BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF OGLETHORPE POWER COMPANY WANSLEY COMBINED CYCLE ENERGY FACILITY ROOPVILLE, GEORGIA ELECTRIC POWER GENERATION PETITION IV-2002-1 PERMIT NO. 4911-149-0006-V-01-0 ISSUED BY THE GEORGIA ENVIRONMENTAL PROTECTION DIVISION	)	AMENDED ORDER RESPONDING TO REMAND

AMENDED ORDER DENYING PETITION FOR OBJECTION TO PERMIT IN RESPONSE TO REMAND

I. Summary of Title V Petition and Remand

This Amended Order Responding to Remand corrects certain errors that were found in the Order Responding to Remand that I signed on September 15, 2005. The September 15 Order, which is superceded by this Order, is being amended to correct certain clerical errors and to address a factual error in note 13 of that order regarding whether Oglethorpe had any ownership interest in units at Plant Wansley operated by Georgia Power.

On February 4, 2002, the United States Environmental Protection Agency ("EPA") received a petition from the Georgia Center for Law in the Public Interest ("GCLPI") on behalf of the Sierra Club, requesting that EPA object to the permit issued pursuant to title V of the Clean Air Act (the "CAA" or "Act"), 42 U.S.C. §7611-7661f, by the Georgia Environmental Protection Division ("EPD") to Oglethorpe Power Company ("Oglethorpe") for its Wansley Combined Cycle Energy Facility ("the Wansley Block 8 Facility " or "Block 8") located in Roopville (Heard County), Georgia. Sierra Club raised five principal reasons that EPA's Administrator should object to the permit: (1) that Oglethorpe was not entitled to a permit for Block 8 under Georgia's Statewide Compliance Rule (the "Rule") because Oglethorpe owns part of another facility (Plant Scherer) which has been issued notices of violation for non-compliance

with the Act; (2) that the permit should have required a case-by-case maximum achievable control technology (MACT) determination for emissions of hazardous air pollutants; (3) that the permit did not provide for adequate monitoring of carbon monoxide; (4) that the permit impermissibly limits who may enforce a federal stack height provision, and (5) that the permit should contain short-term best achievable control technology (BACT) limits.

On November 15, 2002, Administrator Christine Todd Whitman issued a final Order (the "November 2002 Order" or "Order") rejecting all these arguments and denying Sierra Club's petition to object to the Oglethorpe permit. Pursuant to Section 502(b) of the CAA, Sierra Club filed a petition for review in the U.S. Court of Appeals for the Eleventh Circuit. Sierra Club's petition sought review of only the first issue: whether EPA must object to Oglethorpe's permit for the Wansley Block 8 Facility pursuant to the Georgia Statewide Compliance Rule based on notices of CAA violations issued to an unrelated party, Georgia Power, for Units 3 and 4 of Plant Scherer, Units 1 and 2 of which are partially owned by Oglethorpe.

Pursuant to the Georgia Statewide Compliance rule, which is incorporated into Georgia's approved state implementation plan ("SIP"), "no permit to construct a new or modified major stationary source [in an area of nonattainment or contributing to an area of nonattainment]" shall be issued unless:

> [t]he owner or operator of the proposed new or modified source has demonstrated that all major stationary sources owned or operated by such person (or by an entity controlling, controlled by, or under common control with such person) in this State, are subject to emission limitations and are in compliance, or on a schedule for compliance, with all applicable emission limitations and standards under the [Georgia Air Quality Act].

Ga. Comp Ga. Comp. R. & Regs. 391-3-1-.03(8)(c)(3).

On May 5, 2004, the Eleventh Circuit granted Sierra Club's petition for review**.** *Sierra Club v. Leavitt*, 368 F.3d 1300 (11th Cir. 2004). The Eleventh Circuit vacated and remanded the Order to EPA for further consideration. The court concluded that "the EPA Order failed to acknowledge its disparate treatment of the same term ["major stationary source"] in its two appearances in the Rule, and thus failed to address an important aspect of the problem." *Id.* 1309. The court found inadequate the EPA's explanation in the Order of how the Rule should be applied when a party is only part-owner of a major stationary source. The court found that Sierra Club had abandoned or waived on appeal its argument that the Wansley Plant is under common control of Oglethorpe and Georgia Power; but the court stated that EPA might at its discretion address the issue again if it has authority to excuse the waiver. *Id*. at 1308 n.13. The court rejected other arguments made by Sierra Club regarding application of the Rule, including the argument that Georgia Power actually operates Block 8 because it controls the water supply. *Id.*

As directed by the Court, I have reexamined and further explained the application of the

Georgia Statewide Compliance Rule, and my revised decision on that issue is set forth below.[1]

II. Summary of Facts

Plant Wansley is located in Heard County, Georgia, an attainment area subject to the Georgia Statewide Compliance Rule because it contributes to the metropolitan Atlanta ozone nonattainment area. In July 2000, Georgia Power Company ("Georgia Power") obtained a combined prevention of significant deterioration ("PSD") preconstruction permit (under Part C, title I of the Act) and title V operating permit from EPD to build four new power blocks for Plant Wansley, Blocks 6, 7, 8, and 9. Subsequently, Georgia Power reached an agreement with Oglethorpe, an unrelated party, under which Oglethorpe would become the owner and operator of one of the unbuilt power blocks, Block 8. Oglethorpe is a not for profit company privately owned by the Georgia Electric Membership Corporation, which does not include Georgia Power Company as a member. Georgia Power also transferred its interest in Block 9 to the Municipal Electric Authority of Georgia ("MEAG"), also unrelated to Oglethorpe. MEAG obtained a combined PSD preconstruction and title V operating permit for Block 9.

On November 30, 2000, Oglethorpe applied to EPD for a combined PSD preconstruction and title V permit for its Wansley Block 8 Facility, a natural gas-fired only combined-cycle block which will generate approximately 521 megawatts of electric power. On January 12, 2002, EPD issued Oglethorpe a combined state PSD preconstruction and operating permit for Block 8. The operating permit was issued pursuant to title V of the CAA, 42 U.S.C. §§ 7661-7661f, EPA's implementing regulations at 40 C.F.R. part 70 ("part 70"), and Georgia's fully approved title V program which is incorporated into Georgia Air Quality Rule 391-3-1-.03(10). The preconstruction permit was issued pursuant to Part C of title I of the Act, 42 U.S.C. §§ 7501-7515, and Georgia's SIP, codified at 40 C.F.R. § 52.570.

Under the combined PSD preconstruction permit and title V operating permit, Oglethorpe assumes responsibility for the operation of the Wansley Block 8 facility. That responsibility is non-transferable; a new permit must be obtained by future owners or operators. See 40 C.F.R. 70.7(d)(1)(iv). Georgia Power continues to have its own preconstruction and title V permit with respect to Blocks 6 and 7 of Plant Wansley; its permit was amended to remove Blocks 8 and 9.

Plant Scherer, located in Monroe County, Georgia, consists of four individual steam electric generating units. Georgia Power has a 75% ownership interest in Unit 3, and the remaining 25% is owned by Gulf Power. Unit 4 is owned 76.36% by Florida Power & Light and 23.64% by Jacksonville Electric Authority. Oglethorpe has a partial interest (60%) in Units 1

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[1] Other issues addressed by the November 2002 Order remain unaffected by the Court decision. Accordingly, I incorporate herein by reference sections IV.B. IV.C, IV.D, and IV.E. of the November 2002 Order, which addressed issues that Sierra Club did not appeal and are not impacted by the remand.

and 2 only. MEAG has a 30% interest in Units 1 and 2. EPD issued one title V operating permit covering the entire Plant Scherer to Georgia Power, the operator of Plant Scherer. Units 1 and 2 at Plant Scherer are not alleged to have CAA violations. Oglethorpe is not alleged to own or operate Units 3 and 4. EPA therefore issued a notice of violation to Georgia Power – but not Oglethorpe – for noncompliance at Units 3 and 4 only. EPA subsequently filed an enforcement action, which is still pending against Georgia Power – but not Oglethorpe – for Units 3 and 4 only.

III. Reexamination of Remanded Issue

As noted above, the Georgia Statewide Compliance Rule provides that "no permit to construct a new or modified major stationary source [in an area of nonattainment or contributing to an area of nonattainment]" shall be issued unless:

> [t]he owner or operator of the proposed new or modified source has demonstrated that all major stationary sources owned or operated by such person (or by an entity controlling, controlled by, or under common control with such person) in this State, are subject to emission limitations and are in compliance, or on a schedule for compliance, with all applicable emission limitations and standards under the [Georgia Air Quality Act].

Ga. Comp Ga. Comp. R. & Regs. 391-3-1-.03(8)(c)(3). Since the Oglethorpe permit at issue serves in part as a title I PSD preconstruction permit for a major stationary source in an area contributing to a nonattainment area, the Georgia Statewide Compliance Rule requires Oglethorpe to make the described compliance demonstration before the PSD preconstruction permit can be issued.[2]

Sierra Club argues that, under the Georgia Statewide Compliance Rule, Oglethorpe should not be allowed to obtain a permit for Block 8 of Plant Wansley because Oglethorpe is part-owner of Units 1 and 2 at Plant Scherer, where EPA has issued notices of violation ("NOVs") to the sole operator, Georgia Power, for violations at Units 3 and 4. Because there were no violations against the units owned or operated by Oglethorpe (or by an entity controlling, controlled by, or under common control with Oglethorpe), EPA agrees with EPD that the Georgia Statewide Compliance Rule did not preclude Oglethorpe from obtaining its title V permit for Block 8.[3]

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[2] Since the permit is also an operating permit, it is also subject to the pending petition for objection pursuant to title V of the Act.

[3] EPD's conclusion was based on a different rationale: that the NOVs do not constitute final adjudication of noncompliance. However, as explained in note 14, EPA believes that it is not necessary to reach that issue here.

The Eleventh Circuit stated that EPA "appears to have determined that the Georgia Rule allows breaking major stationary sources into constituent parts with compliance determined individually." 368 F.3d 1300. It then stated that such an interpretation means that EPA is giving the term "major stationary source" its ordinary meaning for title V permitting purposes in its first appearance in the Rule but then redefining it without explanation as "facilities" in its second appearance in the rule. *Id.*[4]

Contrary to the court's conclusion, EPA has not given the term "major stationary source" two different meanings within the Rule. When applying the Rule, EPA uses the term in a consistent way for both parts of the Rule. In the first instance when "major stationary source" appears in the Rule, EPA focuses only on the particular source[5] for which the permit to construct is sought and identifies its owner or operator. Similarly, in the second instance, EPA looks at only those sources that are owned or operated by the applicant[6] (or another entity that controls the applicant, is controlled by the applicant, or is under common control with the applicant).[7] In other words, in both instances in the Georgia Statewide Compliance Rule, EPA interprets the term "major stationary source" to allow consideration of only those individual sources that are owned or operated by the preconstruction permit applicant (or its affiliates).

In determining whether an applicant needs a preconstruction or title V permit in the first place, the permitting authority must determine whether the new source is a "major stationary source" either on its own or by aggregation with adjacent sources that are under "the control of the same person (or persons under common control)." If the new source qualifies as a "major stationary source" for permitting purposes, and the area is a nonattainment area or affects a nonattainment area, then the Rule will apply. Once the Rule applies, the next step is to determine the scope of the compliance demonstration that must be made. In determining the scope of the compliance determination under the Rule, EPA interprets the term "major stationary source" in both parts of the rule to include only the particular source(s) owned or operated by the applicant (or its affiliates).

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[4] As the Eleventh Circuit observed, the Georgia Rule uses the term "major stationary source" in two places: (1) "no permit to construct a new or modified major stationary source" shall be issued... unless "[t]he owner or operator of the proposed new or modified source has demonstrated [(2)] that all major stationary sources owned or operated by such person (or by an entity controlling, controlled by, or under common control with such person)" are in compliance.

[5] The term "source" is used in this Order to mean an *individual* source or unit, rather than including other structures, units, or facilities that are adjacent.

[6] "Applicant" is used here as a shorthand for the owner or operator of the new source.

[7] For convenience, this order will use the term "affiliates" to refer to entities that control the applicant, are controlled by the applicant, or are under common control with the applicant.

Here, Oglethorpe applied for a preconstruction and title V permit for Block 8 of Plant Wansley. Because Block 8 was considered a title I "major stationary source" in an attainment area, a PSD preconstruction permit was required. Application of the Rule was triggered because Heard County was found to contribute to nonattainment in the Atlanta area. Determining the scope of the compliance demonstration required by the Rule involves two inquiries that correspond to the two parts of the Rule; (1) which entity or entities must demonstrate compliance and (2) which sources must be in compliance.

For the first part of the Georgia Statewide Compliance Rule, Block 8 (and not the remainder of Plant Wansley) is the "major stationary source" and its owner and operator is Oglethorpe. The new permit applies only to Block 8, which is owned and operated by Oglethorpe. Therefore, Oglethorpe – and not Georgia Power – is the entity that must make the compliance demonstration because it is the owner and operator of the new major stationary source, i.e., Block 8.

For the second part of the Rule, the question is which major stationary sources must be in compliance. The Rule requires that "all major stationary sources owned or operated by [Oglethorpe] (or by an entity controlling, controlled by, or under common control with [Oglethorpe]" must be in compliance. As directed by the plain language of the Georgia Statewide Compliance Rule, in deciding whether Oglethorpe is eligible for a preconstruction permit for Block 8, EPA looks to see whether the sources *owned or operated* by Oglethorpe (or its affiliates) are in compliance with the CAA. Plant Scherer was apparently considered a major stationary source for title V permit purposes, and Georgia Power was issued a single title V permit as sole operator of all four units. Units 3 and 4 at Plant Scherer are the sources with alleged violations, but these sources are not owned or operated by Oglethorpe (or its affiliates). Georgia Power and others – not Oglethorpe – own and operate Unit 3 and Unit 4. Oglethorpe has a partial interest in Units 1 and 2 at Plant Scherer, which are not alleged to have any CAA violations. There is no evidence that demonstrates that Oglethorpe owns or operates Units 3 and 4.[8] Nor did Sierra Club demonstrate that Georgia Power is "an entity controlling" Oglethorpe, is "controlled by" Oglethorpe, or is "under common control" with Oglethorpe for purposes of the Rule.[9] Thus, Sierra Club has not shown that Oglethorpe's compliance demonstration was

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[8] Georgia Power is the operator of all units, including Units 1 and 2, owned by Oglethorpe. Thus, EPD may hold Georgia Power responsible for compliance at all of the units of Plant Scherer, since it either owns or operates all of them. However, Oglethorpe is not responsible for compliance at Units 3 and 4 as it neither owns nor operates them.

[9] The court found Sierra Club abandoned or waived on appeal its argument that Plant Wansley is under common control of Oglethorpe and Georgia Power and that Georgia Power should also be considered the owner or operator of Block 8. I decline to reconsider this issue. Even if I were to excuse Sierra Club's waiver, I would conclude that the Georgia Rule requires an analysis of whether Oglethorpe and Georgia Power are under common control (by a third

deficient. In looking at both parts of the Rule, EPA believes the focus should be on sources owned or operated by the entity that owns and operates the new source..

It is true that for purposes of determining whether a source is "major" or not for purposes of title I, EPA considers whether facilities that are located on contiguous or adjacent properties are under "the control of the same person (or persons under common control)." 40 C.F.R. § 51.165(a)(1)(I) and (ii). A major stationary source determination would trigger certain title I requirements (such as PSD review for an attainment area and new source review for a nonattainment area), and would also trigger the requirement to get a permit under title V.[10]

However, EPA does not consider a determination that adjacent sources are under "common control" for purposes of determining "major stationary source" permitting status to be a determination that the owner or operator of one source also "operates" the adjacent source for purposes of the Statewide Compliance Rule. The Rule plainly requires that the sources be "*owned or operated* by" Oglethorpe or *owned and operated* "by an entity controlling, controlled by, or under common control with [Oglethorpe]." EPA does not treat a major stationary source permitting determination for contiguous or adjacent sources as establishing that each owner or operator of a separate source has responsibility for ensuring compliance at both sources. Rather, for compliance purposes, an entity is determined to have legal responsibility for compliance according to the underlying legal requirements of the Act.[11] EPA believes this approach is justified by the different purposes of the major source determination and the Rule's requirement to show statewide compliance.

The purpose of the "common control" test in defining a major stationary source for permitting purposes is to ensure that sources do not evade major source status (and its more stringent requirements) by artificially sub-dividing sources. The Georgia Statewide Compliance Rule has a different purpose. The purpose of the Rule is to provide an incentive – i.e., eligibility

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party), rather than whether Plant Wansley is under common control of Oglethorpe and Georgia Power. There is no evidence Oglethorpe and Georgia Power are under common control of another entity, and thus, I would deny the petition on this point.

[10] EPA's title V regulations use a similar test for major source determinations, defining "major source" as "any stationary source (or any group of stationary sources that are located on one or more contiguous or adjacent properties, and under common control of the same person (or persons under common control))". 40 C.F.R. § 70.2.

[11] In certain circumstances, it may be possible for more than one entity to have responsibility for complying with an underlying Clean Air Act requirement, but a source will not have legal responsibility for complying with a Clean Air Act requirement applicable to a contiguous or adjacent source simply because the two sources have been determined to constitute a major stationary source under 40 C.F.R.§ 52.165(a)(1)(i) and (ii).

for a new construction permit – to applicants to keep all their existing sources in compliance. Interpreting "major stationary source" in the Georgia Statewide Compliance Rule to apply to particular sources owned or operated by the applicant serves this purpose. Consistent with the goal of providing an incentive for compliance, the focus of the inquiry under the Rule is on the entity seeking the permit, and the sources for which it can control compliance. The "control" analysis under the Rule is necessarily limited to entities that have the actual ability to achieve compliance at a specific source. Thus, if Oglethorpe had a parent company that operated a noncompliant major stationary source elsewhere in Georgia, that parent company would be presumed to have the ability and incentive to maintain compliance at all sources statewide. Sierra Club has not demonstrated that Oglethorpe has the ability to control compliance at Units 3 and 4 or that Oglethorpe or its affiliates operate or have the ability to control any other noncompliant major stationary sources in Georgia.

EPA does not believe that the Georgia Statewide Compliance Rule's purpose would be served if the applicant were penalized for violations at sources where it does not have the power to correct the violations. Entities who are not owners or operators of a source could not legally enter into compliance schedule agreements pursuant to part 70 because those entities have no right to bind the owner or operator to the required sequence of enforceable actions leading to compliance. Requiring a company to bring into compliance sources that it does not own or operate would be inequitable, and possibly futile or counterproductive.[12]

The legislative history behind CAA section 173 further supports EPA's interpretation of the Georgia Statewide Compliance Rule.[13] In imposing section 173's statewide compliance condition on potential new source permittees, Congress clearly sought to focus the inquiry on the entity seeking to construct the new source and to require the compliance of any other existing sources owned (or otherwise controlled) by that entity:

> when the owner of sources in an area exceeding health standards applies for approval of a new source in the area, it is important to assure that all applicable emission limitations are met at existing facilities <u>owned by that owner.</u>

123 Cong. Record 18,018 (1977) (Senator Edmund Muskie giving an overview of the CAA amendments to the Senate when introducing the amendments for debate) (emphasis added).

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[12] It is not clear that Oglethorpe could even reasonably be expected to have notice of compliance issues (such as an NOV or enforcement action) at sources it does not own or operate. Therefore, it may be impracticable for Oglethorpe to make the compliance demonstration for such sources.

[13] The Georgia Statewide Compliance Rule is derived from, and closely tracks the language of, Section 173.

Congress intended that CAA section 173 would give sources that were resisting compliance "an incentive to end that resistance." See *id*.

In light of the above, EPA concludes that Georgia Power's alleged noncompliance at Units 3 and 4 at Plant Scherer[14] did not preclude the issuance, under the Georgia Statewide Compliance Rule, of Oglethorpe's combined preconstruction and title V permit for Block 8.[15]

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[14] Oglethorpe has argued that NOVs that have not been finally adjudicated should not be considered violations of the CAA for purposes of the Rule. Because EPA concludes that EPD need not consider compliance at Units 3 and 4 at Plant Scherer, there is no need to reach that issue.

[15] Since the remand, in a citizen suit commenced by Sierra Club after the Block 8 permit was issued, a district court found that Georgia Power had violated opacity requirements under the Act with respect to coal-fired units that it owns at Plant Wansley. *Sierra Club v. Georgia Power Company*, Case No. 3:02 CV 151 (N. D. Ga.) (Dec. 15, 2004) (now on appeal to Eleventh Circuit). EPA understands that Oglethorpe has a minority ownership interest in these coal-fired units. Although the citizen suit against Georgia Power relied on emission reports starting from as early as 1999, Sierra Club did not raise any issue of noncompliance at Plant Wansley either in its comments to EPD on the Block 8 draft title V permit or in its 2002 title V petition to EPA (Sierra Club submitted a copy of the 2004 district court decision to EPA staff by electronic mail in April 2005). Section 505(b)(2) of the Act requires that a petition to EPA to object to a permit be based on objections to the permit that "were raised with reasonable specificity during the public comment period" (unless it was impracticable to do so) and places the burden on the petitioner to "demonstrate[] . . . that the permit is not in compliance" with the Act. Thus, in order to constitute a basis for granting the petition under Section 505(b)(2), Sierra Club needed to – but did not – raise the issue of emission exceedances at Plant Wansley properly in comments to the permitting authority and in its petition. Furthermore, the Georgia Statewide Compliance Rule requires an assessment of statewide compliance only at the time of issuance of the new permit; by contrast, the title V regulations (which are not at issue here) require annual recertification of compliance at the permitted source (40 C.F.R. § 70.6(c)(5)). In the absence of a finding of noncompliance by the state, EPA, or a court, the existence of emission exceedances by themselves would not necessarily have precluded Georgia EPD from issuing the Block 8 NSR permit.

IV. Conclusion

For the reasons discussed above and pursuant to section 505(b) of the CAA, 42 U.S.C. § 7661d(b), and 40 C.F.R. § 70.8(d), I hereby deny the petition to object of GCLPI on behalf of Sierra Club concerning the Wansley Block 8 Facility title V operating permit. The decision is based on further analysis and explanation of the application of the Georgia Statewide Compliance Rule in light of the Eleventh Circuit's decision in *Sierra Club v. Leavitt*, which vacated and remanded EPA's November 2002 Order for further consideration consistent with the court's opinion.

Nov. 14, 2005
Date

/s/
Stephen L. Johnson
Administrator