

BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF)
MIDWEST GENERATION, LCC)
JOLIET GENERATING STATION AND)
WILL COUNTY GENERATING)
STATION)
) ORDER RESPONDING TO PETITIONER'S
Petition number V-2005-2) REQUEST THAT THE ADMINISTRATOR
CAAPP No. 95090046 and 95090080) OBJECT TO ISSUANCE OF A STATE
Proposed by the Illinois) OPERATING PERMIT
Environmental Protection Agency)
_____)

ORDER DENYING PETITION
FOR OBJECTION TO PERMIT

On August 15, 2005, pursuant to its authority under the Illinois Clean Air Act Permitting Program ("CAAPP"), the Illinois Environmental Protection Act, 415 ILCS 5/39.5, title V of the Clean Air Act ("Act"), 42 U.S.C. §§ 7661-7661f, and EPA's implementing regulations in 40 C.F.R. part 70 ("part 70"), the Illinois Environmental Protection Agency ("IEPA") published proposed title V operating permits for Midwest Generation, LLC, Joliet Generating Station ("Joliet permit") and Will County Generating Station ("Will County permit"). The Joliet Generating Station operates three coal-fired boilers with a nominal capacity of 1435 megawatts, an electrostatic precipitator and low nitrogen oxide burners. Other equipment at the facility includes an auxiliary boiler, coal handling and processing units, fly ash processing units, and gasoline storage tanks. The Will County Generating Station operates four coal-fired boilers with nominal capacities of 1728, 1712, 2709, and 5016 mmBtu/hour, respectively, an electrostatic precipitator and low nitrogen oxide burners. Other equipment at the facility includes coal handling and processing units, fly ash processing units, and gasoline storage tanks.

On November 23, 2005, the United States Environmental Protection Agency ("EPA") received a petition from the Chicago Legal Clinic ("Petitioner") requesting on behalf of Citizens Against Ruining the Environment that EPA object to issuance of the Joliet and Will County permits, pursuant to section 505(b)(2) of the Act and 40 C.F.R. § 70.8(d).

Petitioner alleges that, in issuing the Joliet and Will County permits, IEPA failed to comply with the requirements of the Act, EPA's regulations at 40 C.F.R. § 70.5(c)(8)(iii), and the Illinois SIP because it did not include compliance schedules to bring the facilities into compliance with the requirements of the Act. Petition at 1.

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 the available information, including the petition, the Joliet and Will County proposed permits, IEPA's responsiveness summary, project summaries, additional information provided by the permitting authority in response to inquiries, the information provided by Petitioner, and relevant statutory and regulatory authorities and guidance, I deny the Petitioner's request.

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 Illinois 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. 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. *See 57 Fed. Reg.* 32250, 32251 (July 21, 1992).

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 arose after the close of the public comment period. If the Administrator objects to the permit and 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, 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).

BACKGROUND

Midwest Generation, LLC submitted applications for title V permits for both facilities on September 7, 1995. IEPA issued draft CAAPP permits on July 1, 2003 and proposed both CAAPP permits on October 10, 2003. During the 30-day public comment period, IEPA received comments on the draft permits, including comments from the Petitioner. On December 8, 2004, IEPA issued "draft revised proposed permits" for both facilities. IEPA proposed the permits on August 15, 2005, and issued final permits on September 29, 2005.

IEPA had notified the public that November 28, 2005 was the deadline to file a petition requesting that EPA object to the issuance of the final permits. Petitioner submitted a petition requesting that the Administrator object to the issuance of the permits to EPA on November 23, 2005. Accordingly, EPA finds that Petitioner timely filed this petition.

ISSUES RAISED BY THE PETITIONER

As noted previously, Petitioner alleges that the permits do not contain compliance schedules designed to bring the sources into compliance with all applicable requirements. The Petitioner notes that, under 40 C.F.R. §70.1(b) and the section 504(a) of the Act, each regulated major source must obtain a permit that "assures compliance by the source with all applicable requirements." 40 C.F.R. § 70.1(b). Furthermore, 40 C.F.R. §§ 70.5(c)(8) and (9) require that, if a facility is in violation of an applicable requirement at the time of permit issuance, the facility's permit must include a schedule containing an enforceable sequence of actions, with milestones, leading to compliance with any applicable requirements. Petition at 1-2. The Petitioners state that the facility certified compliance in its application, and that IEPA accepted the certification. Concurrent with its release of the revised proposed permits, IEPA provided a responsiveness summary that explains that "the objective of the [Title V] permit is to assure compliant operations and 'flag' potentially noncompliant operations." Petitioner claims that IEPA is not assuring compliant operations at these facilities and is ignoring the explicit documentation of non-compliant operations taking place at these facilities. Petition at 3.

A. Opacity

The Petitioners allege that the permits lack compliance schedules to bring the Will County and Joliet plants into compliance with the opacity standards. Petitioners have included summaries of Midwest Generation's quarterly opacity reports. Petition at 3-4. Petitioners state that the chart demonstrates that there have been violations at all units every year from 1999 through 2005. Petition at 5. The Petitioners assert that the alleged violations "have been continuous and regular over the last six years and continue up through the most recently available quarterly reports," including "the period throughout which IEPA issued draft, proposed, revised proposed, draft revised proposed, and final permits...." Petition at 5-6.

Petitioners raised these and similar arguments in comments on the draft and re-proposed permits for these facilities, and submitted petitions requesting that the Administrator to object to the proposed permits in a previous round of petitions filed on these permits. See, e.g., In the Matter of Midwest Generation, LLC Joliet Generating Station, Petition V-2004-3, at 31-32 (June 24, 2005) ("Joliet Order"). In responding to those previous petitions, EPA concluded that IEPA had failed to respond to significant comments on the opacity issue and directed IEPA to respond to the comments concerning the need for a compliance schedule for the alleged opacity violations. *Id.* at 32.

IEPA responded to the public comments as directed in EPA's June 2005 order when it re-proposed the Will County, Joliet, and other utility permits on August 15, 2005, and issued the final permits on September 29, 2005. In responding to the comments from the Petitioners and others concerning opacity exceedances, IEPA noted the concern expressed by the commenters that, according to them, the coal fired boilers at the plants were not fully compliant with the opacity limitations or PM standards. Responsiveness Summary ("RS") at 15. IEPA stated that the coal-fired boilers are subject to separate opacity and PM standards, and that compliance with the two requirements must be separately addressed. RS at 15. IEPA then stated that "opacity is a practical means for determining whether PM emissions control equipment, which for the coal-fired boilers at these plants are typically ESPs, are being properly maintained and effectively operated to comply with applicable PM standards." RS at 15. IEPA maintains, however, that increased or excess opacity does not necessarily translate into non-compliance with the PM emissions standard and states that "while opacity levels may be used to assess compliance and noncompliance with PM standards, opacity levels do not provide a precise gage for distinguishing between compliant and noncompliant operations." RS at 16.

IEPA also stated that, historically, emissions testing demonstrated that the PM emissions are "typically well within the applicable standard" and that "the ESPs at these plants can generally ensure compliance with the PM standard even when a number of the fields in the ESP are not in service." RS at 15. IEPA maintained that there is no evidence of noncompliance with the PM standard and that, therefore, a compliance schedule related to the PM standard is not warranted. RS at 15. IEPA then acknowledges that "[q]uarterly opacity reports submitted to the Agency by the sources, though not part of the permit applications, do indicate that the coal-fired

boilers do, at times, exhibit excess opacity.” RS at 16. IEPA disputes the contention that the exceedance reports alone are sufficient to require the inclusion of a compliance schedule and notes that the sources certified compliance. RS at 16. IEPA then states:

Additionally, information in the quarterly opacity reports, as have been resubmitted to the Illinois EPA with certain public comments, is not determinative of whether these exceedances constitute violations, much less ongoing violations. Even to the extent these exceedances rise to the level of a violation, past exceedances do not necessarily constitute a sufficient basis to include a compliance schedule in these permits.

RS at 16.

IEPA does not agree with the Petitioner that the number of exceedances is significant because COM data is measured and counted every six minutes, or ten times an hour. RS at 16. IEPA also states that the total number and the duration of exceedances are not directly equivalent, and points out that the past exceedances intermittently occur and then abate without a particular pattern or frequency. RS at 16. IEPA maintains that the boilers comply with the opacity limitations the vast majority of the time and “[t]hat exceedances, especially opacity exceedances, may occur intermittently is recognized by state and federal regulations and by federal guidance.” RS at 16. IEPA concludes that the circumstances do not warrant the imposition of a compliance schedule for opacity exceedances in the CAAPP permits.

The Petitioners express several concerns with the explanations contained in IEPA’s responsiveness summary. First, Petitioners claim that the “explanations in IEPA’s responsiveness summary do not negate these violations or excuse its failure to include a compliance schedule in the permits.” Petition at 5. Second, the Petitioners note that the responsiveness summary states that “neither the applications nor comments provide information evidencing noncompliance with the PM standard. Accordingly, a factual basis has not been presented upon which to include compliance schedules in these CAAPP permits related to PM emissions from the coal-fired boilers.” Petition at 6. Petitioners believe this language is counter to 35 Ill. Admin. Code § 212.124, which provides that violations of the opacity limitations are independently enforceable, regardless of whether there is a violation of the PM standard. Petition at 6. Petitioners’ third concern with the responsiveness summary is IEPA’s reliance on Will County and Joliet’s certifications of compliance and assertion that “for the vast majority of time, the coal-fired boilers comply with opacity limitations.” RS at 16. Petitioners argue that reliance on self-certified compliance and the argument that the facilities are in compliance most of the time is not a shield for the times when the facilities are in violation. Petition at 6. Petitioners stress that there is no *de minimus* threshold required for quantity of violations when there are continuous and ongoing violations. Petition at 7. Petitioners’ final concern with the responsiveness summary is with IEPA’s suggestion that federal policy excuses violations. The Petitioners maintain that there is no federal policy that allows or excuses intermittent violations and, if IEPA is relying on a decade-old policy related to enforcement priorities, that reliance is misplaced. Petitioners assert that the policy served only to direct enforcement resources, not to excuse noncompliance. Petition at 7.

Petitioners assert that, in light of the statutory mandate to include a compliance schedule, EPA must object to the permit. Petitioners raise the Second Circuit's decision in NY PIRG v. Johnson, 427 F.3d 172 (2d Cir. Oct 24, 2005), in which the Court held that issuance of an NOV and commencement of an enforcement action is sufficient demonstration of noncompliance to trigger the title V requirement to include a compliance schedule in the title V operating permit. Petition at 7-8, citing NY PIRG v. Johnson, at 11. Petitioners conclude that, since a compliance schedule is mandatory, the Administrator must object. Petition at 8.

Section 70.6(c)(3) requires that title V permits include a schedule of compliance consistent with Section 70.5(c)(8). Section 70.5(c)(8) prescribes the requirements for compliance schedules to be submitted as part of a permit application. For sources that are not in compliance with applicable requirements at the time of permit issuance, compliance schedules must include "a schedule of remedial measures, including an enforceable sequence of actions with milestones, leading to compliance." 40 C.F.R. § 70.5(c)(8)(iii)(C). The compliance schedule should "resemble and be at least as stringent as that contained in any judicial consent decree or administrative order to which the source is subject." EPA will grant an objection in a title V petition if "the petitioner demonstrates to the Administrator that the permit is not in compliance with the requirements of this Act." 42 U.S.C. § 7661d(b)(2).

As stated above, EPA's petition orders for Midwest Generation, LLC's five coal fired power plants required IEPA to "address Petitioner's significant comments."¹ IEPA responded to EPA's order and addressed the comments concerning the need for a compliance schedule to address opacity exceedances as reported in the sources' quarterly reports. Petitioners question the sufficiency of IEPA's explanation and again request that EPA order IEPA to include a compliance schedule to address what Petitioners claim are ongoing opacity violations.

First, as discussed above, IEPA states in the responsiveness summary that the quarterly opacity reports are not determinative proof of opacity violations, yet Petitioners argue, however, that they can determine when an exceedance is eligible for the eight minute exemption contained in the SIP and that the chart that Petitioners included with the comments did not include the exceedances eligible for the eight minute exemption. Petition at 4-5. The eight minute exemption provision is contained in Illinois' SIP at 35 Ill. Admin. Code § 212.123. That provision sets the opacity standard at thirty percent, but exempts opacity emissions greater than thirty percent and less than sixty percent for an aggregate of eight minutes in any sixty minute period, if there are no more than three such exceedances in a twenty-four hour period. Petition at 4-5. In addition to the eight minute exception, however, the Illinois SIP at 35 Ill. Admin. Code § 212.124 contains an affirmative defense for excess opacity during startup, malfunction and breakdown. Petitioners assert that "only a fraction" of the exceedances are potentially eligible for the startup, malfunction

¹ See Fisk Order at 4-5, In the Matter of Midwest Generation, LLC Crawford Generating Station, Petition V-2004-2, at 4-5 (March 25, 2005), In the Matter of Midwest Generation, LLC Waukegan Generating Station, Petition V-2004-5, at 4-5 (September 22, 2005), In the Matter of Midwest Generation, LLC Joliet Generating Station, Petition V-2004-3, at 32-33 (June 24, 2005), and In the Matter of Midwest Generation, LLC Romeoville Generating Station, Petition V-2004-4, at 30-31 (June 24, 2005).

or breakdown affirmative defense. Petition at 4-5.

Second, Petitioners challenge IEPA's claim that there is no evidence that there are ongoing violations of opacity at the sources and IEPA's reliance on the compliance certification submitted by the sources. Petitioners direct IEPA to the most recent quarterly report to demonstrate that the opacity exceedances are ongoing at the facility, and question IEPA's reliance on the sources' compliance certifications. EPA regulations require sources to submit a compliance certification at the time of permit application. 40 C.F.R. § 70.5(c)(9). In this case, the sources re-submitted compliance certifications with their updated title V applications in 2003 and reaffirmed the certifications in 2005. EPA does not agree with Petitioners' general assertion that reliance on a compliance certification is never appropriate. The title V program requires self-monitoring, self-reporting and annual compliance certification. Permitting authorities can rely on the assertions of sources, and, absent a clear demonstration of non-compliance, are not required to question each compliance certification it receives. When a source's compliance certifications are up-to-date, EPA agrees that it generally is appropriate for a permitting authority to consider the certification when deciding whether or not a compliance schedule is required. Nonetheless, because in this case there is information contained in COMs reports indicating numerous exceedances of the opacity standard, some of which may not to be excused, IEPA should not just accept the certification certifying compliance with the opacity standard as dispositive without undertaking some additional review.

Petitioner asserts that IEPA allows intermittent compliance based on state and federal regulations and federal guidance. That assertion mischaracterizes the states responsiveness summary. In fact, IEPA indicated that state and federal regulations and federal guidance contemplate that "opacity exceedances may occur intermittently." RS at 16. We note that the Illinois SIP does not consider all exceedances of opacity limitations to be violations. *See* 35 Ill. Admin. Code §§ 212.123 and 212.124.

Federal, state, and local authorities must exercise discretion when determining the appropriate course of action when assessing potential violations of the Act applicable requirements. Such decisions are highly discretionary. It is EPA's policy that information that may indicate non-compliance, such as the evidence provided by Petitioner, be given to the enforcement arm of EPA. A state or federal enforcement office will then investigate and determine if any violations occurred and, if so, whether further action is warranted, as resources and environmental priorities allow. If EPA's or the State's enforcement office initiates enforcement proceedings, and those enforcement proceedings result in a settlement or adjudicated finding of non-compliance, the title V permit will be re-opened and the appropriate compliance schedule put in to the title V permit.

EPA's and a state's enforcement investigations and the state's permitting process timelines often do not coincide, therefore, the title V permit must be carefully crafted not to shield the permittee from any potential enforcement action that may result from an investigation of alleged violations. The Midwest Generation power plant permits do not shield the sources from enforcement for past violations of the opacity standard. Nor do the permits shield the sources from

an enforcement action for future violations of the opacity or other requirements. In addition, in the event of any future exceedances, the permits require Midwest Generation to submit a report containing a detailed explanation of the cause of excess opacity and a detailed explanation of the corrective actions taken to lessen the opacity and to evaluate any possibility of ongoing opacity issues at these facilities. See permit condition 7.1.10-2.d.iii.

On October 19, 2006, IEPA submitted to EPA a letter summarizing its activities to address the opacity exceedances reported by Midwest Generation. IEPA clarified in the letter that, in response to a number of comments, its Division of Air Pollution Control Permits Section reviewed opacity data for 22 coal-fired power plants. IEPA determined in its review that it was appropriate to require in the title V permits for these plants additional monitoring, recordkeeping and reporting requirements, but that “neither this review nor the record in total provided a sufficient basis to support the inclusion of compliance schedules in the CAAPP permits.” IEPA stated, however, that the review did not conclude that there were no opacity standard violation, and did not foreclose future action on the part of IEPA. IEPA pledged to “continue to review quarterly opacity reports submitted by these sources, together with the existing information, to determine whether enforcement action is warranted. As part of such future action, Illinois EPA will make a determination as to whether the frequency and pattern of the opacity *exceedances* at these sources warrant enforcement action, e.g., they meet U.S. EPA’s criteria for high priority *violation(s)*, and ... proceed accordingly per our existing compliance guidance and agreements.” IEPA further stated that, where an enforcement action is initiated and results in a settlement or finding of non-compliance, it would revise the CAAPP permit for the subject source to include any relevant requirements contained in a settlement agreement or order into the permit.

The USEPA finds that IEPA reasonably concluded that a compliance schedule was not warranted at the time of permit issuance. IEPA did not rely on the source’s compliance certification only, and record reflects that the IEPA undertook the necessary additional review of opacity data and did not find a sufficient basis to support the inclusion of a compliance schedule in these permits. EPA finds that Petitioner has not demonstrated noncompliance at the time of permit issuance as required by the CAA and that IEPA’s commitments meet EPA’s policy for handling potential non-compliance issues in the Title V permitting process. The USEPA maintains that the Title V petition process is not the appropriate venue to drive discretionary enforcement decisions of the permitting authority, particularly when the petitioner fails to demonstrate that a violation of the Act has occurred. It is reasonable for a state to resolve matters like this through diligent monitoring of potential non-compliance, and enforcement actions as necessary, and to make necessary adjustments to the Title V permit when any such actions are resolved. For these reasons, EPA denies the petition on this issue

B. New Source Review

Petitioner alleges that IEPA never required the applicant to submit sufficient information to determine whether New Source Review (NSR) rules apply and to evaluate the sources’ NSR

compliance. Petition at 8. Petitioner notes that 40 C.F.R. part 70 requires that permit applications must include all information “sufficient to evaluate the subject source and its application and to determine all applicable requirements.” Petition at 8; *see* 40 C.F.R. 70.5(a)(2).

Petitioner raised these and similar arguments in petitions to the Administrator to object to the proposed permits. *See, e.g.,* Joliet Order at 33-34. In responding to those previous petitions, EPA concluded that IEPA had failed to respond to significant comments on the issue, and directed IEPA to respond to those comments. *Id.* at 34. IEPA included in the permit record for the August 15, 2005 proposed permits its responsiveness summary, in which it responded to the comments received on the June 4, 2003 draft permits.

In response to EPA's June 24, 2005 objections, IEPA stated in its responsiveness summary that “the application and public comments do not provide information of the type that is necessary as a matter of law, to show that NSR, as a matter of fact, has been triggered by activities at these plants and is an applicable requirement for any of these plants, much less whether NSR control technology requirements are applicable.” RS at 17. IEPA goes on to state that the question of what constitutes a modification subject to new source review is the focus of continued litigation. “Because the investigation and litigation continue, ... and because the records for the 22 CAAPP permits lack information clearly showing noncompliance with NSR, it is premature, unnecessary, and inappropriate to attempt to make NSR applicability determinations for these plants and to include compliance schedules in the CAAPP permits.” RS at 17. The Petitioners assert, however, that “[t]he relevant question is not whether NSR has been triggered or whether NSR control technology requirements are applicable but whether IEPA conducted a sufficient investigation of NSR applicability.” Petition at 9. Petitioners assert that IEPA’s conclusion that the Will County and Joliet applications “do not provide information of the type that is necessary as a matter of law, to show that NSR, as a matter of fact, has been triggered by activities at these plants and is an applicable requirement ... ignores the prima facie evidence of violations provided by the Illinois Attorney General and Petitioners.” Petition at 9. Petitioners maintain that, “at a minimum, IEPA should have investigated whether NSR has been triggered.” Petition at 9. In response to IEPA’s statement that “potential NSR issues posed at these plants are complex and investigation of these issues is not amenable to resolution during permitting,” Petitioners argue that the complexity of the issues and the administrative burden of resolving them in this proceeding are of no relevance, and do not negate the Act’s requirement that IEPA assure compliance with the Act and NSR. Petition at 10.

As stated above, EPA will grant an objection in a title V petition if “the petitioner *demonstrates* to the Administrator that the permit is not in compliance with the requirements of this Act.” 42 U.S.C. § 7661d(b)(2) (*emphasis added*). The USEPA finds that IEPA has not reached a final determination in this permitting context that PSD is an applicable requirement for these sources, that the USEPA has not determined otherwise, and that a court has not issued a determination in the litigation context. Accordingly, there is no requirement under the facts of this case for the permits to include either PSD limits or a compliance schedule for the source to come into compliance with such limits at this time. EPA believes that the allegations made by the Petitioners do not contain sufficient specific information to demonstrate that the Will County or

