BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF TVA JOHN SEVIER FOSSIL PLANT ROGERSVILLE, TENNESSEE AND TVA KINGSTON FOSSIL PLANT HARRIMAN, TENNESSEE ELECTRIC POWER GENERATION PETITION IV-2002-6 PERMIT NOS. 548473 AND 548401 ISSUED BY THE TENNESSEE DEPARTMENT OF ENVIRONMENT AND CONSERVATION	ORDER RESPONDING TO PETITIONER'S REQUEST THAT THE ADMINISTRATOR OBJECT TO ISSUANCE OF A STATE OPERATING PERMIT

ORDER PARTIALLY GRANTING AND PARTIALLY DENYING PETITION FOR OBJECTION TO PERMIT

On November 18, 2002, the United States Environmental Protection Agency ("EPA") received a petition from Mr. Reed Zars, on behalf of the National Parks Conservation Association ("NPCA" or "Petitioner"), requesting that EPA object to the permits issued by the Tennessee Department of Environment and Conservation ("TDEC" or the "Department") to the Tennessee Valley Authority ("TVA") for its Kingston Fossil Plant located in Harriman (Roane County), Tennessee, and its John Sevier Fossil Plant located in Rogersville (Hawkins County), Tennessee. The permits are state operating permits issued September 16, 2002, pursuant to title V of the Clean Air Act ("CAA" or the "Act"), 42 U.S.C. §§ 7661-7661f.

Petitioner asserts that the fourth paragraph of Condition E3-6 in both the Kingston and John Sevier permits is inconsistent with the CAA. This paragraph states:

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

Petitioner alleges that this paragraph, which Petitioner refers to as the "'prima facie' provision," fails to ensure compliance with the applicable opacity limits. Petitioner also expresses concern that this paragraph allows TDEC to make changes to the state implementation plan ("SIP") without EPA approval and improperly shields the source from its requirement to independently certify compliance. Petitioner has requested that EPA object to the Kingston and John Sevier

permits pursuant to CAA section 505(b)(2) and require that TDEC remove the "'prima facie' provision."

Based upon review of all the information, including the Kingston and John Sevier permits, the statements of basis prepared by TDEC for the draft permits, additional information provided by the permitting authority, and information provided by the Petitioner in the petition, EPA grants the Petitioner's request in part and denies the petition in part for the reasons set forth below.

I. STATUTORY AND REGULATORY FRAMEWORK

Section 502(d)(1) of the Act calls upon each state to develop and submit to EPA an operating permit program intended to meet the requirements of CAA title V. The State of Tennessee originally submitted its title V program governing the issuance of operating permits on November 10, 1994. EPA granted interim approval to the program on July 29, 1996. See 61 Fed. Reg. 39335 (July 29, 1996). Full approval was granted by EPA on November 14, 2001. See 66 Fed. Reg. 56996 (November 14, 2001). The program is now incorporated into Tennessee's Air Pollution Control Regulation 1200-3-9-.02(11). All major stationary sources of air pollution and certain other sources are required to apply for title V operating permits that include emission limitations and other conditions as necessary to assure compliance with applicable requirements of the Act, including the applicable implementation plan. See CAA sections 502(a) and 504(a).

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

Under Section 505(b)(1) of the Act and 40 CFR § 70.8(c)(1), the Administrator is authorized to review state operating permits issued pursuant to title V, and to object to permits that are determined not to be in compliance with requirements of the Act, including the requirements of a SIP and Part 70. Upon receipt of a proposed permit, EPA has 45 days to object to final issuance of the permit. If EPA does not object to a permit on its own initiative, CAA section 505(b)(2) and 40 CFR § 70.8(d) provide that any person may petition the Administrator, within 60 days of the expiration of EPA's 45-day review period, to object to the permit. These sections also provide that petitions shall be based only on objections to the permit raised with reasonable specificity during the public comment period (unless the petitioner

demonstrates that it was impracticable to raise such objections within that period or the grounds for such objections arose after that period).

Section 505(b)(2) of the Act requires the Administrator to issue a permit objection if a petitioner demonstrates that a permit is not in compliance with the requirements of the Act, including the requirements of 40 CFR Part 70 and the applicable implementation plan. If, in responding to a petition, EPA objects to a permit that has already been issued, the permitting authority or EPA will modify, terminate, or revoke and reissue the permit consistent with the procedures in 40 CFR §§ 70.7(g)(4) or (5)(i) and (ii) for reopening a permit for cause. A petition to object does not stay the effectiveness of the permit or its requirements if the permit was issued after the expiration of EPA's 45-day review period. See CAA Section 505(b)(2)-(3); 40 CFR § 70.8(d).

II. PROCEDURAL BACKGROUND

A. Permitting Chronology

TDEC received a title V permit application submitted by TVA for the Kingston facility on August 25, 1997. The Department determined the application to be administratively complete on August 28, 1997. On June 14, 2002, TDEC published a public notice providing for a 30-day public comment period on the draft title V permit for the Kingston facility. The public comment period for the draft permit ended on July 14, 2002.

TDEC received a title V permit application submitted by TVA for the John Sevier facility on August 27, 1997. The Department determined the application to be administratively complete on September 15, 1997. On June 15, 2002, TDEC published a public notice providing for a 30-day public comment period on the draft title V permit for the John Sevier facility. The public comment period for the draft permit ended on July 15, 2002.

TDEC accepted comments on the permits in a letter from NPCA dated July 19, 2002, which serves as the basis for this petition. TDEC issued the final permits to TVA on September 16, 2002.

B. Timeliness of Petition

TDEC submitted proposed permits for both the Kingston and John Sevier facilities to EPA on August 19, 2002. The EPA's 45-day review period for these proposed permits ended October 3, 2002. The 60th day following that date was December 2, 2002, the deadline for filing any petitions on the permits. As noted previously, EPA received the instant petition on November 18, 2002. Therefore, EPA considers this petition to be timely filed.

III. FACILITY BACKGROUND

The TVA John Sevier Fossil Plant is a steam electric generating facility consisting of four coal-fired boilers, one coal handling facility, one railcar thawer, and one dry ash handling system. The facility produces approximately 800 megawatts (MWs) of electricity power.

The TVA Kingston Fossil Plant is a steam electric generating facility consisting of nine coal-fired boilers, one coal handling facility, and one ash handling system. The facility produces approximately 1700 megawatts (MWs) of electric power and has electrostatic precipitator control.

The primary air emissions from each facility are volatile organic compounds (VOC), nitrogen oxides (NO_X), particulate matter (PM), sulfur dioxide (SO_2), carbon monoxide (CO), and hazardous air pollutants (HAP). Among other things, the facilities are subject to limitations from the Tennessee SIP on opacity of emissions and on PM emissions. Tennessee Rules 1200-3-5 and 1200-3-6. See *Title V Application Review*, Tennessee Valley Authority, Permit Nos. 548473 and 548401.

IV. ISSUES RAISED BY THE PETITIONER

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

Petitioner's comment: TDEC regularly provides written responses to TVA's quarterly reports finding that, because TVA's opacity exceedances are "below the applicable *de minimis* level," no enforcement action will be initiated. By stating in the fourth paragraph of Condition E3-6 that its written responses "shall constitute prima facie evidence of compliance with the visible emission standard" TDEC is attempting to expand the non-SIP *de minimis* enforcement provision of Rule 1200-3-20-.06 into an unwarranted determination of compliance.

EPA's response: Petitioner's comment here addresses the fourth paragraph of Condition E3-6, as provided at the beginning of this Order, which TDEC considers a corollary to the "de minimis" enforcement provision contained in the third paragraph of that permit condition. The "de minimis" provision is based on a provision in Tennessee Rule 1200-3-20-.06. Paragraph 1200-3-20-.06(5) states, in relevant part, that "[w]here violations are determined from properly certified and operating continuous emission monitors, no notice of violation will be automatically issued unless the specified de minimis levels are exceeded."

In granting full approval to the Tennessee title V program, EPA addressed Petitioner's concern in the context of responding to its comment that there were deficiencies in Tennessee's administration of its title V program based on the appearance of "prima facie evidence of compliance" language in a single permit (the TVA Bull Run Fossil Plant permit). See 66 Fed. Reg. at 56997 (November 14, 2001). The Agency explained that Tennessee's rule

1200-3-20-.06(5) contemplates that all excess emissions be viewed as violations of the applicable opacity standard. This is consistent with EPA's policy as articulated in the September 20, 1999, guidance memorandum entitled "State Implementation Plans (SIPs): Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown."

EPA also acknowledged that the "prima facie evidence of compliance" language could be problematic, but declined to find a deficiency in the State's title V program, noting, among other things, that EPA had not found any other permits containing the paragraph, and that if the clause resulted in improper compliance certifications or hindered enforcement of permit conditions by EPA or citizens, revision of the permit would be an appropriate action.

In addition, EPA stated that it did not believe that Tennessee could use the permit condition or the underlying regulation to excuse violations. However, EPA noted that it would continue to monitor the State's use of Rule 1200-3-20-.06 in permits to ensure that violations are not excused. Id. In a letter dated November 30, 2001, EPA reiterated to Tennessee EPA's intent to monitor the State's implementation of the provision and to exercise its authority to reopen permits, if necessary.

In the context of this petition for permit objection, EPA must now consider whether the paragraph containing "prima facie evidence of compliance" language in these two permits causes the permits not to be in compliance with any applicable requirements or the requirements of Part 70. This inquiry is separate and distinct from the question of whether an implementation deficiency exists in the title V program. EPA finds that the "prima facie evidence of compliance" language, on its face, is not consistent with 40 CFR § 40 CFR § 70.6(c)(1).

Specifically, the first sentence of Permit Condition E3-6 improperly provides that TDEC's written responses acknowledging unexcused exceedances are evidence of compliance: "Written responses to the quarterly reports of excess emissions shall constitute prima facie evidence of compliance with the applicable visible emission standard." However, the TDEC letters acknowledging exceedances could not, under any reasonable interpretation, constitute evidence of compliance. The letters do not contain a determination that the source is in compliance with the underlying visible emissions standard despite the evidence showing exceedances of the standard. In fact, the TDEC letters proffered by Petitioners confirm that TDEC is not finding compliance, and, on the contrary, is confirming the occurrence of "unexcusable exceedances." See Petition, Att. 2 ("no enforcement action will be initiated by this agency concerning the unexcusable exceedances listed in [the attachment]").[1] Thus, the "prima facie evidence of compliance" language in Condition E3-6 is contrary to the requirement of § 70.6(c)(1) that the permit contain

[1] While we generally agree that permitting authorities may establish enforcement policies, including action levels, which serve as general guidelines, a nonenforcement decision may be based on many factors unrelated to compliance, and thus is not equivalent to a compliance determination.

"compliance certification . . . requirements sufficient to assure compliance with the terms and conditions of the permit."

The State's September 11, 2002, letter offering an interpretation of 1200-3-20-.06(5) does not remedy the permit deficiency. The letter stated that ". . . the *de minimis* rule paragraph does not establish an automatic exception to compliance, nor does it create an affirmative defense." TDEC's apparent intention was to apply the *de minimis* criterion in Paragraph 1200-3-20-.06(5) to determine whether to take an immediate enforcement action rather than to determine whether the exceedance constitutes a violation.

Since the time of that letter, compliance certifications submitted to EPA indicate that the *de minimis* regulation is being implemented in a manner inconsistent with the State's interpretation as contained in the September 11, 2002, letter. Compliance certifications from the the TVA Bull Run Fossil Plant appear to rely on TDEC's written responses to the quarterly reports as confirming opacity compliance despite indications elsewhere in the certifications that there were exceedances of the opacity standard that fell below the *de minimis* level. Therefore, the source appears to certify continuous compliance without identifying the *de minimis* deviations as possible exceptions to compliance. Thus, as the plain language of Condition E3-6 expressly authorizes, TDEC's written responses to the quarterly reports, regardless of content, become tantamount to actual compliance with the visible emission standard, despite the State's representation that 1200-2-30-.06(5) – and presumably permit conditions arising from this rule – do not give rise to a determination of compliance.

Consistent with EPA's stated intention that it would continue to monitor the use of the language, EPA finds that the fourth paragraph of Condition E3-6 is inconsistent with the requirements of 40 CFR § 70.6(c)(1), a finding that is borne out by the compliance certifications thus far submitted in reliance on that paragraph. Therefore, EPA grants the petition based on this issue.

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

Petitioner's comment: Condition E3-6 improperly shields the source from its requirement to independently certify compliance. The provision basically states that if Tennessee says the quarterly reports are acceptable, then TVA can rely on that representation to claim it is in compliance with the underlying emission limit.

EPA's response: The second sentence of the fourth paragraph of Condition E3-6 states: "For purposes of annual certification of compliance with the applicable visible emissions condition, the acceptance, by the Division, of the quarterly reports of excess emissions shall be the basis of said certification." However, requiring, or even allowing, a source to certify compliance based solely on the State's acceptance of a report of excess emissions is inconsistent with the requirements of Part 70. Annual compliance certifications must be based upon, among other

things, the monitoring data and any other material information as described in 40 CFR § 70.6(c)(5)(iii)(B) (Tennessee Rule 1200-3-9-.02(11)(e)3.(v)(III)II). See § 70.6(c)(5)(iii)(C), Tennessee Rule 1200-3-9-.02(11)(e)3.(v)(III)III. Additionally, "[t]he certification shall identify each deviation and take it into account in the compliance certification." Id. Condition E3-6 improperly shifts the burden of assessing compliance status to TDEC. TVA cannot claim to be "in compliance" based on the fact that TDEC accepted their quarterly excess emissions report and provided a written response. Every source must base its annual compliance certification on its own evaluation of its monitoring data and any other material information. Furthermore, under the Clean Air Act, EPA or citizens may use direct emissions monitoring data generated by continuous emissions monitors as well as any other credible evidence, to establish or support an independent effort to determine a facility's compliance status. See 66 Fed. Reg. at 56997-56998 (November 14, 2001). Therefore, EPA grants the petition on this issue.

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

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

EPA's response: As discussed above (Sections IV.A. and IV.B.), EPA has granted the relief requested by Petitioner by objecting to the fourth paragraph of Condition E3-6 on other grounds. Thus, this issue is denied as moot.

V. CONCLUSION

For the reasons discussed above and pursuant to Section 505(b)(2) of the Act and 40 CFR §§ 70.7(g)(4) and (5) and 70.8(d), EPA hereby grants the petition of NPCA concerning the Kingston and John Sevier title V operating permits with respect to issues IV.A. and IV.B., finding cause to reopen the permits, and denies the petition as moot with respect to issue IV.C.

So ordered.

July 2, 2003
Date

/s/
Linda J. Fisher
Acting Administrator