

BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF)
MIDWEST GENERATION, LCC)
FISK GENERATING STATION)
) ORDER RESPONDING TO PETITIONER'S
Petition number V-2004-1) REQUEST THAT THE ADMINISTRATOR
CAAPP No. 95090081) OBJECT TO ISSUANCE OF A STATE
Proposed by the Illinois) OPERATING PERMIT
Environmental Protection Agency)
_____)

ORDER PARTIALLY DENYING AND PARTIALLY GRANTING
PETITION FOR OBJECTION TO PERMIT

On October 10, 2003, 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 a proposed title V operating permit for Midwest Generation, LLC, Fisk Generating Station ("Fisk permit"). The Fisk Generating Station operates one coal-fired boiler with a nominal capacity of 349 megawatts, an electrostatic precipitator and low nitrogen oxide burners. Other equipment at the facility includes an auxiliary boiler, coal handling and processing units, turbines fired with diesel and natural gas, and a gasoline storage tank.

On January 22, 2004, the United States Environmental Protection Agency ("EPA") received a petition from the Chicago Legal Clinic ("Petitioner") requesting on behalf of a number of environmental groups that EPA object to issuance of the Fisk permit, pursuant to section 505(b)(2) of the Act and 40 C.F.R. § 70.8(d).

Petitioner alleges that, in issuing the Fisk permit, IEPA failed to comply with the requirements of section 503(e) of the Act, 42 U.S.C. § 7661b(e), and 40 C.F.R. § 70.7(h)(2), and that the permit fails to (1) include a compliance schedule to bring the facility into compliance with CAA requirements; (2) include conditions that meet the legal requirements for monitoring; (3) contain conditions that meet requirements for the use of credible evidence; (4) comply with EPA policy on startup, malfunction, and breakdowns; and (5) comply with EPA policy requiring a permit to be practically enforceable. Petition at 1-2.

EPA has reviewed these allegations pursuant to the standard set forth in section 505(b)(2) of the Act, which requires the Administrator to issue an objection if the Petitioner demonstrates to the

Administrator that the permit is not in compliance with the applicable requirements of the Act. *See also* 40 C.F.R. § 70.8(d); *New York Public Interest Research Group v. Whitman*, 321 F.3d 316, 333 n.11 (2nd Cir. 2002).

Based on a review of all available information, including the petition, the Fisk proposed permit, project summary, 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 grant the Petitioner's request in part and deny it in part for the reasons set forth in this Order.

STATUTORY AND REGULATORY FRAMEWORK

Section 502(d)(1) of the Act requires each state to develop and submit to EPA an operating permit program to meet the requirements of title V. EPA granted final full approval of the 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 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) or (5)(i) and (ii), and 40 C.F.R. § 70.8(d).

BACKGROUND

Midwest Generation, LLC submitted an application for a title V permit on September 7, 1995 for the Fisk Generating Station (“Fisk Generation,” “Fisk plant” or “Fisk facility”). IEPA issued a draft CAAPP permit on June 26, 2003 and a proposed CAAPP permit on October 10, 2003. During the 30-day public comment period, IEPA received comments on the draft permit, including comments from the Petitioner. On December 8, 2004, IEPA issued a “draft revised proposed permit” for the Fisk Generation facility, but has not repropoed the permit to EPA or issued a final title V permit to the Fisk Generation facility. IEPA has discussed issues with EPA and has attempted to address some of them in the draft revised proposed permit; however, EPA is reviewing and responding to the Petitioner’s issues based only on the October 10, 2003 proposed Fisk permit.

IEPA had notified the public that January 23, 2004 was the deadline to file a petition requesting that EPA object to the issuance of the final Fisk permit. Petitioner submitted to EPA its request, dated January 22, 2004, to object to the issuance of the Fisk permit. Accordingly, EPA finds that Petitioner timely filed this petition.

ISSUES RAISED BY THE PETITIONER

As noted previously, Petitioner generally alleges that the permit does not meet the requirements of the Act in five categories: 1) the permit does not contain compliance schedules designed to bring the source into compliance with all applicable requirements; 2) the permit does not contain sufficient periodic monitoring to assure compliance with applicable requirements; 3) the permit contains terms that violate credible evidence requirements; 4) the permit contains terms that allow emissions in excess of emissions limitations during start-up, shutdown and malfunction; and 5) the permit contains terms that are not enforceable as a practical matter.

I. Compliance Schedules

The Petitioner notes that 40 C.F.R. § 70.5(c)(8)(iii)(C) requires 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 a sequence of actions with milestones, leading to compliance with

any applicable requirements. Petition at 2. The Petitioner states that the facility certified compliance in its application, and that IEPA accepted the certification despite evidence to the contrary. *Id.* Specifically, Petitioner claims that IEPA possesses evidence of numerous unresolved exceedances of state and federal opacity limitations at the facility and of modifications to the facility that triggered new source review. The Petitioner concludes that the proposed permit therefore must include a compliance schedule and new source review requirements to bring the Fisk plant into compliance with the requirements of the Act. As discussed in more detail below, EPA is requiring IEPA to respond to Petitioner's comment in the permit record.

A. Opacity Exceedances

The Petitioner alleges that the permit lacks a compliance schedule to bring the Fisk plant into compliance with the opacity standards. Petitioner has attached copies of records submitted by the facility which detail ongoing opacity exceedances. Petition at 3. Petitioner notes that on at least eight occasions in one quarter, the Fisk facility recorded opacity exceedances at levels that were greater than twice the legal limit. Petition at 4. The Petitioner further claims that Fisk Generation reported 70 unresolved exceedances of opacity limitations from January 1, 2002 through June 30, 2003. Petitioner states that these continued exceedances suggest "more fundamental problems relating to facility operations." Petition at 4-5. Petitioner asserts that, in light of the number of exceedances of the opacity standard, the number of years these exceedances have been occurring and reported without resolution, and the fact that they are based on continuous emission monitoring data, the CAAPP permit issued by IEPA without a schedule of compliance is not legally adequate and warrants objection. Petition at 5.

In determining whether an objection is warranted for alleged flaws in the procedures leading up to permit issuance, such as Petitioner's claims that IEPA improperly ignored the facility's compliance history as documented in the records Petitioner submitted, EPA considers whether a petitioner has demonstrated that the alleged flaws resulted in, or may have resulted in, a deficiency in the permit's content. *See* CAA § 505 (b)(2) (requiring an objection "if the petitioner demonstrates ... that the permit is not in compliance with the requirements of this Act") In Petitioner's view, the deficiency that resulted here is the lack of a compliance schedule.

40 C.F.R. §§ 70.5(c)(8) (iii)(C) and 70.6(3) require that if a facility is in violation of an applicable requirement and it will not be in compliance at the time of permit issuance, its permit must include a compliance schedule that meets certain criteria. 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). If the reported violation has been corrected prior to permit issuance, a compliance schedule is no longer necessary.

The Petitioner brought to IEPA's notice the issues raised in the petition and the supporting documentation during the public comment period on the draft permit. September 26, 2003, Comments on Application No. 95090081. IEPA, however, did not respond to the Petitioner's comments regarding the necessity for a compliance schedule for opacity exceedances. It is a general

principle of administrative law that an inherent component of any meaningful notice and opportunity for comment is a response by the regulatory authority to significant comments. *Home Box Office v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977) (“the opportunity to comment is meaningless unless the agency responds to significant points raised by the public.”) Accordingly, IEPA has an obligation to respond to significant public comments.

EPA concludes that IEPA’s failure to respond to significant comments may have resulted in one or more deficiencies in the Fisk permit. As a result, EPA is granting the petition on this issue and requiring IEPA to address Petitioner’s significant comments.

B. Requirements under New Source Review

The petition alleges that Fisk Generation improperly avoided new source review (NSR) permitting requirements and, in turn, the requirement to install modern pollution control equipment. Petition at 5. According to Petitioner, there are several sources of information that indicate that, since 1990, Fisk Generation has undergone extensive modifications that were subject to NSR. Specifically, Petitioner alleges that a boiler/turbine overhaul in 1995, including a steam chest replacement in July 1995, triggered the applicability of NSR program requirements. As evidence of the project, Petitioner attached to the petition and cited from an article written by Brian Schumel of PCI Energy Services. The Petitioner further cites as evidence that Fisk Generation has triggered NSR requirements: (1) an increase of emissions in the two-year period following 1995 based on the Clean Air Markets database, and (2) a statement made by Midwest Generation in a filing with the U.S. Securities and Exchange Commission about potential financial liability for resolution of a CAA section 114 request.

Petitioner discusses in some detail why it is important to address the question of NSR applicability at the title V permitting stage. According to the Petitioner, NSR serves two purposes: ensuring that facilities comply with air quality standards when they are modified and ensuring that, when new plants or existing plants undergo a major modification, they install state-of-the-art control technology. Petition at 6. Petitioner asserts that NSR is directly relevant to the title V permitting process here because entirely different emissions and operational standards would have applied to the facility from those currently proposed in the permit. Petition at 7. Petitioner believes that IEPA should have determined whether modifications were made at the facility and whether these modifications are exempt from CAA compliance because they are “routine maintenance, repair or replacement.” Petition at 9. Petitioner contends IEPA should have looked at the four factor test adopted by the Seventh Circuit in *Wisconsin Electric Power Company v. Reilly*, 893 F.2d 901 (7th Cir. 1990), to determine whether modifications at Fisk constitute routine maintenance repair, or replacement. Petitioner further asserts that, without NSR, IEPA cannot know which emission and operational standards apply to the Fisk facility and, therefore, the title V permit fails to include applicable requirements that arise under NSR. The Petitioner asserts that the title V permit for Fisk should include an enforceable schedule of compliance for NSR to occur, coupled with emission and operational standards equivalent to a new facility in this source category. According to the Petitioner, the absence of such a compliance schedule renders the permit insufficient and subject to objection by the Administrator. The Petitioner claims that IEPA developed the permit based solely

on the applicant's representation that it is not subject to NSR, despite the fact that evidence to the contrary was provided by commenters during the public participation process. See September 26, 2003 comments on Application No. 95090081. Petitioner concludes that the permit must contain a compliance schedule to bring the source into compliance with NSR requirements. Petition at 5-10.

The Petitioner brought the issues raised here to IEPA's attention during the public comment period on the draft permit. Petitioner's comments were significant, yet IEPA provided no response to the comments. As noted in section I.A., above, it is a general principle of administrative law that an inherent component of any meaningful notice and opportunity for comment is a response by the regulatory authority to significant comments. *Home Box Office v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977). Accordingly, IEPA has an obligation to respond to significant public comments.

EPA concludes that IEPA's failure to respond to Petitioner's significant comments may have resulted in one or more deficiencies in the Fisk permit. As a result, EPA is granting the petition on this issue and requiring IEPA to address Petitioner's significant comments.-

II. Monitoring

Petitioner alleges that the Fisk permit fails to meet the requirements for monitoring under 40 C.F.R. § 70.6(a)(3)(i). Petitioner alleges that section 7.5.8, which covers monitoring of auxiliary boilers, contains neither monitoring requirements nor a monitoring frequency, as required by CAA section 504 and 40 C.F.R. § 70.6(a)(3). Instead, Petitioner asserts that this section requires testing only in response to a written request from IEPA. Petitioner also alleges that section 7.5.7 requires testing for nitrogen oxides, opacity and carbon monoxide only in response to a written request from IEPA. Similarly, Petitioner asserts that section 7.6.8, which covers monitoring of turbines at the facility, fails to require a monitoring frequency, that the source keep records of monitoring, or that the source report to IEPA results of monitoring. Petitioner concludes that, without appropriate monitoring conditions, it is not possible for the public, EPA or IEPA to ensure that the permittee is complying with applicable emissions standards. Petition at 11. Petitioner's allegations regarding sections 7.5 and 7.6 are addressed separately below.

A. Section 7.5

Section 7.5.7 of the Fisk permit contains a statement of IEPA's authority to request testing for emissions of opacity, sulfur dioxide, particulate matter, nitrogen oxides, and carbon monoxide. The section specifies timeframes, procedures, and methods to be used once IEPA requests that the source test for these pollutants. However, it does not specify when or how often IEPA will require such testing. Merely including IEPA's authority to request a test in a permit condition rather than specifying the frequency with which testing must occur is inadequate to assure compliance with the nitrogen oxide, opacity, sulfur dioxide, particulate matter, or carbon monoxide standards for the relevant time period. Therefore, the permit condition fails to include "periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit . . ." 40 C.F.R. § 70.6 (a)(3)(i)(B) and Section 39.5 of the Environmental

Protection Act. In addition, Section 7.5.8 requires only that Fisk Generation submit to IEPA for approval a monitoring plan that specifies which operating parameters Fisk will monitor to demonstrate compliance with the emission limitations in the permit for nitrogen oxides. The monitoring plan is not part of the permit record. Section 7.5.8 refers to a requirement that the facility submit a monitoring plan pursuant to 40 C.F.R. § 60.49b(c), but there is no evidence that the facility did so. IEPA must either include the approved monitoring plan in the permit or incorporate it by reference into the title V permit. Because the proposed permit fails to require any monitoring that would “yield reliable data from the relevant time period that are representative of the source’s compliance with the permit,” the petition is granted on this issue. The final permit must contain monitoring that meets the requirements of 40 C.F.R. § 70.6 (a)(3)(i)(B) and Section 39.5 of the Environmental Protection Act.

B. Section 7.6

The Petitioner alleges that section 7.6.8 fails to specify a monitoring frequency, any record keeping requirements, or a requirement to report monitoring results to IEPA. Petition at 11. Section 7.6.4 of the Fisk permit contains emission limitations on opacity, sulfur content in the fuel, the concentration of sulfur dioxide emissions, nitrogen oxides emissions and a restriction on operating hours for turbines at the facility which use distillate fuel oil but are started up with natural gas as described in section 7.6.1.

Section 7.6.8 contains requirements for monitoring emissions of nitrogen oxides from these units, and section 7.6.9 contains a requirement to maintain records of operating hours and of sulfur content of the fuel used by the turbines. However, the permit does not have any monitoring requirement to demonstrate compliance with either the opacity or sulfur dioxide concentration limits. Although there is a recordkeeping requirement for sulfur content in the fuel, the permit does not specify what method the source must use to determine the sulfur content, or how frequently it must make that determination. Therefore, the petition is granted on this issue. IEPA must include in the final permit “periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source’s compliance” with the emission limitations stated in section 7.6.4. 40 C.F.R. § 70.6 (a)(3)(i)(B) and Section 39.5 of the Illinois Environmental Protection Act.

III. Credible Evidence

Petitioner states that the proposed Fisk permit contains numerous conditions that “violate the credible evidence rules.” Petition at 11. Section 113(a) of the CAA, 42 U.S.C. § 7413(a), authorizes EPA to bring enforcement actions “on the basis of any information available to the Administrator.” Petitioner asserts that, in the Region 9 Title V Permit Review Guidelines, September 9, 1999, p. III- 46, EPA interpreted this language to mean any “credible evidence” that a court would accept. Petition at 10. Petitioner further cites the Region 9 Guidelines to assert that “any credible evidence can be used to show a violation of or, conversely, demonstrate compliance with an emission limit.” Consequently, permit language may not exclude the use of any data that may provide credible evidence.

Petitioner notes that the Fisk permit includes section 9.1.3, which expressly allows the use of other credible evidence notwithstanding specific conditions that may specify compliance practices for specific applicable requirements. Petitioner alleges that this term is insufficient to negate the violations of the credible evidence rules contained in the other conditions that limit the use of credible evidence. Petition at 10.

EPA has clarified through rulemaking (generally referred to as the “credible evidence” rule) that various kinds of information, including non-reference test data, may be used “to demonstrate compliance or non-compliance with emission standards.” 62 *Fed. Reg.* 8314, 8315 (February 24, 1997). As explained below, EPA grants in part and denies in part on this issue.

A. Language establishing compliance methods

Petitioner first alleges that section 5.2.2(a) limits credible evidence by specifying how compliance with that requirement will be determined. Petition at 11. Section 5.2.2(a) contains a facility-wide opacity limitation on fugitive particulate matter emissions. It states that “compliance with this requirement shall be based on the procedures in Section 7 (Unit Specific Conditions) of this permit.” Petitioner also alleges that sections 5.9.1, 7.1.12, 7.2.12, 7.3.12, 7.4.12, 7.5.12, 7.6.12 and 7.7.12 violate credible evidence requirements because they include a limited list of “compliance procedures.” Finally, Petitioner alleges that, because section 7.1.8(b) requires continuous monitoring for SO₂ and states that such monitoring “shall be used to demonstrate compliance,” it establishes an exclusive link between the test method (continuous monitoring) and the emissions limit for sulfur, unacceptably limiting the use of credible evidence. Petition at 11-12.

The sections of the Fisk permit cited by Petitioner generally contain language stating that compliance with specific limits is “addressed by” monitoring, testing, or record keeping provisions in specific terms of the permit. Section 5.9.1 states that there are no general compliance procedures. In addition to providing that compliance “is addressed by” recordkeeping, section 7.6.12 provides that compliance with section 7.6.4(b) is demonstrated by records required by section 7.6.9(c). Section 7.7.12 provides that compliance with sections 7.7.4(a) and (b) is considered to be assured by the use of certain procedures and by recordkeeping required by section 7.7.9. Section 7.1.8(b) provides that “...the Permittee shall install, operate, calibrate and maintain continuous monitoring equipment for the measurement of SO₂ from the affected boilers which shall be used to demonstrate compliance with the limits in Condition 7.1.4(c) based on the average hourly SO₂ emission rate determined from monitored data from three-hour block averaging periods...”

After reviewing the terms cited by the Petitioner and the general terms in section 9, EPA concludes that the proposed Fisk permit appropriately provides for the use of credible evidence by EPA, IEPA, or citizens to demonstrate whether or not a facility is in compliance with federally enforceable requirements. Petitioner has failed to either point to any language in the permit conditions cited in the petition that excludes the use of credible evidence or provide any instances where IEPA improperly excluded the use of credible evidence. The language in the specific permit

conditions that Petitioner cites does not say that the specified methods or procedures are the exclusive or sole methods or procedures to be used to determine compliance. In addition, section 9.1.3 specifically makes any other credible evidence available for use, notwithstanding other conditions of the permit, by any person to prove compliance or violation of any applicable requirement. For these reasons, EPA denies the petition with respect to this issue.

B. Statements about the potential for violations

Petitioner claims that section 7.1.12.d is “completely contrary to the credible evidence rule and citizens' right to enforce a permit by stating that ‘compliance is assumed to be inherent.’” Petition at 12. Section 7.1.12.d states:

“Compliance with the CO emission limitation in 7.1.4(d) is addressed by emission testing in accordance with Condition 7.1.7.

Note: Further compliance procedures are not set by this permit as compliance is assumed to be inherent in operation of an affected boiler under operating conditions other than startup or shutdown.” (emphasis added)

Although EPA believes that the proposed Fisk permit generally provides for the use of credible evidence, EPA agrees that the note in term 7.1.12(d) is inappropriate in the permit and leads to confusion. EPA is requiring IEPA to remove the note because it provides that “compliance is assumed to be inherent” when the boiler is operating under normal conditions. Such language, on its face, is not consistent with part 70, which requires permits to contain “testing, monitoring, reporting and recordkeeping requirements” and to have “periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source’s compliance”. 40 C.F.R. § 70.6(c)(1) and (a)(3)(i)(B). In essence, the Note in Section 7.1.12(d) could be read as eliminating the need for any of the compliance requirements (testing, monitoring, recordkeeping, and reporting) of part 70 to determine whether the facility is complying with the CO emission limits in the permit. In addition, the language in the note is not in compliance with the annual compliance certification requirements under part 70. Compliance certifications must be based, among other things, on the monitoring data described in 40 C.F.R. § 70.6(c)(5)(iii)(B) and (C). Every source’s annual compliance certification must be based on its own evaluation of its data. The permit may not authorize the facility to certify compliance based on something else, such as an assumption that compliance is inherent. Therefore, EPA grants the petition on this issue to the extent that IEPA is required to remove the note. See EPA’s order *In the Matter of TVA Gallatin Power Plant, Gallatin, Tennessee and TVA Johnsonville Power Plant, New Johnsonville, Tennessee Electric Power Generation*, Petition IV-2003-04, at 4-9, (July 29, 2004), available on the internet at <http://www.epa.gov/Region7/programs/artd/air/title5/petitiondb/petitions>.

IV. Startup, malfunction, and breakdown policy

The Petitioner alleges that automatic exemptions for excess emissions during startup and malfunction are inconsistent with EPA's guidance (Kathleen M. Bennett, "Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions," September 28, 1982 ("Bennett Memo"); Steven A. Herman, "State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown," September 20, 1999 ("Herman Memo")). Petition at 11. Petitioner alleges that the Fisk permit has numerous conditions that allow for automatic exemptions from applicable emission limits and standards during startup, shutdown and malfunction. Petition at 11-12.

A. Continued operation in violation of the applicable requirements or applicable standards

In alleging that the proposed permit authorizes automatic exemptions, Petitioner points to the following sections: 7.1.3(b), 7.1.3(c), 7.2.3(b), 7.3.3(b), 7.4.3(b), 7.5.3(b), 7.5.3(c), 7.6.3(b), 7.6.3(c). Petitioner states that the authorization in these sections is unclear, and can be read as impermissibly excusing a violation. Petition at 13.

The permit conditions that the Petitioner cites specify requirements for the facility during startup, malfunction and breakdown. The startup provision in Section 7.1.3(b) of the Fisk permit states that the permittee is allowed to operate the coal fired boiler in violation of specified applicable standards during startup because the permittee "has affirmatively demonstrated that all reasonable efforts have been made to minimize startup emissions, duration of individual startups and frequency of startups." The general authorization is qualified by a limit on the time period that the boiler can continue to operate under the authorization and by a provision that the authorization "does not shield the Permittee from enforcement for any such violation and shall only constitute a prima facie defense to such an enforcement action." Sections 7.5.3(b) and 7.6.3(b) contain identical authorizations and limitations for auxiliary boilers and turbines during startups, but the timeframes for the affected emissions unit to operate under the authorization differs in each section.

The Illinois SIP provision at 35 IAC § 201.262 provides that a permitting authority shall not authorize a permittee to operate in violation of emission limits and standards during startups unless the permittee has affirmatively demonstrated that it has made all reasonable efforts to, among others, minimize excess emissions. Sections 7.1.3(b), 7.5.3(b) and 7.6.3(b) mirror the language of this SIP provision. The Fisk permit contains a determination that the source already has made a demonstration that it has made all reasonable efforts to minimize startup emissions, duration of startups and frequency of startups. However, neither the permit nor the permit record (e.g., a statement of basis) provide any information about or explanation of how IEPA determined in advance that the permittee met its burden of affirmatively demonstrating that it had complied with the affirmative defense requirements of the permit. EPA is granting the petition and requiring IEPA to explain how it determined in advance that the permittee had met the requirements of the Illinois SIP at 35 IAC § 201.262.

The malfunction or breakdown provisions in sections 7.1.3(c), 7.2.3(b), 7.3.3(b), 7.4.3(b), 7.5.3(c), and 7.6.3(b) state that that the permittee is allowed to operate the units in violation of specified applicable standards during malfunction or breakdown because the permittee has submitted “proof that continued operation is required to provide essential service, prevent risk of injury to personnel or severe damage to equipment.” These sections mirror the language of the Illinois SIP provision at 35 IAC § 201.262 which provides that a permitting authority shall not authorize a permittee to operate in violation of emission limits and standards during malfunctions or breakdowns unless the permittee has submitted proof that continued operation is required to provide essential service, prevent risk of injury to personnel or severe damage to equipment. To authorize continued operation of units in violation of applicable standards, IEPA must have received proof that such operation is necessary to provide essential services, or to prevent injury to personnel or severe damage to equipment. The specific proof required in each instance usually will depend on the nature and the cause of the malfunction or breakdown. Thus, a determination that the permittee has met the requirements of 35 IAC § 201.262 to authorize continued operations during malfunction or breakdowns is a case-by-case determination. EPA therefore is granting the petition and requiring IEPA either to explain in the statement of basis how it determined in advance that the permittee had met the requirements of the Illinois SIP at 35 IAC § 201.262 or to specify in the permit that continued operation during malfunction or breakdown will be authorized on a case-by-case basis if the source meets the SIP criteria.

B. Definition of malfunction

Petitioner alleges that, because sections 7.1.3(c), 7.2.3(b), 7.3.3(b), 7.4.3(b), 7.5.3(c) and 7.6.3(c) do not include a definition of “malfunction,” and because the word is vague, these permit terms are unenforceable as a practical matter. Petition at 14.

The purpose of a title V permit is to ensure that a source operates in compliance with all applicable requirements. The lack of a definition for the term “malfunction” in the permit does not, on its face, render the permit unenforceable. This is a commonly used regulatory term, and the plain meaning of the term is clear. Moreover, Petitioner has not demonstrated that IEPA has improperly or inconsistently interpreted the term in practice so as to render it unenforceable. Petitioner points out that EPA recommends that malfunction be defined as “a sudden and unavoidable breakdown of process or control equipment.” Petition at 12 *citing* Herman Memo. However, Petitioner fails to identify any instance where IEPA has interpreted “malfunction” in a manner that contradicts or is inconsistent with EPA’s recommended definition in the Herman Memo. For these reasons, the petition is denied on this issue.

C. Operating log

The Petitioner, citing the Herman Memo, alleges that, because sections 7.1.9(g), 7.1.9(h)(ii), 7.2.9(g)(ii), 7.3.9(f)(ii), 7.4.9(f)(ii), 7.5.9(c), 7.5.9(d)(ii), 7.6.9(e), and 7.6.9(f)(ii) of the Fisk permit do not require that the source’s responses to excess emissions be documented by a properly signed, contemporaneous operating log, they warrant EPA objection.

Sections 7.1.9(g) and 7.6.9(e) of the Fisk permit contain recordkeeping requirements for different emissions units during startup. Sections 7.1.9(h)(ii), 7.2.9(g)(ii), 7.3.9(f)(ii), 7.4.9(f)(ii) and 7.6.9(f)(ii) contain recordkeeping requirements for various emissions units during malfunctions. Section 7.5.9 is incorrectly numbered and contains two subsections; one contains recordkeeping requirements for startups and the other for malfunctions. All of these sections are similar in that they require the source to maintain records of, among other things, the date and description of the startup or malfunction, the duration of the startup or malfunction, and an estimate of the magnitude of excess emissions occurring during the startup or malfunction. In addition, for malfunctions, the source is required to keep records of the corrective actions used to reduce the quantity of emissions.

The 1999 Herman memo, “State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown,” cited by Petitioner, states that, to be approved into a SIP, an affirmative defense must require that an owner or operator’s actions during startup, shutdown or malfunctions be “documented by properly signed, contemporaneous operating logs, or other relevant evidence.” 35 IAC §§ 201.261-201.265, which provide for an affirmative defense to the continued operation and emission of pollutants in excess of established limits during startup, shutdown and malfunction, do not contain the requirement that a source document its response with properly signed, contemporaneous operating logs or other relevant evidence. However, EPA approved sections 201.261-201.265 into the Illinois SIP in 1972, before publication of the Herman Memo. Sections 7.1.9(g), 7.1.9(h)(ii), 7.2.9(g)(ii), 7.3.9(f)(ii), 7.4.9(f)(ii), 7.5.9(d)(ii), 7.6.9(e), and 7.6.9(f)(ii) of the Fisk permit are consistent with sections 201.261-201.265 of the Illinois SIP. EPA cannot properly object to including in a title V permit a permit term that mirrors the language of federally approved SIP rules. Such provisions are “applicable requirements,” as that term is defined in 40 C.F.R. § 70.2. Therefore, the petition is denied on this issue.

Section 7.5.9(c) does not address startups or malfunctions, and so the Herman memo is not relevant to it. Accordingly, the petition is denied on this issue for section 7.5.9(c).

V. Practical Enforceability

Petitioner claims that the Fisk permit contains numerous terms which are not enforceable as a practical matter, and violate EPA policy regarding practical enforceability. Petition at 14. The petition cites EPA Region 9 Title V Permit Review Guidelines, September 9, 1999, p. III-46:

A permit is enforceable as a practical matter (or practically enforceable) if permit conditions establish a clear legal obligation for the source [and] allow compliance to be verified. Providing the source with clear information goes beyond identifying the applicable requirement. It is also important that permit conditions be unambiguous and do not contain language which may intentionally or unintentionally prevent enforcement.

Petitioner goes on to argue that, even if words, such as "reasonable" or "significant," are quoted directly from the Act or regulations, their use may render the permit insufficiently clear to be enforceable as a practical matter. Petitioner claims that permit conditions which reference undefined procedures, documents, or instructions are not practically enforceable. Petitioner cites EPA Region 9 Title V Permit Review Guidelines, September 9, 1999, p. III-52 - III-53, which requires that undefined terms such as "reasonable precautions" or "best engineering practices" must be defined in the permit. Petition at 14. Petitioner's allegations are addressed below.

A. Undefined procedures and documents

1. Petitioner alleges that the requirement to operate according to "other written instructions" in sections 7.1.3(b)(ii) and 7.5.3(b)(ii) of the Fisk permit is vague and fails to specify which instructions the permittee is required to follow. As a result, these terms are unenforceable as a practical matter. Petition at 17-18.

7.1.3(b)(ii) and 7.5.3(b)(ii) state :

“The Permittee shall conduct startup of an affected boiler in accordance with the manufacturers’ instructions or other written instructions prepared by the Permittee and maintained on site, that are specifically developed to minimize excess emissions from startups and that include, at a minimum the following measures:”

The condition then goes on to specify the measures that must be included in the written instructions.

The Illinois SIP at 35 IAC § 201.262 requires Fisk “affirmatively demonstrate that all reasonable efforts have been made to minimize startup emissions, duration of individual startups and frequency of startups.” Although the permit language does not reflect the exact wording of the underlying applicable requirement, the permit term is designed to specify how Fisk must comply with the SIP requirement to minimize excess emissions from startups. Because the permit outlines the measures that must be included in the written instructions and the SIP does not specify that the instructions must be approved or reviewed, the petition is denied on this issue.

2. Section 7.1.7(b)(1) requires the permittee to perform testing at “other operating conditions that are representative of normal conditions.” Petitioner alleges that this phrase is vague and not practically enforceable, and that specific operating conditions must be included in the permit. Petition at 16.

This section specifies the conditions under which a performance test run at the facility is acceptable. Although the specific language cited by Petitioner is not specific, the remainder of section 7.1.7(b) sets out test methods and procedures which the source must follow in performing tests. These conditions are not specifically identified in a regulation, but are negotiated on a site-specific basis between the permittee and regulatory agency, either prior to a performance demonstration, or as determined during the agency’s review of the test report. These conditions are not only site-specific, but may also vary with time, manufacturing conditions, or other factors that

change at an individual facility. This term, in conjunction with the other requirements of section 7.1.7, provides detail about how Fisk must conduct performance tests and what the criteria are for an acceptable performance demonstration. The phrase to which the Petitioner objects does not affect the enforceability of these provisions, therefore, the petition is denied with respect to this issue.

3. Petitioner notes that sections 7.1.8(a)(i) and (b) require that monitoring equipment must be operated pursuant to written monitoring procedures that include a quality assurance/control plan. Further, section 7.1.8(a)(i) requires that “procedures shall reflect the manufacturer’s instruction as adapted by the Permittee based on its experience.” Petitioner alleges that these terms are vague because they allow the permittee unlimited discretion in developing such procedures. As a result, the terms are practically unenforceable. Petition at 16.

The permit condition that the Petitioner cites requires that the permittee must, among other things, pursuant to 40 CFR § 75.14, operate continuous monitoring equipment to measure opacity from the boilers. The condition goes on to require written monitoring procedures and that such “procedures shall reflect the manufacturer’s instruction as adapted by the Permittee based on its experience.” This language is not from 40 C.F.R. section 75.14, which is the authority cited in the permit for this permit language. EPA grants this petition on the issue. IEPA must remove language from 7.1.8(a)(i) which is not required by the underlying applicable requirement or explain in the permit or statement of basis how this language implements the meaning and intent of the underlying applicable requirement.

4. Section 7.6.3(b)(ii)(a) requires the permittee to minimize startup emissions, the duration of startups, and to minimize the frequency of startups by implementing "established startup procedures." The Petitioner alleges that this terminology is vague and fails to define with specificity what procedures the permittee is required to follow, rendering the term not practically enforceable. Petition at 16.

Section 7.6.3(b)(ii)(a) requires the permittee to minimize emissions during startups by implementing “established startup procedures.” The Illinois SIP at 35 § IAC 201.262 requires Fisk to “affirmatively demonstrate that all reasonable efforts have been made to minimize startup emissions, duration of individual startups and frequency of startups.” Although the permit language does not reflect the exact wording of the underlying applicable requirement, the permit term is clearly designed to specify how Fisk must comply with the SIP requirement to minimize excess emissions from startups. Because neither the SIP nor the permit condition specify or establish the requirements or minimum elements of the startup procedures, the permit term is practicably unenforceable. EPA grants the petition on the issue. IEPA must remove “established startup procedures” from 7.6.3(b)(ii)(a), include the startup procedures in the permit, or include minimum elements of the startup procedures that would “affirmatively demonstrate that all reasonable efforts have been made to minimize startup emissions, duration of individual startups and frequency of startups”.

5. Section 8.5 requires that tests be conducted using standard test methods. Petitioner alleges that the permit must define the term “standard test methods,” or, at a minimum, cite a regulation or statute where that term is defined. Petitioner asserts that the term, as written, allows the permittee too much discretion in deciding what qualifies as a standard test method, and, therefore, is unenforceable as a practical matter. Petition at 15.

Section 8.5 is a general term included under the “General Permit Conditions” provisions of Section 8. IEPA includes generic requirements for facilities as general supplemental language in every title V permit in Illinois. As a general matter, specific terms and conditions for each emission unit specify which test methods the source must use to monitor the emission of particular pollutants. Therefore, the petition is denied on this issue.

B. Permit conditions that contain imprecise timeframes are not practically enforceable.

Petitioner claims that permit conditions that contain imprecise timeframes are not practically enforceable, and cites EPA Region 9 Title V Permit Review Guidelines, September 9, 1999 as a basis for this claim.

1. Petitioner alleges that the language in section 5.2.3(b) which requires the permittee to amend its operating program "from time to time" so that it is "current" is vague, subjective, and not practically enforceable. The Petitioner also alleges that the section 5.2.3(c) requirement that paved areas be cleaned on a "regular" basis is vague, undefined, and not practically enforceable. The language in condition 5.2.7 requiring the permittee to "immediately" implement the episode action plan is vague, subjective and therefore not practically enforceable. Petition at 17.

The language in sections 5.2.3(b) and (c) and 5.2.7 comes directly from the EPA-approved Illinois SIP provisions 35 IAC §§ 212.312, 35 IAC § 212.306, and 35 IAC §§ 244.142 thru 144 respectively. EPA cannot properly object to including in a title V permit a permit term that mirrors the language of federally approved SIP rules. Such provisions are “applicable requirements” as that term is defined in 40 C.F.R. § 70.2. The petition is denied on this issue.

2. The petition alleges that the terms “timely” and “as soon as” used in section 7.1.3(b)(ii)(D) are vague and undefined. This term, which requires only “timely energization of the electrostatic precipitator as soon as this may be safely accomplished,” allows the permittee too much discretion. Petition at 17.

Section 7.1.3(b)(ii)(D) lists the procedures that a permittee must include in written instructions that it develops to minimize excess emissions during startups. Included in this list of procedures is the “[t]imely energization of the electrostatic precipitator as soon as this may be safely accomplished without damage or risk to personnel or equipment.” Petitioner alleges that the phrases (“timely” and “as soon as”) in this provision are vague because they allow the permittee too much discretion. Petitioner is, however, reading these phrases in isolation. EPA believes that these

phrases, when read in the context of the entire sentence, require the facility to energize the electrostatic precipitator as soon as the facility can safely do so without risk to personnel or damage to equipment, thus limiting the facility's discretion and tying it to safety concerns. Therefore, the petition is denied on this issue.

3. Petitioner alleges that the language "as expeditiously as possible" in section 7.1.8(a)(iv) is vague and not practically enforceable. Petition at 17.

EPA's review of the permit proposed for Fisk Generation shows that this phrase is not used in section 7.1.8(a)(iv). The petition is denied on this issue.

4. Sections 7.1.10(b)(i), 7.2.10(b)(i), 7.3.10(b)(i), 7.4.10(b)(i), 7.5.10(b)(i), and 7.6.10(b)(i) of the Fisk permit require the permittee to "notify the Illinois EPA's Regional Office, by telephone ... as soon as possible during normal working hours for each incident of continued operation during malfunctions and breakdowns." Petitioner alleges that the term "as soon as possible" is vague and allows the permittee too much discretion in determining when to notify IEPA. Consequently, Petitioner asserts that the conditions are not practically enforceable. Petition at 17-18.

The underlying applicable requirement for this term is found in 35 IAC § 202.263 of the SIP. The timeframe for reporting emissions to IEPA during a malfunction or breakdown required by this SIP provision is "immediately" not "as soon as possible" as the permit allows. The petition is granted for on this issue. IEPA must revise the permit to require Fisk to report to the agency "immediately" or explain how the phrase "as soon as possible" meets the requirements of 35 IAC § 202.263.

5. Petitioner alleges that sections 7.2.9(a) and (b) in the permit require the permittee to keep records "which shall be kept up to date." According to Petitioner, this wording is vague and therefore not practically enforceable. Petition at 18.

EPA believes this language clearly requires the permittee to maintain current records on an ongoing basis. Therefore the petition is denied on this issue.

C. Permit conditions that use the term "reasonable" are not practically enforceable.

The permit contains the terms "reasonable" and "reasonably" in a number of sections. Petitioner alleges that that these terms are vague, subjective, and allow the permittee too much discretion. Use of the vague terms "reasonable" and "reasonably" leads to the conditions being not practically enforceable and, therefore, according to the Petitioner, the Administrator must object to the permit. Petition at 18.

1. Petitioner alleges that sections 7.2.3(b)(ii), 7.3.3(b)(ii), 7.4.3(b)(ii), and 7.5.3(b)(ii) are not practically enforceable because they require only that the “affected boiler ... reasonably be repaired or removed” and that the permittee take only “reasonable steps to minimize emissions.” Petition at 18.

The Illinois SIP at 35 IAC § 201.262 allows the Permittee to continue operation of the affected operation in violation of the applicable requirements in the event of a malfunction or breakdown if the Permittee has submitted “proof that continued operation is required to provide essential service, prevent risk of injury to personnel or severe damage to equipment.”

Sections 7.2.3(b)(ii), 7.3.3(b)(ii), 7.4.3(b)(ii), and 7.5.3(b)(ii) state:

“... The Illinois EPA, Air Compliance Section, in Springfield, may grant a longer extension if the Permittee demonstrates that extraordinary circumstances exist and the affected operation can not reasonably be repaired or removed from service within the allowed time, the affected operation can not be repaired or removed from service as soon as practicable; and the Permittee is taking all reasonable steps to minimize excess emissions, based on the actions that have been and will be taken.”

The language in the permit condition, which does not reflect the exact wording of the underlying applicable requirement, attempts to specify the kind of “proof” that the facility must provide for IEPA to grant an extension of time for the facility to continue to operate the malfunctioning unit in violation of the applicable emission limits. Because neither the SIP nor the permit condition specify the criteria to determine whether a unit can be “reasonably” repaired or what constitute “reasonable” steps during malfunction or breakdown, the condition is practically unenforceable. EPA grants the petition on the issue. IEPA must remove “reasonably” and “reasonable” from 7.2.3(b)(ii), 7.3.3(b)(ii), 7.4.3(b)(ii), and 7.5.3(b)(ii) or define or provide criteria to determine “reasonably” and “reasonable” that meet the requirements of the SIP.

2. Sections 7.1.3(c)(iv), 7.2.3(c)(iv), 7.3.3(c)(iv), 7.4.3(c)(iv), 7.5.3(c)(iv), and 7.6.3(c)(iv) of the permit provide that “the permittee shall comply with all reasonable directives of the Illinois EPA.” Petitioner alleges that the permit is deficient because it does not require the permittee to comply with all IEPA directives. Petition at 19.

Some of the sections to which Petitioner refers in his discussion of this issue do not contain the language about which Petitioner is concerned. EPA believes that Petitioner meant to refer in this section of the petition to sections 7.2.3(b)(iv), 7.3.3(b)(iv), and 7.4.3(b)(iv) rather than 7.2.3(c)(iv), 7.3.3(c)(iv), and 7.4.3(c)(iv), and will address the issue as if Petitioner had done so.

The language in these sections is taken directly from 35 IAC § 201.263, which is part of the federally approved Illinois SIP. As discussed above, EPA could not properly object to including in a title V permit, a permit term that mirrors the language of federally approved SIP rules. Such provisions are “applicable requirements,” as that term is defined in 40 C.F.R. § 70.2. Therefore, the petition is denied on this issue.

3. Sections 7.2.6(a)(i), 7.3.6(a)(i), and 7.4.6(a)(i) provide that the permittee must implement measures that “minimize visible emissions of particulate matter and provide a reasonable assurance of compliance” with applicable emission standards. Petitioner alleges that the permit does not require compliance with applicable requirements because of the use of the word “reasonable” in these sections, and asserts that the term renders the condition vague and not practically enforceable. Petition at 19.

EPA agrees that the term “reasonable,” as it is used here, is inappropriate. Furthermore, reasonable is not a requirement of Part 70, Section 504 of the Clean Air Act or Section 39.5 of the Environmental Protection Act. The permittee has an obligation to comply with all applicable emission standards, and to implement control measures that will assure compliance with those limits. Therefore, by including the word “reasonable” in these sections, the permit term goes beyond what is allowed by the applicable requirements. The petition is granted on this issue. IEPA must remove the term “reasonable” from these permit conditions.

D. Permit conditions that allow for too much agency discretion are not practically enforceable

Petitioner asserts that the permit has numerous provisions that are not practically enforceable because a permit condition allows for too much agency discretion. As a result, citizens are not able to enforce the permit condition without access to a determination by IEPA. Such agency discretion allows the source to negotiate the condition “off-permit” and bypass the permitting process requirements and procedures. Petition at 20.

1. Section 5.2.3(a) provides for IEPA review of the operating program regarding fugitive particulate matter. Petitioner asserts that allowing this sort of agency discretion renders the condition not practically enforceable. The condition is also vague because it fails to indicate what this review entails, for instance, whether review of the program involves IEPA approval or whether review provides IEPA with the opportunity to alter the program. Petition at 20.

The origin for section 5.2.3(a) of the Fisk permit is 35 IAC § 212.309(a), a part of the Illinois SIP. 35 IAC § 212.309(a) refers for implementation to sections 212.310 and 212.312 of the Illinois SIP, which require the plan to be submitted to IEPA for review. Section 5.2.3(a) appropriately incorporates the SIP requirement which provides that the plan must be submitted to IEPA for review. The petition is denied for this issue.

2. Petitioner alleges that section 7.1.7(a)(i)(B) allows the IEPA to waive the requirement for testing particulate matter and carbon monoxide. Petitioner believes that this provision makes the testing requirements not practically enforceable because citizens would have trouble disputing a finding by the Director that the testing requirement should be waived. Petition at 20.

Section 7.1.7(a)(i) details the testing requirements to measure PM emissions. However, the permit term goes on to say in section 7.1.7(a)(i)(B) “[n]otwithstanding [the testing requirement], the Illinois EPA may upon request of the Permittee . . . waive this requirement.” The ability of IEPA to waive the testing requirement altogether would result in monitoring that failed to “yield reliable data from the relevant time period that are representative of the source’s compliance with the permit.” 40 C.F.R. § 70.6(a)(3)(i)(B) and Section 39.5 of the Environmental Protection Act. The petition is granted on this issue. IEPA must either remove the provision authorizing it to waive the testing requirements or explain how such a waiver would meet the requirements of part 70.

3. Petitioner alleges that condition 7.1.7(c) provides for IEPA review and approval of a test plan for the coal-fired boiler and allows IEPA to impose additional conditions through the test plan. This sort of agency discretion renders the condition not practically enforceable because citizens would not be able to enforce the permit condition without access to a determination by IEPA and would have difficulty challenging a decision by the IEPA to approve the test plan. Further, this agency discretion allows the source to negotiate the test plan “off-permit” and bypass the permitting process requirements and procedures. Petition at 20.

The language of section 7.1.7(c), taken from 35 IAC § 283.220 of the federally-approved Illinois SIP, is clear on its face. As discussed in sections V.B.1, a permitting authority cannot use a title V permit to modify a requirement from a federally approved SIP. Therefore, the petition is denied on this issue.

E. Certain other permit conditions that contain vague language are not practically enforceable.

Petitioner alleges that the permit has a number of other conditions that are not practically enforceable because they allow too much agency discretion. The permit allows the source to negotiate conditions “off-permit” and bypass the permitting process requirements and procedures. Petition at 20.

1. Section 5.2.3(a) of the Fisk permit requires the permittee to operate the source “under the provisions of an operating program . . . designed to significantly reduce fugitive particulate matter emissions.” Petitioner asserts that the term “significantly” is vague and, therefore, not practically enforceable. Petition at 19-20.

The language in this section is taken directly from 35 IAC § 212.309(a)¹, which is part of the federally approved Illinois SIP. As discussed above, EPA could not properly object to

1 . The Seventh Circuit addressed EPA’s approval of this SIP provision in *Citizens for a Better Environment v. EPA*, 649 F2d. 522 (7th Cir. 1981). The Court decided that the term “significantly,” as used in this SIP provision, was not necessarily unenforceable. The question of whether the required fugitive operating program resulted in a significant reduction of emissions was one of fact, to be determined in a particular situation. *Id.* at 528. At the time the Seventh

including in a title V permit, a permit term that mirrors the language of federally approved SIP rules. Such provisions are “applicable requirements,” as that term is defined in 40 C.F.R. § 70.2. Therefore, because section 5.2.3 (a) tracks the SIP provision the petition is denied on this issue.

2. Petitioner alleges that section 5.2.7, which addresses the episode action plan, is vague and lacking sufficient detail to be practically enforceable. For section 5.2.7(a) to be enforceable, Petitioner asserts, the episode action plan would need to be defined and the contents of the plan delineated in much greater detail. Section 5.2.7(b) requires that the permittee implement only the “appropriate” steps in the plan. The term “appropriate” is subjective, vague and not practically enforceable. Petitioner states that section 5.2.7(c) uses the term “changed,” and alleges that it is subjective and not practically enforceable. Petition at 21. Section 5.2.7(c) does not contain the word “changed,” but provides that the permittee must submit to IEPA a revised plan if an “operational change” occurs.

A source’s episode action plan sets out steps which the source must take if IEPA issues various levels of air pollution advisories. 35 IAC § 244, with which section 5.2.7(a) of the Fisk permit requires the source to comply, requires sources to develop a plan describing actions that the source will take at each level of alert. EPA believes that the term “appropriate,” as used in section 5.2.7(b) of the Fisk permit, clearly means that the source implements the section of its plan for the level of alert issued by the state. The use of the term “appropriate” in this section of the permit, therefore, is not vague and unenforceable. The petition is denied on this issue.

3. Petitioner alleges that sections 5.7.1, 7.1.10(g), 7.2.10(a), 7.3.10(a), 7.4.10(a), 7.5.10(c), 7.6.10(a), and 7.7.10 use the term “deviation” and, that these sections are not practically enforceable because the term is vague. Petition at 21.

Section 5.7.1 contains general, source-wide reporting requirements. In the remaining sections cited by Petitioner, the permit requires reporting of deviations from specific permit requirements. IEPA cites section 39.5(7)(f) of the Illinois Environmental Protection Act, 415 ILCS 5/39.5(7)(f), as the origin and authority for each of these sections.

The lack of a definition for the term “deviation” does not, on its face, render the permit unenforceable. This is a commonly used regulatory term, and the plain meaning of the term is clear. Moreover, Petitioner has not demonstrated that IEPA has improperly interpreted it in practice so as to limit impermissibly the reporting required by these sections. For this reason, the petition is denied on this issue.

4. Petitioner alleges that the language in conditions 7.1.3(c)(ii), 7.2.3(b)(ii), 7.3.3(b)(ii), 7.4.3(b)(ii), and 7.5.3(b)(ii) is unclear. Petitioner asserts that two consecutive sentences in these sections are inconsistent, because the first allows IEPA to grant an extension if

Circuit reviewed U.S. EPA’s approval of this SIP provision, it was identified as section 203(f) of the Illinois SIP.

“extraordinary circumstances” exist, while the second provides for an extension if “unusual circumstances” exist. Petitioner asserts that this difference in language sets a lower threshold in the second sentence. Furthermore, the terms “extraordinary circumstances” and “unusual circumstances” are not defined and are unclear in general and, therefore, they are not practically enforceable. Petition at 21.

The draft Fisk permit contained the language to which Petitioner cites, except that it occurred in section 7.5.3(c)(ii), rather than 7.5.3(b)(ii). In the proposed permit, the sections at issue provide that IEPA may grant an extension if the permittee demonstrates that “extraordinary circumstances exist.” Therefore, the petition is moot regarding the inconsistent use of language in the permit condition. However, EPA agrees that the term “extraordinary circumstances” is vague. Although the sections at issue are derived from section 201.262 of the Illinois SIP, which provides the criteria for allowing operation of a unit in violation of certain SIP provisions during periods of malfunction, the language of these permit sections goes beyond the provisions of the SIP by allowing continued operation during an undefined set of circumstances. Therefore, the petition is granted for this issue. IEPA either must define “extraordinary circumstances” in a manner consistent with the requirements of the SIP or remove the language from the permit.

5. Section 7.1.7(b)(ii) of the Fisk permit, which addresses testing requirements for particulate matter and carbon monoxide, provides that “[m]easurements shall be taken at an appropriate location.” Petitioner alleges that the term “appropriate” is vague and not practically enforceable. Petition at 21-22.

EPA agrees that the provisions in section 7.1.7(b)(ii) are not specific with respect to measurement location. However, the next section, 7.1.7(b)(iii), requires that the source use EPA Method 1 to determine the location of sampling points. Method 1 is very clear with respect to the procedures for determining appropriate sampling points, or measurement locations. Section 7.1.7, taken as a whole, is enforceable as a practical matter; the petition is denied on this issue.

6. Petitioner alleges that section 7.1.8(d) is not practically enforceable because it is stated in the “conditional.” Petition at 22. It places the burden of determining whether the requirements of the permit are consistent with those of 40 C.F.R. part 75 on the permittee or on citizens enforcing the permit.

Section 7.1.8(d) describes the monitoring requirements for the coal fired boilers. It provides that “[t]o the extent that applicable performance specifications and operating requirements for monitoring under 40 C.F.R. Part 75 are inconsistent with the above requirements for monitoring, the procedures of 40 C.F.R. Part 75 shall take precedence.” Under this provision, the requirements of part 75, applicable requirements as defined in 40 C.F.R. 70.2, act as default minimum monitoring requirements in the event that any other monitoring provision in the permit condition are found to be inconsistent with part 75. Petitioner has not cited any instance where a monitoring condition may be inconsistent with part 75 and that the monitoring requirements in part 75 would be inappropriate in that instance. Because Petitioner has failed to demonstrate, as

required under section 505(b)(2) of the Act, that the permit is not in compliance with the requirements of the Act, the petition is denied on this issue.

7. Petitioner alleges that section 7.1.10(d)(ii) provides examples of recordkeeping requirements by way of example, but is not clear whether these are requirements or mere suggestions. Petitioner asserts that the permit is deficient because examples are not practically enforceable and the permit failed to require specific actions of the permittee. Petition at 22.

Upon review, EPA believes that section 7.1.10(d)(ii) contains reporting requirements, not examples. Therefore, the petition is denied on this issue.

8. Petitioner alleges that the permit language “such as” in sections 7.2.6(a)(i), 7.3.6(a)(i), and 7.4.6(a)(i) is vague and transforms into examples that are not practically enforceable the language that follows “such as.” Petitioner asserts that this is especially troublesome in the cited sections because this language relates to control measures. The permit is deficient because it fails to require specific control measures. Petition at 22.

Petitioner further alleges that sections 7.2.6(a)(ii), 7.3.6(a)(ii), and 7.4.6(a)(ii) are devoid of practically enforceable substantive requirements. They state that “The permittee shall operate and maintain each affected process with the control measures identified in Conditions 7.2.9(b), 7.3.9(b), or 7.4.9(b),” yet none of those conditions identify any control measures beyond what are currently being implemented at the facility, which could be none at all. *Id.*

Sections 7.2.6(a)(ii), 7.3.6(a)(ii), and 7.4.6(a)(ii) require that some control measures be implemented. These sections contain requirements to operate and maintain each affected process with the control measures identified in the record keeping provisions of the respective sections of the permits (7.2.9(b), 7.3.9(b), and 7.4.9(b)). Together, these terms are enforceable as a practical matter with respect to operational restrictions for visible emission from these units. Therefore, the petition is denied on this issue.

9. The Petitioner alleges that it is unclear what is meant by a “summary of compliance compared to the established control measures” in sections 7.3.9(c)(v) and 7.4.9(c)(v). This language is vague and therefore not practically enforceable. Petition at 22.

EPA agrees with Petitioner that the language of sections 7.3.9(c)(v) and 7.4.9(c)(v) is confusing. First, the language is not clear on its face. Additionally, there are no compliance measures in sections 7.3 or 7.4 with which the permittee can compare compliance. The petition is granted on this issue. IEPA must either remove the term from the permit or clarify the term such that the reader understands what a “summary of compliance” must contain and how the summary relates to the control measures.

10. Petitioner asserts that the terminology “good air pollution control practice” in section 7.5.4(a)(iii) is vague, not defined, and, therefore, not practically enforceable. Petitioner

maintains that the term must be defined, with the exact actions delineated that the permittee must take. Petition at 22.

Section 7.5.4 is derived from 40 C.F.R. § 60.11(d), which are part of the general requirements of the New Source Performance Standards. The Petitioner has not alleged or demonstrated that IEPA has not included in the permit the specific requirements that apply to individual emissions units. Therefore, the petition is denied on this issue.

11. Petitioner alleges that the compliance certification contained as a Standard Permit Condition in section 9.8 is inadequate. The section requires that the source submit its compliance certification no later than May 1. It is unclear whether the requirement means May 1 of every year, and is, therefore, not practically enforceable.

EPA disagrees. Section 9.8 requires the submission of annual compliance certifications. The language cited by Petitioner makes clear that Fisk Generation must, at a minimum, submit its compliance certification no later than May 1 of each year. The petition is denied on this issue.

CONCLUSION

For the reasons set forth above, and pursuant to section 505(b)(2) of the Clean Air Act, I grant in part and deny in part the petition of the Chicago Legal Clinic requesting the Administrator to object to issuance of the title V CAAPP permit to Midwest Generation, LCC, Fisk Generating Station.

Dated: March 25, 2005

/s/
Stephen L. Johnson
Acting Administrator