

BACT (in this case, SCR); and (8) be responsive to public comments regarding PSD issues. For the reasons set forth below, I deny DWA's request.

I. STATUTORY AND REGULATORY FRAMEWORK

Section 502(d)(1) of the Act requires each state to develop and submit to EPA an operating permit program intended to meet the requirements of Title V. The State of Arizona, on behalf of MCESD, submitted a Title V program governing the issuance of operating permits in Maricopa County. The regulations for MCESD's Title V program are contained in the Maricopa County Air Pollution Control Regulations ("MCAPCR"). On October 30, 1996, EPA granted interim approval to MCESD's Title V program. 61 Fed. Reg. 55910; see also 40 CFR part 70, appendix A. On December 5, 2001, EPA granted full approval to MCESD's Title V program. 66 Fed. Reg. 63175.

Major stationary sources of air pollution and other sources covered by Title V are required to obtain an operating permit that includes emission limitations and such other conditions as are necessary to assure compliance with applicable requirements of the Act. See 42 U.S.C. §§ 502(a) and 504(a). The Title V operating permit program does not generally impose new substantive air quality control requirements (which are referred to as "applicable requirements") but does require permits to contain monitoring, recordkeeping, reporting, and other conditions necessary to assure compliance by sources with existing applicable requirements. 57 Fed. Reg. 32250, 32251 (July 21, 1992). "Applicable requirement" is defined at 40 CFR § 70.2 to mean, among other things, any standard or other requirement provided for in an applicable implementation plan approved or promulgated by EPA; any term or condition of any construction permit issued pursuant to the PSD or non-attainment new source review ("NSR") programs of title I, parts C or D, of the Act; and any standard or other requirement under section 111 of the Act (standards of performance for new stationary sources), section 112 of the Act (national emission standards for hazardous air pollutants), or under title IV of the Act (acid rain program). Generally speaking, applicable requirements are those requirements that apply to a facility that are federally enforceable. 40 CFR § 70.6(a)(1).

Under sections 505(a) and (b)(1) of the Act and 40 CFR §§ 70.8(a) and (c)(1), permitting authorities are required to submit all operating permits proposed pursuant to Title V to EPA for review, and EPA will object to permits determined by the Agency not to be in compliance with applicable requirements of the Act or the requirements of 40 CFR part 70. If EPA does not object to a permit on its own initiative, section 505(b)(2) of the Act and 40 CFR § 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. To justify the exercise of an objection by EPA to a Title V permit pursuant to section 505(b)(2), a petitioner must demonstrate that the permit is not in compliance with the requirements of the Act, including the requirements of part 70. Part 70 requires that a petition must 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.”¹ 40 CFR § 70.8(d). A petition for review does not stay the effectiveness of the permit or its requirements if the permit was issued after the expiration of EPA’s 45-day review period and before receipt of the objection. If EPA objects to a permit in response to a petition and the permit has been issued, the permitting authority or EPA will modify, terminate, or revoke and reissue such a permit using the procedures in 40 CFR §§ 70.7(g)(4) or (5)(i) and (ii) for reopening a permit for cause.

The PSD requirements of the Act ensure that new major stationary sources use appropriate air pollution control technology. To this end, sections 110(a)(2)(C) and 161 of the Act require states to have a PSD program in their applicable implementation plans. Under the PSD program, the construction of a new major stationary source of emissions of any regulated pollutant requires the owner or operator to obtain a PSD permit that meets the requirements of section 165 of the Act. See 40 CFR §§ 52.21(b)(2)(i) and 52.21(i)(2). In particular, the PSD permit must require the application of BACT to control emissions of pollutants emitted in significant amounts. 40 CFR § 52.21(j).

If a state implementation plan (“SIP”) does not contain an approved PSD program, the federal PSD regulations at 40 CFR § 52.21 governing permit issuance apply to the area. EPA may in turn delegate its authority to a state or permitting authority to issue federal PSD permits on its behalf. See 40 CFR § 52.21(u). Because Arizona’s SIP pertaining to Maricopa County lacks an approved PSD program, EPA Region IX delegated administration of the PSD program in Maricopa County, Arizona, to MCESD on January 12, 1994. 59 Fed. Reg. 1730-01. Therefore, the applicable requirements governing the issuance of PSD permits in Maricopa County are the federal PSD regulations found at 40 CFR § 52.21, and PSD permits issued by MCESD are considered federal permits. See 40 CFR § 52.144. Any appeal of a MCESD-issued PSD permit is governed by 40 CFR § 124.19 and is exclusively reviewed by the EPA Environmental Appeals Board (“Board”). The regulations at 40 CFR part 124 provide that when a federal PSD permit, like the HGS Permit, is appealed to the Board, the permit is not effective and construction may not begin until the Board has disposed of the appeal. 40 CFR § 124.15.

II. PSD ALLEGATIONS

The second through fourth and sixth through eighth allegations raised by DWA in its petition and identified above challenge MCESD’s BACT determination, a component of the federal PSD permit issued to HGS. DWA also made each of these same allegations in its appeal to the Board of the PSD permit. The Board denied DWA’s appeal by an Order dated May 14, 2001. See In re Harquahala Generation Project, PSD Appeal No. 01-04 (EAB, May 14, 2001). Because the allegations challenging the BACT determination that were raised in the petition have already been decided by the Board, I defer to the holding of the Board on these issues.

We find that DWA’s petition on the HGS Permit meets the jurisdictional requirements for a Title V petition.

Deferring to the Board's holding is consistent with my previous orders responding to petitions requesting EPA to object to the issuance of a combined federal PSD and Title V permit. These orders clarify that the Board is the appropriate authority to review challenges to a federal PSD permit and its requirements. See In re Kawaihae Cogeneration Project, 7 E.A.D. 107 (EAB 1997); see also In re Hawaii Electric Light Company, Inc.'s Project, 8 E.A.D. 66 (EAB1998). Therefore, I deny DWA's request that EPA object to the HGS Permit based on allegations regarding challenges to the PSD portion of the Permit.

III. NON-PSD ALLEGATIONS

Additionally, for the reasons stated below, neither of the two non-PSD allegations, the first and fifth allegations, provides a basis for an objection by EPA to the HGS Permit. Each of these allegations are separately reviewed below.

A. Excess Emission Affirmative Defense Allegation

In its first allegation, DWA challenges MCESD's incorporation of Condition 10 into the HGS Permit. Condition 10 was an affirmative defense provision that applied during periods of excess emissions caused by malfunction, maintenance, startup or shutdown of the emission unit. Upon our review of the Condition, we determined that Condition 10 was likely not consistent with either EPA policy and guidance for acceptable affirmative defenses in state implementation plans² or with 40 CFR § 70.6(g)(5), which outlines an acceptable affirmative defense provision for Title V purposes. Moreover, though MCESD labeled the condition "locally enforceable only," such language did not make the Condition any less objectionable as the defense still applied to all terms of the permit including federally enforceable applicable requirements.³ As

² EPA has issued various policy memoranda since 1982 on the ability of permitting authorities to incorporate into SIPs and state-issued permits provisions allowing relief during periods of excess emissions. The basic principle, originally set forth in a September 28, 1982 policy memorandum from Kathleen Bennett entitled Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions ("1982 Excess Emission Policy"), is that permitting authorities cannot incorporate automatic exemptions into operating permits or SIPs, thus ensuring that "all periods of excess emissions [are] violations of the applicable standard." Despite this prohibition, the 1982 Excess Emission Policy does allow permitting authorities to use an enforcement discretion approach when deciding whether to pursue excess emission violations occurring during periods of startup, shutdown, maintenance or malfunction. Building on the 1982 Excess Emission Policy, a 1999 policy memorandum from Steven A. Herman and Robert Perciasepe entitled State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown ("1999 Excess Emission Policy") explained that a permitting authority may express its enforcement discretion through appropriate affirmative defense provisions approved into the SIP as long as the affirmative defense applies only to civil penalties and meets certain criteria. Though the 1999 Excess Emission Policy generally applies only to SIP provisions, it is useful guidance in reviewing the acceptability of affirmative defense provisions included elsewhere such as in a Title V permit.

³ Though the Board considered the acceptability of Condition 10 as it pertains to the federal PSD program, this ruling is not dispositive for Title V purposes. The Board concluded that "because of its exclusively local nature, this affirmative defense provision does not appear to conflict with or detract from federal PSD enforceability." Though this is true, the issue under Title V is not one of "federal PSD enforceability," but rather the appropriateness

such, its inclusion created unacceptable limitations on MCESD's ability to enforce its federally approved Title V program.

Despite our initial concern with Condition 10, MCESD has recently replaced the original objectionable affirmative defense provision contained in Condition 10 with one that is consistent with EPA policy and guidance. The affirmative defense provision now included in the Permit as Condition 10 was approved into the State of Arizona's implementation plan on August 2, 2002, and became final on October 1, 2002. 67 Fed. Reg. 54957. MCESD processed the administrative modification to the Permit changing Condition 10 on October 30, 2002. As Condition 10 has now been changed to a non-objectionable term, the Petitioner's allegation is moot and no longer serves as a basis to object to the Permit.

B. Local Opacity Provision

A permitting authority may include state-only (i.e. non-federally enforceable) requirements in a Title V permit at its discretion. See generally 40 CFR § 70.6(b)(2). State-only terms are not subject to the requirements of Title V and hence are not be evaluated by EPA unless those terms are drafted in a way that might impair the effectiveness of the permit or hinder a permitting authority's ability to implement or enforce the permit.

The fifth allegation raised by DWA concerns opacity limitations included in the HGS Permit. DWA claims that it is "inappropriate" for MCESD to include a provision in the Permit which allows visible emissions for "startup and shutdown, soot blowing, or unavoidable combustion irregularities" not exceeding three minutes in length when adequate control technology has been applied. MCESD responded to this allegation in its Response to Comments by pointing out that the three minute exception was for a 20% opacity standard based on a County-only rule, and not for the 40% SIP-approved standard. The HGS Permit also clearly states that the 20% opacity standard and its related exemptions are "locally enforceable only." HGS Permit, pages 21-22. Because the 20% opacity limit and any exceptions to that limit are not federally enforceable applicable requirements, they are outside of EPA's authority or ability to review for adequacy pursuant to a Title V petition to object. Moreover, the Permit did not create an exemption to the 40% opacity limit, which is an applicable requirement. I deny DWAs petition with regards to the three-minute exception as this provision allows relief from an exclusively local rule.

of a permitting authority's decision to incorporate into Title V permits affirmative defenses which are not consistent with the Part 70 regulations or relevant EPA guidance. The inclusion of inconsistent affirmative defenses can create legal impediments to the permitting authority's ability to implement and enforce its approved Title V program, as well as other federally approved or delegated programs.

DWA also contends that MCESD should incorporate the 20% opacity limit into its SIP to replace the current 40% opacity limit.⁴ However, a petition for EPA to object to a Title V permit is not the appropriate vehicle to request such a SIP change. EPA reviews individual Title V permits for compliance with the approved Title V program requirements and other applicable requirements when petitioned by petitioners such as DWA. If DWA believes that MCESD's approved SIP is deficient, other avenues exist for DWA to raise its concerns with EPA. Therefore, DWA's request to object to the HGS permit on this issue is denied.

IV. CONCLUSION

For the reasons set forth above, I deny DWA's petition requesting that I object to the issuance of the HGS Permit pursuant to CAA section 505(b). Six of the eight allegations in DWA's petition concerned requirements of the federal PSD program. These allegations were reviewed in DWA's PSD appeal to the Board, and the Board denied the appeal by an Order dated May 14, 2001. I defer to the Board's ruling on these allegations. Allegation one, though originally having merit, has now been mooted by the changing of the objectionable condition to a non-objectionable one. The remaining allegation, number five, concerns a condition entirely local in nature. Because the condition is not an applicable requirement, nor does it hinder or interfere with MCESD's ability to implement or enforce its Title V program, I find that this allegation does not provide a basis for objection to the Permit.

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Linda J. Fisher
Acting Administrator

⁴ As background, EPA is currently addressing this matter with the state of Arizona. We recently disapproved revisions to Arizona Department of Environmental Quality ("ADEQ") Rule 18-2-702 finding, among other reasons, ADEQ had not demonstrated that the 40% opacity standard contained in the General Provisions represented RACM/RACT. 67 Fed. Reg. 59456 (Sept. 23, 2002). In our disapproval, we noted that several other States and local air pollution control districts had found a 20% opacity requirement generally constituted RACM/RACT. ADEQ is currently reevaluating the appropriate level of control.