

BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF)	
)	
SCRUBGRASS GENERATING COMPANY, LP,)	
POWER PLANT)	PETITION NUMBER III-2016-5
VENANGO COUNTY, PENNSYLVANIA)	
)	
PERMIT No. 61-00181)	ORDER RESPONDING TO THE
)	PETITIONER’S REQUEST THAT THE
ISSUED BY THE PENNSYLVANIA)	ADMINISTRATOR OBJECT TO THE
DEPARTMENT OF ENVIRONMENTAL)	ISSUANCE OF A STATE OPERATING
PROTECTION)	PERMIT
)	

ORDER GRANTING A PETITION FOR OBJECTION TO PERMIT

I. INTRODUCTION

On May 4, 2016, the U.S. Environmental Protection Agency (EPA) received a petition dated May 3, 2016, (Petition) from the Sierra Club (the Petitioner), pursuant to section 505(b)(2) of the Clean Air Act (CAA or Act), 42 U.S.C. § 7661d(b)(2). The Petitioner requests that the EPA object to the proposed operating permit no. 61-00181 (the Proposed Permit) issued by the Pennsylvania Department of Environmental Protection (PADEP) to Scrubgrass Generating Company, LP, for the operation of the Scrubgrass Generating Company Facility (Scrubgrass or the Facility) in Venango County, Pennsylvania. The operating permit was proposed pursuant to title V of the CAA, CAA §§ 501–507, 42 U.S.C. §§ 7661–7661f, and 25 Pa. Code §§ 127.501–127.543. *See also* 40 C.F.R. part 70 (title V implementing regulations). This type of operating permit is also referred to as a title V permit or part 70 permit.

Based on a review of the Petition and other relevant materials, including the Proposed Permit, the permit record, and relevant statutory and regulatory authorities, and as explained further below, the EPA grants the Petition requesting that the EPA object to the Proposed Permit.

II. STATUTORY AND REGULATORY FRAMEWORK

A. Title V Permits

Section 502(d)(1) of the CAA, 42 U.S.C. § 7661a(d)(1), requires each state to develop and submit to the EPA an operating permit program to meet the requirements of title V of the CAA and the EPA’s implementing regulations at 40 C.F.R. part 70. The Commonwealth of Pennsylvania submitted a title V program governing the issuance of operating permits on May 18, 1995. The EPA granted full approval of Pennsylvania’s title V operating permit program in 1996. *See* Clean

Air Act Final Full Approval of Operating Permits Program; Final Approval of Operating Permit and Plan Approval Programs Under Section 112(1); Final Approval of State Implementation Plan Revision for the Issuance of Federally Enforceable State Plan Approvals and Operating Permits Under Section 110; Commonwealth of Pennsylvania, 61 Fed. Reg. 39597 (July 30, 1996) (codified at 40 C.F.R. § 52.2020(c)). This program, which became effective on August 29, 1996, is codified in 25 Pa. Code §§ 127.501–127.543.

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 as necessary to assure compliance with applicable requirements of the CAA, including the requirements of the applicable implementation plan. CAA §§ 502(a), 504(a), 42 U.S.C. §§ 7661a(a), 7661c(a). The title V operating permit program generally does not impose new substantive air quality control requirements, but does require permits to contain adequate monitoring, recordkeeping, reporting and other requirements to assure sources' compliance with applicable requirements. 57 Fed. Reg. 32250, 32251 (July 21, 1992); *see* CAA § 504(c), 42 U.S.C. § 7661c(c). One purpose of the title V program is to “enable the source, States, the EPA, and the public to understand better 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 for assuring compliance with such requirements.

B. Review of Issues in a Petition

State and local permitting authorities issue title V permits pursuant to their EPA-approved title V programs. Under CAA § 505(a), 42 U.S.C. § 7661d(a), and the relevant implementing regulations found 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 proposed permit if the EPA determines that the proposed permit is not in compliance with applicable requirements under the Act. CAA § 505(b)(1), 42 U.S.C. § 7661d(b)(1); *see also* 40 C.F.R. § 70.8(c). If the EPA does not object to a permit on its own initiative, any person may petition the Administrator, within 60 days of the expiration of the EPA's 45-day review period, to object to the permit. CAA § 505(b)(2), 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d).

The 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). CAA § 505(b)(2), 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d). In response to such a petition, the Act requires the Administrator to issue an objection if a petitioner demonstrates that a permit is not in compliance with the requirements of the Act. CAA § 505(b)(2), 42 U.S.C.

§ 7661d(b)(2); 40 C.F.R. § 70.8(c)(1).¹ Under section 505(b)(2) of the Act, the burden is on the petitioner to make the required demonstration to the EPA.²

The petitioner’s demonstration burden is a critical component of CAA § 505(b)(2). As courts have recognized, CAA § 505(b)(2) contains both a “discretionary component,” to determine whether a petition demonstrates to the Administrator that a permit is not in compliance with the requirements of the Act, and a nondiscretionary duty to object where such a demonstration is made. *Sierra Club v. Johnson*, 541 F.3d at 1265–66 (“[I]t is undeniable [that CAA § 505(b)(2)] also contains a discretionary component: it requires the Administrator to make a judgment of whether a petition demonstrates a permit does not comply with clean air requirements.”); *NYPIRG*, 321 F.3d at 333. Courts have also made clear that the Administrator is only obligated to grant a petition to object under CAA § 505(b)(2) if the Administrator determines that the petitioner has demonstrated that the permit is not in compliance with requirements of the Act. *Citizens Against Ruining the Environment*, 535 F.3d at 677 (stating that § 505(b)(2) “clearly obligates the Administrator to (1) determine whether the petition demonstrates noncompliance and (2) object if such a demonstration is made” (emphasis added)).³ When courts have reviewed the EPA’s interpretation of the ambiguous term “demonstrates” and its determination as to whether the demonstration has been made, they have applied a deferential standard of review. *See, e.g., MacClarence*, 596 F.3d at 1130–31.⁴ Certain aspects of the petitioner’s demonstration burden are discussed below; however, a more detailed discussion can be found in *In the Matter of Consolidated Environmental Management, Inc., Nucor Steel Louisiana*, Order on Petition Nos. VI-2011-06 and VI-2012-07 at 4–7 (June 19, 2013) (*Nucor II Order*).

The EPA has looked at a number of criteria in determining whether a petitioner has demonstrated noncompliance with the Act. *See generally Nucor II Order* at 7. For example, one such criterion is whether the petitioner has addressed the state or local permitting authority’s decision and reasoning. The EPA expects the petitioner to address the permitting authority’s final decision, and the permitting authority’s final reasoning—including the Response to Comments (RTC)—where these documents were available during the timeframe for filing the petition. *See MacClarence*, 596 F.3d at 1132–33.⁵ Another factor the EPA has examined is whether a

¹ *See also New York Public Interest Research Group, Inc. v. Whitman*, 321 F.3d 316, 333 n.11 (2d Cir. 2003) (*NYPIRG*).

² *WildEarth Guardians v. EPA*, 728 F.3d 1075, 1081–82 (10th Cir. 2013); *MacClarence v. EPA*, 596 F.3d 1123, 1130–33 (9th Cir. 2010); *Sierra Club v. EPA*, 557 F.3d 401, 405–07 (6th Cir. 2009); *Sierra Club v. Johnson*, 541 F.3d 1257, 1266–67 (11th Cir. 2008); *Citizens Against Ruining the Environment v. EPA*, 535 F.3d 670, 677–78 (7th Cir. 2008); *c.f. NYPIRG*, 321 F.3d at 333 n.11.

³ *See also Sierra Club v. Johnson*, 541 F.3d at 1265 (“Congress’s use of the word ‘shall’ . . . plainly mandates an objection whenever a petitioner demonstrates noncompliance.” (emphasis added)).

⁴ *See also Sierra Club v. Johnson*, 541 F.3d at 1265–66; *Citizens Against Ruining the Environment*, 535 F.3d at 678.

⁵ *See also, e.g., In the Matter of Noranda Alumina, LLC*, Order on Petition No. VI-2011-04 at 20–21 (December 14, 2012) (denying a title V petition issue where petitioners did not respond to the state’s explanation in response to comments or explain why the state erred or the permit was deficient); *In the Matter of Kentucky Syngas, LLC*, Order on Petition No. IV-2010-9 at 41 (June 22, 2012) (denying a title V petition issue where petitioners did not acknowledge or reply to the state’s response to comments or provide a particularized rationale for why the state erred or the permit was deficient); *In the Matter of Georgia Power Company*, Order on Petitions at 9–13 (January 8, 2007) (*Georgia Power Plants Order*) (denying a title V petition issue where petitioners did not address a potential defense that the state had pointed out in the response to comments).

petitioner has provided the relevant analyses and citations to support its claims. If a petitioner does not, the EPA is left to work out the basis for petitioner's objection, contrary to Congress's express allocation of the burden of demonstration to the petitioner in CAA § 505(b)(2). *See MacClarence*, 596 F.3d at 1131 (“[T]he Administrator’s requirement that [a title V petitioner] support his allegations with legal reasoning, evidence, and references is reasonable and persuasive.”).⁶ Relatedly, the EPA has pointed out in numerous orders that, in particular cases, general assertions or allegations did not meet the demonstration standard. *See, e.g., In the Matter of Luminant Generation Co., Sandow 5 Generating Plant*, Order on Petition No. VI-2011-05 at 9 (January 15, 2013).⁷ Also, if a petitioner did not address a key element of a particular issue, the petition should be denied. *See, e.g., In the Matter of Georgia Pacific Consumer Products LP Plant*, Order on Petition No. V-2011-1 at 6–7, 10–11, 13–14 (July 23, 2012).⁸

The information that the EPA considers in making a determination whether to grant or deny a petition submitted under 40 C.F.R. § 70.8(d) on a proposed permit generally includes, but is not limited to, the administrative record for the proposed permit and the petition, including attachments to the petition. The administrative record for a particular proposed permit includes the draft and proposed permits; any permit applications that relate to the draft or proposed permits; the statement of basis for the draft and proposed permits; the permitting authority's written responses to comments, including responses to all significant comments raised during the public participation process on the draft permit; relevant supporting materials made available to the public according to 40 C.F.R. § 70.7(h)(2); and all other materials available to the permitting authority that are relevant to the permitting decision and that the permitting authority made available to the public according to § 70.7(h)(2). If a final permit and a statement of basis for the final permit are available during the agency's review of a petition on a proposed permit, those documents may also be considered as part of making a determination whether to grant or deny the petition.

If the EPA grants an objection in response to a title V petition, a permitting authority may address the EPA objection by, among other things, providing the EPA with a revised permit. *See, e.g.,* 40 C.F.R. § 70.7(g)(4). However, as explained in the *Nucor II Order*, a new proposed permit in response to an objection will not always need to include new permit terms and conditions. For example, when the EPA has issued a title V objection on the ground that the permit record does not adequately support the permitting decision, it may be acceptable for the permitting authority to respond only by providing additional rationale to support its permitting decision. *Id.* at 14 n.10. In any case, whether the permitting authority submits revised permit terms, a revised permit record, or other revisions to the permit, the permitting authority's

⁶ *See also In the Matter of Murphy Oil USA, Inc.*, Order on Petition No. VI-2011-02 at 12 (September 21, 2011) (denying a title V petition claim where petitioners did not cite any specific applicable requirement that lacked required monitoring); *In the Matter of Portland Generating Station*, Order on Petition at 7 (June 20, 2007) (*Portland Generating Station Order*).

⁷ *See also Portland Generating Station Order* at 7 (“[C]onclusory statements alone are insufficient to establish the applicability of [an applicable requirement].”); *In the Matter of BP Exploration (Alaska) Inc., Gathering Center #1*, Order on Petition Number VII-2004-02 at 8 (April 20, 2007); *Georgia Power Plants Order* at 9–13; *In the Matter of Chevron Products Co., Richmond, Calif. Facility*, Order on Petition No. IX-2004-10 at 12, 24 (March 15, 2005).

⁸ *See also In the Matter of Public Service Company of Colorado, dba Xcel Energy, Pawnee Station*, Order on Petition No. VIII-2010-XX at 7–10 (June 30, 2011); *Portland Generating Station Order* at 5–6; *Georgia Power Plants Order* at 10.

response is generally treated as a new proposed permit for purposes of CAA § 505(b) and 40 C.F.R. §§ 70.8(c) and (d). *See Nucor II Order* at 14. As such, it would be subject to the EPA's opportunity to conduct a 45-day review per CAA § 505(b)(1) and 40 C.F.R. § 70.8(c), and an opportunity to petition under CAA § 505(b)(2) and 40 C.F.R. § 70.8(d) if the EPA does not object. The EPA has explained that treating a state's response to an EPA objection as triggering a new EPA review period and a new petition opportunity is consistent with the statutory and regulatory process for addressing objections by the EPA. *Nucor II Order* at 14–15. The EPA's view that the state's response to an EPA objection is generally treated as a new proposed permit does not alter the procedures for the permitting authority to make the changes to the permit terms or condition or permit record that are intended to resolve the EPA's objection, however. When the permitting authority modifies a permit in order to resolve an EPA objection, it must go through the appropriate procedures for that modification. For example, when the permitting authority's response to an objection is a change to the permit terms or conditions or a revision to the permit record, the permitting authority should determine whether its response is a minor modification or a significant modification to the title V permit, as described in 40 C.F.R. § 70.7(e)(2) and (4) or the corresponding regulations in the state's EPA-approved title V program. If the permitting authority determines that the modification is a significant modification, then the permitting authority must provide for notice and opportunity for public comment for the significant modification consistent with 40 C.F.R. § 70.7(h) or the state's corresponding regulations.

When a permitting authority responds to an EPA objection, it may choose to do so by modifying the permit terms or conditions or the permit record with respect to the specific deficiencies that the EPA identified. Permitting authorities need not address elements of the permit terms or conditions or the permit record that are unrelated to the EPA's objection. As described in various title V petition orders, the scope of the EPA's review (and, accordingly, the appropriate scope of a petition) on such a response would be limited to the specific permit terms or conditions or elements of the permit record modified in that permit action. *See In The Matter of Hu Honua Bioenergy, LLC*, Order on Petition No. VI-2014-10 at 38–40 (September 14, 2016); *In the Matter of WPSC, Weston*, Order on Petition No. V-2006-4 at 5–6, 10 (December 19, 2007).

III. BACKGROUND

A. The Scrubgrass Generating Company Facility

Scrubgrass is an 83.5 megawatt generating facility located in Venango County, Pennsylvania. This facility is owned by the Scrubgrass Generating Company, LP, an affiliate of National Energy and Gas Transmission, Inc. Bituminous waste coal is processed from stock piles prior to combustion in two circulating fluidized bed (CFB) boilers.

B. Permitting History

The PADEP issued an initial title V operating permit for the Facility on November 10, 1997. By letter dated March 20, 2015, Scrubgrass Generating Company submitted an application to significantly modify the title V permit (Permit Modification Application). The significant modifications addressed the applicable requirements of the following federal regulations: 1) the

Mercury and Air Toxics Standards (MATS) Rule, pursuant to 40 C.F.R. part 63, subpart UUUUU (the MATS Rule); 2) the Acid Rain Program, pursuant to 40 C.F.R. part 72; and 3) the Cross State Air Pollution Rule, pursuant to 40 C.F.R. part 97. The Permit Modification Application reflected the PADEP's January 21, 2015, approval of a 3-year extension of time, until April 16, 2019, for Scrubgrass to comply with the MATS Rule's hydrochloric acid (HCl) or sulfur dioxide (SO₂) emissions limit. On January 23, 2016, the PADEP initiated a 30-day public comment period on the modifications to the Scrubgrass title V permit. On the same date, the PADEP initiated a 45-day EPA review period by submitting the Proposed Permit and a statement of basis to EPA Region 3. By letter dated February 21, 2016, Sierra Club submitted comments to the PADEP on the modifications to the Scrubgrass title V permit. The PADEP did not respond to Sierra Club's February 21, 2016, comments. The EPA's 45-day review period on the Proposed Permit ended on March 8, 2016, and the EPA did not object to the issuance of the Proposed Permit.

C. Timeliness of Petition

Pursuant to the CAA, if the EPA does not object to a proposed permit during its 45-day review period, any person may petition the Administrator within 60 days after the expiration of that 45-day review period. 42 U.S.C § 7661d(b)(2). The EPA's 45-day review period expired on March 8, 2016. Thus, any petition seeking the EPA's objection to the Permit was due on or before May 9, 2016. The Petition, dated May 3, 2016, was electronically submitted to EPA Region 3 on May 4, 2016; therefore, the EPA finds that the Petitioner timely filed the Petition.

IV. DETERMINATIONS ON ISSUES RAISED BY THE PETITIONER

Petitioner's Claim: The Proposed Permit's 3-year MATS Rule compliance date extension is unexplained and unlawful.

Petitioner's Claim: The Petitioner generally claims that the EPA should object to the Proposed Permit because the permit improperly provides for a 3-year extension for compliance with the HCl or SO₂ requirements of MATS (hereinafter referred to as the "3-year extension").⁹ Petition at 4–5.¹⁰ The Petitioner claims that the PADEP does not have the authority to grant such an extension under section 112 of the CAA, and both the PADEP and Scrubgrass failed to justify why such an extension would be warranted. *Id.* at 6–7. Further, the Petitioner claims that Scrubgrass does not qualify for an extension under section 112 of the CAA because the extension "concerning HAPs from mining waste cannot be applied to a rule that concerns emissions from coal and oil combustion." *Id.* at 6.

⁹ The Petitioner identifies the Proposed Permit requirements at issue: "In Site-Level Requirements Nos. 16 and 17, DEP proposes that Scrubgrass comply with the requirements of MATS by April 16, 2016, except for the HCl/SO₂ requirements, for which the draft modification proposes an April 16, 2019 compliance date." Petition at 5.

¹⁰ This Order cites pages of the Petition according to the number printed in the bottom right-hand corner of each Petition page. The EPA notes, however, that due to an apparent formatting error each page of the Petition is misnumbered by one page (i.e., the first page of the Petition is misnumbered as page "2," the second page is misnumbered "3"). The EPA is nevertheless using the original (incorrect) pagination for the ease of a reader reviewing this Order alongside the original Petition.

The Petitioner generally asserts that the Permit's 3-year extension for HCl/SO₂ requirements of the MATS Rule is improper "because neither [the PADEP] nor Scrubgrass itself justify in any way why the facility needs such an extension." *Id.* The Petitioner states that the PADEP's "purported grant of a three-year extension comes in a single-page, perfunctory letter that observes that [the PADEP] has received Scrubgrass's three-year extension request, and that [the PADEP] is granting the request." *Id.* The Petitioner claims that this PADEP letter contains neither an explanation for why the PADEP granted the request, nor "any justification under governing law why the requested extension would be permissible or proper." *Id.* Nor, according to the Petitioner, did the PADEP "try [to] justify the extension in the draft permit or memo." *Id.* Further, the Petitioner asserts that the PADEP "has not yet released its comment response document." *Id.* at 4.

The Petitioner claims that under CAA § 112, the PADEP does not have the authority to grant a 3-year extension (until April 16, 2019) for the HCl/SO₂ requirements set forth in the MATS Rule. *Id.* at 5. The Petitioner asserts that, in accordance with CAA § 112(i)(3)(B), "permitting authorities can offer at most a single one-year extension of compliance dates for facilities who meet the requirements for such an extension." *Id.* The Petitioner states that "Scrubgrass applied to [the PADEP] to obtain this one-year extension on March 7, 2014 and it was approved by [the PADEP] on April 14, 2014." *Id.* at 4.

In addition, the Petitioner asserts that under CAA § 112, "a Title V permitting authority can offer '[a]n additional extension of up to 3 years,' but only as pertains to 'mining waste operations,' and only then where the one-year compliance extension 'is insufficient **to dry and cover mining waste in order to reduce emissions**' of hazardous air pollutants." *Id.* at 5 (emphasis in original) (quoting 42 U.S.C. § 7412(i)(3)(B)). The Petitioner claims that "the three-year extension is available only if it is needed to provide the time necessary to eliminate emissions from undried and uncovered mining waste," and that the 3-year statutory and regulatory extension provisions do not apply to Scrubgrass. *Id.* at 5–6 (citing CAA § 112(i)(3)(B); 40 C.F.R. § 63.6(i)(4)(i)(A)). In support of this argument, the Petitioner asserts three main points: 1) "Scrubgrass does not qualify for such an extension as it does not dry and cover mining waste 'in order to reduce' HAP emissions," *Id.* at 5; 2) the MATS Rule "does not even concern emissions from mining waste, but rather emissions from the combustion of coal and oil in power plants," *Id.* at 6 (citing 40 C.F.R. § 63.9984); and 3) "(a)n extension in section 112 concerning HAPs from *mining waste* cannot be applied to a rule that concerns emissions from coal and oil combustion." *Id.*

EPA's Response: For the reasons stated below, the EPA grants the Petitioner's request for an objection on this claim.

Because the PADEP did not respond to significant comments criticizing the Permit's 3-year MATS compliance extension and the record as a whole is inadequate for the EPA to sufficiently evaluate the Petitioner's substantive claim regarding the propriety of the extension, the EPA grants the Petitioner's request for an objection on this claim.

1. *Relevant Factual Background: Title V Permit Conditions and Record Submitted by the PADEP*

The Petitioner challenges the PADEP's authority to issue an extension of time to meet applicable HCl/SO₂ requirements set forth at 40 C.F.R. §§ 63.9980–63.10042. The Permit Conditions related to the Petitioner's claim are set forth in Section IX (Compliance Schedule) at Conditions 16 and 17 (the Permit Conditions).

In relevant part, Permit Condition C.IX.16 states:

The owner/operator shall comply with all applicable requirements of 40 CFR 63.9980 through 63.10042, including applicable Tables and appendices by April 16, 2016, as approved by the Department in its letter dated April 14, 2014, except those related to [HCl/SO₂] requirements [Scrubgrass is planning on using the [SO₂] surrogate of 0.2 lb/mmbtu (30 day rolling average)].¹¹

In relevant part, Permit Condition C.IX.17 states:

The owner/operator shall comply with the Subpart UUUUU HCl/[SO₂] requirements by April 16, 2019, as approved by the Department in its letter dated January 21, 2015.¹²

In addition to the Permit, the permit record for granting the 3-year extension includes the PADEP's Technical Review Memo (also known as the Statement of Basis). The Technical Review Memo includes the following explanation relating to factual background:

The requirements of the MATS rule are applicable to [the Scrubgrass facility]. . . . [Scrubgrass] applied to the Department on March 7, 2014 to obtain a 1 year MATS compliance extension. The 1-year extension was approved by the Department on April 14, 2014. Scrubgrass also requested an additional 3-year extension of the HCl/SO₂ requirements on December 31, 2014. The request was made by SGP to provide sufficient time for the facility to dry and cover mining waste in order to reduce emissions of certain substances listed as Hazardous Air Pollutants (HAPs). The request was pursuant to Section 112(i)(3)(B) of the Clean Air Act. The Department granted the additional 3-year extension for compliance with the HCl/SO₂ requirements in accordance with 40 C.F.R § 63.6(i)(4)(i)(A) in a letter dated January 21, 2015. The facility was required to submit the modification to incorporate the extensions into the [title V permit].

Technical Review Memo at 1–2.

In addition, the Technical Review Memo provides the following information relating to Scrubgrass's potential use of the 3 years provided to comply with the HCl/SO₂ requirements set forth in the MATS Rule:

Because of the variability of the sulfur concentrations in the waste coal, the facility may need to add additional limestone feed equipment to continuously

¹¹ Final Permit at 22 (brackets in original).

¹² *Id.* at 23.

comply with the MATS [SO₂] standard. SGP is currently evaluating several options for achieving compliance. The first option is to add a second limestone transport line from the limestone processing building to the limestone storage day bin. This would provide SGP the ability to transport twice as much limestone to the day bin for periods of high usage when the sulfur in the fuel is higher than normal. The second proposed addition is to add a new sand limestone feed system that would allow the facility to pre-mix sand limestone with the waste coal fuel. This addition would occur on the bunker feed conveyor that transports waste coal to the power block fuel bunkers prior to the two CFBs. This addition would include a hopper, conveyors, and a type of feeder to meter the material onto the bunker feed belt. Having the ability to pre-mix limestone with the waste coal would give the facility the ability to recover [SO₂] emissions should the primary equipment fail to run at full capacity. SGP is also evaluating the option of making no significant changes to equipment and running the facility at a lower load capacity. The current and future pricing curves are being evaluated to determine whether any of the above mentioned items are a good option for the facility.

Id. at 2–3.

On January 23, 2016, the PADEP published public notice of an opportunity to comment on the Draft Permit. By letter dated February 21, 2016, the Petitioner timely submitted comments on the Draft Permit during the public comment period (Petitioner’s Comments). The PADEP did not respond to public comments (i.e., the permit record does not include an RTC document).

2. *Relevant Legal Background*

a. Permitting Authority’s Response to Comments

It is a general principle of administrative law that an inherent component of any meaningful opportunity for public comment is a response by the permitting authority to significant comments. *See, e.g., In the Matter of the Dow Chemical Company, Plaquemine*, Order on Petition No. VI-04-02 at 10 (December 22, 2004) (citing *Home Box Office v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977) (“[T]he opportunity to comment is meaningless unless the agency responds to significant points raised by the public.”)); *In the Matter of Midwest Generation, Fisk*, Order on Petition No. V-2004-1 at 4–5 (March 25, 2005) (same); *In the Matter of Midwest Generation, Crawford*, Order on Petition V-2004-2 at 6 (March 25, 2005) (same); *In the Matter of Midwest Generation, Joliet*, Order on Petition No. V-2004-3 at 5 (June 24, 2005) (same); *In the Matter of Midwest Generation, Romeoville*, Order on Petition No. V-2004-4 at 5 (June 24, 2005) (same); *In the Matter of Midwest Generation, Waukegan*, Order on Petition No. V-2004-5 at 5 (September 22, 2005) (same); *In the Matter of Onyx Environmental Services*, Order on Petition V-2005-1 at 18–19 (February 1, 2006) (same); *In the Matter of Louisiana Pacific Corp.*, Order on Petition V-2005-3 at 4–5 (November 5, 2007) (*Louisiana Pacific Corp. Order*) (same); *In the Matter of Kerr-McGee Gathering, Frederick*, Order on Petition No. VIII-2007-1 at 5 (February 8, 2008) (same).

In this context, “significant comments” include those that concern whether the title V permit includes terms and conditions addressing federal applicable requirements. *See, e.g., Louisiana*

Pacific Corp. Order at 5 (“Petitioner’s comment was a significant comment because it raised an issue that [the state] might have failed to incorporate an applicable requirement into the [facility’s] renewal permit in violation of [the state program] and 40 C.F.R. part 70.”).

b. CAA section 112(i)(3)(B) Authority

Section 112 of the CAA requires the EPA to establish national emission standards within designated categories and subcategories for both new and existing major sources of HAPs that “require the maximum degree of reduction in emissions of the hazardous air pollutants subject to this section (including a prohibition on such emissions, where achievable)” that the Administrator determines is achievable based on existing technology, taking cost and other specific factors into consideration. 42 U.S.C. § 7412(d)(2). Accordingly, CAA § 112 emission standards are referred to as “maximum achievable control technology” or “MACT” standards. The MATS Rule is a MACT standard promulgated pursuant to section 112 of the CAA. Section 112(i)(3) of the CAA provides that, generally, the MACT standard may not include compliance dates for existing sources later than 3 years after the effective date of those standards. However, extensions of time may be granted under specific conditions as set forth in CAA § 112(i). Two successive extensions exist under CAA § 112(i)(3)(B), which provides:

The Administrator (or a State with a program approved under subchapter V) may issue a permit that grants an extension permitting an existing source up to 1 additional year to comply with standards under subsection (d) of this section if such additional period is necessary for the installation of controls. An additional extension of up to 3 years may be added for mining waste operations, if the 4-year compliance time is insufficient to dry and cover mining waste in order to reduce emissions of any pollutant listed under subsection (b) of this section.

The EPA’s regulations implementing CAA § 112(i)(3)(B) at 40 C.F.R. § 63.6(i)(4)(i)(A) address this authority for extensions of time from compliance with MACT standards:

The owner or operator of an existing source who is unable to comply with a relevant standard established under this part pursuant to section 112(d) of the Act may request that the Administrator (or a State, when the State has an approved part 70 permit program and the source is required to obtain a part 70 permit under that program, or a State, when the State has been delegated the authority to implement and enforce the emission standard for that source) grant an extension allowing the source up to 1 additional year to comply with the standard, if such additional period is necessary for the installation of controls. An additional extension of up to 3 years may be added for mining waste operations, if the 1-year extension of compliance is insufficient to dry and cover mining waste in order to reduce emissions of any hazardous air pollutant.

40 C.F.R. § 63.6(i)(4)(i)(A).

3. *EPA’s Analysis*

The Petitioner has demonstrated that the Permit and permit record are inadequate for the EPA to

sufficiently evaluate the Petitioner's substantive claim regarding the propriety of the Permit's 3-year MATS compliance extension. Further, the PADEP did not respond to the Petitioner's significant comments raising the same issues in the Petition.

The MATS HCl/SO₂ requirements were promulgated pursuant to CAA § 112(d), and are thus "applicable requirements" for part 70 purposes. *See* 40 C.F.R. § 70.2 (defining "applicable requirement" to include "Any standard or other requirement under section 112 of the Act"). All part 70 permits are required to include emission limitations and standards to assure compliance with applicable requirements. *Id.* § 70.6(a)(1); 25 Pa. Code 127.502(a). The Petitioner's significant comments assert that the Permit improperly provides a 3-year compliance extension from an applicable requirement. *See, e.g., Louisiana Pacific Corp. Order* at 5 ("Petitioner's comment was a significant comment because it raised an issue that [the state] might have failed to incorporate an applicable requirement into the [facility's] renewal permit in violation of [the state program] and 40 C.F.R. part 70.").

These comments were raised with reasonable specificity during the Permit's comment period, as required by CAA § 505(b)(2) and 40 C.F.R. § 70.8(d). By letter dated February 21, 2016, the Petitioner timely submitted significant comments on the Draft Permit to the PADEP during the public comment period. The Petitioner's Comments presented the same substantive issue and arguments set forth in the Petition. The Petitioner's Comments asserted:

[T]he proposed permit modification improperly and illegally seeks to grant a three-year extension of the deadline for compliance with certain aspects of the Mercury and Air Toxics Standards ("MATS") rule. Such a proffered extension is not valid, and cannot change the date by which the Scrubgrass facility is to comply with MATS.

Petitioner's Comments at 1. The Petitioner's Comments also contended that the PADEP "is without authority to grant such an additional three-year extension of the MATS compliance date; the proposed 2019 extension is thus ultra vires, and invalid." *Id.* at 2. Further, the Petitioner's Comments stated, "By proposing a three-year extension, DEP is attempting to argue that Scrubgrass needs three extra years to comply with HCl/SO₂ limits *from the boiler's emissions stack* because it will take that long to 'dry and cover mining waste' that is not even the source of the emissions in question." *Id.* at 3 (emphasis in original).

The Permit provides for a 3-year extension, until April 16, 2019, for complying with the HCl/SO₂ requirements set forth in the MATS Rule. *See* Permit Condition C.IX.17. However, the permit record does not include an RTC document, and neither the Permit itself, the Technical Review Memo, nor any other part of the permit record provides a rationale for granting that compliance extension.

The permit record simply does not address the issue raised by the Petitioner: Whether the PADEP has the authority pursuant to CAA § 112(i)(3)(B) to grant Scrubgrass a 3-year extension, until April 16, 2019, of the HCl/SO₂ requirements set forth at 40 C.F.R §§ 63.9980–63.10042. More specifically, the PADEP's record for the Permit does not explain why Scrubgrass needs the 3-year extension to "dry and cover mining wastes so as to prevent HAP emissions from those

undried and uncovered mining wastes.” Petition at 6; *see* CAA § 112(i)(3)(B).

The Technical Review Memo explains the factual background and the possibility that Scrubgrass may need additional time for coming into compliance with the MATS Rule’s HCl/SO₂ requirements. *See* Technical Review Memo at 1–3. However, the Technical Review Memo does not explain why the source qualifies for the mining waste extension set forth in CAA § 112(i)(3)(B), and, thus, also does not respond to the Petitioner’s significant comments.

As the relevant permitting authority, the PADEP has the right to make certain permitting decisions and to justify the legality of those permitting decisions. The record that the PADEP submitted to the EPA in this instance, however, lacks such justification, and the EPA thus lacks the information necessary for the adequate review of the legal and factual issues set forth in the Petition. *See Louisiana Pacific Corp. Order* at 5.

Accordingly, the EPA finds that the PADEP did not respond to significant comments and that the record as a whole is inadequate for the EPA to sufficiently evaluate the Petitioner’s substantive claim regarding the propriety of the Permit’s 3-year MATS compliance extension. *See In the Matter of Doe Run Company, Buick*, Order on Petition No. VII-1999-001 at 25 (July 31, 2002) (“The title V permit, the Statement of Basis, and Response to Comments documents, as a whole, constitute the decisionmaking record.”). For the foregoing reasons, the EPA grants the Petitioner’s request for an objection on this claim.

Direction to the PADEP: In responding to this Order, the PADEP should review its determination and the legal and factual basis for the 3-year extension at issue in the Petition. The PADEP should either provide an explanation on the record to adequately support its determination or, if the PADEP concludes upon further review that its determination was in error, the PADEP should revise the title V permit as necessary. If the PADEP concludes upon further review that its determination is supportable, the PADEP must explain why the 3-year extension under CAA § 112(i)(3)(B) is appropriate for Scrubgrass in this case. Specifically, the PADEP must respond to the significant comments raised in public comments which, as summarized above, concern the 3-year extension under CAA § 112(i)(3)(B).¹³ *See Louisiana Pacific Corp. Order* at 4–5.

¹³ The Petitioner stated, “Sierra Club reserves the right to provide supplemental comments to [PADEP] and to EPA pursuant to this Petition following any such forthcoming comment response document.” Petition at 4. The EPA notes that part 70 does not provide an opportunity for citizens to submit “supplemental comments” on a state’s RTC document. If, in responding to this Order, the PADEP supplements its record to support its present determination, the public would then have an opportunity to petition the EPA under 40 C.F.R. 70.8(d) on the PADEP’s supplemental record. As the EPA has previously explained, when a state responds to an EPA title V objection by supplementing the permit record, that response is treated as a new proposed permit for purposes of CAA section 505(b) and 40 C.F.R. § 70.8(c)–(d). *See, e.g., In the Matter of Seneca Energy II, LLC*, Order on Petition No. II-2012-01 (June 29, 2015). Conversely, if the PADEP revises the title V permit and provides a revised draft permit for public comment, the public would have an opportunity to comment on any changes at that time. *See* 40 C.F.R. 70.7(h).

V. CONCLUSION

For the reasons set forth above and pursuant to CAA § 505(b)(2), and 40 C.F.R. § 70.8(d), I hereby grant the Petition as described above.

Dated: MAY 12 2017



E. Scott Pruitt
Administrator