BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF:	)	ORDER RESPONDING TO
	)	PETITIONER'S REQUEST
CARMEUSE LIME AND STONE	)	THAT THE ADMINISTRATOR
	)	OBJECT TO ISSUANCE OF
Permit No. 405031990-P20	)	STATE OPERATING PERMIT
Issued by the Wisconsin	)	
Department of Natural Resources	)	Petition Number V-2010-1

ORDER DENYING PETITION FOR OBJECTION TO PERMIT

On December 15, 2009, the Wisconsin Department of Natural Resources (WDNR) issued a title V renewal operating permit to the Carmeuse Lime and Stone Plant (Carmeuse) pursuant to its authority under the state of Wisconsin's implementing statute, Wis. Stat. Ann. 285.62-285.64, and regulations, Wis. Admin. Code NR 407, title V of the Clean Air Act (Act), 42 U.S.C. §§ 7661-7661f, and the U.S. Environmental Protection Agency's (EPA) implementing regulations at 40 C.F.R. part 70 (part 70). Carmeuse is a lime processing plant that manufactures dolomitic lime from limestone.

On January 13, 2010, David Bender of the Garvey McNeil & McGillivray, SC, Law Offices submitted to the EPA on behalf of the Sierra Club (Petitioner) a petition requesting that the EPA object to issuance of the Carmeuse title V permit pursuant to section 505(b)(2) of the Act and 40 C.F.R. § 70.8(d). The Petitioner alleges that the title V permit should have "limited the plant to burning only coal in Kiln #2," and not petroleum coke. More specifically, the Petitioner alleges that: (1) a 1979 Prevention of Significant Deterioration (PSD) permit issued by the EPA did not allow petroleum coke to be burned as fuel and the permit was never modified to allow for it; (2) WDNR was not authorized to revise the EPA's permit; and (3) a 1995 permit action by WDNR was flawed in that the correct permit process was not used, and both the netting and increment analyses were not carried out correctly.

The 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 (2d Cir. 2003).

Based on a review of the available information, including the petition, the permit record, and relevant statutory and regulatory authorities and guidance, I deny the Petitioner's request 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 the EPA an operating permit program to meet the requirements of title V. The 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 other conditions necessary to assure compliance with applicable requirements of the Act, including the requirements of the applicable state implementation plan. *See* sections 502(a) and 504(a) of the Act, 42 U.S.C. §§ 7661a(a) and 7661c(a). The title V operating permit program generally does not impose new substantive air quality control requirements (referred to as "applicable requirements"), but does require that permits contain monitoring, recordkeeping, reporting and other requirements to assure compliance by sources with applicable emission control requirements. 57 Fed. Reg. 32250, 32251 (July 21, 1992) (EPA final action promulgating part 70). One purpose of the title V program is to "enable the source, states, the 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 permit program is a vehicle for ensuring that air quality control requirements are appropriately applied to facility emission units and that compliance with these requirements is assured.

Under section 505(a) of the Act, 42 U.S.C. § 7661d(a), and the relevant implementing regulations at 40 C.F.R. § 70.8(a), states are required to submit each proposed title V operating permit to the EPA for review. Upon receipt of a proposed permit, the EPA has 45 days to object to final issuance of the permit if the EPA determines the permit is not in compliance with applicable requirements or the requirements of title V. 40 C.F.R. § 70.8(c). If the 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 the 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)." 42 U.S.C. § 7661d(b)(2). In response to such a petition, the Administrator must issue an objection if a petitioner demonstrates that a permit is not in compliance with the requirements of the Act. *Id. See also* 40 C.F.R. § 70.8(c)(1); *New York Public Interest Research Group*, 321 F.3d at 333 n.11. Under section 505(b)(2) of the Act, the burden is on the petitioner to make the required demonstration to the 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). If, in responding to a petition, the EPA objects to a permit that has already been issued, the 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), (5)(i) - (ii) and 70.8(d).

BACKGROUND

On December 27, 2008, Carmeuse submitted to WDNR an application to renew the title V permit. WDNR published the public notice of the draft title V permit on July 3, 2009, and proposed the title V renewal permit on October 28, 2009. During the public comment period, WDNR received comments on the draft permit, including comments from the Petitioner. The EPA did not object to the permit. WDNR issued the final permit on December 15, 2009.

Under the statutory timeframe in section 505(b)(2) of the Act, February 9, 2010, was the deadline to file a petition requesting that the EPA object to the issuance of the final Carmeuse title V renewal permit. The Petitioner submitted its petition to object to the issuance of the Carmeuse permit to the EPA on January 13, 2010. Accordingly, the EPA finds that the Petitioner timely filed its petition.

ISSUES RAISED BY THE PETITIONER

I. The permit fails to include fuel use restrictions from a PSD permit.

The Petitioner claims that the permit fails to include fuel use restrictions from a PSD permit issued by the EPA in 1979 to prevent Carmeuse from using petroleum coke at its facility, and that the fuel use restrictions remain in effect because they were never modified through a lawful PSD permit modification. The Petitioner makes several specific allegations related to this general claim, which are described in I. A. through E. below.

A. The fuel use restrictions in the EPA's "Approval to Construct" PSD permit, #EPA-5-A-79, must be included as applicable requirements in the title V permit.

The Petitioner states that the EPA issued a permit for Kiln #2 at Carmeuse in 1979 that included best available control technology (BACT) for sulfur dioxide (SO_2). The Petitioner alleges that the EPA-issued permit limited the plant to burning only coal in Kiln #2, but WDNR's title V permit for the plant omits that requirement and, instead, provides that petroleum coke (pet coke) can be burned. According to the Petitioner, the EPA's 1979 permit only approved coal combustion in the kiln. Pet coke was neither considered nor approved, and the EPA never modified its permit to allow for this. Petition at 1-2.

B. WDNR was not authorized to revise the EPA-issued PSD permits in 1995.

The Petitioner claims that the EPA has never modified the federal PSD permit for Kiln #2 to allow for pet coke combustion. The Petitioner further asserts that WDNR could not have lawfully modified the 1979 EPA-issued PSD permit to allow for pet coke combustion through the WDNR's 1995 state construction permit, 93-RV-108, because WDNR was not authorized to revise the EPA-issued PSD permits in 1995. The Petitioner alleges that this authorization was only given in 2007, effective June 11, 2007, and was not retroactive. *Id.* at 2.

C. WDNR did not modify the EPA-issued 1979 PSD permit in accordance with 40 C.F.R. part 124 and PSD.

The Petitioner further asserts that, even if it had the authority as the EPA's delegate to modify the federal PSD permit, WDNR was never authorized to modify the EPA-issued permit through a state construction permit. According to the Petitioner, PSD permits, such as the 1979 PSD permit that the EPA had issued to Carmeuse, can only be "modified" by rescinding (in whole or in part) the existing permit and issuing a new permit in its place. *Id.*, citing 40 C.F.R. §§ 52.21(q), (u), (w), 124.5(g)(2) (providing that PSD permits are not subject to modification under § 124.5). If WDNR wanted to change the coal restriction to allow pet coke combustion, WDNR was required to do so as the EPA's delegate by complying with 40 C.F.R. part 124. The Petitioner claims that, in addition, WDNR was "required to require compliance with the PSD program for [the fuel] change because a change in fuel from coal to a coal and pet coke mix is a 'change in method of operation' that would have subjected the lime kiln to PSD permitting." Petition at 2.

D. An increment analysis would have been required in such a reissuance.

The Petitioner asserts that, in its 1995 state preconstruction permit purporting to allow for pet coke combustion, WDNR analyzed impacts on the National Ambient Air Quality Standards (NAAQS) for SO_2, but did not do the required increment analysis. *Id.*, citing 40 C.F.R. § 52.21(d), (k). The Petitioner claims that the SO_2 impacts from the source would have violated the SO_2 increments. The Petitioner concludes that the fact that the reissued (modified) permit would not have been granted under 40 C.F.R. § 52.21 because of SO_2 increment violations merely reinforces the fact that WDNR never complied with 40 C.F.R. § 52.21 or part 124 in allowing for pet coke combustion. Petition at 3.

E. The fuel switch resulted in a significant increase in actual emissions which should have triggered PSD permitting.

The Petitioner alleges that the fuel switch to a fuel blend including pet coke was a change in the method of operation that should have triggered PSD requirements. The Petitioner contends that, although there are fuel changes that can be exempt from the definition of a major modification, the change at the Carmeuse facility does not satisfy the criteria for such exemption. *Id.* at 3 - 4. The Petitioner further asserts that WDNR was mistaken in its assumption that the facility "netted out" of PSD, claiming that there were no emission decreases at the plant that were contemporaneous or creditable to the fuel change in 1995, and, therefore, there was no "netting." The Petitioner states that, to the extent that WDNR intended to mean that the switch to pet coke did not result in a significant increase in actual emissions under 40 C.F.R. § 52.21(b)(3)(i)(a), WDNR's own analysis contradicts this assertion. Citing the Preliminary Determination at 5-6, the Petitioner claims that, in 1995, WDNR identified the pre-change SO_2 emissions as 413.81 tons per year and the potential to emit after the alleged modification for the coal/pet coke blend as 584.38 tons per year. The increase of 170.54 tons per year exceeds the 40 tons per year SO_2 threshold for a major modification. The Petitioner concludes that it is unclear how WDNR determined that there would be no emission increase. Petition at 3-6.

Response

For the reasons set forth below, I deny the petition. Although the Petitioner claims that the permit fails to include fuel use restrictions from the permit issued by the EPA in 1979 that prevent the use of pet coke, the Petitioner has not shown that this 1979 permit did not allow the use of pet coke. Specifically, the Petitioner claims that "EPA clearly considered and approved only coal combustion in the kiln – pet coke was not considered and was not approved." Petition at 1. The Petitioner further claims that "there is no evidence anywhere in the permit record of pet coke being considered or approved." Petition at 2.

On June 16, 1978, Carmeuse – then Rockwell Lime (Rockwell) – submitted to the EPA (via WDNR) its construction permit application. In the application, Rockwell specified that the facility would burn coal, petroleum coke and natural gas. Rockwell also provided in the application the heating value, sulfur content and ash content for all three fuels. In a July 24, 1978, document submitted to WDNR with additional information regarding its construction permit application, Rockwell stated that the fuel would be a mixture of coal, petroleum coke and natural gas. On September 27, 1979, the EPA sent Rockwell a letter, which included the EPA's permit # EPA-5-A-79. In the letter, the EPA stated, "Please be advised that this approval is based upon your written application; any departure from the terms in the application must receive the prior written authorization from U.S. EPA." It is important to note that the EPA's 1979 permit did not contain any fuel type restrictions and that Rockwell's application specifically included using pet coke as a fuel. The Petitioner's claim that there is no evidence anywhere in the permit record of pet coke being considered or approved is factually incorrect.

In addition, on November 7, 1989, the EPA issued Notice of Violation (NOV) EPA-5-90-A-6 to Rockwell, alleging that it used pet coke that exceeded the 2.1% sulfur limit. The NOV stated, "Rockwell Lime Company has been utilizing petroleum coke as fuel for the kiln No. 2. Analysis of the petroleum coke samples taken on June 29, 1988, July 12, 1988, and November 12, 1988, documented sulfur contents of 4.24 percent, 4.31 percent, and 4.05 percent respectively, well exceeding the limit set by the construction permit." The NOV did not state that the use of pet coke as a fuel was a violation, or that the EPA's permit did not allow pet coke. Then, in a January 1990 letter from David Kee, Air Division Director, EPA, Region 5, to Joseph G. Birsch, Executive Vice-President, Rockwell Lime, regarding Rockwell's response to the 1989 NOV, the EPA said the facility was in compliance because it had stopped using "non-complying fuel." The EPA stated that "to substantiate that Rockwell Lime will continue to use compliant fuel, you are hereby required, under the authority of Section 114 of the Clean Air Act… to perform fuel sampling and analysis, and to provide such information to U.S. EPA in the manner indicated" in the letter. The EPA then required Rockwell to: "conduct monthly fuel sampling and analysis on each type of solid fuel used" and to provide in each report each type of fuel burned for the month, the amount of each fuel burned for the month, the date and amount of usage for any fuel containing more than 2.1% sulfur by weight on an as-fired basis, and the amount and sulfur content of other fuels used on the same day. In a letter from Carmeuse to WDNR dated January 5, 1990, Carmeuse references a meeting it had with the EPA on December 12, 1989 – between when the NOV was issued and when the EPA sent its 1990 letter – in which it told the EPA it was using a fuel blend. Consistent with the record of the 1979 permitting itself, the NOV

and follow-up letter from the EPA to Rockwell (written with the knowledge that Rockwell continued to use a fuel blend) provide additional evidence that the EPA later considered the 1979 permit to allow Rockwell to use pet coke as a fuel. In particular, the follow-up letter indicates that in 1990, the EPA interpreted the 1979 permit to allow the use of pet coke.

The Petitioner points to paragraphs 6 and 10 of the 1979 permit as evidence that the permit allows only coal to be used at the Carmeuse facility. Paragraph 6, in the "Findings" section of the permit, states:

> "The lime in the kiln and baghouse will absorb sulfur dioxide. In addition, a low sulfur coal with a maximum sulfur content of 1 percent will be used. If a low sulfur coal is not available a medium sulfur coal with a sulfur content not greater than 2.1 percent will be used."

Paragraph 10, which is in the "Conditions" section and which the permit states "represent[s] the application of BACT," says: "The sulfur content of the coal used to fire the kiln shall not exceed 2.1 percent on a 24-hour basis." However, none of this language explicitly limits the facility to use only coal. Rather, these provisions outline the limits applicable to coal when the facility does use it.

Based on the history described above, the EPA believes that the 1979 permit authorized pet coke, and that the Petitioner has not provided sufficient evidence to show that this interpretation is unreasonable. This interpretation is supported by the facts that the permit application specifically contemplated the use of pet coke, there was an absence of any explicit disapproval of the use of pet coke in the permit record and the EPA's approval tied operations to the terms of the permit application. As a result, the Petitioner has failed to show that the provision in the 2009 title V permit allowing the use of pet coke as part of a fuel blend is inconsistent with the 1979 permit. Thus, this petition is denied.

The EPA notes that, concerning the Petitioner's claim that WDNR was not authorized to revise the 1979 EPA permit in 1995, the EPA had delegated to WDNR authority to administer the federal part 52 PSD permitting program, including the authority to amend previously EPA-issued permits. This was effected by letter on February 16, 1989, from the EPA Region 5 Administrator Valdas Adamkus to the WDNR Secretary Carroll D. Besadny, regarding the full delegation to Wisconsin of the PSD permitting program, which was in turn signed by Secretary Besadny on March 9, 1989. In this letter, the EPA stated, "With respect to any PSD permits issued by the USEPA before the program was delegated on November 13, 1987, this delegation includes authority to implement the technical, administrative, and enforcement provisions of the PSD regulations for those permitted sources and includes authority to amend those permits." Thus, when WDNR issued the 1995 construction permit in question, WDNR did have the authority to amend the EPA issued permits.

The EPA further notes that the Petitioner has failed to show that there was a switch to a fuel blend including pet coke that was a change in the method of operation that should have been subject to PSD permitting.[1] The Petitioner has also not shown that WDNR failed to conduct the

[1] EPA also notes that the content of WDNR's 1995 permit action, taken as EPA's delegatee, may have been

required "netting analysis" and SO_2 increments analysis, which are required for permit actions where changes in the method of operation would trigger PSD.[2] Since the record here supports the conclusion that pet coke was an allowable fuel under the 1979 EPA-issued permit, the Petitioner has not demonstrated that the 1995 permit authorized a change in the method of operation, and thus that PSD permitting was triggered. A physical change or change in the method of operation does not include use of any fuel which the source was "approved to use under any permit issued under 40 C.F.R. § 52.21 or under regulations approved pursuant to 40 C.F.R. § 51.166." See 40 C.F.R. § 52.21(b)(2)(i) and (iii)(e)(2). The Petitioner has not shown that the EPA's belief that the 1979 permit allowed the use of pet coke is unreasonable, and thus has not established that this exclusion does not apply. The Petitioner has thus also not shown that it would have been erroneous for the State to take action to revise the 1979 permit as the State did in the 1995 action, and thus that the State failed to comply with the Act.

A PSD "netting analysis" could only have been required in this situation if actions that could amount to a major modification had occurred. Under regulations applicable in 1995, a major modification requiring a PSD permit was defined as a physical change in or a change in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the Act. 40 C.F.R. § 52.21(b)(2)(i). In the absence of a physical change or change in the method of operation, there is no major modification and thus no need to conduct a netting analysis to determine whether a PSD permit is required. Since the Petitioner did not demonstrate that a change in method of operation occurred and thus did not show that use of pet coke was a major modification requiring a new PSD permit, the Petitioner has not demonstrated that WDNR failed to conduct a required

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appealable to the Environmental Appeals Board (EAB), in which case it may not be appropriate to review the substance of the permit here. The appeal of federal PSD permits issued pursuant to the federal regulations at 40 C.F.R. § 52.21 is governed by the regulations at 40 C.F.R. § 124.19, and authority to review such permits rests exclusively with the EAB. Because of the exclusive authority of the EAB in this area, the Administrator has declined to review the merits of a federal PSD permit in the context of a petition to review a title V permit. *See, e.g.,* In re Kawaihae Cogeneration Project, Petition No. 0001-01-C (Order on Petition) (March 10, 1997).

[2] EPA also notes that 40 C.F.R. § 70.8(d) and Section 505(b)(2) of the Act, require that any petition shall be based only 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 such objections within such period, or unless the grounds for such objection arose after such period. To the extent the Petitioner argues in its petition that this permit amendment required rescission and reissuance of the permit rather than "modif[ication] . . . through a state construction permit," the Petitioner failed to raise this claim with reasonable specificity during the public comment period, and the claim was not raised by any other commenter. The Petitioner's comments state only that "if EPA's permit were to be modified, EPA was required to reopen the permit following the procedures in 40 C.F.R. § 52.21 and part 124." In fact, if the Petitioner made any claim, it is that the permit amendment required reopening, not rescission. In addition, no commenter raised with reasonable specificity the Petitioner's specific issues regarding increment analysis. The Petitioner's comments state that "[I]f EPA were to grant authorization to burn petroleum coke, it was required to go through PSD permitting following the procedures in 40 C.F.R. § 52.21 and part 124. Because that was never done, the original PSD permit's requirements remain in place." This comment makes no reference to increment analysis, and were it to raise any questions at all about what the proper content of a PSD permitting process should have been had it occurred, it does so in a manner that is too broad and vague to provide the State with adequate notice and opportunity to respond. The Petitioner has also not demonstrated that it was impracticable to raise either of these issues, and there is no indication that the grounds for these claims arose after the comment period.

netting analysis to determine if the facility would experience a major modification by using pet coke fuel.

In addition, the Petitioner has not shown an increment analysis was required since the Petitioner has not demonstrated that a new permit was required to authorize a major modification and also has not demonstrated that the 1995 permit revision authorized an increase in emissions that would require an increment analysis. The EPA regulations do not directly address revisions of PSD permits, but the EPA has previously observed that permit revisions should address all PSD requirements that may be affected by an increase in permitted emissions (including protection of increments).[3] To the extent applicable to circumstances other than those described in this memorandum, this policy is not implicated here because the Petitioner has not shown that the permit revision authorized an increase in emissions from what was allowed under the 1979 permit.[4]

In summary, the Petitioner has failed to show that it was improper for the title V permit issued to Carmeuse in 2009 to allow for the use of a fuel blend of natural gas, coal and petroleum coke. Therefore, I deny the petition in its entirety.

CONCLUSION

For the reasons set forth above and pursuant to section 505(b)(2) of the Act and 40 C.F.R. § 70.8(d), I hereby deny the petition filed by David Bender on behalf of the Sierra Club objecting to the title V renewal operating permit issued to Carmeuse.

Dated: NOV 4 2011

Lisa P. Jackson
Administrator

[3] Memorandum from Gary McCutchen and Michael Trutna to J. David Sullivan, *Request for Determination on Best Available Control Technology (BACT) Issues – Ogden Martin Tulsa Municipal Waste Incinerator Facility* (November 19, 1987). The EAB has observed that the McCutchen memorandum regarding Ogden Martin was limited to the particular circumstances described pending the issuance of more comprehensive guidance. ***In re: Chehalis Generating Facility*, PSD Appeal No. 01-06, slip op. at 27 (EAB Aug. 20, 2001).**

[4] EPA also notes that, prior to the issuance of the WDNR 1995 permit action, EPA recognized in a January 13, 1995, letter that the revised permit would include as SO_2 BACT "the use of fuel blend (natural gas, coke and coal) having a sulfur content of 2.1% . . . ." EPA stated that it would consider the revised permit with that BACT provision to "meet the requirements of the Clean Air Act."