

BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF:)	
)	ORDER RESPONDING TO
WISCONSIN PUBLIC SERVICE)	PETITIONER'S REQUEST
CORPORATION'S JP PULLIAM)	THAT THE ADMINISTRATOR
POWER PLANT)	OBJECT TO ISSUANCE OF STATE
)	OPERATING PERMIT
Permit No. 405031990-P21)	
Issued by the Wisconsin)	Petition Number V -2012-01
Department of Natural Resources)	

ORDER DENYING PETITION TO OBJECT TO PERMIT

On August 21, 2012, pursuant to its authority under the state of Wisconsin's implementing statute, Wis. Stat. Ann. 285.62-285.64, and regulations, Wis. Admin. Code Natural Resources (NR) 407, title V of the Clean Air Act (Act), 42 U.S.C. §§ 7661-7661f, and the U.S. Environmental Protection Agency's implementing regulations at 40 C.F.R. Part 70, the Wisconsin Department of Natural Resources (WDNR) issued a title V renewal operating permit to the Wisconsin Public Service Corporation's JP Pulliam power plant (JP Pulliam). Located in Green Bay, Brown County, Wisconsin, the JP Pulliam plant is a 400 megawatt (MW) electric generation facility that primarily consists of six coal-fired boilers.

On October 2, 2012, David Bender of Garvey McNeil & McGillivray, South Carolina, submitted to the U.S. Environmental Protection Agency (EPA) on behalf of the Sierra Club (the Petitioner) a petition requesting that the EPA object to issuance of the July 3, 2012, proposed revised JP Pulliam title V permit pursuant to section 505(b)(2) of the Act and 40 C.F.R. § 70.8(d). The Petitioner alleges that (1) the permit is deficient because it does not include either the heat input limits from the 1987-88 construction permit applications or Prevention of Significant Deterioration (PSD) and nonattainment major New Source Review (NNSR) requirements¹; and (2) the permit does not contain sufficient monitoring for particulate matter (PM) and, thus, fails to satisfy the monitoring requirements of Part 70.

The EPA has reviewed the Petitioner's allegations pursuant to the standard set forth in section 505(b)(2) of the Act, which requires the Administrator to issue an objection if the petitioner

¹ The construction permit applications that the Petitioner refers to are for construction permits 87-AJH-027 (1987 construction permit) and 88-AJH-101(1988 construction permit). The Petitioner included Permits 87-AJH-027 and 88-AJH-101 as Exhibits G and H to their October 2, 2012, Petition.

demonstrates to the Administrator that the permit is not in compliance with the applicable requirements of the Act. *See also* 40 C.F.R. § 70.8(d); *New York Public Interest Research Group v. Whitman*, 321 F.3d 316, 333 n.11 (2d Cir. 2003).

As discussed below in the Order, EPA's review of this petition is limited to the scope of the revision in the JP Pulliam title V permit (finalized August 21, 2012). Based on a review of the available information, including the petition, the permit record, and relevant statutory and regulatory authorities and guidance, I deny the Petitioner's request to object for the reasons set forth in this Order.

STATUTORY AND REGULATORY FRAMEWORK

Section 502(d)(1) of the Act, 42 U.S.C. § 7661a(d)(1), calls upon each state to develop and submit to the EPA an operating permit program intended to meet the requirements of title V of the Act. The EPA granted final full approval of the Wisconsin title V operating permit program effective November 30, 2001. 66 Fed. Reg. 62946 (December 4, 2001).

All major stationary sources of air pollution and certain other sources are required to apply for title V operating permits that include emission limitations and other conditions necessary to assure compliance with applicable requirements of the Act, including the requirements of the applicable State Implementation Plan (SIP). *See* sections 502(a) and 504(a) of the Act, 42 U.S.C. §§ 7661a(a) and 7661c(a). The title V operating permit program generally does not impose new substantive air quality control requirements (referred to as "applicable requirements"), but does require that permits contain monitoring, recordkeeping, reporting, and other requirements sufficient to assure compliance with applicable requirements. 57 Fed. Reg. 32250, 32251 (July 21, 1992). One purpose of the title V program is to "enable the source, states, the EPA, and the public to understand better the requirements to which the source is subject, and whether the source is meeting those requirements." *Id.* Thus, the title V operating permit program is a vehicle for ensuring that air quality control requirements are appropriately applied to facility emission units and for assuring compliance with such requirements.

Under section 505(a) of the Act, 42 U.S.C. § 7661d(a), and the relevant implementing regulations 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 permit if the EPA determines the permit is not in compliance with applicable requirements or the requirements of Part 70. 40 C.F.R. § 70.8(c). Section 505(b)(2) of the Act provides that, if the EPA does not object to a permit on its own initiative, any person may petition the Administrator, within 60 days of expiration of the EPA's 45-day review period, to object to the permit. 42 U.S.C. § 7661d(b)(2); *see also* 40 C.F.R. § 70.8(d). The petition must "be based only on objections to the permit that were raised with reasonable specificity during the

public comment period provided by the permitting agency (unless the petitioner demonstrates in the petition to the Administrator that it was impracticable to raise such objections within such period or unless the grounds for such objection arose after such period).” 42 U.S.C. § 7661d(b)(2). In response to such a petition, the Administrator must issue an objection if a petitioner demonstrates that a permit is not in compliance with the requirements of the Act. *Id. see also* 40 C.F.R. § 70.8(c)(1); *New York Public Interest Research Group, Inc. v. Whitman*, 321 F.3d 316, 333 n.11 (2nd Cir. 2003). Under section 505(b)(2) of the Act, 42 U.S.C. § 7661d(b)(2), the burden is on the petitioner to make the required demonstration to the EPA. *Sierra Club v. Johnson*, 541 F.3d 1257, 1266-1267 (11th Cir. 2008); *Citizens Against Ruining the Environment v. EPA*, 535 F.3d 670, 677-678 (7th Cir. 2008); *Sierra Club v. EPA*, 557 F.3d 401, 406 (6th Cir. 2009); *McClarence v. EPA*, 596 F.3d 1123, 130-31 (9th Cir. 2010) (discussing the burden of proof in title V petitions). If, in responding to a petition, the EPA objects to a permit that has already been issued, the EPA or the permitting authority will modify, terminate, or revoke and reissue the permit consistent with the procedures set forth in 40 C.F.R. §§ 70.7(g)(4), (5)(i)-(ii) and 70.8(d).

BACKGROUND

The Wisconsin Public Service Corporation (WPSC) initially submitted to WDNR on June 12, 2007, an application to renew the title V permit for the JP Pulliam plant. WDNR published the public notice of the draft title V permit on February 13, 2009, and issued the final permit on April 30, 2009. The Petitioner submitted a petition on that permit on June 25, 2009. The EPA responded to the petition on June 28, 2010, with an order granting the petition. *See In re. Wisconsin Public Service Corporation’s JP Pulliam Power Plant*, Petition V-2009-01 (June 28, 2010) (2010 Pulliam Order). Among other things, we granted the petition on whether: (1) the permit omits the maximum hourly heat input limits that are applicable because they were contained in a preconstruction permit application submitted by the permittee and relied upon by WDNR to issue a New Source Review (NSR) synthetic minor permit; and (2) the permit’s PM monitoring for the boilers is adequate.

In response to EPA’s 2010 Order, WDNR provided public notice for a revised draft title V permit on September 23, 2011. Both the EPA and the Petitioner provided comments on this draft permit. WDNR proposed a revised title V permit on February 16, 2012. On May 9, 2012, the Petitioner filed a petition on the February 2012 permit. However, on July 3, 2012, WDNR proposed a revised permit to the EPA. WDNR issued the final title V permit on August 21, 2012.

The Petitioner submitted to the EPA a petition dated October 2, 2012, requesting that the Administrator object to the July 3, 2012, proposed revised permit. The EPA finds that the Petitioner timely filed its petition.

ISSUES RAISED BY THE PETITIONER

I. The July 2012 permit must include for boilers 5-8 either the heat input limits from the 1987-88 construction permit applications or PSD and NNSR requirements.

The Petitioner's Allegations: The Petitioner alleges that the proposed July 2012 title V permit must include the heat input limits included in and used by WDNR to analyze the 1987 and 1988 construction permit applications, or PSD and/or NNSR requirements as a result of the burner modifications.

Specifically, the Petitioner first claims that the heat input limits are applicable requirements for title V purposes because they were in the 1987-88 construction permit applications, which were incorporated by reference into construction permits 87-AJH-027 and 88-AJH-101 by the language of the permits themselves. Petition at 7-8. The Petitioner states that the Wisconsin SIP clearly requires that the stationary source must be constructed “in accordance with the application as approved by the department.” *Id.* at 8. The Petitioner further claims that, in evaluating the projects to replace oil burners with larger natural gas burners, WDNR relied on the heat rates to determine that PSD would not apply when it issued the 1987 and 1988 construction permits. *Id.* The Petitioner asserts that WDNR assumed in its analysis that emissions would decrease as a result of the project because the overall heat input would remain constant, as a decrease in emissions from coal combustion would offset an increase in emissions of nitrogen oxides (NO_x) and PM from the new gas burners. *Id.* at 9 -10. Thus, the Petitioner argues, it is only because WDNR held the maximum heat input constant that WDNR could have concluded that no emissions increase would occur. *Id.* at 11 - 12. The Petitioner claims that, if the maximum heat input were not capped, the gas burner project would increase the boiler size and emissions, requiring additional applicable requirements. *Id.* at 12. The Petitioner reasons that, because WDNR did not cap coal heat input, it must have relied on the maximum hourly heat input from the applications to prevent the projects from becoming subject to PSD. *Id.* at 12 - 13. The Petitioner concludes that the maximum hourly heat input rates from the applications are therefore enforceable limits that are applicable requirements and should be in the July 2012 title V permit. *Id.* at 13.

The Petitioner argues in the alternative that, if the heat input limits from the applications for permits 87-AJH-027 and 88-AJH-101 are not enforceable as applicable requirements of the permits, the boilers were modified and subject to PSD and NNSR because the permits did not contain emission limits that capped the source's post-project annual emissions so that they did not exceed the threshold for PSD/NNSR. *Id.* The Petitioner claims that WDNR set limits in the permits to cap only one fuel -- natural gas -- rather than capping the plant's annual emissions at the baseline emission rate plus no more than the threshold amount for sulfur dioxide (SO₂), NO_x, and PM. *Id.* The Petitioner notes that WDNR has determined that by adding the gas burners, the

boilers were modified, and asserts that whether the modifications were “major modifications,” triggering applicability of PSD/NNSR, depends on whether they resulted in a “significant net emissions increase.” *Id.* at 14. The Petitioner provides an analysis that they maintain demonstrates that the projects resulted in a significant net emissions increase in SO₂, NO_x, and PM under the appropriate emissions increase test. *Id.* at 14 - 16.

The Petitioner alleges that WDNR dismissed the Petitioner’s analysis of emission increases and concluded that “based on the available information,” the project would not lead to additional use of the boiler or increased emissions. *Id.* at 18. According to the Petitioner, WDNR’s decision is premised on an incorrect interpretation of the Seventh Circuit’s decision in *Wisconsin Electric Power Company v. Reilly*, 893 F.2d 901 (7th Cir. 1990) (*WEPCO*). *Id.* The Petitioner claims that the *WEPCO* decision was not available to “non-like-kind” modifications. Petition at 18. The Petitioner maintains that calculations of emissions increases should be made using the “actual-to-potential” test. *Id.* at 18 - 22. The Petitioner asserts that the *WEPCO* case rejected application of the “actual-to-potential” test to certain types of projects deemed to be “like-kind replacements,” by applying a test that did not contain an assumption that operations would increase up to the permitted levels, but instead using a lower projection of future operating hours and emission rates based upon past operations (known as the “actual-to-projected-actual” test). *Id.* at 22. The Petitioner claims that, because the projects in the *WEPCO* case involved “like-kind replacements,” the source was considered to have “begun normal operations” before the project. *Id.* at 22 - 23. In contrast, according to the Petitioner, because the project at the Pulliam facility involved changing the design and increasing the size of the burners, the projects were not “like-kind replacements.” *Id.* at 23 - 24. The Petitioner concludes that, because they were not “like-kind replacements,” the test to determine whether the projects triggered PSD and NNSR is the “actual-to-potential” test. *Id.* at 24.

Finally, the Petitioner alleges that, even if the *WEPCO* “actual-to-projected-actual” test applied to the Pulliam projects, WDNR’s conclusion that emissions would not increase is unsupported. *Id.* at 24 - 25. The Petitioner argues that WDNR’s analysis projects that emissions would increase, but that the permits do not cap annual emissions below the historic baseline plus “significant increase” rate of 40 tons per year. *Id.* at 25. The Petitioner states that the applicable test for “non-like-kind” replacements is the “actual-to-potential” test, and that there is no dispute that, under that test, the projects triggered PSD/NNSR. *Id.* The Petitioner concludes that, if the heat input limits are not enforceable, the Administrator must object to the permit because it lacks applicable PSD/NNSR requirements. *Id.* at 26.

The EPA Response: The Petitioner alleges that the heat input limits are applicable requirements and were relied upon in making rule applicability decisions in the 1987-88 construction permits 87-AJH-027 and 88-AJH-101; and that if heat input rates are not enforceable, the gas burner replacement projects in those two permits should have resulted in PSD/NNSR applicability. For the reasons described below, the Petition is denied with respect to the above claim.

In the 2010 Pulliam Order, the EPA directed WDNR to address the following two issues:

- Whether Wisconsin SIP NR 406.10 and/or the provision in Permit 027 described above incorporate the contents (including heat input rates) of a preconstruction permit application into the Wisconsin SIP and/or preconstruction permit, thus making the contents of the permit application part of these applicable requirements.
- Whether WDNR had relied on the heat input rates in issuing Permit 027 and/or making the permitting decision described in the September 7, 1993, letter, and, if so, whether the heat input rates must be included in the title V permit to assure compliance with Permit 027.²

2010 Pulliam Order at 8.

The Petitioner claims that the heat input limits are applicable requirements for title V purposes because they were in the 1987-88 construction permit applications and therefore incorporated by reference into the 1987-88 construction permits by the language of the permits themselves. Petition at 7. Concerning the 1987 construction permit, these assertions are inconsistent with WDNR's statements in the preliminary determination accompanying the draft revised Pulliam permit that WDNR issued in response to the 2010 Pulliam Order. *Analysis and Preliminary Determination for the Significant Revision of Operation Permit 405031990-P20* (September 16, 2011) (2011 PD). In the 2011 PD, WDNR stated that "The Department does not believe that in this case the total heat inputs of the boilers are incorporated into the Wisconsin SIP or into the construction Permit #87-AJH-027." 2011 PD at 15. WDNR explained that the inclusion of the heat inputs in the construction permit application was descriptive, not prescriptive. *Id.* According to WDNR, "the important thing was that the facility construct and operate the natural gas-fired burners in conformity with the explicit conditions in the construction permit." *Id.* at 15-16. WDNR's position is consistent with the plain text of the Wisconsin SIP NR 406.10, which defines violations to include when an owner or operator "fails to construct and operate a stationary source in accordance with conditions imposed by [WDNR]." ³ As mentioned above, WDNR clarified that it did not include the heat inputs as conditions in the 1987 construction permit.

The Petitioner claims that the heat inputs are incorporated into the two construction permits by a permit statement in both Permits 87-AJH-27 and 88-AJH-101. Petition at 7. This statement, in relevant part, provides that:

² Permit 027 is the 1987 construction permit 87-AJH-027.

³ Wisconsin SIP NR 406.10 also lists other violations, including the failure "to construct a stationary source in accordance with the application as approved by [WDNR]." This provision is discussed in more detail below.

“Wisconsin Public Service Corporation is authorized to construct and operate ... as described in plans and specifications dated... in conformity with the following ... conditions.” *Id.*

WDNR’s statement in the 2011 PD that “the important thing was that the facility construct and operate the natural gas-fired burners in conformity with the explicit conditions in the construction permit” clarifies that the obligation imposed by this permit statement is to construct and operate in conformity with the conditions in the permit; therefore, WDNR has not by this statement incorporated, nor did it intend to incorporate, heat inputs as part of the construction permits. Although WDNR’s explanation in the 2011 PD relates to permit 87-AJH-027,⁴ due to the similarity of the language at issue in both Permits 87-AJH-027 and 88-AJH-101, we believe WDNR’s explanation in the 2011 PD equally applies to Permit 88-AJH-101. In light of WDNR’s clarification, we conclude that the Petitioner fails to demonstrate that WDNR has incorporated by reference the heat inputs in the construction permit applications for Permits 87-AJH-027 and 88-AJH-101. Further, in claiming that the SIP requires that the heat inputs in the permit application be applicable requirements, the Petitioner does not address the above described provision in SIP NR 406.10; instead it references a different statement in SIP NR 406.10 that defines violation to include failure “to *construct* a stationary source a stationary source in accordance with the application as approved by the department.”⁵ (*Emphasis added*). Unlike the construction permit statement cited by the Petitioner, which addresses both construction and operation, this SIP provision addresses only construction. However, the Petitioner is not claiming that the boilers were not constructed in accordance with the permit application or that requirements governing construction but not operation need to be in the title V permit. Also, the 1987-88 construction permits do not include heat input rates as permit terms and conditions. For the reasons stated above, the Petitioner has failed to demonstrate that Wisconsin SIP NR 406.10 or the provision in permit 87-AJH-027 incorporates the heat input rates of boilers in preconstruction permit application, thus making the heat input rates part of these applicable requirements.

The Petitioner further claims that WDNR relied on the heat rates to determine that PSD would not apply when it issued construction permits 87-AJH-027 and 88-AJH-101. Petition at 9-13. The Petitioner argues that “What is also clear is that if the maximum heat input was not held constant, the increased heat input from the large gas burners, the gas burner projects would increase the boiler size and emissions and require additional applicable requirements.” Petition at 12. However, WDNR included in the 2011 PD the PSD applicability analyses it conducted at

⁴ We did not expect the 2011 PD to address Permit 88-AJH-101 because that permit was not a subject of our 2010 Pulliam Order that the draft revised Pulliam permit and the accompanying 2011 PD tried to address.

⁵ Wisconsin SIP NR 406.10 provides, in relevant part, that: “Any owner or operator who fails to construct a stationary source in accordance with the application as approved by the department; any owner or operator who fails to construct and operate a stationary source in accordance with conditions imposed by the department... shall be considered in violation ...”

the time for these two construction permits, and the Petitioner fails to show that WDNR relied on heat inputs in these PSD applicability analysis. In support of its claim, the Petitioner cites to WDNR's New Source Performance Standard (NSPS) analysis for these construction permits, the construction permit applications, and a November 11, 1993, memorandum to the file prepared by WDNR. *Id.*⁶ However, none of these documents were referenced in WDNR's PSD analysis for these two 1987-88 construction permits. Although the NSPS analysis was conducted at the same time, there is no evidence that WDNR carried the NSPS analysis over to its PSD analysis. Concerning the November 11, 1993, memo, the Petitioner asserts that this memo is further evidence that WDNR relied on the heat rates to determine that PSD would not apply when it issued construction permits 87-AJH-027 and 88-AJH-101. Petition at 12. Specifically, the Petitioner claims that this memo is evidence that "the gas burner projects would increase the boiler size and emissions and require additional applicable requirements." *Id.* The November 11, 1993, document is a memo to the file from a Wisconsin permit engineer concerning a request from WPSC for revising the 1988 permit terms. As discussed above, WDNR did not rely on heat input rates in issuing the 1987-88 construction permits and the 1987-88 construction permits did not include heat input rates as permit terms and conditions. The November 11, 1993, memo does not concern the 1987 construction permit. Further, the existence of a 1993 memo to the file does not change the factual basis on which WDNR determined that PSD did not apply in issuing the 1988 construction permit. In the second instance, the November 11, 1993, memo concerns a *proposed revision* to the construction permit 88-AJH-101, not the original 88-AJH-101 that is at issue in this petition. For these reasons, the Petitioner has not demonstrated that the November 11, 1993, memo is further evidence that WDNR relied on the heat rates to determine that PSD would not apply when it issued construction permits 87-AJH-027 and 88-AJH-101. In light of the above, we conclude that the Petitioner fails to demonstrate that WDNR relied on heat inputs in making PSD applicability decisions in issuing Permits 87-AJH-27 and 88-AJH-101.

The Petitioner further claims that if the heat input rates are not enforceable, then the natural gas burner replacement projects triggered PSD. For the reasons stated below, we deny the petition on this issue. As a preliminary matter, the issue of PSD applicability for the projects allowed under Permits 87-AJH-027 and 88-AJH-101 appears to be outside the scope of the title V permit revision at issue in this petition. In the context of permit modifications and reopenings for cause, the EPA has interpreted its title V regulations at 40 C.F.R. Part 70 to provide a more limited scope for citizen petitions to the EPA than is otherwise available for original permit issuance and permit renewals. *See, e.g., In the Matter of Wisconsin Public Service Corporation -- Weston Generating Station* (Weston Order) (December 19, 2007) at 5-7 (discussing permit modifications); *In the Matter of Tennessee Valley Authority Shawnee Fossil Plant* (Shawnee Order) (August 31, 2012) at 5-6 (discussing permit reopenings for cause). In these orders, among other things, the EPA noted that "this interpretation is not only consistent with the regulations

⁶ The Petitioner included the November 11, 1993, memo as Exhibit X to their May 9, 2012, Petition.

but it also furthers the statutory requirement that the title V regulations contain "[a]dequate, streamlined, and reasonable procedures" for evaluating permit applications and issuing permits." *Weston Order* at 6 (citing CAA § 502(b)(6); 40 U.S.C. § 7661a(b)(6)); see also *Shawnee Order* at 6.

WDNR made clear in its February 16, 2012, Response to Comments document and elsewhere in its record, that the issue of whether projects allowed under permits 87-AJH-027 and 88-AJH-101 were subject to PSD was beyond the scope of this limited permit revision proceeding. See, e.g., *Response to Comments on the Preliminary Determinations for Wisconsin Public Service Corporation – JP Pulliam Plant, Permit 405031990-P21* (February 16, 2012) (February 2012 RTC), at 7-8.^{7, 8} The EPA believes this issue is beyond the proper scope of this petition because it was not directly addressed by the permit revision at issue here.

Regardless of whether this issue of PSD applicability is properly subject to a petition on this permit revision, on January 4, 2013, the EPA filed in United States District Court for the Eastern District of Wisconsin a complaint against WPSC for violations of the Clean Air Act New Source Review program. In the complaint, EPA alleged, among other things, that WPSC made major modifications to major emitting facilities at certain electricity generating stations located in Wisconsin, and failed to obtain necessary permits and install and operate necessary controls under the CAA to reduce SO₂, PM and NO_x. On the same day, the parties jointly filed a Consent Decree (CD) and a motion to lodge the CD. The CD contains specific requirements for the four Pulliam boilers that are at issue in this Petition. For Boilers Units 5 and 6, the CD would require that, no later than June 1, 2015, WPS must retire these units or obtain all required permits should it decide to refuel or repower such unit. For Boilers Units 7 and 8, the CD contains specific NO_x, SO₂ and PM emission limitations and control requirements. Entry of the CD would resolve all of EPA's claims against WPS that arose from any modification commenced prior to the lodging of the CD at these four boilers at Pulliam, including the burner replacement projects at issue in this Petition, and at certain emission units at another WPSC facility. The EPA anticipates that the CD requirements, not only the specific emission limitations but also the requirement to retire, refuel or repower, will achieve significant reductions of SO₂, NO_x and PM. The EPA intends to seek Court's entry of the consent decree. Upon entry, the CD would resolve, among other issues, the PSD issue raised in this title V petition.

⁷ The February 2012 RTC is included as Exhibit D to the Petition.

⁸ The fact that WDNR responded to comments on this issue did not make this issue a proper subject of a petition on this revision. Relatedly, in the *Weston Order*, the EPA explained that,

[w]e do not think the permitting authorities' discretion concerning the solicitation of comments affects our interpretation of the rule concerning the scope of petitions for permit modification actions...EPA did not intend, in offering permitting authorities such discretion, to expand the permissible scope of petitions to issues not germane to the permit modifications the permitting authorities ultimately adopt.

Weston Order at 9, fn 3; see also *Shawnee Order* at 7, fn 5.

In the title V petition order context, the EPA has previously addressed the situation where a final settlement resolves the claims raised in a title V petition. See *In Re WE Energies Oak Creek Power Plant*, Permit No. 241007690-PIO, at 6-10 (June 12, 2009) (Oak Creek Order). The analysis and ultimate determination in the Oak Creek Order are relevant to and inform the EPA's determination on this Petition. In the Oak Creek Order, the EPA explained,

As the petition raises the same issues EPA has resolved in the consent decree, this petition requires EPA to address the relationship between two distinct, but related parts of the CAA -- the enforcement provisions of the Act (in this case, sections 113 and 167) and EPA's obligation to respond to petitions to object to state permits issued under title V. Congress did not directly address how EPA must handle title V petitions that raise the same issues EPA has resolved through an enforcement settlement. The enforcement provisions of the Act do not address how EPA must treat a title V petition on an issue EPA has settled in an enforcement case. See CAA sections 113(b) and 167. Similarly, title V does not directly answer this question. Title V provides that "[t]he Administrator shall issue an objection ... if the petitioner demonstrates to the Administrator that the permit is not in compliance with the requirements of this chapter..." CAA § 505(b)(2)...

...Where EPA has entered into a CD specifically designed to address a source's compliance with the Act, and the CD has been given the force of law by a court, it is not clear that Congress intended the Administrator to accept a contrary demonstration that could potentially force EPA to require a state to add additional permit terms and potentially undermine the CD in the title V context. A review of the legislative history does not further elucidate congressional intent on this matter.

As Congress has not directly spoken to this precise question at issue, EPA may adopt a reasonable interpretation to fill the gap. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837,842-44 (1984). EPA adopts the approach that, once EPA has resolved a matter through enforcement resulting in a CD approved by a court, the Administrator will not determine that a demonstration of noncompliance with the Act has been made in the title V context. This approach is reasonable for several reasons, including: (1) it avoids conflicts between settlements of enforcement cases and responses to title V petitions (including potentially competing court proceedings); (2) it does not create disincentives for sources to agree to reasonable terms in settling enforcement matters; (3) it does not require EPA to revisit complex applicability issues in the short 60 day timeframe for EPA to respond to title V petitions; (4) it does not unfairly prejudice sources that settled enforcement actions in good faith; and (5) EPA should not be forced to re-litigate issues of compliance with the Act where EPA and the source have settled. Further, the public is afforded an opportunity to comment on CDs, see 28 C.F.R. § 50.7.

Oak Creek Order at 8-10.

In a subsequent title V order, *In re. Tennessee Valley Authority Paradise Fossil Fuel Plant*, Petition IV-2010-1 (May 2, 2011) (TVA Order), the EPA similarly denied a petition issue that was being addressed in a global settlement among multiple parties, including the EPA and the facility. At the time the EPA issued the TVA title order, one relevant settlement document (a consent decree) was lodged with the court while undergoing public notice and comment. *Id.* at 15. Citing to the Oak Creek Order, the EPA explains in the TVA order that “EPA recognizes that the consent decree at issue in the Oak Creek Order had already been found to be ‘fair, reasonable, adequate, and consistent with the policies underlying the CAA’ and entered by the court at the time that the [title V] order was issued.” *Id.* at 17. However, in the TVA Order, the EPA noted, among other things, that a final settlement has been reached and a consent decree has been lodged with the court, and concluded that:

It is appropriate and consistent with the CAA for the EPA to defer to the resolution of the final steps of the settlement processes. Thus, consistent with the Oak Creek Order, in these circumstances the Administrator will not determine that a demonstration of noncompliance with the Act has been made in the title V context. *Id.* at 17.

In the present case, we similarly believe that it is appropriate and consistent with the CAA for the EPA to defer to the resolution of the final steps of the settlement processes in the Pulliam enforcement action. The EPA has reached a settlement and lodged the CD with the court. The lodged CD reflects EPA’s exercise of enforcement under the CAA. The CD would require significant injunctive relief and penalties, as well as resolving allegations of PSD violations, including the modifications at issue in the Petition. In light of the circumstances described above relative to the present issue, and consistent with the Oak Creek Order and TVA Order, the EPA determines that the Petitioner has not “demonstrate[d] to the Administrator that the permit is not in compliance with the requirements of [the Act].” CAA § 505(b)(2).

For the reasons stated above, the Petition is denied on this issue.

II. The permit’s PM surrogate monitoring fails to satisfy the requirements of Part 70, which requires monitoring that provides data sufficient to determine compliance.

The Petitioner’s Allegations: The Petitioner maintains that the permit at issue in this petition is a revision of a permit to which the Administrator previously objected because the permit did not include adequate monitoring. Petition at 26 - 27. The Petitioner states that WDNR “adopted a correlation between opacity emissions ‘as indicators of compliance’ with the PM emission

limits.⁹” *Id.* at 27. The Petitioner states that, through a stack test, WDNR determined opacity emission rates that correlated with 95 percent of the 0.1 lb/one million British Thermal units (mmbtu) PM emission limit, and provided a table specifying the opacity levels associated with the 0.095 lb/mmbtu emission rate for each boiler. *Id.*

The Petitioner states that it pointed out in its comments that WDNR refers to the Continuous Assurance Monitoring (CAM) rule and to emission “excursions” in the same discussion as monitoring pursuant to 40 C.F.R. Part 70, and that this reference has the potential to cause confusion. *Id.* at 28. The Petitioner asserts that Part 70 monitoring must provide data representative of the source’s compliance with the underlying permit limits, whereas CAM indicator ranges and “excursion” levels are set to ensure that controls are operating, but are not necessarily based on values that represent compliance. *Id.* The Petitioner alleges that the July 2012 title V permit’s “CAM plan ‘excursion’ indicator ranges alone are not necessarily sufficient monitoring to satisfy Part 70.” *Id.* The Petitioner thus claims that the title V permit lacks PM monitoring for the boilers that is sufficient to assure compliance for Part 70 purposes or to satisfy the monitoring requirements of the Wisconsin SIP. *Id.* at 29.

The Petitioner claims that “EPA has already interpreted Part 70 to require an explicit correlation in the permit between a surrogate monitoring range and an emission rate sufficient to determine directly from the surrogate whether emissions are complying or violating the numeric emission limit and that EPA has required that the surrogate range be established and made enforceable in the permit.” *Id.* at 30. The Petitioner asserts that the EPA has explicitly required that a permit must identify the upper and lower ends of a parameter range “that corresponds to compliance with the underlying limit” and “provides direct evidence of compliance or non-compliance with the permit.” *Id.* at 31 - 32, citing *In re Dunkirk Power LLC*, Order Responding to the Petitioner’s Request that the Administrator Object to Issuance of a State Operating Permit, Petition Number II-2002-02, at 20 (July 31, 2003). The Petitioner explains that, in its response to comments on this permit, WDNR stated, “An examination of the data used to determine the indicator ranges shows that there were some test runs where the average opacity was greater than the chosen indicator range, but particulate matter emissions were less than the emission limit.” *Id.* at 32, quoting WDNR’s February 16, 2012, Response to Comments at 11. February 2012 RTC 11. Examining WDNR’s statements, the Petitioner concludes that “WDNR contends that opacity ranges are not ‘by themselves’ sufficient to determine that emissions are above, or below the permit limits.” The Petitioner claims that it is not enough for the source to merely submit data

⁹ As noted previously, the permit at issue is the title V permit proposed on July 3, 2012. The Petitioner provided public comment on the PM monitoring provisions for the boilers on the September 23, 2011, proposed title V permit. WDNR responded to these comments in its February 16, 2012, RTC. WDNR modified the PM monitoring requirements for the boilers in its July 3, 2012, proposed permit. In this petition, the Petitioner relies on comments submitted on the September 2011 permit (Exhibit B of their May 2012 Petition) and WDNR’s response to those comments on February 16, 2012.

indicative of control device performance; rather that data must provide a conclusion of whether the source is in compliance with applicable requirements. *Id.* at 34.

The Petitioner alleges that, because WDNR asserts that the opacity ranges upon which it relies to satisfy Part 70 monitoring requirements are not capable of providing sufficient data, and since there is no other monitoring in the permit to determine whether the boilers are operating in compliance with the applicable PM limits, that the monitoring fails to comply with Part 70. *Id.* The Petitioner further points to *In the Matter of Tampa Electric Co., F.J. Gannon Station* (Sept. 8, 2000), and asserts that the EPA was explicit that, where a surrogate range is established in the permit, the surrogate range must be enforceable. The Petitioner asserts that either WDNR must set the opacity surrogate range to be enforceable, or WDNR must develop monitoring that is sufficient to yield data representative of compliance with the permit limits. *Id.*

The EPA Response: For the reasons described below, the Petition is denied with respect to the above claim.

In EPA's 2010 Pulliam Order, the EPA directed WDNR to explain how the Pulliam title V permit provides adequate PM monitoring for the boilers or modify the permit as necessary to ensure that it contains monitoring sufficient to assure compliance with the PM limits in the permit for the boilers. Pulliam Order at 11. In response to the 2010 Pulliam Order, WDNR proposed a revised title permit that includes modifications to the PM monitoring requirements for the boilers. Specifically, the proposed revised permit includes opacity ranges established in the CAM plan for PM monitoring for the boilers under Part 70.¹⁰ See permit conditions I.A.1.b(5) and I.B.1.b(5). WDNR established a correlation that found a relationship between PM and opacity and set opacity parameter ranges that correspond to PM emissions that are 95 percent of the applicable PM emission limit. *Analysis and Preliminary Determinations for the Significant Revision for Operation Permit 405031990-P20* (September 16, 2011) (2011 PD), at 25. WDNR includes the parameter ranges as an indicator of performance of the control devices. See permit conditions I.A.1.b(5) and I.B.1.b(5). WDNR also relies on these indicator ranges (which indicates excursion from the PM limit) as an indicator of compliance. 2011 PD at 25.

In addition to the opacity indicator ranges, the permit requires monitoring of the operating status of each Electrostatic Precipitator (ESP) transformer-rectifier set (TR-set)¹¹ as a secondary

¹⁰ Though the permit references "Compliance Assurance Monitoring (CAM)" for the permit conditions described above, the permit cites to NR 407.09(4)(a)1, part of WDNR's title V operating permit program, as one of the authorities for these conditions.

¹¹ For an ESP, "the power system maintains voltage at the highest level without causing excess spark over between the discharge electrode and collection plate. These power sets are also commonly called transformer-rectifier (T-R) sets." See Air Pollution Training Institute Training Course SI: 412 Electrostatic Precipitator Plan Review, available at <http://yosemite.epa.gov/oaqps/EOGtrain.nsf>.

indicator of performance of the control devices. See permit conditions I.A.1.b(2) and (3). In its October 21, 2011, comment on the draft revised title V permit, the Petitioner stated that the CAM plan should address conditions that could increase emissions, other than whether the TR-sets are out of service, the Petitioner further stated that, for example, the TR-sets could experience “high resistivity, low capture, low power, pluggage.”¹² WDNR explained in its February 2012 RTC the relationship between ESP parameter monitoring and PM and opacity emissions: “If an ESP is experiencing problems such as high resistivity, low, power, etc., to such an extent that PM emissions increase, this will show up in the opacity.” February 2012 RTC at 13. In addition, the permit continues to require biennial testing. See permit condition I.A.1.b.1. As this permit condition indicates, the testing is for the purpose of demonstrating compliance with the boiler PM emission limits.

As described above, in addition to adding the CAM provisions described above as part of PM monitoring for the boilers under Part 70, the permit continues to require biennial testing, and parametric monitoring of the ESP for demonstrating and monitoring compliance with the PM limits for the boilers. See permit conditions I.A.1.b., I.A.1.c., I.B.1.b, and I.B.1.c. The suite of monitoring requirements described above is consistent with the monitoring approach we reviewed in a number of orders. See *In re Public Service Company of Colorado, dba Xcel Energy, Hayden Station*, Petition VIII-2009-01 (March 24, 2010), at 5. *In re Public Service Company of Colorado, dba Xcel Energy, Pawnee Station*, Petition VIII-2010-XX (June 30, 2011), at 12; *In re Public Service Company of Colorado, dba Xcel Energy, Cherokee Station*, Petition VIII-2010-XX (September 29, 2011), at 11; *In re Public Service Company of Colorado, dba Xcel Energy, Valmont Station*, Petition VIII-2010-XX (September 29, 2011), at 10. As in those cases, the revised Pulliam permit uses a three-pronged approach for assuring compliance with the PM limit: (1) biennial performance testing to demonstrate that the specified limit is being met; (2) continuous monitoring of the operation and maintenance of the ESP to ensure that it continues to operate properly (including monitoring operational parameter; including voltage, current, and sparking rate); and (3) the CAM plan which includes ranges of opacity established that correlate to the applicable PM limits. See permit conditions I.A.1.b., I.A.1.c., I.B.1.b, and I.B.1.c.

The Petitioner did not discuss how, viewed as a whole, this three-pronged approach in the revised permit is not adequate to assure compliance with the applicable PM limit. Rather, the Petitioner’s claim appears to focus on the CAM provisions included as part of the PM monitoring for the boilers in the title V permit. Specifically, the Petitioner claims that the CAM plan’s “excursion” indicator ranges, alone, are not necessarily sufficient monitoring to satisfy Part 70.” Petition at 28. However, we see no indication in the permit record, nor has the Petitioner identified any, that WDNR is relying on the opacity ranges alone to assure compliance with the PM limits for the boilers. In fact, as described above, the permit contains other PM

¹² See Bender, *Permit Comments on Draft permit 405031990-P21 and, In the Alternative, Petition to Revise Pursuant to Wis. Admin. Code §NR 407.14* (October 21, 2011), section 9.

monitoring provisions. To the extent that the Petitioner claims that the EPA has in the past interpreted Part 70 to require all indicator ranges in a title V permit to be enforceable, the Petitioner is incorrect. Whether a permit contains adequate monitoring to assure compliance is fact-specific, depending on all of the relevant monitoring provisions in each title V permit. The fact that certain indicator ranges in one title V permit must be enforceable to assure compliance with an applicable requirement in that permit does not necessarily speak to whether indicator ranges in other title V permits must be enforceable. For example, in *In re. Huntley Generating Station*, Petition II-2002-11 (July 31, 2003), which the Petitioner cited in support of its claim, the EPA discussed other monitoring provisions in that title V permit, such as one stack test per permit term, thus indicating that the EPA took into account the other monitoring provisions in that permit in addressing that monitoring issue in that order. In this case, the Petitioner did not identify one of the other PM monitoring provisions in the Pulliam permit, and discussed the other PM monitoring provision in a cursory manner. Furthermore, the Petitioner has not demonstrated how all of the monitoring provisions together failed to assure compliance with the PM limits or how Pulliam is sufficiently similar to the facts in the previous orders referenced in the petition such that the opacity indicator ranges in the Pulliam permit must be enforceable.

As mentioned above, under title V a petitioner has the burden to demonstrate to the EPA that a permit is not in compliance with the requirements of the Act. *Sierra Club v. Johnson*, 541 F.3d 1257, 1266-1267 (11th Cir. 2008); *Citizens Against Ruining the Environment v. EPA*, 535 F.3d 670, 677-678 (7th Cir. 2008); *Sierra Club v. EPA*, 557 F.3d 401, 406 (6th Cir. 2009); *McClarence v. EPA*, 596 F.3d 1123, 130-31 (9th Cir. 2010) (discussing the burden of proof in title V petitions). Because the Petitioner simply challenges the indicator range in the CAM plan without addressing the overall monitoring scheme for the PM limits in the permit, the Petitioner failed to demonstrate that the monitoring requirements in the permit are insufficient to assure compliance with the PM limits.

For the reasons stated above, the petition is denied on this issue.

CONCLUSION

For the reasons set forth above and pursuant to CAA section 505(b)(2) and 40 C.F.R. § 70.8(d), I hereby deny the Petition requesting that the EPA object to the proposed title V permit 405031990-P21 issued to WPSC JP Pulliam power plant located in Green Bay, Brown County Wisconsin, on July 3, 2012.

JAN - 7 2013

Dated: _____



Lisa P. Jackson

Administrator