

BEFORE THE ADMINISTRATOR  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

|                                 |                                  |
|---------------------------------|----------------------------------|
| _____ )                         |                                  |
| IN THE MATTER OF )              |                                  |
| TVA GALLATIN POWER PLANT )      |                                  |
| GALLATIN, TENNESSEE AND )       |                                  |
| TVA JOHNSONVILLE POWER PLANT )  | ORDER RESPONDING TO PETITIONER'S |
| NEW JOHNSONVILLE, TENNESSEE )   | REQUEST THAT THE ADMINISTRATOR   |
| ELECTRIC POWER GENERATION )     | OBJECT TO ISSUANCE OF STATE      |
| PETITION IV-2003-4 )            | OPERATING PERMITS                |
| )                               |                                  |
| PERMIT NOS. 546307 AND 546342 ) |                                  |
| ISSUED BY THE TENNESSEE )       |                                  |
| DEPARTMENT OF ENVIRONMENT AND ) |                                  |
| CONSERVATION )                  |                                  |
| _____ )                         |                                  |

**ORDER PARTIALLY GRANTING AND PARTIALLY DENYING PETITION FOR  
OBJECTION TO PERMIT**

On April 1, 2003, the United States Environmental Protection Agency ("EPA") received a petition from Mr. Reed Zars, on behalf of the Sierra Club ("Petitioner"), requesting that EPA object to the permits issued by the Tennessee Department of Environment and Conservation ("TDEC" or the "Department") to the Tennessee Valley Authority ("TVA") for its Gallatin Power Plant located in Gallatin (Sumner County), Tennessee, and its Johnsonville Power Plant located in New Johnsonville (Humphreys County), Tennessee. The permits are state operating permits issued February 24, 2003, pursuant to Title V of the Clean Air Act ("CAA" or the "Act"), 42 U.S.C. §§ 7661-7661f ("Title V"), EPA's implementing regulations at 40 C.F.R. Part 70 ("Part 70"), and TDEC's fully approved Part 70 program (Tennessee Air Pollution Control Regulations, Rule 1200-3-9-.02).

Petitioner alleges that certain conditions in the Gallatin and Johnsonville permits are inconsistent with Title V because they fail to assure compliance with applicable opacity limits and improperly shield TVA from its requirement to independently certify compliance. In addition, Petitioner alleges that, through these same permit conditions, TDEC inappropriately seeks to revise Tennessee's State Implementation Plan ("SIP") approved by EPA, and sets an opacity limit for the Johnsonville facility that is less stringent than required by the Tennessee SIP. Based on these allegations, Petitioner has requested that EPA object to the Gallatin and Johnsonville permits pursuant to CAA Section 505(b)(2).

Upon review of all the information before EPA, including the Gallatin and Johnsonville permits, the statements of basis prepared by TDEC for the draft permits, additional information provided by the permitting authority, and information provided by Petitioner in the petition, EPA grants in part and denies in part the petition for the reasons set forth below.

## I. STATUTORY AND REGULATORY FRAMEWORK

Section 502(d)(1) of the Act calls upon each state to develop and submit to EPA an operating permit program intended to meet the requirements of Title V. The State of Tennessee was granted full approval for its operating permit program on November 30, 2001. 40 C.F.R. Part 70, Appendix A. All major stationary sources of air pollution and certain other sources are required to apply for Title V operating permits that include emission limitations and other conditions as necessary to assure compliance with applicable requirements of the Act, including the applicable implementation plan. See CAA Sections 502(a) and 504(a).

The Title V operating permit program generally does not impose new substantive air quality control requirements (referred to as "applicable requirements") on sources. The program does require permits to contain monitoring, recordkeeping, reporting, and other conditions to assure compliance by sources with existing applicable requirements. See 57 Fed. Reg. 32250, 32251 (July 21, 1992). One purpose of the Title V program is to "enable the source, States, EPA, and the public to better understand the requirements to which the source is subject, and whether the source is meeting those requirements." Id. Thus, the Title V operating permit program is a vehicle for ensuring that existing air quality control requirements are appropriately applied to facility emission units in a single document, therefore enhancing compliance with the requirements of the Act.

Under Section 505(b) of the Act and 40 C.F.R. § 70.8(c)(1), the Administrator is authorized to review state operating permits issued pursuant to Title V, and to object to permits that are determined not to be in compliance with requirements of the Act, including the requirements of a State Implementation Plan (SIP) and Part 70. Upon receipt of a proposed permit, EPA has 45 days to object to final issuance of the permit. If EPA does not object to a permit on its own initiative, CAA Section 505(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. These sections also provide that petitions shall be based only on objections to the permit raised with reasonable specificity during the public comment period (unless the petitioner demonstrates that it was impracticable to raise such objections within that period or the grounds for such objections arose after that period).

Section 505(b)(2) of the Act requires the Administrator to issue a permit objection if a petitioner demonstrates that a permit is not in compliance with the requirements of the Act, including the requirements of Part 70 and the applicable implementation plan. If, in responding to a petition, EPA objects to a permit that has already been issued, EPA or 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) for reopening a permit for cause. A petition for review does not stay the effectiveness of the permit or its requirements if the permit was issued after the expiration of EPA's 45-day review period. See CAA Section 505(b)(2)-(3); 40 C.F.R. § 70.8(d).

## **II. BACKGROUND**

### **A. Permitting Chronology**

TDEC received a Title V permit application submitted by TVA for the Gallatin Power Plant on December 2, 1996. The Department determined the application to be administratively complete on December 9, 1996. On October 18, 2002, TDEC published a public notice providing for a 30-day public comment period on the draft Title V permit for the Gallatin facility. The public comment period for the draft permit ended on November 18, 2002.

TDEC received a Title V permit application submitted by TVA for the Johnsonville facility on December 6, 1996. The Department determined the application to be administratively complete on December 30, 1996. On October 18, 2002, TDEC published a public notice providing for a 30-day public comment period on the draft Title V permit for the Johnsonville facility. The public comment period for the draft permit ended on November 18, 2002.

TDEC received comments on the permits from the Sierra Club in letters dated November 18, 2002, for the Johnsonville permit and November 21, 2002, for the Gallatin permit, which serve as the basis for this petition. TDEC issued the final permits to TVA on February 24, 2003.

### **B. Facility Background**

The TVA Gallatin Fossil Plant is a steam electric generating facility consisting of four coal fired boilers, a combustion turbine plant, one auxiliary boiler, one coal handling facility, and one ash handling system. The facility produces approximately 428 megawatts (MWs) of electric power and has electrostatic precipitator control.

The TVA Johnsonville Fossil Plant is a steam electric generating facility consisting of ten coal fired boilers, a combustion turbine plant, two auxiliary boilers, one coal handling facility, and one ash handling system. The facility produces approximately 1259 megawatts (MWs) of electric power and has electrostatic precipitator control.

The primary air emissions from each facility are volatile organic compounds (VOCs), nitrogen oxides (NO<sub>x</sub>), particulate matter (PM), sulfur dioxide (SO<sub>2</sub>), carbon monoxide (CO), and hazardous air pollutants (HAPs). Among other requirements, the facilities are subject to limitations from the Tennessee SIP on opacity of emissions and on PM emissions. *See Title V Application Review*, Tennessee Valley Authority, Permit Nos. 546307 and 546342.

## **III. THRESHOLD REQUIREMENTS**

### **A. Timeliness of Petition**

TDEC submitted proposed permits for both the Gallatin and Johnsonville facilities to EPA on December 16, 2003. The EPA's 45-day review period for these proposed permits ended

January 30, 2003. The sixtieth day following that date was March 31, 2003, the deadline for filing any petitions to object to the permits. As noted previously, on April 1, 2003, EPA received a petition from Petitioner requesting that EPA object to the permits. The petition was postmarked by the U.S. Postal Service on March 31, 2003, therefore EPA considers this petition to be timely.

## **B. Objections Raised Previously with Reasonable Specificity**

Sierra Club raised the issues addressed in this Order in both its November 18, 2002, comment letter on the draft Title V permit for the TVA Johnsonville Fossil Plant and its November 21, 2002, comment letter on the draft Title V permit for the TVA Gallatin Fossil Plant. The State response can be found in TDEC's Response to Comments for TVA - Gallatin and Johnsonville Fossil Plants.

## **IV. ISSUES RAISED BY THE PETITIONER**

### **A. Permit condition fails to ensure compliance with the applicable opacity limits.**

Petitioner's comment: TDEC regularly provides written responses to TVA's quarterly reports finding that, because TVA's exceedances of the opacity limits in the Tennessee SIP are "below the applicable *de minimis* level," no enforcement action will be initiated. By stating in Condition E3-6 of the Johnsonville permit and E3-7 of the Gallatin permit that written responses "shall constitute prima facie evidence of compliance with the visible emission standard," TDEC is attempting to expand the *de minimis* enforcement provision of Rule 1200-3-20-.06, which is not part of the SIP, into an unwarranted determination of compliance.

EPA's response: EPA addressed the same "prima facie evidence of compliance" provision in a previous Order and determined that the provision was inconsistent with the requirement in 40 C.F.R. § 70.6(c)(1) that the permit contain provisions sufficient to assure compliance with the terms and conditions of the permit. In the Matter of TVA John Sevier Fossil Plant, Rogersville, Tennessee, and TVA Kingston Fossil Plant, Harriman, Tennessee, Electric Power Generation, Petition No. IV-2002-6, at 4-6 (July 2, 2003) ("TVA John Sevier/Kingston Order").<sup>1</sup> The same State and federal regulations are at issue in our review of the Gallatin and Johnsonville TVA permits. We reach the same conclusion here for the reasons described below, consistent with the previous determination.

Petitioner's comment addresses a provision in Condition E3-6 of the Johnsonville permit and E3-7 of the Gallatin permit. This provision states:

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<sup>1</sup> This Order is available at <http://www.epa.gov/region07/programs/artd/air/title5/petitiondb.htm>.

Written responses to the quarterly reports of excess emissions shall constitute prima facie evidence of compliance with the applicable visible emission standard. For purposes of annual certification of compliance with the applicable visible emissions condition, the acceptance, by the Division, of the quarterly reports of excess emissions shall be the basis of said certification.

The provision relates to the SIP-approved opacity standards set forth in TAPC Rules 1200-3-5.01 and 1200-3-5.05, and a *de minimis* enforcement provision set forth at TAPC Rule 1200-3-20-.06(5). To understand the issue concerning the “prima facie evidence of compliance” provision, we first explain these opacity standards and Tennessee’s *de minimis* enforcement provision.

Under TVA’s title V permit, the opacity standard for the Gallatin coal-fired boilers is 20 percent opacity, except for one 6 minute period per hour of not more than 40 percent opacity, set in accordance with TAPC Rule 1200-3-5-.01(1). See Gallatin Title V Permit at E3-7. Under TVA’s title V permit for the Johnsonville plant, the standard is 28 percent opacity, except for one 6 minute period per hour of not more than 40 percent opacity, set pursuant to TAPC Rule 1200-3-5-.05(6). See Johnsonville Title V Permit at E3-6. Both permits further provide that TVA is obligated to submit quarterly reports of excess opacity emissions, pursuant to TAPC Rules 1200-3-10-.02(2) and 1200-3-9-.02(11)(e)(1)(iii). See Gallatin Title V Permit at E3-13; Johnsonville Title V Permit at E3-12.

While the opacity standards set forth in TAPC Rules 1200-3-5.01 and 1200-3-5.05 do not include any exceptions for *de minimis* exceedances, Tennessee’s SIP does contain TAPC Rule 1200-3-20-.06(1), which requires that, in the event of excess emissions, a “notice of violation shall automatically be issued” with an exception for certain startup, shutdown, and malfunction (“SSM”) conditions or excess emissions covered by the *de minimis* provision set forth in Rule 1200-3-20-.06(5). TAPC Rule 1200-3-20-.06(5) provides that: “[w]here violations are determined from properly certified and operating continuous emission monitors, *no notice of violation will be automatically issued unless the specified de minimis levels are exceeded*” (emphasis added). The *de minimis* level applicable to a coal-fired boiler’s opacity is defined as 2 percent of the time during a calendar quarter (excluding periods of certain SSM events) so long as no more than one 24-hour exceedance per calendar year takes place. Id.

TDEC’s Office of General Counsel issued an interpretation of its *de minimis* rule (TAPC Rule 1200-3-20-.06(5)) to EPA on September 11, 2002, in response to EPA’s concerns about its effect on a source’s compliance obligation for the opacity standard. In this letter, TDEC stated that “. . . the *de minimis* rule paragraph does not establish an automatic exception to compliance, nor does it create an affirmative defense.” See Letter from Steven Stout, Assistant General Counsel, TDEC, to Kay Prince, EPA Region 4, September 11, 2002, at 2 (“TDEC Letter to EPA”). Additionally, Tennessee indicated that “the regulation stipulates that all excess emissions be viewed as violations of the opacity standard.” Id. Thus, according to TDEC’s September 2002 interpretation, TDEC intended to apply the *de minimis* criterion in TAPC Rule

1200-3-20-.06(5) to determine whether to take an immediate enforcement action rather than to determine whether the exceedance constitutes a violation. *Id.* (“EPA does not believe that Tennessee can use the language in ... the underlying regulation, to excuse violations at the facility” and “Tennessee accepts EPA’s stated interpretation of the rule paragraph...”); see also Response to Comments for the Gallatin and Johnsonville Plants, at 3 (“Tennessee concedes that, as written, 1200-3-20-.06(5) does no more than limit state enforcement discretion.”).

Against this background, EPA considers, in the context of this petition for permit objection, whether the permit conditions containing the “prima facie evidence of compliance” language in the Gallatin and Johnsonville permits are inconsistent with any applicable requirements or the requirements of Part 70.<sup>2</sup> For the reasons detailed below, EPA finds that because these permit conditions authorize letters acknowledging unexcused exceedances of the opacity standards to be evidence of *compliance*, the “prima facie evidence of compliance” language, on its face, is not consistent with 40 C.F.R. § 70.6(c)(1).

Section 70.6(c)(1) of EPA’s Title V regulations requires all Part 70 permits to contain “compliance certification,. . . requirements sufficient to assure compliance with the terms and conditions of the permit.” 40 C.F.R. § 70.6(c)(1). The “prima facie evidence of compliance” language in Conditions E3-6 and E3-7 of the permits is inconsistent with 40 C.F.R. § 70.6(c)(1) because the language fails to assure compliance with the permits’ opacity standards. For example, the first sentence of the permit conditions in question improperly provide that TDEC’s written responses acknowledging unexcused exceedances are evidence of compliance: “Written responses to the quarterly reports of excess emissions shall constitute prima facie evidence of compliance with the applicable visible emission standard.” TDEC has issued such written

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<sup>2</sup> This inquiry is separate and distinct from the question EPA addressed in 2001 of whether an implementation deficiency exists in TDEC’s Title V program. EPA first addressed Petitioner’s concern as part of the response to comments for the approval of the Tennessee Title V program. The National Parks Conservation Association commented in letters dated April 19, 2001 and June 11, 2001, that there were deficiencies in Tennessee’s administration of its Title V program based on the inclusion of “prima facie evidence of compliance” language in a single permit (the TVA Bull Run Fossil Plant permit). See 66 Fed. Reg. at 56997 (November 14, 2001). The Agency explained that Tennessee’s Rule 1200-3-20-.06(5) contemplates that all excess emissions be viewed as violations of the applicable opacity standard. This is consistent with EPA’s policy as articulated in the September 20, 1999, guidance memorandum entitled “State Implementation Plans (SIPs): Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown.”

EPA acknowledged that the “prima facie evidence of compliance” language could be problematic, but declined to find a deficiency in the State’s Title V program, noting, among other things, that EPA had not found any other permits containing the paragraph, and that if the clause resulted in improper compliance certifications or hindered enforcement of permit conditions by EPA or citizens, revision of the permit would be an appropriate action. EPA noted that it would continue to monitor the State’s use of Rule 1200-3-20-.06 in permits to ensure that violations are not excused.

EPA subsequently addressed the issue in reviewing two individual Title V permits in response to a citizen petition to object to the permits, pursuant to section 505(b)(2), and objected to the provisions at that time. See TVA John Sevier/Kingston Order at 4-6.

responses to TVA in response to TVA's quarterly reports of excess opacity measurements from the Gallatin and Johnsonville plants. See Letter from J. Stewart, TDEC, to D. Spencer, TVA Gallatin Fossil Plant, May 11, 2004; Letter from J. Stewart, TDEC, to D. Wallace, TVA Johnsonville Fossil Plant, May 17, 2004. These written responses acknowledge unexcused exceedances of the opacity standard, yet, under permit conditions E3-6 and E3-7, the letters are "prima facie evidence of compliance."<sup>3</sup> The "prima facie evidence of compliance" language is therefore contrary to the requirements of 40 C.F.R. § 70.6(c)(1) that the permit contain "compliance certification . . . requirements sufficient to assure compliance with the terms and conditions of the permit."

In addition to acknowledging unexcused exceedances, TDEC's letters to TVA go further and conclude that compliance may be certified based on the reported opacity measurements. See Letter from J. Stewart, TDEC, to D. Spencer, TVA Gallatin Fossil Plant, May 11, 2004; Letter from J. Stewart, TDEC, to D. Wallace, TVA Johnsonville Fossil Plant, May 17, 2004. EPA believes this conclusion is inappropriate in light of the State's September 11, 2002, interpretation of the *de minimis* provision in Rule 1200-3-20-.06(5) as being only related to enforcement decisions (rather than compliance determinations).<sup>4</sup> Nonetheless, despite the State's interpretation of the *de minimis* regulation set forth in the September 11, 2002, letter to EPA, the compliance certifications for the TVA Gallatin and Johnsonville plants do in fact certify that the plants are "in compliance" with the visible emissions standard, citing TDEC's responses to the quarterly opacity reports of *de minimis* excess opacity measurements as evidence of compliance. See Johnsonville Compliance Certification at 5; Gallatin Compliance Certification at 4.<sup>5</sup> At least

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<sup>3</sup> In its petition, Petitioner proffers a similar TDEC letter relating to another TVA plant (Kingston). Petitioner's letter is evidence of the nature of the exceedances at these facilities. TDEC's letter to TVA for the Kingston facility confirms the occurrence of "unexcusable exceedances," but determines that no action will be taken because the exceedances fall below the *de minimis* level. See, Petition, Att.2 ("no enforcement action will be initiated by this agency concerning the unexcusable exceedances listed in [the attachment]"). Since the time of the filing of the petition, TDEC issued similar letters to TVA for the Gallatin and Johnsonville plants. Though the letters do not repeat the phrase "unexcusable exceedances," it is clear from the SIP, and the State's interpretation as represented to EPA, that the exceedances are unexcusable exceedances of the opacity limits. See Rule 1200-3-5-.01 and -.02; Rule 1200-3-20-.06(5); TDEC Letter to EPA at 2.

<sup>4</sup> While EPA generally agrees that permitting authorities may establish enforcement policies, including action levels, which serve as general guidelines, a decision to not take enforcement may be based on many factors unrelated to compliance, and thus is not equivalent to a compliance determination.

<sup>5</sup> EPA notes that only TVA's cover letters to its certifications state that TVA is identifying non-exempt opacity periods in excess of the opacity standard as possible intermittent deviations, and at the same time, TVA's cover letters emphasize disagreement with EPA's interpretation of the effect of the TDEC letters on compliance: "EPA recently has determined that TVA should not certify compliance with opacity requirements on the basis of the Division's responses to quarterly opacity reports. *We believe EPA's determination is wrong* because the Division bases its determinations of opacity compliance on its knowledge of plant control equipment and maintenance practices as well as application of the two-percent *de minimis* provision in the permits..."(emphasis added). See Letter from D. Spencer, TVA Gallatin Fossil Plant, to B. Stephens, TDEC, February 24, 2004; Letter from D. Wallace, TVA Johnsonville Fossil Plant, to B. Stephens, TDEC, February 25, 2003 (sic).

one other TVA plant - the Bull Run Fossil Plant - is also certifying compliance based on TDEC's response to excess opacity reports where exceedances are covered by the *de minimis* regulation. Bull Run Compliance Certification at 3 (February 25, 2002).

Thus, as the plain language of Conditions E3-6 and E3-7 expressly authorize, TDEC's written responses to the quarterly reports may be (and are being) used by the sources as evidence of actual compliance with the opacity standard, despite exceedances of that standard and despite the State's representation to EPA that the *de minimis* rule – and presumably permit conditions arising from this rule – do not give rise to a determination of compliance. Consistent with EPA's determination in the TVA John Sevier/Kingston Order, EPA finds that the “prima facie evidence of compliance” provision is inconsistent with the requirements of 40 C.F.R. § 70.6(c)(1). Accordingly, EPA grants the petition based on this issue, and objects to the “prima facie evidence of compliance” provision in Condition E3-6 of the Johnsonville permit and Condition E3-7 of the Gallatin permit. EPA directs TDEC to reopen the Gallatin and Johnsonville Title V permits to resolve this portion of the objection.

**B. TDEC is improperly shielding the source from its requirement to independently certify compliance.**

Petitioner's comment: The permit provisions in Condition E3-6 in the Johnsonville permit and E3-7 in the Gallatin permit improperly shield TVA from its requirement to independently certify compliance. The provision basically states that if Tennessee says the quarterly reports are acceptable, then TVA can rely on that representation to claim it is in compliance with the underlying emission limit under Part 70. Again, this is expanding the *de minimis* rule well beyond its plain meaning.

EPA's response: Condition E3-6 in the Johnsonville permit and E3-7 in the Gallatin permit state in part: “For purposes of annual certification of compliance with the applicable visible emissions condition, the acceptance, by the Division, of the quarterly reports of excess emissions shall be the basis of said certification.” EPA reviewed this same provision in the TVA John Sevier/Kingston Order, and determined that it was inconsistent with the compliance certification provisions in 40 C.F.R. § 70.6(c)(5)(iii). TVA John Sevier/Kingston Order at 6-7. EPA has reached the same conclusion on this issue in reference to the Gallatin and Johnsonville permits for the reasons described below, consistent with that Order.

Compliance certifications must be based on, among other things, the monitoring data described in 40 C.F.R. § 70.6(c)(5)(iii)(B) and must identify and take into account each deviation. 40 C.F.R. § 70.6(c)(5)(iii)(C). Every source must base its annual compliance certification on its own evaluation of such data. Id. Conditions E3-6 and E3-7 improperly shift the burden of assessing compliance status to TDEC by providing that certain actions by TDEC form the basis of the source's annual compliance certification. Because a source's annual compliance certification must be based on its own evaluation of its data, the permit may not authorize TVA to certify compliance based on something else - *e.g.*, TDEC's acceptance of

quarterly emissions reports or a written response from TDEC; even one that purports to find the source in compliance with the opacity standard. Thus, the provision in Conditions E3-6 and E3-7 relating to the annual compliance certification is not in compliance with 40 C.F.R. § 70.6(c)(5)(iii).<sup>6</sup> Therefore, EPA grants the petition on this issue and objects to this provision as set forth in Condition E3-6 of the Johnsonville permit and Condition E3-7 of the Gallatin permit. EPA directs TDEC to reopen the Gallatin and Johnsonville Title V permits to resolve this portion of the objection.

**C. TDEC does not have the ability to make changes to the SIP without EPA approval.**

Petitioner's comment: Conditions E3-6 and E3-7 can be characterized as a “director’s discretion” provision, where a finding of compliance is based upon the *de minimis* language in Rule 1200-3-20-.06. By including this condition in the permits, the State seeks to revise unilaterally the EPA-approved SIP without going through the SIP revision procedures. Such a revision to the SIP by a state is prohibited under section 110(i) of the Clean Air Act.

EPA's response: Since EPA has granted the relief requested by Petitioner by objecting to the “prima facie” provision of Conditions E3-6 and E3-7 on other grounds, this issue need not be addressed.

**D. Permit Condition Contains Less Stringent Opacity Limit for Johnsonville than required in the SIP.**

Petitioner's comment: Condition E3-6 of the Johnsonville permit allows for an opacity limit that does not comply with the requirements of the Tennessee SIP. Specifically, this condition provides for a visible emission limit of 28 percent opacity with one six-minute period per hour of up to 40 percent opacity. This provision conflicts with the applicable 20 percent opacity limit in the Rule 1200-3-5-.01(1) of the EPA-approved SIP. TDEC stated that Johnsonville’s relaxed opacity limit was set pursuant to Rule 1200-3-5-.05. There is nothing in the EPA approved version of the rule that establishes or allows a variance from the SIP’s 20 percent opacity limit for the Johnsonville facility or any other facility.

EPA's response: Petitioner’s interpretation of the applicability of the visible emissions standard in Rule 1200-3-5-.01 is incorrect. According to Rule 1200-3-5-.01(5), “the visible emissions limits set forth in Rule 1200-3-5-.01 [regarding a 20 percent opacity limit], shall apply unless a specific visible emission standard is set in a subsequent paragraph of this rule or subsequent rule of this Division 1200-3.” (Emphasis added). TDEC has identified Rule 1200-3-

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<sup>6</sup> We also note that, under the Clean Air Act, EPA or citizens may use direct emissions monitoring data generated by continuous emissions monitors as well as any other credible evidence, to establish or support an independent effort to determine a facility’s compliance status. See 63 Fed. Reg. 8314 (February 24, 1997); see also 66 Fed. Reg. at 56997-56998 (November 14, 2001). The State’s Title V regulations at Rule 1200-3-9-.02(11)(e)(3)(v)(III) reflect this general duty to consider credible evidence known to the source in the compliance certification.

5-.05(6) as the applicable regulation for this condition – that is, a “subsequent rule” establishing a specific visible emission standard.

Under Rule 1200-3-5-.05(6), certain existing sources with a certificate of validation are subject to a 40 percent opacity limit as follows: “No visible emissions in excess of forty (40) percent opacity for more than one - six (6) minute period in any one (1) hour or more than twenty-four (24) minutes in any one twenty-four (24) hour period.”<sup>7</sup> Rule 1200-3-5-.05(6). This provision has been approved by EPA as a revision to the Tennessee SIP. 40 C.F.R. § 52.2220(c); 62 Fed. Reg. 43643, 43644 (Aug. 15, 1997). Thus, Petitioner is incorrect in contending that the SIP does not authorize a variance from the 20 percent opacity limit set forth in Rule 200-3-5-.01(1).<sup>8</sup> With regard to the opacity limit, Petitioner has not demonstrated that the permit is in non-compliance with the Act or the applicable implementation plan. Therefore, EPA denies the petition with respect to this issue.

## V. CONCLUSION

For the reasons discussed above and pursuant to Section 505(b)(2) of the Act and 40 C.F.R. §§ 70.7(g)(4) and (5) and 70.8(d), EPA hereby grants the petition of the Sierra Club concerning the Gallatin and Johnsonville Title V operating permits with respect to issues IV.A. and IV.B., finding cause to reopen the permits. EPA dismisses the petition with respect to issue IV.C., and denies the petition with respect to IV.D.

So ordered.

July 29, 2004  
Date

/s/  
Michael O. Leavitt  
Administrator

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<sup>7</sup> The record reflects that the source has a current certificate of validation issued by TDEC.

<sup>8</sup> TAPC Rule 1200-3-5-.01 (3) allows for the establishment of a more restrictive emission limit than is otherwise specified in the chapter, upon mutual agreement between the source and the Technical Secretary. The 28 percent opacity limit contained in the permit is more restrictive than the regulatory limit of 40 percent that is established in TAPCR 1200-3-5-.05(6). Additionally, Section 116 of the Clean Air Act states in part, “such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.” Therefore, the state can establish a limit that is more restrictive than the 40% opacity limit included in the federally enforceable SIP.