



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

THE ADMINISTRATOR

The Honorable Anne Milgram
Attorney General
State of New Jersey
Office of the Attorney General
25 Market Street
Trenton, New Jersey 08625-0093

SEP 25 2008

Dear Attorney General Milgram:

This letter responds to the petition for reconsideration filed by your office on behalf of the New Jersey Department of Environmental Protection (NJDEP). The petition, dated September 14, 2007, asked that the United States Environmental Protection Agency (EPA or Agency) reconsider an Order, dated June 20, 2007, which denied NJDEP's request under Section 505(b)(2) of the Clean Air Act, 42 U.S.C. § 7661d(b)(2), that EPA object to a Clean Air Act title V permit proposed by the Pennsylvania Department of Environmental Protection (PADEP) for the Reliant Portland Generating Station in Northampton County, Pennsylvania. See 72 Fed. Reg. 39,414 (July 18, 2007). For the reasons set forth in detail in this letter, EPA denies the petition for reconsideration.

The Reliant Portland Steam Generating plant (Reliant Portland) is an electric generating plant located in Northampton County, Pennsylvania, along the Delaware River. The major emitting units at Reliant Portland are two coal-fired boilers (designated Units 1 and 2) and three gas/oil-fired simple cycle combustion turbines (Units 3 through 5). Reliant Portland is a major stationary source of air pollution, as defined by the Clean Air Act (CAA or Act), and is required to have a title V operating permit that includes emission limitations and other conditions as necessary to assure compliance with applicable requirements of the Act, including the applicable state implementation plan. See CAA sections 502(a) and 504(a), 42 U.S.C. §§ 7661a(a) and 7661c(a). On June 8, 2005, PADEP released a draft of the Reliant Portland title V permit (Draft Permit) for public comment. NJDEP submitted four pages of comments by letter dated July 8, 2005. EPA Region III e-mailed comments on the June 8th Draft Permit to PADEP on June 24, 2005. On December 2, 2006, PADEP provided its response to the comments of NJDEP (as an "affected state") pursuant to 25 Pa. Code § 127.522(e) and 40 C.F.R. § 70.8(b)(2) to EPA and NJDEP, and indicated that it was not modifying the draft permit in response to the comments provided in NJDEP's July 8, 2005 letter. Almost six months after this statement, PADEP

submitted what it labeled as a “final draft” of the Reliant Portland title V permit to EPA via e-mail on May 24, 2006. The May 24, 2006 permit incorporated changes in response to EPA’s comments. EPA has not had further comments on this latest “final draft.”¹ EPA considers this May 24, 2006 “final draft” permit to be the “proposed” permit in this matter.

Pursuant to Section 505(b)(2) of the Act, NJDEP filed a petition (the “Petition”) with EPA asking the Agency to object to the May 24, 2006 proposed permit. On June 20, 2007, I signed an order (the “Order”) denying New Jersey’s Petition, notice of which was published in the Federal Register on July 18, 2007. On September 14, 2007, New Jersey filed both a petition for review of the Order in the U.S. Court of Appeals for the Third Circuit, and the petition for reconsideration. The court stayed the petition for review until September 26, 2008, in order to allow EPA to respond to NJDEP’s petition for reconsideration.²

1) National Ambient Air Quality Standards (NAAQS) Exceedances

New Jersey’s petition for reconsideration alleges that the “[d]enial . . . unlawfully failed to consider the merits of NJDEP’s objection to the lack of operational heat input limits in the Title V permit . . .” Petition for Reconsideration, p. 1. Specifically, the petition seeks reconsideration of NJDEP’s claims that heat input limits are necessary for Reliant Portland’s Units 1 and 2 to avoid violations of the Pennsylvania SIP and of the NAAQS for Particulate Matter (PM) and, possibly, Nitrogen Oxide (NO_x).

Section 505(b)(2) of the CAA allows “any person” to timely petition the Administrator to object to the issuance of a title V permit if it is not in compliance with the “applicable requirements” of the CAA or the requirements of an “applicable implementation plan.” CAA Section 505(b)(1) and (2). However, “the petition shall be based only on objections raised with reasonable specificity during the public comment period . . . (unless the petitioner demonstrates in the petition to the Administrator that it was impracticable to raise such objection within such period or unless the grounds for such objection arose after such period).” CAA Section 505(b)(2). Thus, in order for the Administrator to consider the “merits” of any objection, that objection must have been raised with reasonable specificity during the public comment period, unless the grounds for the objection arose after the public comment period or the petitioner demonstrates that it was impractical to raise the objection within the comment period.

The Order declined to directly address the substance of NJDEP’s allegation that an objection to the permit was warranted because the lack of heat input limits would lead to NAAQS violations, finding that the question of whether the lack of heat input limits would cause NAAQS violations was not raised in any comments to Pennsylvania. Instead, New Jersey raised in its comments to Pennsylvania the question of whether the lack of enforceable heat input limits

¹ PADEP has not yet issued the final title V permit for Reliant Portland.

² EPA notes that the Order is not subject to the requirements of CAA section 307(d), as it does not fall within any of the enumerated categories in section 307(d)(1). However, EPA has considered the petition pursuant to the CAA and the Administrative Procedures Act, 5 USC §551 et seq.

would cause violations of New Source Review (NSR), Prevention of Significant Deterioration (PSD), or the New Source Performance Standards (NSPS) portions of the CAA, or violations of the Pennsylvania state implementation plan (SIP). Indeed, the words "NAAQS" or "National Ambient Air Quality Standards" do not appear anywhere in New Jersey's comments to Pennsylvania. Nor did New Jersey submit any data with its comments to PADEP showing that emissions from the Reliant Portland plant at its permitted level caused or contributed to any NAAQS violation.

New Jersey suggests that "NJDEP could not have raised its argument that the lack of enforceable heat input limits in the operating permit would lead to NAAQS exceedances in its public comments." Pet. for Reconsideration at 7. However, a review of the permitting record, and NJDEP's other comments, show that New Jersey could have raised the alleged link between heat input limits and possible NAAQS exceedances in its comments on the proposed title V permit.

First, PADEP's change to the draft title V permit after the public comment period clarifying that heat input limits are not enforceable was consistent with other changes PADEP made to the title V permit prior to the public comment period. Moreover, NJDEP specifically recognized the significance of those changes and commented upon them during the public comment period. New Jersey's comments 1, 3, and 5 specifically note that PADEP's proposed title V permit did remove maximum coal throughput and maximum oil throughput values for Units 1 and 2, and eliminated fuel throughput limits and maximum heat input limits for Unit 5 that appeared in the previous title V permit. Indeed, New Jersey's comment 5 states "[b]y approving the proposed permit without previous plan approval MMBtu/hour limits or title V/State operating permit fuel throughput limits, PADEP is allowing Unit 5 to increase its actual emissions." By dropping the fuel throughput limits for Units 1 and 2 in pre-comment period iterations of the title V permit, PADEP clearly signaled its interpretation that the heat input numbers listed for Units 1 and 2 were not limits on heat input to Units 1 and 2.

In addition, New Jersey's comments on the heat input numbers listed in the draft permit for Units 1 and 2 were limited to this simple question: "Is the last plan approval value of 1464 MMBtu/hr Unit 1's current operational limit?" New Jersey asked the identical question regarding Unit 2. *See* New Jersey's comments 2.c and 4.c. The fact that NJDEP asked this question indicates that it had identified uncertainty related to whether these were current operational limits. If NJDEP was that concerned about potential NAAQS violations arising from a lack of heat input limits for Units 1 and 2, it should have stated that concern explicitly.

Finally, EPA notes that New Jersey's petition for reconsideration states that modeling performed by NJDEP "shows existing NAAQS violations at the heat inputs in the Unofficial Permit" (Pet. for Reconsideration, p. 9).³ Thus, even if PADEP had stated that the listed heat inputs for Units 1 and 2 were enforceable limits, New Jersey's modeling purports to show that operation at those listed heat input limits would cause PM_{2.5} NAAQS exceedances. Again, this suggests that if NJDEP was concerned about or aware of NAAQS exceedances, this issue should have been raised in public comments to the permitting authority. New Jersey is an unusually sophisticated commenter because it has significant responsibility for implementing the CAA, including running its own CAA permitting program. If New Jersey has significant concerns regarding important NAAQS issues, it should raise them clearly in its comments on another state's title V permit.

In light of all of these circumstances, EPA believes that NJDEP could have raised the issue of whether the lack of heat input limits would lead to NAAQS exceedances in comments on the proposed permit and that reconsideration of this issue is not warranted for that reason. It is important to note, however, that another reason reconsideration is not warranted is that even if EPA had substantively considered the alleged NAAQS exceedances first cited in NJDEP's Petition for objection, the outcome in the Order would not have changed.

Permits issued under title V must contain terms and conditions to assure compliance with all applicable requirements of the CAA. Contrary to New Jersey's assertion, the NAAQS are not one of the "applicable requirements" for which Reliant Portland's title V permit must assure compliance. *See* 42 U.S.C. § 7661c(a); 40 CFR § 70.2. New Jersey cites part of the definition of "applicable requirement" found at 40 C.F.R. § 70.2 as evidence that the NAAQS are an "applicable requirement." Pet. for Reconsideration, p. 9. Specifically, New Jersey cites subsection 13 of the definition of "applicable requirement" found at 40 C.F.R. § 70.2. This subsection of the definition includes the NAAQS within the ambit of an "applicable requirement" ". . . but only as it would apply to temporary sources permitted pursuant to Section 504(e) of the Act." Section 504(e), entitled "temporary sources," allows the permitting authority

³ EPA notes that New Jersey submitted modeling data with its Petition to object of July 21, 2006, and its petition for reconsideration of September 2007, and then additional modeling data by mail dated April 18, 2008 and July 23, 2008. As to the first set of modeling data submitted with the Petition to object, there is no evidence it could not have been presented at the time of public comments on the draft permit. The modeling submitted with the July 2006 Petition to object was dated May 1999, indicating it was in existence six years before PADEP issued the draft Reliant title V permit. EPA did not consider the 2008 modeling submissions because they were submitted significantly after the date of the petition for reconsideration and significantly after the date EPA filed an unopposed motion with the Court of Appeals for the Third Circuit seeking to stay pending litigation to allow EPA to review the petition for reconsideration. In addition, as discussed below, even if EPA had considered all of this modeling and found that NJDEP had provided a sufficient demonstration that the Portland Generating Station was contributing to the occurrence of NAAQS exceedances, the outcome of the Order (and of this response) would not have changed.

to issue a single permit for similar operations at multiple temporary locations. Reliant Portland is not a temporary source, so this particular part of the definition of “applicable requirements” does not apply.⁴ The remaining parts of the definition of “applicable requirements” do not include any direct reference to the NAAQS.

The CAA has a statutory scheme whereby the EPA sets the NAAQS, but the states then determine how best to attain and maintain the NAAQS within their boundaries. As EPA has explained in prior orders denying petitions to object to permits issued by NJDEP, a NAAQS by itself does not impose any obligation on sources. "A source is not obligated to reduce emissions as a result of the [NAAQS] until the state identifies a specific emission reduction measure needed for attainment (and applicable to the source), and that measure is incorporated into a SIP approved by EPA." In the Matter of Marcal Paper Mills, Inc., (Nov. 30, 2006); *see also* In the Matter of Camden Cogeneration Plant, (May 25, 2006) (same), In the Matter of G.P. Gypsum Corp. Associates Facility, (Apr. 6, 2006) (same); Cate v. Transcontinental Gas Pipe Line Corp., 904 F.Supp. 526 (W.D. Va. 1995) (“It is well-established that the NAAQS are not an ‘emission standard or limitation’ as defined by the Act. . . . Thus, suits to force compliance with the NAAQS are not allowed under § 7604”)

There are mechanisms within the CAA to ensure compliance with the NAAQS, including where a source in one area contributes to nonattainment in another area. However, title V permits are the means of ensuring compliance with existing SIP and CAA requirements, and not for determining whether additional controls are necessary to bring an area into attainment with the NAAQS. Accordingly, even if NJDEP had provided a sufficient demonstration pursuant to section 505(b)(2) that the Portland Generating Station was contributing to the occurrence of NAAQS exceedances, under the scheme of the CAA, EPA would not object to an otherwise valid title V permit solely because the source contributed to nonattainment.

2) SIP Violations

The petition for reconsideration also seeks reconsideration of EPA’s conclusion in the Order that the proposed title V permit adequately assures compliance with SIP requirements. In the Order, EPA considered on the merits, and rejected, NJDEP’s contention that it had demonstrated that the lack of operational heat input limits, either through fuel input limits or heat input limits, would lead to violations of the Pennsylvania SIP. EPA discussed, at page 8 of the Order, whether there was any need for heat input limits in the title V permit in order to ensure compliance with those title V permit limits derived from the Pennsylvania SIP, i.e., the pounds per Million Btu (lbs/MMBTU) limits for particulate matter (PM), sulfur dioxide (SO₂), and nitrogen oxides (NO_x), the tons per three hour limit for SO₂, and the tons per month limit for

⁴ Likewise, NJDEP did not raise the issue of 25 Pa. Code 127.12(6) in its title V petition, and has not demonstrated that the provision was applicable to this permit, or that the permit failed to contain any applicable requirement. 25 Pa. Code 127.12(6) requires that permit applications to construct, modify, reactivate, and operate source show that the source will not adversely affect attainment or maintenance of a NAAQS when requested by PADEP. There has been no showing that PADEP has made such a request.

NOx for Unit 2. EPA concluded that the monitoring requirements in the permit, including Continuous Emissions Monitoring System (CEMS) and Continuous Opacity Monitoring Systems (COMS), were adequate to ensure compliance with these SIP-derived limits. Indeed, PADEP made certain changes to the draft title V permit in response to EPA comments in order to strengthen the monitoring provisions that now appear in the proposed title V permit.

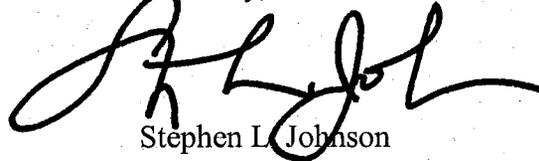
The petition for reconsideration states that the proposed permit is insufficient because it may lead to violations of the SIP, particularly because the permit sets only a concentration limit for PM, and fails to set a PM mass limit. NJDEP has failed to identify any federally-enforceable PM mass limit applicable to the facility. EPA has identified a PM concentration limit, and explained in the Order its conclusion that the site-specific testing and monitoring requirements for PM are sufficient to assure compliance with that limit. NJDEP's title V Petition did not raise the issue of whether COMS are adequate monitoring for the PM concentration limit, and neither the title V Petition nor the petition for reconsideration contains sufficient information to demonstrate that the monitoring is insufficient to assure compliance.⁵ Accordingly, EPA concludes that NJDEP has not shown that reconsideration of this issue is warranted.

3) Hazardous Air Pollutant (HAP) Emissions

The petition for reconsideration for the first time seeks review of "the impact that increases in heat input at the Portland Plant would have on emissions of hazardous air pollutants" Pet. for Reconsideration at 12. Because this issue was never raised in the title V Petition, EPA finds there is no basis for a petition for reconsideration on these grounds. EPA also notes that New Jersey has failed to identify, much less demonstrate noncompliance with, any federal standard or requirement issued under CAA section 112, or any other CAA applicable requirement governing the emission of HAPs from Reliant Portland. Accordingly, even if it were appropriate to consider this issue, the petition for reconsideration provides no basis on which to object to the permit.

For the reasons discussed above, EPA concludes that reconsideration of the June 20, 2007 Order is not warranted. If you have any questions concerning this decision, please contact David Orlin in the Office of General Counsel, at (202) 564-1222.

Sincerely,



Stephen L. Johnson

⁵ Contrary to the suggestion in the petition for reconsideration, the basis for the PM monitoring was not developed based on a small number of infrequent stack tests but on a site-specific correlation between the COMS and approximately 7000 PM grab samples.