BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF	)	ORDER RESPONDING TO PETITIONERS' REQUEST THAT THE ADMINISTRATOR OBJECT TO ISSUANCE OF A STATE OPERATING PERMIT
TRANSALTA CENTRALIA GENERATION, LLC	)	
Issued by the Southwest Clean Air Agency	)	Permit No. SW98-8-R3

ORDER DENYING PETITION
FOR OBJECTION TO PERMIT

On September 16, 2009, the Southwest Clean Air Agency (SWCAA), a Washington State air pollution agency, issued a renewed Title V operating permit to TransAlta Centralia Generation, LLC (TransAlta) pursuant to Title V of the Clean Air Act (CAA), 42 U.S.C. §§ 7661-7661f, CAA §§ 501-507 (TransAlta Title V Permit). On October 29, 2009, Earthjustice submitted to EPA, on behalf of the Sierra Club, the National Parks Conservation Association, and the Northwest Environmental Defense Center (collectively, the "Earthjustice Petitioners" or the "Petitioners"), a petition requesting that EPA object to the issuance of the TransAlta Title V Permit pursuant to section 505(b)(2) of the CAA, 42 U.S.C. § 7661d(b)(2), and 40 C.F.R. § 70.8(d) (Earthjustice Petition or Petition).

The Earthjustice Petition alleges that the TransAlta Title V Permit fails to comply with Washington law as incorporated in and applied by the Washington State Implementation Plan (SIP) because it alleges the permit:

(1) fails to provide for the control of carbon dioxide (CO_2) emissions, an air contaminant that is detrimental to human health and welfare, property, and business;

(2) fails to provide for the control of mercury emissions, an air contaminant that is detrimental to human health and welfare, property, and business;

(3) fails to provide for adequate control of nitrogen oxide (NOx) emissions, an air contaminant that is detrimental to human health and welfare, property, and business; and (4) fails to require Reasonably Available Control Technology (RACT) for the control of CO_2 or mercury emissions.

Earthjustice Petition at 2. The Earthjustice Petition also requests that EPA independently review the "general duty" language in Requirement 28 (page 15) of the TransAlta Title V Permit regarding startup, shutdown, and malfunction (SSM) and the alleged resulting relaxation of certain emission standards in the TransAlta Title V Permit. *Id.* at 2-3.

EPA has reviewed the Earthjustice Petitioners' allegations pursuant to the standards set forth in section 505(b)(2) of the CAA, 42 U.S.C. § 7661d(b)(2), 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 CAA. *See also* 40 C.F.R. § 70.8(d); *New York Public Interest Research Group v. Whitman*, 321 F.3d 316, 333 n.11 (2d Cir 2003). Based on a review of available information, including the TransAlta Title V Permit and Permit record, the Earthjustice Petition, other available information, and the relevant statutory and regulatory authorities and guidance, I deny the Petition.

I. STATUTORY AND REGULATORY FRAMEWORK

Section 502(d)(1) of the CAA, 42 U.S.C. § 7661a(d)(1), requires each state to develop and submit to EPA an operating permit program meeting the requirements of Title V. EPA granted interim approval to the Title V Operating Permit program submitted by the state of Washington and its local air agencies, including SWCAA, effective December 9, 1994. 59 Fed. Reg. 55813 (Nov. 9, 1994); *see also* 60 Fed. Reg. 62992 (Dec. 8, 1995) (final interim approval after remand on unrelated issue). EPA promulgated final full approval of Washington's Title V operating permit program effective September 12, 2001, 66 Fed. Reg. 42439 (August 13, 2001), and an update to that final approval effective January 2, 2003. 67 Fed. Reg. 74179 (December 2, 2002). *See* 40 C.F.R. part 70, appendix A.

All major sources of air pollution and certain other sources are required to apply for an operating permit that includes emission limitations and such other conditions as are necessary to assure compliance with applicable requirements of the CAA. See CAA §§ 502(a) and 504(a), 42 U.S.C. §§ 7661a(a) and 7661c(a). The Title V Operating Permit Program does not generally impose new substantive air quality control requirements (referred to as "applicable requirements"), but does require that permits contain monitoring, recordkeeping, reporting, and other requirements to assure compliance by sources with applicable emission control requirements. 57 Fed. Reg. 32250, 32251 (July 21, 1992) (final action promulgating part 70 rule). One purpose of the Title V program is to "enable the source, states, EPA, and the public to better understand the applicable requirements to which the source is subject, and whether the source is meeting those requirements. *Id.* Thus, the Title V Operating Permit program is a vehicle for ensuring that air quality control requirements are appropriately applied to facility emission units and that compliance with these requirements is better assured.

Under section 505(a) of the CAA, 42 U.S.C. § 7661d(a), and the relevant implementing regulations at 40 C.F.R. § 70.8(a), permitting authorities are required to submit all proposed Title V Operating Permits to EPA for review. Upon receipt of a proposed permit, EPA has 45 days to object to final issuance of the permit if EPA determines it is not in compliance with applicable requirements or the requirements of part 70. 40 C.F.R. § 70.8(c). If EPA does not object to a permit on its own initiative, section 505(b)(2) of the CAA provides 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. 42 U.S.C. § 7661d(b)(1); *see also* 40 C.F.R. § 70.8(d). The petition must be based "only on objections to the permit that were raised with reasonable specificity during the public comment period provided by the permitting agency (unless the petitioner demonstrates in the petition to the Administrator that it was impracticable to raise such objections within such period or unless the grounds for such objection arose after such period)." 42 U.S.C. 7661d(b)(2); *see also* 40 C.F.R. § 70.8(d). In response to such a petition, the Administrator must issue an objection if the petitioner demonstrates that a permit is not in compliance with the requirements of the CAA. *Id.; see also* 40 C.F.R. § 70.8(c)(1); *NYPIRG v. Whitman*, 321 F.3d 316, 333 n.11 (2d Cir. 2003). Under section 505(b)(2) of the CAA, the burden is on the petitioner to make the required demonstration to EPA. *Sierra Club v. Johnson*, 541 F.3d 1257, 1266-1267 (11th Cir.

2008); *Citizens against Ruining the Environment v. EPA*, 535 F.3d 670, 677-678 (7th Cir. 2008); *Sierra Club v. EPA*, 557 F.3d 401, 406 (6th Cir. 2009); *McClarence v. EPA*, 596 F.3d 1123, 1130-1131 (9th Cir. 2010) (discussing the burden of proof in Title V petitions).

II. BACKGROUND

The TransAlta facility located in Centralia, Washington, consists of a coal-fired power plant that generates electricity from steam driven turbines and a combustion turbine plant consisting of four combustion turbines that operate as a peaking plant. The Title V Permit that is the subject of this Petition was issued in response to a Title V renewal application submitted by TransAlta. SWCAA issued a draft Title V Permit for public comment on May 15, 2009. The Earthjustice Petitioners submitted timely comments dated July 2, 2009, on the draft permit. SWCAA responded to the comments and submitted a proposed permit to EPA on July 21, 2009. EPA's 45-day review period for the TransAlta Title V Permit ended on September 4, 2009, and SWCAA issued the final permit on September 16, 2009. The 60th day following the end of EPA's 45-day review period was November 3, 2009. The Earthjustice Petition was received by EPA on October 29, 2009. Accordingly, EPA finds that the Earthjustice Petition was timely filed.

III. ISSUES RAISED BY THE PETITIONER

A. Control of Carbon Dioxide and Mercury Emissions

The Earthjustice Petitioners allege that the TransAlta Title V Permit fails to provide for the control of CO_2 emissions and mercury as required by the Washington SIP. The Petitioners begin by stating that each Title V Permit must include "enforceable emission limitations and standards, a schedule of compliance....and such other conditions as are necessary to assure compliance by the source with all applicable requirements of [the CAA], including the requirements of the applicable implementation plan," citing to 42 U.S.C. § 7661c(a); 40 C.F.R. § 70.1, and the comparable provisions of Washington's Title V regulations, WAC 173-401-605. Earthjustice Petition at 3. The Earthjustice Petitioners then note that the Washington SIP contains the following provision, WAC 173-400-040(5), which is an "applicable requirement" under Title V:

> **Emissions detrimental to persons or property.** No person shall cause or permit the emission of any air contaminant from any source if it is detrimental to the health, safety, or welfare of any person, or causes damage to property or business.[2]

Id. The Earthjustice Petitioners continue that CO_2 and mercury are "air contaminants" as defined in the Washington SIP (see WAC 173-400-030 and SWCAA 400-030), because they are each a vapor or gas, and that they are injurious to human health, to ecosystems in Washington, and to the Washington economy. *Id.* at 6 & 8. With respect to CO_2, the Petitioners allege that TransAlta's CO_2 emissions comprise roughly 10 percent of the total greenhouse gas emissions for the state of Washington and provide information supporting their argument that CO_2 emissions adversely affect human health, welfare, and economies around the world. *Id.* at 4-5. The Petitioners conclude that the TransAlta Title V Permit fails to include or conform to all applicable requirements of the Washington SIP because the TransAlta facility emits large quantities of CO_2, CO_2 is injurious to human health and the environment, and the permit does not contain emissions limitations or a schedule of compliance. *Id* at 6-7.

The Earthjustice Petitioners make an almost identical argument with respect to mercury emissions, alleging that the TransAlta facility is the largest emitter of mercury in the state and that mercury is a toxic air pollutant with well-known adverse impacts on human health and the environment. *Id* at 7-8. The Petitioners conclude that the TransAlta Title V Permit fails to include or conform to all applicable requirements of the Washington SIP because the TransAlta facility emits large quantities of mercury, mercury is injurious to human health and the environment, and the permit does not contain emissions limitations or a schedule of compliance that assure compliance with the requirements of WAC 173-400-040(5) and SWCAA 400-040(5) with respect to mercury emissions despite the fact that mercury control technologies are achieving substantial emission reductions. *Id.* at 8-9.

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[2] The version of this regulation was effective as a matter of state law on September 20, 1993, and approved into the Washington SIP on June 2, 1995. *See* 40 C.F.R. § 52.2479. Washington has since revised this subparagraph to substitute the word "allow" for the word "permit." SWCAA 400-040(5) contains the same language as WAC 173-400-040(5) and is also in the Washington SIP. *See* 40 C.F.R. § 52.2470(c)(70).

EPA Response.

There is no dispute that the TransAlta Title V Permit does include the "applicable requirement" at issue, WAC 173-400-040(5) and SWCAA 400-040(5), verbatim. *See* TransAlta Title V Permit, Section VI, Req-5.[3] The TransAlta Title V Permit also contains compliance assurance monitoring, recordkeeping, and reporting requirements for that applicable requirement in Section VII, Condition M4[4]. This section of the TransAlta Title V Permit requires TransAlta to keep a record of, investigate, and take any needed corrective action in response to a complaint. In addition, Section VIII, Condition K.1(b) generally requires the permittee to keep records of all complaints and corrective action, and Section IX, Condition R2 requires the permittee to report all complaints to SWCAA within three days of receipt.

The Petitioners contend that, in light of the applicable requirement at issue, SWCAA is required to impose emission "limitations" for CO_2 and mercury in the TransAlta Title V Permit, noting in particular that control technologies for mercury emissions are available.[5] Earthjustice Petition at 9. EPA has previously addressed a similar claim regarding a similarly broad prohibition on air pollution in the Georgia SIP. *See* In the Matter of Hercules, Inc., Petition IV-2003-01, 2004 (November 10, 2004) (hereafter referred to as the "Hercules Order"). The provision at issue in the Hercules Order broadly prohibited "injurious" emissions of air pollution and, as with the Earthjustice Petition in this case, the petition in Hercules asserted that the permitting authority's failure to impose in the Title V permit specific emission limitations or standards to implement the broad prohibition on air pollution violated the requirements of section 504(a) of the CAA. In that case, EPA concluded that the permitting authority was not

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[3] EPA's understanding is that both CO_2 and mercury are "air contaminants" under the Washington SIP and therefore currently fall within the scope of WAC 173-400-040 and SWCAA 400-040 as approved into the Washington SIP.

[4] Section VII, Condition M4 contains the compliance assurance monitoring, recordkeeping, and reporting requirements for Section VI, Req-5., which is the applicable requirement WAC 173-400-040(5) and SWCAA 400-040(5).

[5] EPA does not read the Petition as asserting that TransAlta is in violation of WAC 173-400-040(5) and SWCAA 400-040(5). To the extent the Petitioners are making such an assertion, Petitioners have only provided information seeking to show generally that TransAlta emits substantial quantities of CO_2 and mercury and that CO_2 and mercury emissions in general are detrimental to human health, the environment, and the economy. In this respect, Petitioners have not met their burden to demonstrate that TransAlta is in violation of WAC 173-400-040 and SWCAA 400-040 at the time of permit issuance. Without a demonstration of noncompliance, there is no requirement that the Title V permit contain a schedule of compliance. *See* 40 C.F.R. §§ 70.5(c)(8)(iii)(C) and 70.6(c)(3).

required to include specific emissions limits or standards to implement that broadly sweeping SIP provision in the Title V permit, so long as compliance could be assured. Hercules Order at *20. Further, because the SIP provision in Hercules was "not derived from any federal requirement," EPA determined that it was appropriate for EPA to consider the State's interpretation of the rule in determining whether the permitting authority had appropriately addressed the broad prohibition on injurious emissions in the Hercules Title V permit. Hercules Order at *19.

The SIP applicable requirement at issue in this Petition of the TransAlta Title V Permit is a similarly broad, sweeping provision, applying to all sources, all emission units, all activities, and all air contaminants emitted anywhere in the State of Washington. As in Hercules, Petitioners have not demonstrated that additional emissions limits or standards are needed to assure compliance with this provision. Further, as in the Hercules matter, the SIP applicable requirement at issue in this Earthjustice Petition is not derived from any federal requirement. EPA believes it is therefore appropriate to consider Washington's interpretation of this SIP provision in considering whether SWCAA has appropriately addressed this requirement in the TransAlta Title V Permit in a manner ensuring compliance. In interpreting WAC 173-400-040(5) and SWCAA 400-040(5) in a challenge to this same TransAlta Title V Permit in a parallel state proceeding, the Washington Pollution Control Hearing Board (Washington PCHB) recently concluded that, as a matter of Washington state law, this provision is intended as a broad prohibition on emissions of air contaminants, and SWCAA is not required to translate this broad prohibition into source-specific emission limits on specific pollutants in Title V permits. *See* Order Granting Summary Judgment, *Sierra Club, et al v. Southwest Washington Clean Air Agency and TransAlta Centralia Generation, L.L.C.*, PCHB No. 09-108 (April 19, 2010) at 19 (referred to hereafter as the "TransAlta PCHB Order") (concluding further that this broad state law prohibition on emissions of air contaminants is enforceable as written). In reaching this conclusion, the Washington PCHB stated that any other result would require Washington permitting authorities to establish in Title V permits case-by-case emission limits, operational requirements, and pollution controls for every air pollutant emitted by a Title V source. TransAlta PCHB Order at 20 ("an expansive reading of [SWCAA] 400-040(5), as requested by the Appellants, would swallow the rules regarding other air pollution limits and would result in

local air authorities being required to determine case-by-case limits for numerous air contaminants.").

Based on the sweeping nature of the SIP provision at issue—applying to all sources, emission units, activities and the resulting air contaminants—as well as the above-referenced provisions already in the permit, the Hercules Order, and consideration of the Washington PCHB's interpretation of WAC 173-400-040(5) and SWCAA 400-040(5), I conclude that the Earthjustice Petitioners have not met their burden of demonstrating that SWCAA was required to include additional emission limitations, operating restrictions, or pollution control requirements for CO_2 or mercury in order to address the applicable requirements of WAC 173-400-040(5) and SWCAA 400-040(5) in the TransAlta Title V Permit. I therefore deny the Petition on this issue.

B. Control of NOx Emissions

The Earthjustice Petitioners make a very similar argument with respect to NOx. Petitioners acknowledge that the TransAlta Title V Permit does provide for the continuation of existing NOx controls at the TransAlta facility, but assert that NOx emissions from the TransAlta facility continue to have detrimental effects on human health, safety, welfare, and business. Earthjustice Petition at 11. The Petitioners conclude that the TransAlta Title V Permit fails to include or conform to all applicable requirements of the Washington SIP because the TransAlta facility emits large quantities of NOx, NOx is injurious to human health and the environment, and the permit does not contain emissions limitations or control requirements, such as selective catalytic reduction, that assure compliance with the requirements of WAC 173-400-040(5) and SWCAA 400-040(5) with respect to NOx emissions. *Id.* at 11.

EPA Response.

For the reasons discussed above in response to the Earthjustice Petitioners' claims with respect to the application of WAC 173-400-040(5) and SWCAA 400-040(5) to CO_2 and mercury, I also deny the Petitioners' claims under these same applicable requirements with respect to emissions of NOx. In short, I conclude that the Earthjustice Petitioners have not met their burden of demonstrating that the permitting authority was required to include additional emission limitations, operating requirements, or pollution control requirements for NOx

emissions in the TransAlta Title V Permit in order to address the applicable requirements of the Washington SIP in WAC 173-400-040(5) and SWCAA 400-040(5), beyond those NOx and other requirements already included in the permit.

In this regard, I also note that the TransAlta Title V Permit contains numerous specific emission limitations, operating requirements, control requirements, and related monitoring, recordkeeping and reporting requirements regulating NOx emissions from the TransAlta facility. *See, e.g.*, TransAlta Title V Permit, Section VI, Req-10, Req-23, Req-24, Req-27, Req-42, Req-45, Req-52, Req-53, Req-60, and Req-62; Section VII, M7, M8, M13, M14, and M17; Section VIII, K2 (citations not inclusive of all requirements in the TransAlta Title V Permit that relate to NOx emissions).[6]

C. RACT for CO_2 and Mercury Emissions

The Earthjustice Petitioners next point to another requirement of the Washington SIP, WAC 173-400-040, which provides in part:

> [A]ll emission units are required to use reasonably available control technology (RACT) which may be determined for some sources or source categories to be more stringent than the applicable emission limitations of any chapter of Title 173 WAC. Where current controls are determined to be less than RACT, ecology or the authority shall, as provided in section 8, chapter 252, Laws of 1993, define RACT for each source or source category and issue a rule or regulatory order requiring the installation of RACT.[7]

[6] Note that legislation reflecting an agreement between TransAlta, the Governor's Office, and some environmental groups in Washington recently passed the Senate in the state of Washington and is expected to pass the House before the end of this legislative session. Senate Bill 5769 would require TransAlta to install non-catalytic reduction (SNCR) to further reduce emissions of NOx at the TransAlta facility, and to shut down one boiler on December 31, 2020, and the other boiler on December 31, 2025. See http://apps.leg.wa.gov/documents/billdocs/2011-12/Pdf/Bills/Senate/Bills/5769-S2.pdf. This legislation has no effect on our responses in this order.

[7] Note that the RACT requirement is in the opening paragraph of these regulations and not in a numeric subpart. This regulation has been approved into the Washington SIP. *See* 40 C.F.R. § 52.2479. SWCAA 400-040 contains the same language as WAC 173-400-040 and is also in the Washington SIP. *See* 40 C.F.R. § 52.2470(c)(70).

Earthjustice Petition at 11. The Petitioners also cite to RCW 70.94.154, the statutory provision for RACT requirements and the statutory basis for WAC 173-400-040. The Earthjustice Petitioners then note that the TransAlta Title V Permit employs no controls for CO_2 or mercury emissions, RACT or otherwise. Therefore, the Petitioners conclude, the failure of the Permit to include any emission limitations for CO_2 or mercury in the Permit violates the RACT requirements of the Washington SIP. *Id.* 11-12.

EPA Response.

Section 505(b)(2) of the CAA, 42 U.S.C. 7661d(b)(2), requires that a Title V petition be based "only on objections to the permit that were raised with reasonable specificity during the public comment period provided by the permitting agency (unless the petitioner demonstrates in the petition to the Administrator that it was impracticable to raise such objections within such period or unless the grounds for such objection arose after such period)." A review of the comments submitted by the Earthjustice Petitioners and other commenters during the public comment period on the draft permit issued by SWCAA shows that no commenter raised with reasonable specificity objections to the permit relating to the SIP RACT requirement—whether in connection with CO_2 and mercury or otherwise. In their general discussion of applicable laws and regulations under the Washington SIP, the comments filed by the Earthjustice Petitioners do cite to and recite the Washington SIP requirement that all emission units are required to use RACT to control air contaminants. *See* Letter from Janette Brimmer, Earthjustice, to Clint Lameroux, SWCAA, dated July 2, 2009, Re: TransAlta Centralia Generation, LLC, p. 4 (citing to SWCAA 400-040). The RACT requirement, however, is not further discussed at any point in the Earthjustice comment letter and the letter contains no allegation that the draft TransAlta Title V Permit fails to comply with RACT requirements in the SIP. Instead, with respect to CO_2 and mercury, the comments allege only that the TransAlta Title V Permit does not comply with the SIP requirement prohibiting emissions of air contaminants as provided in WAC 173-400-040(5). Not surprisingly, SWCAA's response to comments on the draft TransAlta Title V Permit responds to the commenters' concerns regarding the SIP requirement prohibiting emissions of air

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Washington has since revised this subparagraph of WAC 173-400-040 to substitute the word "permitting authority" for "ecology or the authority" and to substitute the codified reference to the authorizing legislation, RCW 70.94.154.

contaminants as it relates to CO_2, mercury, and NOx, but does not discuss the SIP RACT requirement, presumably because SWCAA did not understand the commenters' restatement of the SIP RACT requirement as an assertion that the draft TransAlta Title V Permit did not comply with the SIP RACT requirement.[8]

Based on the comments submitted during the public comment period on the draft TransAlta Permit, I therefore find that neither the Petitioners nor any other commenter raised with reasonable specificity objections to the permit based on an alleged failure to comply with the SIP RACT requirement with respect to CO_2 and mercury. Moreover, the Petitioners do not contend, nor have they established, that it was impracticable to raise these concerns during the public comment period or that grounds for this objection arose after the comment period. I therefore deny the Petition on this issue.

In any event, EPA also finds that Petitioners have not demonstrated that the failure of the TransAlta Title V Permit to include emission limitations for CO_2 or mercury violates the RACT requirements of the Washington SIP. The applicable requirement at issue requires all sources to meet RACT and further states, "Where current controls are determined to be less than RACT, ecology or the authority shall, as provided in section 8, chapter 252, Laws of 1993, define RACT for each source or source category and issue a *rule* or *regulatory order* requiring the installation of RACT." WAC 173-400-040 (emphasis added); *see also* SWCAA 400-040. When Ecology initially proposed that this sentence be added to WAC 173-400-040, the sentence stated that Ecology or the local authority would "define RACT for each source or source category and issue a rule or regulatory order *or operating permit* requiring the installation of RACT." *See* Washington State Department of Ecology, Responsiveness Summary for Amendments to the General Regulations for Sources of Air Pollution Chapter 173-400 WAC (July 1993), pg. 35 (emphasis added). Ecology received numerous comments on this proposed language requesting that the phrase "or operating permit" be removed from that sentence because:

> RACT review is a separate process from the operating permit and incorporated at the appropriate time. The language is not necessary since RACT requirements

[8] The letter from Earthjustice to Nancy Helm dated July 24, 2009, transmitting to EPA Region 10 the comments that the Earthjustice Petitioners submitted to SWCAA during the public comment period on the draft permit (prior to the submission of the Earthjustice Petition) also does not mention the SIP RACT requirement. In contrast, that letter does discuss the SIP requirement prohibiting emissions of air contaminants as provided in WAC 173-400-040(5), a further indication that Earthjustice did not raise the RACT issue in its public comments on the draft permit.

> existing at time of permit issuance will be included in the permits. There is no need to include language that may imply permits are used to establish new requirements. The permit should be a compilation of existing requirements including RACT.

Id. In response, Ecology removed the phrase "or operating permit condition" from this provision, explaining that the phrase "or operating permit condition" conflicted with the authorizing legislation for this RACT requirement in WAC-173-400-040. *Id.* Ecology explained that it interpreted the RACT requirement in the authorizing legislation, House Bill 1089 (now codified in RCW 70.94.154), as requiring "that RACT determinations will be made through rules and regulatory orders." *Id.* In other words, since this SIP requirement was first promulgated, Ecology has interpreted both the authorizing statute and the implementing regulation as requiring that RACT be established first in a regulation or in a regulatory order, and not in a Title V operating permit. Washington's EPA-approved Title V Operating Permit Program also expressly provides in WAC 173-401-605(3) that "emission standards and other requirements contained in rules or regulatory orders in effect at the time of operating permit issuance or renewal shall be considered RACT for purposes of permit issuance or renewal." *See* 59 Fed. Reg. 55813 (November 9, 1994) (final interim approval of Washington's Title V Operating Permit Program); 66 Fed. Reg. 42439 (August 13, 2001) (full approval of Washington's Title V program).

As discussed above, I conclude that the Petitioners have not met the procedural requirements for raising the RACT issue in this Title V Petition and deny the Petition on that basis. In addition, based on the language of the applicable requirement in the Washington SIP, the record preceding adoption of the applicable requirement, and the similar language in Washington's EPA-approved Title V program, I conclude that the Petitioners have not met their burden to demonstrate that the failure of the TransAlta Title V Permit to include emission limitations for CO_2 or mercury in the Permit violates the RACT requirements of the Washington SIP. This is an additional ground for denying the Petition on this issue.

D. "General Duty" Clause and Startup, Shutdown and Malfunction Provisions

The Earthjustice Petitioners' final contention is that the TransAlta Title V Permit provides for relaxation of a number of emissions requirements in the Permit. Earthjustice

Petition at 14. The Petitioners point in particular to what they term "general duty" language in Section VI, Req-28, of the TransAlta Title V Permit, which provides that:

> At all times, including periods of startup, shutdown, and malfunction, the plant shall, to the extent practicable, maintain and operate air pollution control equipment in a manner consistent with good air pollution control practice for minimizing emissions. Determination of whether acceptable operating and maintenance procedures are being used will be based on information available to SWCAA, which may include, but is not limited to, monitoring results, review of operating and maintenance procedures and records, and inspection of the source.

The Earthjustice Petitioners assert that this type of provision was found by a court to be contrary to the plain requirements of section 112 of the CAA in *Sierra Club v. Environmental Protection Agency*, 551 F.3d 1019 (D.C. Cir. 2008).[9] Earthjustice Petition at 15. Although the Petitioners concede that they did not raise this issue in commenting on the draft TransAlta Title V Permit, they request that EPA review the TransAlta Title V Permit to determine if it conforms to the requirements of the Clean Air Act as articulated by the Court in *Sierra Club v. EPA*. *Id.* at 2-3 & fn 2.

EPA Response.

As discussed in response to the previous issue, section 505(b)(2) of the CAA, 42 U.S.C. 7661d(b)(2), requires that a Title V petition be based "only on objections to the permit that were raised with reasonable specificity during the public comment period provided by the permitting agency (unless the petitioner demonstrates in the petition to the Administrator that it was impracticable to raise such objections within such period or unless the grounds for such objection arose after such period)." The Petitioners concede in their Petition that they did not raise this issue in their public comments on the draft TransAlta Title V Permit issued by SWCAA, and do not contend that it was impracticable to do so or that grounds for this objection arose after the

[9] In *Sierra Club v. Environmental Protection Agency*, the Court vacated the startup, shutdown, and malfunction (SSM) exemption in EPA's section 112 general provisions regulations as inconsistent with the CAA requirement that some section 112 standards apply continuously.

comment period.[10] Instead, the Earthjustice Petitioners request that EPA nonetheless independently assess whether amendments to the TransAlta Title V Permit are necessary to conform to current federal requirements. Because the Petitioners have not met the procedural requirements for petitioning EPA to object to the TransAlta Title V Permit on this issue, EPA denies the Petition in this respect.

IV. CONCLUSION

For the reasons set forth above and pursuant to section 505(b)(2) of the Clean Air Act, and 42 U.S.C. § 7661d(2), and 40 C.F.R. § 70.8(d), I hereby deny the Earthjustice Petitioner's request that EPA object to the issuance of the TransAlta Title V Permit.

April 28, 2011
Dated

Lisa P. Jackson
Administrator

[10] The Petitioners suggest that they did not comment on this issue during the public comment period on the draft TransAlta Title V Permit because they were still analyzing the *Sierra Club* decision. Earthjustice Petition at 3 n.2. That decision was issued in 2008, well before the Earthjustice Petitioners filed their comments on the draft permit on July 2, 2009.