrate, maintain and operate a continuous emission monitor that meets the applicable performance specifications in 40 C.F.R. part 60, Appendix B or 40 C.F.R. part 75, Appendices A to I, incorporated by reference in s. NR 484.04 (21) and (27), and follow a quality control and quality assurance plan for the monitor which has been approved by the department. Petition at 2. Petitioner asserts that one of these two methods must be used, but that, instead of including one of the two compliance demonstration methods required by the Wisconsin SIP in the permit, WDNR relies on the Particulate Matter (PM) compliance demonstration and monitoring requirements in the permit to ensure compliance with the visible emissions (VE) limits for processes P05, P06, and P41, and boiler B09. Petitioner alleges that the failure to include in the permit the required monitoring for VE limits violates the Wisconsin SIP and results in a deficient permit.

The Petitioner further claims that, even if the SIP allowed WDNR to waive the requirement to use one of the two VE monitoring options in NR 439.06(9)(a), WDNR has failed to explain how the monitoring required for PM ensures compliance with the VE standards. Petitioner asserts that WDNR's statement of basis must "include a discussion of the decision making that went into the development of the Title V permit and provide the permitting authority, the public, and EPA a record of the applicability and technical issues surrounding the issuance of the permit." (citing *In the Matter of Los Medanos Energy Ctr.*, Order Denying in Part and Granting in Part Petition for Objection to Permit, 2001 Petition, at 10-11 (May 24, 2004). Petitioner concludes that WDNR's failure to set forth the basis for its assumption that PM monitoring is sufficient to ensure compliance with the VE limit results in a deficient permit. Petition at 2-3.

Petitioner also alleges that WDNR's two failures described above (i.e. the failure to include the SIP required VE monitoring in the permit and the failure to explain its permitting decision to use PM monitoring to ensure VE compliance) are exacerbated by the fact that the PM monitoring in the permit is deficient. Specifically, Petitioner alleges that the permit relies on biennial stack tests alone for process P04, but WDNR fails to explain how biennial stack testing assures continuous compliance with the PM or the VE limit in the two-year period between tests. Petitioner notes that WDNR "merely asserts that it has determined that the recordkeeping requirements are sufficient to ensure compliance with the PM, and therefore also the VE, limits." Petition at 3. Petitioner alleges that this results in a deficient permit because WDNR "has not actually determined that the Permit requires sufficient monitoring and recordkeeping for PM for P04 to assure continuous compliance." Petitioner concludes that, without further explanation, WDNR's assertion of sufficiency is not adequate to demonstrate that the permit assures compliance with applicable limits. Petition at 3.

Response

Section NR 439.06 of the Wisconsin SIP provides that "[w]hen tests or a continuous monitoring system are required by the department, the owner or operator of a source shall use the reference methods listed in this section and in ss. NR 439.07 to 439.095 to determine compliance with emission limitations, unless an alternative or equivalent method is approved, or a specific method is required, in writing, by the department." Petitioner alleges that the Wisconsin SIP requires the use of the reference methods specified in section NR 439.06(9)(a) of the SIP to demonstrate and monitor compliance with the VE limits for processes P05, P06, and P41 and boiler B09, and that the permit is deficient for failing to incorporate any of the methods provided in section 439.06(9)(a). Petitioner raised this issue with WDNR in its comments on the draft Louisiana Pacific renewal permit. In its response to comments, WDNR restated its conclusion that the compliance monitoring and demonstration requirements in the permit are adequate. WDNR, however, did not respond to Petitioner's comment that the Wisconsin SIP requires the use of the methods provided in section NR 439.06(9)(a) of the SIP for determining and monitoring compliance with the VE limits for processes P05, P06, and P41 and boiler B09.

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. Petitioner's comment was a significant comment because it raised an issue that WDNR might have failed to incorporate an applicable requirement into the Louisiana Pacific renewal permit in violation of the Wisconsin SIP and 40 C.F.R. part 70. WDNR's response that the permit requirements are adequate does not allow EPA to determine that the methods specified in section 439.06(9)(a) are not applicable to this facility. EPA concludes that WDNR's failure to respond to this significant comment may have resulted in one or more deficiencies in the Louisiana Pacific renewal permit. Therefore, I grant the petition on this issue and order WDNR to adequately address Petitioner's comment that the Wisconsin SIP requires the use of the reference methods provided in section NR 439,06(9)(a) of the SIP to determine and monitor compliance with the VE limits for processes P05, P06, and P41, and boiler B09.

Petitioner further alleges that, even if the Wisconsin SIP allows WDNR to waive the use of the methods provided in section NR 439.06(9)(a), WDNR fails to provide a statement of basis for the permit's VE compliance demonstration and monitoring requirements for processes P05, P06, and P41 and boiler B09. 40 C.F.R. § 70.7(a)(5) requires that a permitting authority provide with a draft Title V permit "a statement that sets forth the legal and factual basis for the draft permit conditions (including references to the applicable statutory or regulatory provisions)." Upon reviewing the draft permit and the relevant information in the permit record, EPA concludes that WDNR did not adequately explain the basis for its permitting decision for the permit's VE compliance demonstration and monitoring requirements for processes P05, P06, and boiler B09.[1] As Petitioner notes, the permit's PM compliance demonstration and monitoring requirements for processes P05, P06, and boiler B09 are also referenced in the permit as the compliance demonstration and monitoring requirements for these emission units' VE limits. The PM compliance demonstration and monitoring requirements in the permit for these emission units are based on the requirement to burn only natural gas. WDNR included as part of its statement of basis an Air Permit Review Calculation Sheet, labeled Appendix A, which was available to the public during the public comment period. The calculations in Appendix A showed that the source's maximum emissions while burning natural gas would not violate the PM limits for these emission units. The calculations, however, did not show that the VE limits for these emission units will not be exceeded by burning only natural gas. Nor did WDNR explain elsewhere in the permitting record how burning only natural gas will assure compliance with the relevant VE limits. WDNR's response to comments contains a statement that the "Department has determined that the monitoring requirements in the draft permit are adequate to demonstrate compliance with the applicable VE limits." (June 17, 2005 Response to Comments on Permit Nos. 05-MDW-024, 05-MDW-024-OP, and 735057950-P10 ("response to comments").)

In light of the above, EPA concludes that WDNR has failed to provide the basis for its permitting decision that compliance with the VE emission limits for processes P05, P06,

[1] EPA's conclusion here does not apply to process P41. As explained in more detail below, I deny the petition on this issue as it relates to process P41.

and boiler B09 can be demonstrated and monitored by burning only natural gas and keeping records of the fuels burned. Therefore, I grant the petition on this issue for processes P05, P06 and boiler B09. WDNR must explain clearly in the statement of basis why the use of natural gas guarantees that the source cannot violate the VE limits for these emissions units, or include in the permit compliance demonstration methods and associated periodic monitoring which WDNR has demonstrated are sufficient to assure compliance with the Act and part 70. However, with respect to P41, I deny the petition on this issue, as explained below.

As noted above, Petitioner alleges that, even if the Wisconsin SIP allows WDNR to waive the use of the methods provided in section NR 439.06(9)(a), WDNR fails to provide a statement of basis for the permit's VE compliance demonstration and monitoring requirements for processes P05, P06, and P41 and boiler B09. However, whereas Petitioner made this allegation with respect to processes P05 and P06 and boiler B09 in its comment on the draft Louisiana Pacific permit, Petitioner did not identify in its comments process P41 as one of the specific emission points that allegedly lack a statement of basis for the VE compliance demonstration and monitoring requirements in the permit. Title V of the Act states that a "petition shall 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; see also 40 C.F.R. § 70.8(d). EPA reviewed the comments submitted on Louisiana Pacific's draft Title V permit during the public comment period. As previously noted, in its comment dated May 23, 2005, Petitioner claimed that WDNR failed to provide a statement of basis for the permit's VE compliance demonstration and monitoring requirements for processes P05 and P06, and boiler B09. None of the comments, however, mentioned that WDNR failed to provide a statement of basis explaining process P41's VE compliance demonstration and monitoring requirements. WDNR could not have reasonably anticipated, and could not have been expected to explain in its response to comments, its bases for the VE compliance demonstration and monitoring requirements for process P41. The Petitioner also has not shown that it was impracticable to raise this issue during the public comment period, or that the issue arose only after the close of the public comment period. Therefore, I deny the petition on this issue as it relates to process P41.

Petitioner further alleges that WDNR's failure to include the required methods in 439.06(9)(a) of the Wisconsin SIP and explain how the permit's PM monitoring ensures compliance with VE limits are exacerbated by the fact that the PM monitoring in the permit for process P04 is deficient. Unlike processes P05, P06, and boiler B09, which rely on burning only natural gas and keeping records of the fuels burned to demonstrate and monitor compliance with their PM and VE limits, the PM monitoring for process P04 is based on biennial stack testing. EPA reviewed the comments submitted on the Louisiana Pacific facility's draft Title V renewal permit during the public comment period. Petitioner commented that the Wisconsin SIP requires one of the two methods in section NR 439.06(9)(a) for monitoring compliance with opacity limits. Petitioner also commented that the VE compliance demonstration requirements in the permit for certain emission units,

including processes P05 and P06 and boiler B09, are insufficient. However, none of the comments mentioned process P04, much less claimed that the PM monitoring for process P04, which is based on stack testing, is deficient.

Petitioner's allegation regarding the PM monitoring for process P04, as presented in this petition, is sufficiently different from the issues raised in the public comments described above, such that WDNR could not have reasonably anticipated, and could not have been expected to explain in its response to comments whether the PM monitoring requirements in the permit for process P04 are adequate, and whether and how these requirements may affect the permit's reliance on fuel restrictions to demonstrate and monitor compliance with the VE limits for processes P05, P06, and boiler B09. See *In the Matter of G-P Gypsum Corporation Associates Facility*, Petitioner No, Il-2005-05, at 4-5. The Petitioner also has not shown that it was impracticable to raise this issue during the public comment period, or that the issue arose only after the close of the public comment period. Therefore, I deny the petition on this issue.

II. PM Monitoring for Processes P05 and P06

Petitioner notes that the permit identifies for processes P05 and P06 specific EPA testing methods as appropriate monitoring methods during a compliance stack test, but fails to require regular compliance stack tests. Instead, the permit relies solely upon the use of natural gas in processes P05 and P06 to demonstrate compliance. Petitioner asserts that the assumption that the fuel choice necessarily achieves compliance is insufficient to assure compliance. The Petitioner further asserts that, even if limiting fuels used in combustion sources is sufficient to demonstrate compliance with PM limits, fuel restrictions alone are insufficient to demonstrate compliance for P05 and P06, because natural gas is not the only source of PM emissions from these processes. Petitioner alleges that processes P05 and P06 also include paint spray devices and sawing operations that generate PM emissions. Petitioner notes that the permit does not require testing for the saws and paint spray devices, but "merely requires that they be exhausted inside the building as a method of controlling particulate matter emissions." According to the Petitioner, this method of determining compliance is insufficient unless the facility monitors all windows, doors, and ventilation openings to ensure that P05 and P06 particulate matter emissions are not escaping through those emission points. Petition at 4. Petitioner alleges that WDNR's failure to explain how the requirement to burn natural gas is sufficient to ensure compliance with PM limits for processes P05 and P06, which have the potential to emit PM from sources other than through natural gas combustion, results in a deficient permit. Petition at 4.

Response

With respect to Petitioner's allegation that the permit fails to require regular compliance tests for PM emissions from processes P05 and P06, Petitioner has not demonstrated that the permit is deficient for not including such a requirement. Petitioner has not identified any applicable requirement that directs the permittee to conduct stack tests. Petitioner also has not demonstrated that stack testing is the only means of demonstrating and

ensuring compliance with the PM limits for these processes. I, therefore, deny the petition on this issue.

Petitioner further alleges that WDNR failed to explain how the permit requirement to burn only natural gas assures compliance with the PM limits for processes P05 and P06, especially since these processes emit PM not just from natural gas combustion, but also from saw and paint spray devices. In support of its allegation, Petitioner notes that section I.D.1(a)(3) of the permit requires that the baghouse for the saws and paint spray devices at processes P05 and P06 be vented inside, except during emergency circumstances. Petitioner alleges that "this method of determining compliance is insufficient unless the facility monitors all windows, doors, and ventilation openings to ensure that P05 and P06 PM emissions are not escaping through those emission points." Petition at 4.

The permit, however, does not contain PM limits that apply to all PM emissions from processes P05 and P06, including those from saw and paint spray devices, nor has Petitioner identified any applicable requirement establishing such limits. The permit specifies at section I.D.(1)(a) a PM emissions limit of 0.15 pound per million Btu of heat, individually, for stacks S05 and S06, which service processes P05 and P06, and cites to section NR 415.06(2)(a) of the Wisconsin SIP as the underlying authority for this PM limit. Section NR 415.06(2)(a) establishes a maximum PM emission limit of 0.15 pounds per million Btu heat input from any stack at a fuel-burning installation of more than 250 million Btu per hour that was constructed or modified after April 1, 1972. This PM emission limit applies only to emissions from fuel burning. Accordingly, the PM emission limits in the permit for stacks S05 and S06 do not apply to emissions from the saws and paint spray devices at processes P05 and P06. Further, contrary to Petitioner's allegation, the work practice requirement in section I.D.1(a)(3) of the permit is not a compliance demonstration or monitoring requirement for the PM limits for stacks S05 and S06, or for any other requirement in the permit. Rather, the work practice requirement is itself an applicable requirement established pursuant to section NR 404.08(2) of the Wisconsin SIP, which authorizes WDNR to require any person "to reduce emissions below limits established in an implementation plan or by air pollution control rules where emissions cause or substantially contribute to exceeding an air standard in a localized area." Footnote 35 of the permit states that this work practice requirement, which was established in a previous construction permit based on modeling, is included in this Title V permit to protect the National Ambient Air Quality Standards (NAAQS). There is no indication that this work practice requirement violates or is in any way inconsistent with any provision of the Wisconsin SIP, 40 C.F.R. part 70, or any other applicable requirement under the Act.

WDNR included as part of its statement of basis an Air Permit Review Calculation Sheet, labeled Appendix A, which was available to the public during the public comment period. The calculations in Appendix A show that the source's maximum emissions while burning natural gas would not violate the PM limits in the permit for stacks S05 and S06. WDNR, therefore, has adequately demonstrated that the fuel restriction requirement in the permit assures compliance with the PM limits for stacks S05 and S06. As noted above, Petitioner has not identified any other PM limit for processes P05 and P06 with which

compliance cannot be demonstrated based on fuel restriction. I, therefore, deny the petition on this issue.

III. Emission Limits For Boiler B03

Petitioner notes that the Louisiana Pacific permit contains in section I.B.2.a.(1) and (2) a NSPS limit on boiler B03, which requires the source to comply with a 20% opacity limit, except for one six-minute period of 27% opacity per hour, and excluding periods of startup, shutdown, and malfunction. The Petitioner asserts that, in its comments on the draft permit, it alerted WDNR that the source also is subject to VE limits from section NR 431.05 of the Wisconsin SIP, and that the SIP limit is more stringent than the NSPS limit. Petition at 4-5. Petitioner states that WDNR appeared to have agreed with the comment, because WDNR responded in the response to comments that the "permit author" concluded that both limits are applicable to the facility. Petitioner claims that, despite its agreement, WDNR nevertheless failed to include the more restrictive SIP limit in the permit; instead, WDNR added to the NSPS limit exemptions from the SIP limit that are not contained in the NSPS limit, thus further weakening the less stringent NSPS limit. Petition at 5.

Petitioner states that Wisconsin Administrative Code § 440.10(1) provides that the "exemption or the granting of an exemption from any requirement of [ch NR 440] does not relieve any person from compliance with chs. 400 to 499 or with ch. 285 or s. 299.15 Stats." Petition at 5. Petitioner further notes that section 440.10(2) of the Wisconsin Administrative Code provides that any source to which a statute or regulation more stringent than the NSPS limit applies must comply with the more stringent requirement. Petition at 5. Petitioner alleges that the permit is deficient because it fails to include the more stringent visible emission limit for boiler B03. Petition at 5-6.

Response

As noted by the Petitioner, both the applicable SIP limits at NR 431.05 and the NSPS opacity requirements contain a 20% opacity limit. However, unlike the NSPS, the SIP does not exempt opacity exceedances during shutdown or malfunction, and does not exempt a six-minute period of 27% opacity per hour. The 20% opacity limit in the SIP applies at all times, except "[w]hen combustion equipment is being cleaned or a new fire started," in which case opacity may not exceed 80% opacity for 6 minutes in any one hour. Wis. Admin. Code § NR 431.05. EPA agrees with Petitioner that the SIP limits are more stringent than the NSPS opacity requirements. To achieve compliance with the SIP limits, the source may not take advantage of the exception to the 20% opacity limit in the NSPS that allows a six-minute period per hour of 27% opacity, except when the combustion equipment is being cleaned or a new fire started, during which time section NR 431.05 allows 80% opacity for 6 minutes in any hour, which is less restrictive than and, therefore, superseded by, the 27% exception in the NSPS.

As the Petitioner correctly noted, WDNR acknowledged in its response to comments that both of the limits on VE are applicable. Response to comments at 5. WDNR clarified in its response to comments that the "exceptions in NR 431.05, Wis. Adm. Code have been

added to the permit with the disclaimer that the exceptions apply unless they are less restrictive than the NSPS requirements. Section NR 440.10(2), Wis. Adm. Code, states that the more restrictive limit applies when multiple limits apply." Id. However, section I.B(2)(a) of the permit, as amended in response to public comments, contains only the less stringent NSPS limit as the primary condition, along with the exceptions from the SIP requirement.

EPA has concluded that WDNR, in its effort to streamline both the NSPS and the SIP opacity requirements for boiler B03, did not fully incorporate the entire SIP requirement, which is more stringent than the NSPS limit. Therefore, I grant the petition on this issue. WDNR must include in the permit both the NSPS and the SIP VE limits for boiler B03, or must accurately streamline the two requirements such that compliance with both requirements can be assured.

IV. Credible Evidence

Petitioner states that section 113 of the Act, 42 U.S.C. § 7413, authorizes EPA to bring enforcement actions "on the basis of any information available to the Administrator." Petitioner asserts that, in the September 9, 1999, Region 9 Title V Permit Review Guidelines (Region 9 guidelines), p. III-46, EPA interpreted this language to mean any "credible evidence" that a court would accept. Petition at 6. Petitioner further cites to the Region 9 guidelines to assert that "any credible evidence can be used to show a violation of or, conversely, demonstrate compliance with an emission limit." Id.

Petitioner notes that the Louisiana Pacific permit is divided into four separate columns for (1) pollutant; (2) numeric limit; (3) compliance demonstration method; and (4) compliance demonstration, monitoring and reporting, citing section I.A(1)(a)-(c) as an example.[2] The preamble to the permit states on page 4 that the "Compliance Demonstration" column (column "c" throughout the permit)[3] lists methods that "may be used to demonstrate compliance with the associated emission limit or work practice standard." Petitioner alleges that this provision, which defines the compliance demonstration requirements in the permit, impermissibly enumerates the evidence to be used to determine compliance. Petitioner alleges that, because this language has the potential to be interpreted as limiting the evidence that can be used to enforce the permit's limits, it violates the credible evidence rule. Petition at 6.

Petitioner further notes that the permit has two definitions of the "Compliance Demonstration" requirements in the permit. In addition to the definition described above, the second definition, on page 5 to the preamble to the permit, states that the "Compliance Demonstration" column of the permit "contains testing requirements and methods to demonstrate compliance with the conditions." According to Petitioner, this provision tacitly limits the methods to demonstrate compliance to only those listed in the specific column of

[2] The final permit contains four columns as follows: 1) "Pollutant"; 2) "(a) Limitations & Requirements"; 3) "(b) Compliance Demonstration"; 4) "(c) Reference Test Methods, Recordkeeping and Monitoring Requirements".

[3] The "Compliance Demonstration" column is column "(b)" in the final permit.

the permit labeled "compliance demonstration." This, according to Petitioner, also is a violation of the credible evidence rule. Petition at 6-7.

The Petitioner notes a provision on page 4 of the preamble to the Louisiana Pacific permit which the Petitioner characterizes as a "vague attempt to preserve the 'credible evidence' rule." Petition at 7. The provision to which the Petitioner refers states: "[n]ot withstanding the compliance determination methods which the owner or operator of a source is authorized to use under chapter NR 439, Wis. Adm. Code, the Department may use any relevant information or appropriate method to determine a source's compliance with applicable emission limitations." (sic) The Petitioner claims that there are two significant problems with this attempt to comply with the credible evidence rule. First, the sentence refers to compliance demonstration methods in NR 439, rather than those in the permit. Petitioner asserts that this provision allowing WDNR to use any evidence despite NR 439 does not cure the restrictive evidence provisions in the permit. Second, the Petitioner claims that the sentence authorizes only WDNR to use credible evidence to determine the facility's compliance. According to the Petitioner, the language "...the Department may use any relevant information...," implies that EPA and citizens may not use "any relevant information" to enforce the permit. Petition at 7. The Petitioner claims that, in its response to comments at page 2, WDNR noted that "the Department is not limited from using credible evidence...," but that WDNR failed to respond to Petitioner's comment that the permit could be interpreted as limiting EPA and citizens' ability to use credible evidence. Petition at 7. Petitioner concludes that the permit is deficient because it impermissibly restricts the evidence that EPA and citizens can use to enforce the permit terms. Petition at 7.

In addition, Petitioner claims that the permit violates the credible evidence rule because certain permit terms link compliance to specific testing or monitoring requirements. Specifically, Petitioner states that sections I.A.(1)(b)(1), I.A(2)(b)(1), I.A.(3)(b)(1), I.A(4)(b)(1), I.A.(5)(b)(1), I.B.(3)(b)(1), I.C.(1)(b)(1), I.C.(2)(b)(1), I.C.(3)(b)(1), I.C.(4)(b)(1), and I.C.(5)(b)(1) of the Louisiana Pacific permit provide that the permittee "shall perform" a specified test "to demonstrate compliance" with a PM limit. Similarly, sections I.B(1)(b)(1) and I.B(4)(b)(1) state that the permittee "shall conduct" a particular test to "demonstrate compliance with" a specific emission limit. Petition at 7-9. Petitioner asserts that these sections violate the credible evidence rule by linking compliance to a specific testing or monitoring requirement. Petition at 7. Finally, Petitioner notes that section I.B(a)(3)[4] provides that the permittee "shall calibrate, maintain, and operate continuous opacity monitoring system (COMS) for measuring the opacity of the emissions discharged to the atmosphere and record the output of the system...." Petitioner similarly alleges that the link between the COMS and the opacity limit may illegally restrict the use of credible evidence. Petition at 9.

Response

After reviewing the two definitions of the permit section heading "compliance demonstration" in the preamble to the permit, as well as the specific permit terms cited by the

[4] Petitioner refers in the petition to section I.B(a)(3) of the permit. The reference to the draft Louisiana Pacific permit should be to section I.B(2)(a)(3).

Petitioner, EPA concludes that none of the preamble provisions or permit conditions described above limit the use of credible evidence. Petitioner has failed either to point to any language in these preamble statements or permit conditions that excludes the use of credible evidence, or to provide any instances where WDNR improperly excluded the use of credible evidence. The language in the specific preamble provisions and permit conditions cited by the Petitioner does not state that the specified methods or procedures are the exclusive or sole methods or procedures to be used to determine compliance. See *In the Matter of Midwest Generation, LCC, Fisk Generating Station*, Petition number V-2004-1 (March 25, 2005). Furthermore, EPA has clarified through rulemaking (which Petitioner refers to as the "credible evidence" rule) that various kinds of information, including non-reference test data, may be used "to demonstrate compliance or non-compliance with emission standards." 62 *Fed. Reg.* 8314, 8315 (February 24, 1997). For these reasons, I deny the petition with respect to this issue as it pertains to the compliance demonstration provisions in the preamble and the specific permit conditions cited by the Petitioner.

With regard to the preamble statement that Petitioner characterizes as a vague attempt to preserve the "credible evidence" rule, we found that this preamble statement is derived from and virtually identical to section NR 439.06 of the EPA-approved Wisconsin SIP. Furthermore, Petitioner has failed to point to any language in this preamble statement that excludes the use of credible evidence. The preamble statement authorizes WDNR to use any evidence to determine compliance notwithstanding the compliance demonstration methods provided in section NR 439. The statement does not require that compliance be determined only by methods specified in the permit, nor does it restrict the use of credible evidence by EPA or citizens. In fact, the preamble statement neither mentions the compliance demonstration methods provided in the permit nor discusses the use of credible evidence by parties other than WDNR. In addition, as mentioned above, EPA has clarified through the credible evidence rule that various kinds of information, including non-reference test data, may be used "to demonstrate compliance or non-compliance with emission standards." *Id.* Lastly, WDNR has confirmed that it does not interpret this preamble to "limit the types of evidence which may be used by other parties seeking to enforce air pollution control requirements." See October 23, 2007, letter from Kevin Kessler, Director of the Wisconsin Bureau of Air Management to Steve Rothblatt, at 2. Therefore, I deny this petition with respect to this issue as it pertains to this specific preamble statement.

V. Practical Enforceability

The Petitioner alleges that the permit contains numerous conditions which are not practically enforceable. Petitioner asserts that, for a permit condition to be enforceable, the "permit must leave no doubt as to exactly what the facility must do to comply with the condition." Petition at 9. Petitioner asserts that a permit condition is not practically enforceable if it references documents, procedures, or instructions that are described in a manner that is insufficient to allow such items and their content to be specifically, finally and conclusively identified. According to the Petitioner, specific numbers must be in the permit, and terminology must be defined. Petition at 9-10, citing Region 9 guidelines at III-52.

A. Reliance on Manufacturer Recommendations

The Petitioner notes that section I.A.(1)(b)(5) of the draft permit states that "[t]he permittee shall establish quality assurance and control practices to ensure the continuing validity of the wet electrostatic precipitator operating parameter data specified in conditions I.A(1)(b)3) and I.A(1)(c)4). (sic) The permittee shall consider manufacturer recommendations or requirements applicable to the monitoring in developing appropriate quality assurance and control practices." Petition at 10. Petitioner claims that WDNR must specify in the permit what quality assurance and control practices are required. Furthermore, if the permit requires a specific plan or "manufacturer recommendations," WDNR must incorporate the requirements into the permit. Petition at 10, citing to *Fisk Generating Station* at 14.

Petitioner notes that WDNR, in responding to comments, stated that the "Malfunction Prevention and Abatement Plan...is required to be submitted to the Department upon request...." Petition at 10, citing to response to comments at 3.

Petitioner asserts that this is insufficient to comply with Title V. According to the Petitioner, the permit requires the permittee to establish quality assurance and control practices and, in doing so, consider manufacturer recommendations that are not in the permit record and that are unknown to WDNR. Petitioner claims that, if WDNR is relying on the Malfunction Prevention and Abatement Plan (Malfunction Plan) to ensure compliance, the permittee must provide the plan in the application. Petition at 10, citing to 40 C.F.R. §§ 70.5(a)(2) (a complete application must contain sufficient information to determine all applicable requirements); 70.5(c) (application cannot "omit information needed to determine the applicability of, or impose, any applicable requirement..."); 70.5(c)(3)(vi) (application must include any "work practice standards"). Additionally, Petitioner asserts that WDNR must determine that the permit requirements, including the Malfunction Plan, assure compliance with all applicable requirements. Petitioner avers that WDNR cannot possibly rely on the plan for its conclusion that the facility will comply with all requirements when WDNR has never reviewed the plan. Petition at 10, citing *Environmental Defense Center, Inc. v. EPA*, 344 F.3d 832, 855-56 (9th Cir. 2003). Third, Petitioner asserts that, because compliance with the permit and the underlying SIP requirements is based on compliance with the Malfunction Plan, the plan must be submitted to WDNR pursuant to NR 439.03(1)(b) of the Wisconsin SIP. Petitioner claims that, if WDNR must request the plan before determining compliance with section I.A(1) of the permit, the reporting requirements are deficient. Petition at 11. Finally, Petitioner alleges that, because compliance with the plan constitutes a permit requirement, the plan must be subject to public notice and comment. The public cannot comment on the sufficiency of the permit if the plan is not part of the permit record. Petition at 11, citing *Waterkeeper Alliance v. EPA*, 399 F.3d 486, 503-04 (2d Cir. 2005).

Response

Section I.A(1)(b)(5) of the permit requires the permittee to establish quality assurance and control practices to ensure the continuing validity of the wet electrostatic precipitator operating parameter data specified in conditions I.A(1)(b)(3) and I.A(1)(c)(4). The same

section further requires the permittee to consider manufacturer's recommendations or requirements applicable to the monitoring in developing appropriate quality assurance and control practices. The permit cites to 40 C.F.R. § 64.3(b)(3) of EPA's compliance assurance monitoring (CAM) rule as the authority for these permit provisions. 40 C.F.R. § 64.3(b) requires the owner or operator of a facility to design the monitoring to meet certain performance criteria, including quality assurance and control practices that are adequate to ensure the continuing validity of the data, as specified in section 64.3(b)(3). Section 64.3(b)(3) further requires that the owner or operator consider manufacturer's recommendations or requirements applicable to the monitoring in developing appropriate quality assurance and control practices. Petitioner appears to argue that these requirements in section 64.3(b)(3), as incorporated into the permit, are not practically enforceable because the permit does not specify what the required quality assurance and control practices are, including any specific plan or manufacturer recommendations that are being required. EPA's CAM rule requires that a permittee submit as part of its Title V renewal permit application the performance criteria for designing monitoring, including the quality assurance and control practices that are required to be established. See 40 C.F.R. §§ 64.4(a)(3) and 64.5(a)(3). The permittee failed to provide such information in the Louisiana Pacific facility's Title V renewal permit application. I therefore grant the petition on this issue. WDNR must reopen the permit, direct the permittee to include the required quality assurance and control practices in its permit application, and make such information available to the public with the draft Title V renewal permit during the public comment period.

However, I reject Petitioner's allegation that the permit is not practically enforceable because the Malfunction Plan is not provided in the permit application and available for public comment. Petitioner appears to argue that, because the permit requires the Malfunction Plan to include the quality assurance and control practices that, as described above, must be submitted with the permit application, WDNR is relying on this plan to assure compliance and must, therefore, obtain and review the plan, as well as make it available for public notice and comment during the permitting process. Section NR 439.11 of the Wisconsin SIP governs malfunction prevention and abatement plans. Specifically, section NR 439.11(1) identifies the information that a source must include in its plan,[5] and section NR 439.11(3) provides that "[n]o owner or operator may fail to carry out [the Malfunction Plan]." The Wisconsin SIP, however, does not require that the Malfunction Plan be available for public comment or be reviewed and approved by WDNR as part of the permitting process. Instead, section NR 439.11(2) provides that WDNR "*may* order any owner or operator to submit the [Malfunction Plan] for review and approval" (emphasis added). Petitioner has not identified any applicable requirement that requires the Malfunction Plan be made part of a Title V permit renewal application and available for public review and comment. Further, compliance with the CAM requirements described above does not necessitate submittal of the entire Malfunction Plan as part of a Title V permit renewal application; the permittee may submit the quality assurance and control practices as

[5] Section NR 439.11(1) does not specifically require that the quality assurance and control procedures described above be included in the Malfunction Plan. However, section NR 439.11(1)(h) authorizes WDNR to require that the Malfunction Plan include "[s]uch information as the department deem pertinent." (sic)

part of the permit application in accordance with EPA's CAM rule, and still include such information in the Malfunction Plan, which need not be submitted until WDNR orders such submission. I, therefore, deny the petition on this issue.

B. Undefined Terms

The Petitioner claims that section I.A.(1)(a)(4) of the permit contains terms that are not defined. Permit section I.A.(1)(a)(4) provides that,

> [u]pon detecting an excursion, the permittee shall restore operation of the dryer system to its normal or usual manner of operation as expeditiously as practicable in accordance with good air pollution control practices for minimizing emissions. The response shall include minimizing the period of any startup, shutdown, or malfunction and taking any necessary corrective actions to restore normal operation and prevent the likely recurrence of the cause of an excursion (other than those caused by excused startup or shutdown conditions).

Petitioner claims that the terms; "normal or usual manner of operation," "expeditiously as possible," "good air pollution control practices," "minimizing the period of any startup, shutdown, or malfunction," and "normal operation" used in section I.A.(1)(a)(4) of the permit are vague, and are not used or defined in the SIP. Petitioner asserts that the terms must be defined more specifically to make the permit requirement practically enforceable. Petition at 11.

Response

The language in section I.A.(1)(a)(4) of the permit, including the terms that Petitioner alleges are undefined and therefore unenforceable, are taken directly from EPA's CAM rule at 40 C.F.R. § 64.7(d). EPA can not properly object to including in a Title V permit terms that mirror an applicable requirement. See *In the Matter of Midwest Generation, LCC, Romeoville Generating Station, Petition No. V-2004-4, p. 19 (June 24, 2005).* Moreover, Petitioner has not demonstrated that WDNR has improperly or inconsistently interpreted the terms in practice so as to render them unenforceable. See *Fisk Generating Station* at 13-15. For these reasons, I deny the petition on this issue.

C. Fugitive Dust Requirements

The Petitioner alleges that section I.F(1)(a) of the permit is not practically enforceable because it does not specify what precautions are necessary to prevent PM from becoming airborne. The Petitioner alleges that WDNR, EPA and the public cannot enforce this requirement unless the permit states specifically what precautions are necessary to prevent PM from becoming airborne. According to the Petitioner, WDNR stated in its response to comments that the substantive "good engineering practices," which define the precautions that the permittee must take, will be contained in the Fugitive Dust Control Plan. The Petitioner notes that the plan, however, is not part of the permit and that, according to

WDNR, it will be submitted at a later date. Therefore, the Petitioner alleges that WDNR cannot determine compliance currently. Petition at 12.

Response

Section I.F.(1)(a) of the permit provides that "[t]he permittee may not cause, allow, or permit any materials to be handled, transported, or stored without taking precautions to prevent PM from becoming airborne...." The WDNR cites section NR 415.04 of the Wisconsin SIP as the origin and authority for condition I.F.(1)(a). NR 415.04 contains a list of "precautions" that a permittee must take to limit fugitive dust. Since permit condition I.F.(1)(a)(1) references as its origin and authority section NR 415.04 of the Wisconsin SIP, and that SIP section contains the list of precautions that must be included in the plan, WDNR, EPA and citizens can determine compliance with the SIP requirement to take the prescribed precautions without the permit reiterating these precautions. The Fugitive Dust Control Plan is not an applicable SIP requirement; therefore it was not necessary for WDNR to make it available as part of the permit record during the public comment period. For these reasons, I deny the petition on this issue.

D. Requirement to Provide Documents and Records to WDNR

The Petitioner alleges that the permit is not practically enforceable by citizens because it fails to require that all documents and records necessary to determine compliance be provided to WDNR and be publicly available at the WDNR offices. The Petitioner notes that, throughout the permit, the permittee is required to maintain records but not required to submit those records to WDNR. Petitioner asserts that, although Section NR 439.03(1)(b) of the Wisconsin SIP allows sources to submit summaries of monitoring results, the summaries must nevertheless "include sufficient data for the department to determine whether the source is in compliance with the applicable requirements...." Petitioner claims that this minimal requirement cannot be waived, even if WDNR maintains the right to request the necessary data. Petition at 12.

Petitioner alleges that, in its response to comments, WDNR asserts that the permit's reporting requirements are sufficient because WDNR retains the right to request additional information from a facility in the event that it is necessary to determine compliance. Petitioner claims that, if WDNR must request additional information to determine compliance, then the summary monitoring reports must not be sufficient for WDNR to determine whether the facility is in compliance. Petitioner states that the requirement to submit sufficient data is an "applicable requirement" because it is part of the SIP. Therefore, Petitioner alleges that the permit is deficient because it relies on WDNR staff's ability to request additional information, rather than requiring periodic reporting of sufficient information to ensure compliance. Petition at 12-13.

Petitioner further states that the requirement to submit sufficient data, rather than maintaining it at the facility, is important because citizens must have access to compliance data. Petitioner notes that the public does not have the authority to request information from the facility. Petitioner claims that the following permit sections violate section 439.03 of the

Wisconsin SIP because they do not require the permittee to submit sufficient compliance documents to WDNR: I.A.(1)(c)(5), (8), and (10); I.A(2)(c)(2); I.A(3)(c)(2) through (6); I.A(4)(c)(2) through (5); I.A(5)(c)(2) through (5); I.A(6)(b) and (c); I.B(3)(c)(2) through (5); I.B(4)(c)(2) and (3); I.B(5)(b) and (c); I.C(1)(c)(2); I.C(2)(c)(2); I.C(3)(c)(2) and (3); I.C(4)(c)(2); I.C(5)(c)(2) through (4); I.C(6)(b) and (c); I.C(7)(b) and (c); I.D(1)(b)(2) and (3); I.D(1)(c)(2) through (4); I.D(2)(c)(2); I.D(3)(b) and (c); I.D(4)(b) and (c); I.E(1)(c)(3) and (4); I.E(2)(b) and (c); I.E(3)(b) and (c); I.E(4)(b) and (c); I.F(1)(c); and I.H(1)(b) and (c). Petition at 13.

Finally, the Petitioner asserts that it is important that the summary excess emission reports required by condition I.J(5)(a)(2) of the draft permit contain all information necessary to determine compliance with permit limits, including information about startup and shut down, the dates and times when emissions exceeded permitted amounts, and documentation of all actions taken when the permit relies on work practices to ensure compliance. Petition at 14.

Response

Petitioner cites to a number of permit provisions that require records to be maintained but not submitted, and alleges that these permit provisions violate section 439.03(1)(b) of the Wisconsin SIP because they fail to require sufficient compliance documents to be submitted. Despite its allegation, Petitioner acknowledges in the petition that section NR 439.03(1)(b) allows reporting of summaries of monitoring results. Section I.J(1) of the draft permit, which is a general reporting requirement applicable to the whole facility and cites section NR 439.03(1)(b) as its authority, requires the permittee to submit to WDNR a semi-annual report containing monitoring data. Although section I.J.(1) generally allows the permittee to submit a summary of monitoring results, subsection I.J.(1)(d) specifically requires that deviations from and violations of applicable requirements be clearly identified. This condition is consistent with section NR 439.03(1)(b) of the Wisconsin SIP and 40 C.F.R. § 70.6(a)(3)(iii)(A). Petitioner did not raise issues with the reporting requirements in section I.J.(1) of the permit. Instead, Petitioner alleges that the permit is deficient because it relies on WDNR's ability to request additional information rather than requiring periodic reporting of sufficient information to ensure compliance. Petitioner alleges that WDNR asserts in its response to comments that the permit's reporting requirements are sufficient *because* WDNR has the authority to request additional information if necessary. Petitioner's description of WDNR's response was inaccurate. In its response to comments, WDNR provided several reasons why the reporting requirements in section I.J.(1) of the permit are adequate for determining compliance. Specifically, WDNR emphasized that adequate information must be included in the reports for determining compliance. WDNR also noted its authority under section NR 439.03(1)(b) to decide the format of the semi-annual reporting and expressed its intent to exercise such authority to ensure that adequate information is provided. WDNR mentioned its authority to request additional information as an additional reason, not the only reason as the Petitioner incorrectly portrayed, for WDNR's conclusion that the permit's reporting requirements are adequate. Furthermore, Petitioner has not demonstrated that compliance with any applicable requirement cannot be determined based on the required reporting in the permit. I, therefore, deny the petition on this issue.

Petitioner also alleges that certain information must be included in a summary excess emission report submitted under section I.J(5)(a)(2) of the draft permit. The permit cites to section NR 439.09(10)(d) of the Wisconsin SIP as the authority for section I.J(5)(a)(2) of the permit. Section NR 439.09(10)(d), however, does not prescribe the information that must be contained in a summary excess emission report; instead, it states that "[t]he summary excess emission report shall be submitted on a form provided by the department or in a format approved by the department." The Wisconsin SIP clearly gives WDNR the discretion to determine the information that must be included in such a summary excess emission report. Furthermore, we are not aware that WDNR has authorized the facility to submit summary excess emissions reports. Even if it has, Petitioner has not demonstrated that any such report is inadequate to assure compliance with any applicable requirement. For these reasons, 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 grant in part and deny in part the petition of David Bender of Garvey McNeil & McGillivray, S.C., on behalf of the Sierra Club, requesting the Administrator to object to issuance of the Title V operating permit to Louisiana Pacific Corporation for its facility in Tomahawk, Wisconsin.

Stephen L. Johnson
Administrator

NOV - 5 2007
Date