



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

Honorable Paula T. Dow
New Jersey Attorney General
P.O. Box 080
Trenton, New Jersey 08625

July 8, 2011

Dear Ms. Dow:

This letter responds to the Petition to Reopen filed by your Office on behalf of the New Jersey Department of Environmental Protection (NJDEP) on or about July 23, 2009. The Petition to Reopen requests that the United States Environmental Protection Agency (EPA) reopen a Clean Air Act (CAA) title V permit issued in 2001 by the Pennsylvania Department of Environmental Protection (PADEP) to the Reliant Portland electricity generating plant in Northampton County, Pennsylvania ("Reliant Portland" or "source"). The Petition to Reopen cites several bases for reopening the permit, including that: there are heat input rates that are applicable requirements that must be included in the source's title V permit as a result of being included in prior plan approvals and applications; that heat input limits are necessary to assure compliance with PM and NOx limits; and that the PM monitoring for the facility is inadequate.

As you know, your Office filed a title V petition seeking an objection to the source's proposed title V permit raising, inter alia, the two latter issues noted above. EPA considered the petition and denied it in an order dated June 20, 2007. In the Matter of Portland Generating Station, Order Denying Petition for Objection to Permit (June 20, 2007). Subsequently, your Office filed a petition for reconsideration of the denial of the objection, which EPA also denied on September 25, 2008. Your Office then petitioned for review in the Court of Appeals for the Third Circuit of these EPA denials. See State of New Jersey Department of Environmental Protection v. U.S. Environmental Protection Agency, Nos. 07-3746 & 08-4818 (3rd Cir.). Before the cases were argued, New Jersey and the United States entered into a settlement agreement under which EPA agreed to respond to New Jersey's Petition to Reopen and New Jersey's pending petitions for review were dismissed with prejudice.

EPA agreed to respond to the Petition to Reopen in order to consider the claim that there are heat input values that were applicable requirements that must be included in the source's title V permit. EPA believes it fully considered the other issues as presented in the petition to object and the petition for reconsideration. In responding to this Petition to Reopen, EPA believes it is

neither necessary nor appropriate to consider once again the other issues in the Petition to Reopen because these were already the subject of New Jersey's title V petition and petition for reconsideration.¹

Reasons and Procedure to Reopen a Title V permit.

Section 505(e) of the CAA authorizes the Administrator to terminate, modify, or revoke and reissue a title V permit for "cause" at any time. The federal title V regulations at 40 CFR Part 70, the state title V regulations, and the source's permit all contain provisions authorizing EPA to reopen the permit in appropriate circumstances. The potential reasons and process for reopening the title V permit at issue here are set forth in Section B, conditions #10 and #11 in Reliant Portland's 2001 title V permit. These permit terms are derived from 25 Pa. Code §§ 127.512(c)(3), 127.542 and 127.543. Those sections of the Pa. Code closely parallel the federal regulations at 40 C.F.R. § 70.7(f), (g), and (h), which govern the reopening for cause of a title V permit by the permitting authority and/or EPA. The potential reasons in this matter for which EPA could reopen the Reliant Portland permit are:

[t]he permitting authority or EPA determines that the permit contains a material mistake or that inaccurate statements were made in establishing the emission standards or other terms or conditions of the permit (40 C.F.R. §70.7(f)(1)(iii)), or

[t]he Administrator or the permitting authority determines that the permit must be revised or revoked to assure compliance with the applicable requirements (40 C.F.R. §70.7(f) (1) (iv)).

As noted above, EPA agreed to respond to New Jersey's Petition to Reopen in order to consider the claim that the heat input rates identified by New Jersey are applicable requirements for which the source's title V permit must assure compliance. Title V permits are required to contain terms and conditions to assure compliance with all applicable requirements. If EPA determined that the source's title V permit was lacking terms and conditions to assure compliance with applicable requirements, then EPA would initiate the process for reopening the permit for cause, pursuant to 40 C.F.R. § 70.7(f)(1) and 70.7(g). However, the granting of a petition to reopen is unusual. Title V of the CAA provides several avenues for commenting upon and challenging the terms of a title V permit, including the requirement of public comment (502(b)(6)), opportunity for judicial review in state court (505(b)(6)), a petition to the Administrator to object to the permit (505(b)), and judicial review of denial of a petition to object (505(b)(2)). As you know, these avenues not only offer an opportunity for members of the public to raise issues, but (unlike the petition to reopen process) may offer a means by which the permitting authority can explain its reasoning and justify its permitting decisions. Furthermore, title V permits expire every five years, providing a regularly recurring opportunity to raise issues about applicability of different federally-enforceable requirements. The CAA places the burden on the person petitioning for an objection to a proposed permit to "demonstrate [] to the

¹ On April 7, 2011, EPA published notice in the Federal Register of its proposal to grant a CAA Section 126 Petition filed by New Jersey which alleged that the Reliant Portland plant was causing or contributing to the exceedance of the SO₂ National Ambient Air Quality Standards (NAAQS) for portions of New Jersey. See 76 Fed. Reg. 19662. That proceeding is entirely separate from the pending petition to reopen the title V permit.

Administrator that the permit is not in compliance with the requirements of this chapter,” (505(b)(2)). The burden for showing that an already-issued title V permit should be reopened is at least the same as a petition to object, if not greater. Accordingly, EPA will grant a petition to reopen only where the petitioner has demonstrated that the conditions for permit reopening are met. *See* 40 C.F.R. 70.7(f). New Jersey’s Petition to Reopen does not demonstrate that the terms of 40 C.F.R. § 70.7(f) have been met.

Before assessing New Jersey’s claim, it is important to provide background on Pennsylvania’s permitting programs. There are two distinct types of permits applicable to both major and minor facilities: 1) a plan approval, which is required for the construction or modification of a source and provides limited authority to operate for a period of 180 days after construction is completed; and 2) a permit to operate. This basic permitting structure has existed since the early 1970’s and continues in this form today. 25 Pa. Code Chapter 127², subchapter B establishes the requirement for all sources (major and minor) to obtain a plan approval prior to construction or modification, while subchapters D and E impose additional plan approval requirements that apply only to major stationary sources. These subchapters constitute the state’s major and minor NSR programs as required under section 110 of the CAA and have been approved as part of the SIP. Similarly, Subchapter F establishes the requirement for all sources (major and minor) to obtain a permit to operate. These requirements have also been approved as part of Pennsylvania’s SIP and such permits are referred to as Federally-Enforceable State Operating Permits (FESOPs).³ Subchapter G, which contains the state’s title V program, imposes additional requirements for state operating permits applicable only to title V sources. Subchapter G is approved in 40 C.F.R. Part 70 as the state’s title V permitting program, but these regulations are not part of the approved SIP.

Although the citations and requirements have changed over time, the implementation of the state’s permitting program has not changed. When a new source is constructed or an existing source is modified, the source’s owner must file a “plan approval application” with PADEP. If PADEP concurs, PADEP issues a “plan approval” authorizing the source to construct or modify the source. Plan approvals may establish new requirements for a facility, including but not limited to, BACT, LAER, BAT, offsets, etc. and synthetic minor limits to avoid an otherwise applicable requirement such as NSR or PSD. The plan approval also allows the source to operate for a limited period of time (usually 180 days) while the facility undergoes shakedown and obtains an operating permit that incorporates the requirements of the plan approval. The plan approval expires by its own terms and is not renewed once an operating permit is issued. If a facility fails to notify the state that it has begun to operate and request an operating permit, it is considered in violation and subject to appropriate enforcement action.

² Subchapter A establishes the general goal of the permitting program to regulate air contamination sources for the public welfare and sets forth general provisions for operational flexibility. Subchapters H through J establish the authority to use general plan approvals and operating permits for source categories, impose permitting fees and establish general conformity requirements. All of these subchapters are approved as part of the SIP.

³ In Pennsylvania, the term “FESOP” only refers to operating permits issued under the authority of subchapter F.

Prior to the creation of the title V permit program in Pennsylvania and a major source obtaining its initial title V permit, a facility in Pennsylvania operated under the authorization of its FESOP permits. After EPA's approval of Pennsylvania's title V permit program in 1996, the state transitioned into the title V permitting program by allowing a major source to operate according to the terms of any existing FESOPs and in accordance with the source's complete, initial title V permit application until such time as the title V permit was issued. When the initial title V permit is issued in Pennsylvania, the permit document itself serves as both a title V and a FESOP permit for the entire facility. Some of the Portland permits cited by New Jersey are Pennsylvania FESOPs, but not title V permits because they were issued prior to 1996 when the state's title V program was approved. However, because these FESOP permits are part of the EPA-approved Pennsylvania SIP, the terms of these operating permits are applicable requirements for purposes of title V unless modified by Pennsylvania in a separate permitting process. Furthermore, according to subchapter F, a source (major or minor) cannot operate unless it is "operated and maintained in accordance with specifications in the application and conditions in the plan approval and operating permit issued by the Department." 25 Pa. Code §127.444. The remainder of this letter will refer to FESOPs as "operating permits" and Pennsylvania title V permits as "title V permits."

Finally, EPA notes that the definition of "applicable requirement," i.e., those substantive pollution control requirements that must be included in a title V permit, is found at 40 CFR § 70.2

New Jersey's Heat Input Claim

The claim for review in New Jersey's Petition to Reopen is that "the Title V permit contains a material mistake in that it fails to incorporate hourly heat input values from pre-Title V permits issued pursuant to Pennsylvania's State Implementation Plan." Petition to Reopen, p. 2. New Jersey alleges that prior plan approvals issued by PADEP and plan approval applications submitted by prior owners of the Portland plant limited heat input rates for Units 1 and 2 at the Portland plant, and therefore PADEP must carry these limited rates forward into the 2001 title V permit. Petition to Reopen, p. 9. New Jersey also states that the source lowered the heat input rates on Units 1 and 2 at one point in order to net out of NSR, and used the heat input values found in earlier permits in modeling used to determine whether Portland's emissions would result in violation of the SO₂ NAAQS. The undisputed emission limits for Units 1 and 2 at the Portland plant as clearly expressed in the 2001 title V permit are:

	Unit 1	Unit 2
NO _x	0.3700 lbs/MMbtu (30 day rolling avg)	0.5800 lbs/MMbtu (30 day rolling avg.) 379.4 tons/month
SO ₂	3.7000 lbs/MMbtu (30 day) 4.000 lbs/MMbtu (daily avg) ⁴ 4.8000 lbs/MMbtu (daily avg max) ⁵	3.7000 lbs/MMbtu (30 day) 4.000 lbs/MMbtu (daily avg.) 4.8000 lbs/MMbtu (daily avg max)

⁴ This daily average cannot be exceeded on more than 2 days in any running 30 day period.

	Unit 1	Unit 2
PM	0.1000 lbs/MMbtu	0.1000 lbs/MMbtu

The title V permit also limits Units 1 and 2 to combusting only coal, #2 fuel oil, and cleaning chemical rinse water. New Jersey also argues that the 2001 title V permit contains heat input limits, and cites the fact that heat input limits were included in title V permit applications and the 2001 title V permit as evidence that any new title V permit should include heat input limits. However, the presence of these figures in the 2001 title V permit does not in itself provide a basis for reopening the title V permit. If the heat input values in the 2001 title V permit are enforceable limits, then there is no need to reopen the permit to add them. Accordingly, EPA will assume for purposes of the petition to reopen and this response that the heat input figures in the current title V permit are not enforceable limits and instead consider whether the permit should contain enforceable heat input limits.

The core question is whether heat input numbers listed in prior plan approval applications, plan approvals, or operating permits rose to the level of “applicable requirements” that must be carried forward into the title V permit. New Jersey’s evidence for these claims is discussed below.

First, New Jersey cites two plan approval applications submitted in 1985 – 86 by Portland’s prior owner, Met Ed, for the installation of electrostatic precipitators (ESPs) on Units 1 and 2.⁶ New Jersey points to these applications, together with the requirement of the Pennsylvania SIP that a source shall be “operated and maintained in accordance with specifications in the application and conditions in the plan approval” (See 25 Pa. Code §§127.25, 127.444) in support of its claim that the heat input numbers are applicable requirements for purposes of title V.

The plan approval applications list “peak” heat input for Unit 1 at 1464 MMBtu/hr and for Unit 2 at 2,093 MMBtu/hr. On January 27, 1987, PADEP issued Plan Approval No. 48-306-005B to construct the Unit 1 ESP. New Jersey notes that the cover letter for this approval states that an operating permit will be issued if, among other things, the operation of the source “conforms to the operational information stated on the application.” The November 4, 1985 plan approval for construction of the Unit 2 ESP uses different language, which makes issuance of the operating permit contingent upon the ESP being constructed and operated as stated in the application.

Similarly, New Jersey points to the plan approval application the source submitted to install combustion controls on Units 1 and 2, and to comply with title IV of the CAA by

⁵ This daily average cannot be exceeded at any time.

⁶ New Jersey has not cited any plan approval applications or plan approvals for the construction of the boilers at Units 1 and 2.

installing low NOx burners on Unit 2. Again, the plan approval applications list heat inputs for the affected units, and PADEP issued plan approvals for the installation of the controls.⁷

EPA agrees that obligations imposed under a SIP are generally applicable requirements for title V purposes. Moreover, EPA acknowledges that the Pennsylvania SIP provides that a source shall be “operated and maintained in accordance with specifications in the application and conditions in the plan approval...” (See 25 Pa. Code §§ 127.25, 127.444). However, EPA does not believe that this SIP provision necessarily converts every descriptive statement included in a plan approval application into a federally-enforceable requirement and an applicable requirement for title V. EPA believes that the SIP could be reasonably interpreted to require compliance with those provisions of the plan approval application that constitute specifications for the modification for which the application was filed, but not to require compliance with every descriptive statement contained in the application.⁸

Judging which provisions of a plan approval application are core requirements that fall within the scope of the “specifications” that must be followed, and which provisions are only descriptive, can be difficult and is best analyzed on a case-by-case basis. In the case of the installation of combustion controls, the ESPs, and low NOx burners for the purpose of complying with the acid rain program, it is significant that the plan approval applications and plan approvals referred to by New Jersey were not for the installation and operation of boilers, but were only for the installation of air pollution control equipment. Moreover, it is significant that New Jersey has only shown that the heat input values appear in the plan approval applications, but New Jersey has not provided plan approvals that specify these heat inputs. If the heat input values for the boilers were understood by PADEP to be a specification for the operation of the combustion controls, ESPs, or low NOx burners, then they likely would have been specified as a term of the plan approvals, and subsequently carried over to the operating permit. If the plan approval did not impose a restriction on heat input, it is unlikely that the operating permit would do so.⁹

New Jersey also cites Met Ed’s 1993 plan approval application seeking to limit the heat input rates for Units 1 and 2 on a daily and annual basis so that it could build a new, fifth unit at the plant without triggering the requirements of New Source Review (NSR) for this new unit as evidence that the heat input values are enforceable, applicable requirements. Met Ed, the prior owner, believed that by taking a permitted limit on the daily and annual heat inputs for Units 1

⁷ There are references to operating permits that correspond to the plan approvals for all of these plan approvals, however New Jersey has only included Operating Permit 48-306-006B for the installation of low NOx burners on Unit 2 in the record for its petition.

⁸ EPA is cognizant of the role states (as well as EPA) have in interpreting SIPs and is not determining that this is the definitive interpretation of this SIP provision. However, New Jersey has not demonstrated that the SIP can only be interpreted to require compliance with every statement contained in the plan approval application.

⁹ EPA is of course not concluding that heat input limits can never be applicable requirements. For example, in a title V order concerning Spurlock Generating Station, EPA concluded that where heat input limits were explicitly included in a state operating permit, and were understood to be enforceable limits by the permitting authority, those limits were applicable requirements until modified through the appropriate state operating permit process. See In the Matter of East Kentucky Power Cooperative, Inc., Hugh G. Spurlock Generating Station, Petition IV-2006-4 (Aug. 30, 2007) at 11-12. See also United States v. Eastern Ky Power Coop., Inc., 498 F. Supp. 2d 995 (E.D. Ky 2007). However, EPA does not believe that New Jersey has established that the heat input values in the plan approval applications at issue must be treated as limits and as applicable requirements for the source.

and 2, it could avoid triggering NSR for NOx on the fifth unit it wanted to build at Portland. (Application for Plan Approval Portland Generating Station Unit 1, October 1993, p. 2 of overview. Ex 11.) *See also* Letter from Bernard E. Turlinski, Chief, EPA Region 3 Air Enforcement Section, undated, to William E. Nuver, Air Pollution Control Engineer, PADEP Bethlehem District Office (Ex. 15, p.2).

PADEP issued the first plan approval for the installation of Unit 5 on March 23, 1994 (Plan Approval No. 48-306-006C). This plan approval established NOx RACT for Unit 2 and limited total NOx emissions from Units 1 and 2 to 3398.8 tons per year via a formula which multiplied each boiler's specified NOx RACT emission limit (expressed as lbs/MMBtu) by the total as-fired annual heat input for each boiler (expressed as MMBtu/yr). Ex. 12b, p. 2. The plan approval also limited total daily NOx emissions from Units 1 and 2 to 39923 pounds per day via a formula which similarly multiplied the NOx RACT emission limit by the total daily as-fired heat input for each boiler. A second plan approval for the installation of Unit 5 was issued on December 14, 1994 (Plan Approval No. 48-006A) which contained all the same requirements but added specific NOx RACT limits for Unit 1 and superseded both the earlier issued plan approval for this change, as well as Plan Approval No. 48-306-005C. Then, in January 1996, Portland's prior owner submitted new plan approval applications for Units 1, 2 and 5 which sought to remove the annual and daily heat input limits on Units 1 and 2 and trigger NSR for the construction of Unit 5 (Ex. 17). These plan approval applications occurred after Portland's prior owner had submitted its first title V application. A memo from William Nuver, dated June 4, 1996 (Ex. 17) recommended removal of the annual and daily heat input limits and recommended that the RACT application be revised. The next permitting action that occurred was the issuance of the first title V/FESOP permit for the facility in 2001, and that permit did not contain these annual and daily heat input limits.

EPA agrees that where a source is subject to a SIP-approved permit that explicitly limits annual heat input in order to net out of NSR, that limit would be an applicable requirement for purposes of title V. However, New Jersey did not submit with its petition an operating permit encompassing the plan approval applications or plan approvals that originally authorized the construction of Unit 5.¹⁰ Moreover, under Pennsylvania law, the operating permit replaces all prior plan approvals, with the plan approvals expiring and any provisions that are still applicable to the source carried over to the operating permit. The current title V/FESOP does not contain these annual or daily heat rate input limits. Accordingly, EPA cannot determine based on this record that the annual and daily heat input limitations requested in the 1993 plan approval application and approved in the 1993 and 1994 plan approvals are currently applicable requirements for the source.¹¹

¹⁰ Because Pennsylvania was transitioning from its state operating permit program to the Title V permit program in 1996, there may be no plan approval applications, plan approvals, or operating permit for this change because this change was handled through the title V permit/FESOP application and issuance process.

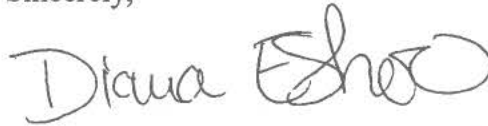
¹¹ EPA recognizes that the removal of an enforceable limit can, in some circumstances, trigger the requirements of NSR. EPA is finding there is not adequate evidence to establish that the heat input figures on the plan applications are currently applicable requirements, and is not making any conclusions as to whether the NSR permitting approach followed by PADEP was appropriate.

New Jersey also suggests that the fact that the heat input numbers were used to model the impact of SO₂ emissions from the Portland plant and other facilities in 1999 is evidence that the heat input numbers are applicable requirements for purposes of title V. However, New Jersey does not explain how these uses of heat input numbers would meet the definition of applicable requirement for purposes of title V and it does not appear that using the heat input figures in these ways would fall within that definition. See 40 C.F.R. § 70.2.

EPA recognizes that the source has used heat input values for various permitting purposes over the last 30 years. In assessing this Petition to Reopen, EPA has considered whether New Jersey has demonstrated that the criteria for reopening a title V permit set forth in 40 C.F.R. § 70.7(f) have been met. EPA is not making any other determinations regarding the source's compliance with Clean Air Act requirements.

Accordingly, for the reasons stated herein, I am denying New Jersey's Petition to Reopen the title V permit issued to Reliant Portland.

Sincerely,

A handwritten signature in black ink that reads "Diana Esher". The signature is written in a cursive, flowing style.

Diana Esher, Director
Air Protection Division