

BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF)	PETITION No. V-2016-10
)	
MIDWEST GENERATION, LLC)	ORDER RESPONDING TO
WAUKEGAN GENERATING STATION)	PETITIONERS REQUESTING
LAKE COUNTY, ILLINOIS)	OBJECTION TO THE ISSUANCE OF
PERMIT No. 95090047)	TITLE V OPERATING PERMIT
)	
ISSUED BY THE ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY)	

ORDER DENYING A PETITION FOR OBJECTION TO PERMIT

I. INTRODUCTION

The U.S. Environmental Protection Agency (EPA) received a petition dated August 5, 2016 (the Petition) from the Sierra Club, Respiratory Health Association and Environmental Law and Policy Center (the Petitioners), pursuant to section 505(b)(2) of the Clean Air Act (CAA or Act), 42 United States Code (U.S.C.) § 7661d(b)(2). The Petition requests that the EPA Administrator object to the proposed operating permit No. 95090047 (the 2016 Permit) issued by the Illinois Environmental Protection Agency (IEPA) for the Waukegan Generating Station (Waukegan Station or the facility) in Lake County, Illinois. The operating permit was issued pursuant to title V of the CAA, CAA §§ 501–507, 42 U.S.C. §§ 7661–7661f, and 415 Illinois Compiled Statutes (ILCS) 5/39.5. *See also* 40 Code of Federal Regulations (C.F.R.) part 70 (title V implementing regulations). This type of operating permit is also referred to as a title V permit or part 70 permit.

Based on a review of the Petition and other relevant materials, including the Permit, the permit record, and relevant statutory and regulatory authorities, and as explained further below, the EPA denies the Petition requesting that the EPA Administrator object to the Permit.

II. STATUTORY AND REGULATORY FRAMEWORK

A. Title V Permits

Section 502(d)(1) of the CAA, 42 U.S.C. § 7661a(d)(1), requires each state to develop and submit to the EPA an operating permit program to meet the requirements of title V of the CAA and the EPA’s implementing regulations at 40 C.F.R. part 70. The state of Illinois submitted a title V program governing the issuance of operating permits in 1993. The EPA granted interim approval of the state’s program in 1995, and full approval in 2001, effective November 30, 2001. See 66 Fed. Reg. 62946 (December 4, 2001). This program is codified in 415 ILCS 5/39.5.

All major stationary sources of air pollution and certain other sources are required to apply for and operate in accordance with title V operating permits that include emission limitations and

other conditions as necessary to assure compliance with applicable requirements of the CAA, including the requirements of the applicable implementation plan. CAA §§ 502(a), 503, 504(a), 42 U.S.C. §§ 7661a(a), 7661b, 7661c(a). The title V operating permit program generally does not impose new substantive air quality control requirements, but does require permits to contain adequate monitoring, recordkeeping, reporting, and other requirements to assure compliance with applicable requirements. 57 Fed. Reg. 32250, 32251 (July 21, 1992); *see* CAA § 504(c), 42 U.S.C. § 7661c(c). One purpose of the title V program is to “enable the source, States, EPA, and the public to understand better the requirements to which the source is subject, and whether the source is meeting those requirements.” 57 Fed. Reg. at 32251. Thus, the title V operating permit program is a vehicle for compiling the air quality control requirements as they apply to the source’s emission units and for providing adequate monitoring, recordkeeping, and reporting to assure compliance with such requirements.

B. Review of Issues in a Petition

State and local permitting authorities issue title V permits pursuant to their EPA-approved title V programs. Under CAA § 505(a), 42 U.S.C. § 7661d(a), and the relevant implementing regulations found at 40 C.F.R. § 70.8(a), states are required to submit each proposed title V operating permit to the EPA for review. Upon receipt of a proposed permit, the EPA has 45 days to object to final issuance of the proposed permit if the EPA determines that the proposed permit is not in compliance with applicable requirements under the Act. CAA § 505(b)(1), 42 U.S.C. § 7661d(b)(1); *see also* 40 C.F.R. § 70.8(c). If the EPA does not object to a permit on its own initiative, any person may, within 60 days of the expiration of the EPA’s 45-day review period, petition the Administrator to object to the permit. CAA § 505(b)(2), 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d).

The petition shall be based only on objections to the permit that were raised with reasonable specificity during the public comment period provided by the permitting authority (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). CAA § 505(b)(2), 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d). In response to such a petition, the Act requires the Administrator to issue an objection if a petitioner demonstrates that a permit is not in compliance with the requirements of the Act. CAA § 505(b)(2), 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(c)(1).¹ Under section 505(b)(2) of the Act, the burden is on the petitioner to make the required demonstration to the EPA.²

The petitioner’s demonstration burden is a critical component of CAA § 505(b)(2). As courts have recognized, CAA § 505(b)(2) contains both a “discretionary component,” under which the Administrator determines whether a petition demonstrates that a permit is not in compliance with the requirements of the Act, and a nondiscretionary duty on the Administrator’s part to object

¹ *See also New York Public Interest Research Group, Inc. v. Whitman*, 321 F.3d 316, 333 n.11 (2d Cir. 2003) (*NYPIRG*).

² *WildEarth Guardians v. EPA*, 728 F.3d 1075, 1081–82 (10th Cir. 2013); *MacClarence v. EPA*, 596 F.3d 1123, 1130–33 (9th Cir. 2010); *Sierra Club v. EPA*, 557 F.3d 401, 405–07 (6th Cir. 2009); *Sierra Club v. Johnson*, 541 F.3d 1257, 1266–67 (11th Cir. 2008); *Citizens Against Ruining the Environment v. EPA*, 535 F.3d 670, 677–78 (7th Cir. 2008); *cf. NYPIRG*, 321 F.3d at 333 n.11.

where such a demonstration is made. *Sierra Club v. Johnson*, 541 F.3d at 1265–66 (“[I]t is undeniable [that CAA § 505(b)(2)] also contains a discretionary component: it requires the Administrator to make a judgment of whether a petition demonstrates a permit does not comply with clean air requirements.”); *NYPIRG*, 321 F.3d at 333. Courts have also made clear that the Administrator is only obligated to grant a petition to object under CAA § 505(b)(2) if the Administrator determines that the petitioner has demonstrated that the permit is not in compliance with requirements of the Act. *Citizens Against Ruining the Environment*, 535 F.3d at 677 (stating that § 505(b)(2) “clearly obligates the Administrator to (1) determine whether the petition demonstrates noncompliance and (2) object *if* such a demonstration is made” (emphasis added)).³ When courts have reviewed the EPA’s interpretation of the ambiguous term “demonstrates” and its determination as to whether the demonstration has been made, they have applied a deferential standard of review. *See, e.g., MacClarence*, 596 F.3d at 1130–31.⁴ Certain aspects of the petitioner’s demonstration burden are discussed below. A more detailed discussion can be found in *In the Matter of Consolidated Environmental Management, Inc., Nucor Steel Louisiana*, Order on Petition Nos. VI-2011-06 and VI-2012-07 at 4–7 (June 19, 2013) (*Nucor II Order*).

The EPA considers a number of criteria in determining whether a petitioner has demonstrated noncompliance with the Act. *See generally Nucor II Order* at 7. For example, one such criterion is whether the petitioner has addressed the state or local permitting authority’s decision and reasoning. The EPA expects the petitioner to address the permitting authority’s final decision, and the permitting authority’s final reasoning (including the state’s response to comments), where these documents were available during the timeframe for filing the petition. *See MacClarence*, 596 F.3d at 1132–33.⁵ Another factor the EPA examines is whether a petitioner has provided the relevant analyses and citations to support its claims. If a petitioner does not, the EPA is left to work out the basis for the petitioner’s objection, contrary to Congress’s express allocation of the burden of demonstration to the petitioner in CAA § 505(b)(2). *See MacClarence*, 596 F.3d at 1131 (“[T]he Administrator’s requirement that [a title V petitioner] support his allegations with legal reasoning, evidence, and references is reasonable and persuasive.”).⁶ Relatedly, the EPA has pointed out in numerous previous orders that general assertions or allegations did not meet the demonstration standard. *See, e.g., In the Matter of Luminant Generation Co., Sandow 5 Generating Plant*, Order on Petition Number VI-2011-05 at

³ *See also Sierra Club v. Johnson*, 541 F.3d at 1265 (“Congress’s use of the word ‘shall’ . . . plainly mandates an objection *whenever* a petitioner demonstrates noncompliance.” (emphasis added)).

⁴ *See also Sierra Club v. Johnson*, 541 F.3d at 1265–66; *Citizens Against Ruining the Environment*, 535 F.3d at 678.

⁵ *See also, e.g., Finger Lakes Zero Waste Coalition v. EPA*, 734 Fed. App’x *11, *15 (2d Cir. 2018) (summary order); *In the Matter of Noranda Alumina, LLC*, Order on Petition No. VI-2011-04 at 20–21 (December 14, 2012) (denying a title V petition issue where petitioners did not respond to the state’s explanation in response to comments or explain why the state erred or why the permit was deficient); *In the Matter of Kentucky Syngas, LLC*, Order on Petition No. IV-2010-9 at 41 (June 22, 2012) (denying a title V petition issue where petitioners did not acknowledge or reply to the state’s response to comments or provide a particularized rationale for why the state erred or the permit was deficient); *In the Matter of Georgia Power Company*, Order on Petitions at 9–13 (January 8, 2007) (*Georgia Power Plants Order*) (denying a title V petition issue where petitioners did not address a potential defense that the state had pointed out in the response to comments).

⁶ *See also In the Matter of Murphy Oil USA, Inc.*, Order on Petition No. VI-2011-02 at 12 (September 21, 2011) (denying a title V petition claim where petitioners did not cite any specific applicable requirement that lacked required monitoring); *In the Matter of Portland Generating Station*, Order on Petition at 7 (June 20, 2007) (*Portland Generating Station Order*).

9 (January 15, 2013).⁷ Also, the failure to address a key element of a particular issue presents further grounds for the EPA to determine that a petitioner has not demonstrated a flaw in the permit. *See, e.g., In the Matter of EME Homer City Generation LP and First Energy Generation Corp.*, Order on Petition Nos. III-2012-06, III-2012-07, and III-2013-02 at 48 (July 30, 2014).⁸

The information that the EPA considers in making a determination whether to grant or deny a petition submitted under 40 C.F.R. § 70.8(d) on a proposed permit generally includes, but is not limited to, the administrative record for the proposed permit and the petition, including attachments to the petition. The administrative record for a particular proposed permit includes the draft and proposed permits; any permit applications that relate to the draft or proposed permits; the statement of basis for the draft and proposed permits; the permitting authority's written responses to comments, including responses to all significant comments raised during the public participation process on the draft permit; relevant supporting materials made available to the public according to 40 C.F.R. § 70.7(h)(2); and all other materials available to the permitting authority that are relevant to the permitting decision and that the permitting authority made available to the public according to § 70.7(h)(2). If a final permit and a statement of basis for the final permit are available during the agency's review of a petition on a proposed permit, those documents may also be considered when making a determination whether to grant or deny the petition.

III. BACKGROUND

A. The Waukegan Generating Station Facility

The Waukegan Generating Station facility is a coal-fired power plant owned and operated by Midwest Generation, LLC (Midwest Generation). The facility is located in Lake County, Illinois and consists of coal-fired boilers and ancillary equipment including coal handling, coal processing, and fly ash equipment.

B. Permitting History

Midwest Generation filed an application for an initial title V permit for Waukegan Station on September 7, 1995. IEPA issued the initial title V permit No. 95090047 to Midwest Generation on February 7, 2006. Midwest Generation appealed the permit to the Illinois Pollution Control Board (Board) on March 13, 2006, challenging certain permit conditions. The Board accepted the appeal and on March 16, 2006, the permit was stayed until resolution of the appeal.⁹ The appeal was settled on April 9, 2015 and resulted in IEPA proposing a revised title V permit for which a public comment period was held beginning on July 18, 2015. The EPA provided formal comments on the permit that were submitted to IEPA on September 23, 2015. IEPA provided a

⁷ *See also Portland Generating Station Order* at 7 (“[C]onclusory statements alone are insufficient to establish the applicability of [an applicable requirement].”); *In the Matter of BP Exploration (Alaska) Inc., Gathering Center #1*, Order on Petition Number VII-2004-02 at 8 (April 20, 2007); *Georgia Power Plants Order* at 9–13; *In the Matter of Chevron Products Co., Richmond, Calif. Facility*, Order on Petition No. IX-2004–10 at 12, 24 (March 15, 2005).

⁸ *See also In the Matter of Hu Honua Bioenergy*, Order on Petition No. IX-2011-1 at 19–20 (February 7, 2014); *Georgia Power Plants Order* at 10.

⁹ The Waukegan Station title V Permit was one of many coal fired power plant permits that was appealed to the Board and stayed in their entirety.

response to all formal comments and issued the final revised title V permit on June 16, 2016, which is the subject of this Petition.

After the Petition was submitted, IEPA initiated proceedings to reopen the permit pursuant to 415 ILC 5/39.5(15)(a)(i) and eventually issued a significant modification of the Permit on December 31, 2019 (2019 Permit). The 2019 Permit includes revisions to portions of the Permit at issue in the Petition. As part of the 2019 Permit issuance process, IEPA provided a public comment period from August 19, 2019, through November 2, 2019, and held a public hearing on October 3, 2019. The proposed 2019 Permit was sent to the EPA for a 45-day review period on December 23, 2019 and IEPA issued the final permit on December 31, 2019. The period to submit a petition to the Administrator to object to the 2019 Permit expired on April 6, 2020.

C. Timeliness of Petition

Pursuant to the CAA, if the EPA does not object to a proposed permit during its 45-day review period, any person may petition the Administrator within 60 days after the expiration of the 45-day review period to object. 42 U.S.C § 7661d(b)(2). The EPA's 45-day review period expired on July 2, 2016. Thus, any petition seeking the EPA's objection to the Proposed Permit was due on or before August 31, 2016. The Petition was dated August 5, 2016, and, therefore, the EPA finds that the Petitioners timely filed the Petition.

IV. DETERMINATIONS ON CLAIMS RAISED BY THE PETITIONERS

Many of the permit conditions that are the subject of the claims presented by the Petitioners have been materially altered and superseded by the issuance of the 2019 Permit discussed above. As described in greater detail below, the issuance of the 2019 Permit, which changes many of the relevant portions of the Permit to which the Petitioners seek objection, renders those claims moot. *See In the Matter of EME Homer City Generation and First Energy Generation – Mansfield*, Order on Petition No. III-2012-06, III-2012-07, and III-2013-02 (July 30, 2014) at 33, 43,46,54 (explaining that a significant modification to the final permit that was issued after the petition resulted in multiple claims being moot). The EPA has identified the claims to which this applies in its individual responses below.

A title V petition may be rendered moot when the version of the permit on which it is based has been withdrawn, superseded, or otherwise no longer operative. *See In the Matter of Consolidated Env'tl Mgmt., Inc. – Nucor Steel Louisiana et al.*, Order on Petition No. 3086-V0 & 2560-00281-V1, at 13 (June 19, 2013) (Nucor Order); *In the Matter of Duke Energy Indiana Edwardsport Generating Station*, Order on Permit No. T083-27138-00003, at 11 (Dec. 13, 2011). Where a superseding proposed permit, with a new rationale, has been put before the EPA, to the extent that the changes relate to the specific objection(s) raised in the petition, the petition is clearly moot. Nucor Order at 13. It makes little sense for the EPA to review an issue that has been overtaken by later events. *Id.* Where there are relevant substantive differences between a permit before the EPA on review and a superseded version of that permit on which a party has petitioned the EPA to object, the “disconnect” between the permitting posture and the posture of the petition makes a determination of mootness even more appropriate. *In the Matter of Meraux Refinery St. Bernard Parish, Louisiana*, Order on Petition No. VI-2012-04, at 18 (May 29, 2015)

(Meraux Order). Among other things, the relief sought by a petition such as Meraux—i.e., an objection by the Administrator to a superseded permit under CAA § 505(b)(2)— would be of uncertain legal or practical consequence, given that the proposed permit terms objected to have already changed. *Id.*

To the extent Petitioners' concerns regarding the issues they raised in the Petition persist, or to the extent they believe the revised permit otherwise is not in compliance with the requirements of the CAA, the Petitioners had the opportunity to petition the Administrator to object to the issuance of the revised permit in accordance with CAA § 505(b) during the time period described above. The EPA is not aware of any petitions requesting the Administrator object to the 2019 Permit.

Claim A: The Petitioners' Claim that "the Permit Fails to Include a Compliance Schedule for Opacity Violations."

Petitioners Claim: The Petitioners contend that the permit must include a compliance schedule for documented opacity violations. The Petitioners note that a title V permit applicant must disclose its compliance status and either certify compliance or enter into an enforceable schedule of compliance to remedy violations. If the facility is in violation of an applicable requirement at the time it receives an operating permit, the facility's permit must include a compliance schedule. Petition at 6, citing to 42 U.S.C. §7661(b) and 40 CFR §70.5(c)(8-9).

The Petitioners assert that Midwest Generation certified compliance with all requirements and IEPA appears to have accepted this certification without considering ongoing enforcement action by the EPA and Illinois Attorney General against Midwest Generation over opacity violations. Petition at 5. In support of its position, the Petitioners cite to case law stating that a state or federal Notice of Violation (NOV) or an ongoing enforcement action are sufficient demonstrations of violations to trigger the requirement for a compliance schedule. Petition at 6, citing to *NY PIRG v. Johnson*, 427 F.3d 172, 180 (2005).

The Petitioners acknowledge IEPA's response to comments indicating that this issue is beyond the scope of this modification proceeding but argue that IEPA does not have the authority to issue a significant modification to a title V permit that does not comply with the requirements of the title V program. Petition at 7. The Petitioners assert that the operation of the facility with opacity violations and without a compliance schedule violates the SIP and, therefore, the Administrator must object.

EPA's Response: For the following reasons, the EPA denies the Petitioners' request for an objection on this claim.

On August 27, 2009, the EPA and the state of Illinois filed a complaint against Midwest Generation for alleged violations, including alleged violations of opacity and PM emission standards at six of its coal-fired facilities, of which Waukegan Station is one. In settlement of this complaint, Midwest Generation entered into a Consent Decree on May 10, 2018, which required Midwest Generation to, among other items, implement corrective actions at Waukegan Station. These corrective action measures include using certain work practices for the electrostatic

precipitators (ESPs) that control the PM emissions from the boilers and operating and maintaining continuous emissions monitoring systems on the boilers for PM emissions. The Consent Decree mandated that the requirements pertaining to Waukegan Station be addressed and made enforceable through a construction permit. Midwest Generation applied for and was issued a construction permit containing the Consent Decree requirements in June 2019 (Construction Permit 19030011). Relevant conditions of the construction permit and the associated Consent Decree have been incorporated by reference into the 2019 Permit. *See* 2019 Permit Condition 6.8.

The inclusion of the Consent Decree requirements in the 2019 Permit resolves the past opacity violations and eliminates the need for a compliance schedule on this issue. The Petitioners had the opportunity to review these requirements in the 2019 Permit and – to the extent that their concerns regarding a compliance schedule persisted – to petition the Administrator to object to the Permit. The Petitioners did not submit comments regarding this issue nor petition EPA to object to the 2019 Permit. As the Petitioners’ claim has been resolved with the inclusion of Consent Decree requirements, this claim is now moot.

Claim B: The Petitioners’ Claim that IEPA “Improperly Involved Outside Entities in Drafting the Permit’s Statement of Basis.”

The Petitioners assert that the Administrator must object because IEPA improperly allowed at least one private entity to give input on Statements of Basis for Illinois coal plants. Petition at 7. The Petitioners explain that under 40 CFR §70.7(a)(5), the “permitting authority” must provide a statement that sets forth the legal and factual basis for the draft permit conditions.

The Petitioners point to a June 2015 draft statement of basis obtained through a Freedom of Information Act request. The draft included comments and mark-ups by an outside attorney. The Petitioners assert that IEPA, as the permitting authority, must issue the statement of basis and that it should not be “a vehicle for private entities to bolster arguments for their preferred regulations.” Petition at 8.

EPA’s Response: For the following reasons, the EPA denies the Petitioners’ request for an objection on this claim.

As the Petitioners correctly state, 40 CFR § 70.7(a)(5) requires that the permitting authority shall provide a statement that sets forth the legal and factual basis for the draft permit conditions. This statement is typically referred to as a statement of basis. The EPA has previously noted that the statement of basis is not part of the permit, nor is it enforceable. It is not used to set limits or create obligations for the facility. *See In the Matter of Midwest Generation, LLC Waukegan Generating Station*, Order on Petition No. V-2004-5 at 8 (September 22, 2005) (Midwest Generation Order (2005)). This is not to say that the Administrator will not object if there is a flaw in the statement of basis which results in a deficiency in the permit.

In this case, IEPA did prepare and present for public review a statement of basis. Regardless of whether IEPA allowed an outside party to provide comments and mark-ups on a draft version of the document, it was IEPA that issued it. The Petitioners have not pointed to any inaccuracies or

flaws in the document, only concerns that an outside party provided input. The Petitioners have failed to identify how this contravenes the regulatory requirement that the permitting authority provide a statement of basis or how IEPA's actions resulted in a deficiency in the Permit.

Therefore, the EPA denies the Petitioners' request for an objection on these claims.

Claim C: The Petitioners' Claim that "the Clean Air Act Permit Program (CAAPP) Permit Does not Provide for Adequate Inspections of Coal and Fly Ash Handling Processes."

The Petitioners assert that the Permit does not require adequate inspections of coal and fly ash handling processes. Specifically, the Petitioners have concerns regarding permit conditions 7.2.8(b), 7.3.8(b), and 7.4.8(b) which, among other things, direct the facility to inspect affected operations by either monitoring visible emissions (VE) or opacity annually. Petition at 8. The Petitioners agree with EPA comments made during the comment period that state it is not clear how the draft permit inspection requirements and frequency of the required VE observations are adequate to yield reliable and accurate emissions data as required by 40 CFR 70.6(a)(3)(i)(B). Petition at 8, citing to IEPA Responsiveness Summary at 85.

The Petitioners do not believe that IEPA's response is adequate. IEPA's response states that for this permit, "[a] key component of the Periodic Monitoring is that Midwest Generation must operate designated control measures for the equipment on an as-needed basis or, in other words, as necessary to assure compliance..." The Petitioners assert that this requirement does not remedy the infrequent visible emissions monitoring and is not practicably enforceable since the term "as needed" is subjective and therefore unenforceable by citizens or IEPA. The Petitioners also disagree with IEPA's response that more frequent monitoring of visible emissions would not provide "useful information." The Petitioners assert that this response is contradicted by IEPA's other statements and that if once-per-year VE monitoring provides useful information, then "it is impossible to understand why more frequent VE monitoring wouldn't provide more useful information." Petition at 8. The Petitioners argue that the absence of VE would confirm that the control measures are operating and being implemented properly.

The Petitioners also argue that it is not sufficient to require the use of control measures without actual regular monitoring of actual emissions.

EPA's Response: For the following reasons, the EPA denies the Petitioners' request for an objection on this claim.

As an initial matter, the Petitioners failed to fully evaluate all the monitoring required by the Permit. They also failed to demonstrate that the monitoring and other provisions of the Permit, which they did not discuss in their petition, when viewed as a whole and in the context of the entire Permit, are inadequate to assure compliance with fugitive emission limits. Petitioners alleging that monitoring requirements are not adequate carry the burden of demonstrating that inadequacy. *See In the Matter of Public Service New Hampshire, Shiller Station*, Order on Petition No. VI-2014-04 at 14-16 (July 28, 2015) (finding that because the Petitioner did not

address the overall monitoring scheme, the Petitioner did not demonstrate that the monitoring requirements in the Permit were insufficient to assure compliance.)

Annual inspections are not the only method the Permit employs to ensure that applicable emission standards related to fugitive emissions and opacity are met. The Permit also requires using work practice standards, including control measures such as enclosures, natural surface moisture, application of dust suppressant, water sprays, and use of dust collection devices. *See* 2016 Permit Condition 7.2.6(a)(i). In addition to the annual inspections, the Permittee is also required to perform monthly inspections of the affected operations to confirm compliance with these control measure requirements. *See* 2016 Permit Condition 7.2.8(a). In addition to the work practice standards, additional inspections include monthly inspections of the coal storage bunker baghouses and the railcar unloader baghouses. These monthly inspections include verifying that visible emissions are not observed in the baghouse exhaust. *See* 2016 Permit Conditions 7.2.8(c) and (d). These inspections, in conjunction with annual VE monitoring, are meant to ensure that the control measures are being properly implemented and are sufficient to ensure compliance with opacity and fugitive emissions limits.

Moreover, additional conditions have been added to the 2019 Permit that address concerns raised by the Petitioners. Specifically, additional monitoring requirements for the coal piles has been added, increasing monitoring to twice per month from May through November and once per month during other months. *See* 2019 Permit Condition 7.2.8(e). This additional monitoring of an area with the greatest likelihood of having fugitive emissions will provide increased checks on the control measures. The additional monitoring requirements include Reference Method 22 testing¹⁰ to address compliance with opacity limitations and limitations on fugitive particulate matter (PM) crossing the property boundary line.

While the EPA has noted that the Petitioners failed to fully evaluate all the monitoring required by the Permit for ensuring compliance with opacity and fugitive emission limitations, the EPA also finds that the Petitioners' concerns are now moot based on provisions added to the 2019 Permit to increase monitoring requirements. While the EPA has not made a determination regarding the sufficiency of the new monitoring, as noted previously, the Petitioners were afforded the opportunity to petition the Administrator to object to the 2019 Permit if they felt these monitoring conditions were still insufficient. The EPA is not aware of any petition submitted on the 2019 Permit.

Claim D: The Petitioners' Claim that "the CAAPP Permit does not Provide Adequate Testing, Inspection and Evaluation Standards."

The Petitioners have raised three claims regarding PM testing. Because these claims include substantially overlapping issues, the EPA will respond to these claims together.

¹⁰ *See* 40 CFR part 60, Appendix A.

Sub claim 1: The Petitioners' Claim that "the CAAPP Permit Provides Too Long a Period Before PM Emissions Testing is Required."

The Petitioners note that a previous draft CAAPP permit required PM emissions measurements be conducted within 180 days of the effectiveness of the permit condition, while the final CAAPP permit increased that length of time to one year. The Petitioners assert that IEPA failed to explain why the increase in time is needed and argue that allowing one year to conduct PM emissions measurements means the Permit fails to include monitoring requirements sufficient to assure compliance with the terms and conditions of the permit. Petition at 10, citing to *In the Matter of Midwest Generation, LLC Fisk Generating Station*, Order on Petition No. V-2004-1, at 5 (March 25, 2005) (Fisk Order).

The Petitioners acknowledge IEPA's response that based on past testing, one should not expect that future testing will show any violations of state PM emissions standards. However, the Petitioners contend that this response "appears to suggest that no future or regular testing is ever needed again where past testing shows compliance." The Petitioners assert that PM testing is crucial given the facility's location in an environmental justice community and because the whole state of Illinois has been designated as "unclassifiable" under the 2012 Annual Fine Particulate Standard. Speaking to this issue, the Petitioners state, "[d]oubling the amount of time before conducting PM emissions measurements raises the risk that the Plant could be operating with excess emissions for an additional six months, risks that we cannot afford in an environmental justice community and an unclassifiable state."

Sub claim 2: The Petitioners' Claim that "the CAAPP Permit Requires a Trigger for PM Emissions Testing when Operating at Higher Loads."

The Petitioners contend that the permit weakened the trigger for when PM emissions testing should occur if the facility is operated at a load higher than the load at which testing was most recently conducted. The Petitioners note that a previous draft of the Permit required testing when loads were more than two percent greater than the load size at which testing occurred; however, in the final Permit, the load would need to be the greater of 10 Megawatts or five percent higher than the load at which testing was last conducted. The Petitioners acknowledge IEPA's explanation that the change was in response to concerns about seasonable variations and seasonal weather conditions; however, they assert that this explanation fails to explain why emissions testing cannot take place in the winter and further, does not explain how the required PM testing assures compliance with PM limits. The Petitioners state that "IEPA must include in the permit PM 'monitoring... requirements sufficient to assure compliance with the terms and conditions of the permit.'" Petition at 11, citing to *Midwest Generation Order* (2005) at 19.

The Petitioners note that the final Permit also extends the duration of time during which the affected boilers could operate at a higher load before triggering the need to conduct PM emissions testing. Petitioners contend that allowing the affected boiler to operate for an aggregate of three days at a higher load than the level at which the boiler was tested jeopardizes Midwest Generation's obligation to assure compliance with PM standards.

Sub claim 3: The Petitioners' Claim that the "CAAPP Permit Should Require CO and PM Emissions Testing Closer to the Affected Boilers' Maximum Operating Loads"

The Petitioners assert that a previous version of the Permit required CO and PM emissions testing be performed at maximum operating loads while the final Permit requires only that the measurements be performed at 90% or better of the "seasonal" maximum operating loads. The Petitioners argue that CO and PM testing should be conducted at or as close to maximum operating loads as possible so that authorities are aware of the maximum emissions levels that might occur. "[I]f testing is not at maximum loads, IEPA must explain why it is at 90% instead of 95% or 98% of maximum loads. Otherwise, the Permit fails to assure compliance with CO and PM limits and meet the requirement that it include 'monitoring... requirements sufficient to assure compliance with the terms and conditions of the permit.'" Petition at 12, citing to Midwest Generation Order (2005) at 19.

The Petitioners contend that IEPA provided a response regarding the term "seasonal" but not the other portion of the comment regarding the 90%. "IEPA has the obligation to respond to significant public comments." Petition at 12 citing to Fisk Order at 5.

EPA's Response: For the following reasons, the EPA denies the Petitioners' request for an objection on these claims.

As noted above, the 2019 Permit includes substantial changes to the 2016 Permit that are relevant to the Petitioners' claims. These changes as described below are sufficient to render the Petitioners' claims regarding PM and CO testing moot. The following are portions of the relevant permit conditions.

2016 Permit Conditions

Permit Condition 7.1.7 Testing Requirements (In part)

Pursuant to Section 39.5(7)(d)(ii) of the Act, the Permittee shall have the PM and CO emissions of each affected boiler measured as specified below:

- a. i. PM emission measurements shall be made no later than one year after the effectiveness of this condition. (Measurements made after December 31, 2003 may satisfy this requirement.)
- ii. PM emission measurements shall be made within 90 days of operating an affected boiler for more than 72 hours total in a calendar quarter at a load* that is more than 10 Megawatts or 5 percent (whichever is greatest) higher than the greatest load on the boiler, during the most recent set of PM tests on the affected boiler in which compliance is shown, provided, however, that the Illinois EPA may upon request of the Permittee provide more time for testing (if such time is reasonably needed to schedule and perform testing or coordinate testing with seasonal conditions). Notwithstanding Condition 5.10, this condition shall take effect after the first complete quarter following the effectiveness of this condition.

iii. Periodic PM emission measurements shall be made for the affected boilers within a time period determined from the compliance margin for the applicable PM emission standard, based on the results of the preceding PM measurement, as follows. For this purpose, the compliance margin is the extent to which the actual PM emissions as measured are lower than the applicable PM limit.

Permit Condition 7.1.7(b)(i). [PM and CO] measurements shall be performed at 90 percent or better of the seasonal maximum operating loads of the affected boilers or related turbines and other operating conditions that are representative of normal operation. In addition, the Permittee may perform measurements at other operating conditions to evaluate variation in emissions.

2019 Revised Permit Conditions

Permit Condition 7.1.7 Testing Requirements (In part)

Pursuant to Section 39.5(7)(d)(ii) of the Act, the Permittee shall have the PM and CO emissions of each affected boiler measured as specified below:

a. i. Intentionally Blank

ii. Intentionally Blank

iii. Periodic PM emission measurements shall be made for the affected boilers within a time period determined from the compliance margin for the applicable PM emission standard, based on the results of the preceding PM measurement as follows. For this purpose, the compliance margin is the extent to which the actual PM emissions as measured are lower than the applicable PM limit.

Permit Condition 7.1.7(b)(i). The Permittee shall operate each affected boiler at maximum normal operating load conditions during each performance test. Maximum normal operating load will generally be between 90 and 110 percent of design capacity but should be representative of unit specific normal operations during each test run....

EPA Analysis

Since the submittal of the Petition, Midwest Generation conducted the initial PM testing that was required within one year from the effectiveness of the permit condition. *See* 2016 Permit Condition 7.1.7(a)(i). As a result, the 2019 Permit no longer has this testing requirement and instead the condition is listed as intentionally blank.¹¹ With the completion of the PM testing required by the 2016 Permit, the EPA considers Claim D, sub claim 1 moot.

The 2019 Permit also eliminated the condition requiring PM testing after operating the boiler for 72 hours at a load higher than the last PM test showing compliance. IEPA explained this change

¹¹ IEPA notes in its Statement of Basis for the 2019 Permit that the testing Reports for PM and CO testing were submitted to Illinois EPA on December 19, 2016 for Unit 8 and January 31, 2017 for Unit 7. *See* 2019 Permit statement of basis at 31.

in the 2019 Permit statement of basis, stating that in place of this condition, Condition 7.1.7(b)(i) in the revised permit would specify that the periodic testing of the coal boilers, as is required to authoritatively confirm compliance with state PM emission standards, must be conducted at “maximum normal operating load conditions.” See 2019 Permit statement of basis at 41. Thus, testing will now be done at the highest load that will be operated and should reflect the maximum emission levels, in contrast to the requirements of the 2016 Permit, which allowed for seasonal variation.

Eliminating Permit Condition 7.1.7(b)(i) and revising Permit condition 7.1.7(b)(i) resolves Petitioners’ concerns that were summarized in Claim D, sub claims 2 and 3 above. These claims asserted that the testing should be closer to maximum operating loads, which is what the new permit condition requires.

These revisions substantially change the permit conditions at issue in the Petitioners’ claims. As explained above, the EPA views these changes as generally aligning with Petitioners’ concerns. In addition, the Petitioners did not petition the Administrator to object to the 2019 Permit terms. As a result, the EPA now considers these claims moot.

Claim E: The Petitioners’ Claim that the “CAAPP Permit Should Require an Increased Frequency of Combustion Evaluations in the Coal-Fired Boilers.”

The Petitioners assert that the Permit reduces the nature and frequency of combustion evaluations for the coal-fired boilers. The Petitioners state that a previous version of the Permit required Waukegan Station to conduct combustion evaluations quarterly while the final Permit reduced the frequency to semi-annually. The Petitioners assert that “[d]oubling the time period between evaluations risks a several-month delay in detecting any combustion issues with boilers and does not assure compliance with the permit’s emissions limits.

Separate from the Petitioners’ concerns regarding the nature and frequency of combustion evaluations, the Petitioners state that they previously raised a concern regarding the removal of a requirement to take preventative measures in response to combustion evaluations. The Petitioners acknowledge IEPA’s response, which stated that “in actual practice combustion evaluations may not identify any preventative measures that need to be taken.” However, the Petitioners argue that this response does not explain why the requirement could not have been revised to require preventative measures when identified rather than the requirement having been removed altogether. The Petitioners further argue that IEPA failed to respond to the Petitioners’ comment about reducing the frequency of combustion evaluations.

EPA’s Response: For the following reasons, the EPA denies the Petitioners’ request for an objection on this claim.

The Petitioners have failed to demonstrate that there is a flaw in the Permit. The Petitioners have provided no analysis beyond a general assertion that the nature and frequency of combustion evaluations fails to assure compliance with permitted emission limits. The Petitioners have not provided any citations to any applicable requirements with which the Permit fails to comply. As discussed in Section II.B of this Order, the CAA places a burden on petitioners to demonstrate

that a permit is not in compliance with the requirements of the Act or of the requirements under 40 C.F.R. part 70. 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(c)(1).

The EPA also disagrees that IEPA failed to respond to the Petitioners' specific comments. The Petitioners specifically identify their comment about reducing the frequency of the evaluation as one to which IEPA failed to respond. However, the Petitioners' comments did not provide any analysis explaining why their preferred frequency of combustion evaluations is necessary. IEPA in its response acknowledged the Petitioners' comment but did not agree with the Petitioners' stance that more frequent combustion evaluations were appropriate. IEPA Response Summary at 55. IEPA also responded to a similar comment from the EPA questioning the reasoning for reduced frequency of combustion evaluations. Within its response, IEPA explained what led to the decrease in frequency and also noted that the facility is subject to the MATS rule that requires "tune-ups" of the boilers every 36 to 48 months.¹²

Claim F: The Petitioners' Claim that the "CAAPP Permit Should Require Records Explaining Opacity Exceedances."

The Petitioners claim that the requirement to maintain records for the continuous opacity monitors (COMS) in 2016 Permit Condition 7.1.9(c)(ii)(B) was revised to eliminate the requirement for an explanation for exceedances in opacity, and instead require only a description of such exceedances. The Petitioners assert that the explanations are necessary to allow IEPA and citizens to bring enforcement actions for opacity violations and that eliminating the requirement for the explanations compromises citizens' abilities to detect violations of the permit. The Petitioners also assert that without PM testing or PM CEMS, there will generally not be records indicating that a PM exceedance occurred and that these explanation of opacity exceedances are "necessary to show whether an SBM condition was occurring."¹³

EPA's Response: For the following reasons, the EPA denies the Petitioners' request for an objection on this claim.

Similar to the previous claim, the Petitioners have made a general assertion without any further analysis or citations explaining how the permit might fail to comply with applicable requirements. Specifically, the Petitioners have not provided an analysis of why providing an explanation for an exceedance is an applicable requirement that must be included in the permit and why the permit is flawed by instead requiring a description of an exceedance. The Petitioners also failed to evaluate all the recordkeeping required by the Permit. Beyond requiring a description for each three-hour block averaging period when average opacity of an affected boiler was above 30 percent, the 2016 permit also required the facility to provide an explanation for each 6-minute period when opacity was above 30 percent. *See* 2016 Permit Condition 7.1.9(c)(ii)(A). It is not immediately clear why explanations of 6-minute periods of opacity

¹² *See* 40 CFR 63.10005(e) and 63.100021(e). *See also* 2019 Permit SOB at 30 stating that tune-ups required by the MATS rule satisfy the semi-annual requirement for a combustion evaluation because tune-ups are more rigorous than what is required during a semi-annual combustion evaluation.

¹³ The Petitioners have not defined SBM and the EPA is assuming the acronym refers to startup, breakdown, and malfunctions.

exceedances would not provide necessary information for IEPA or citizens to bring enforcement actions.

As IEPA noted in the 2019 Permit statement of basis, the original purpose of 2016 Permit Condition 7.1.9(c)(ii)(B) was to address compliance with applicable state standards for PM emissions on an interim basis until the Permittee began conducting Compliance Assurance Monitoring (CAM). *See* 2019 Permit statement of basis at 49. The now-approved CAM plan addresses compliance with PM standards and therefore IEPA eliminated the 2016 Permit Condition 7.1.9(c)(ii)(B) from the 2019 Permit. To the extent that Petitioners have concerns with evaluating whether there is a violation of PM standards, EPA anticipates that they could do so through the facility's compliance with the CAM plan.

Since the Petitioners have failed to demonstrate how this condition results in a flaw in the Permit and because the changes in the 2019 render this issue moot, the EPA denies the request for an objection on this claim.

V. CONCLUSION

For the reasons set forth above and pursuant to CAA § 505(b)(2) and 40 C.F.R. § 70.8(d), I hereby deny the Petition as described above.

Dated: September 15, 2020



Andrew R. Wheeler
Administrator