BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF: WASTE MANAGEMENT OF LA. L.L.C. WOODSIDE SANITARY LANDFILL & RECYCLING CENTER, WALKER, LIVINGSTON PARISH, LOUISIANA Permit Number: 1740-00025-V1 ISSUED BY LOUISIANA DEPARTMENT OF ENVIRONMENTAL QUALITY ON DECEMBER 5, 2008	)	ORDER RESPONDING TO PETITIONERS' REQUEST THAT THE ADMINISTRATOR OBJECT TO THE ISSUANCE OF A TITLE V OPERATING PERMIT Petition Number VI-2009-01

ORDER GRANTING IN PART AND DENYING IN PART
PETITION FOR OBJECTION TO PERMIT

I. INTRODUCTION

On January 2, 2009, the United States Environmental Protection Agency (EPA) received a petition from the Louisiana Environmental Action Network, Concerned Citizens of Livingston Parish, Mr. O'Neil Couvillion, and Mr. Harold Wayne Breaud (Petitioners) pursuant to section 505(b)(2) of the Clean Air Act (CAA or Act), 42 U.S.C. § 7661d(b)(2) (the Petition). The Petition requests that EPA object to the title V operating permit issued by the Louisiana Department of Environmental Quality (LDEQ) on December 5, 2008, to Waste Management of Louisiana L.L.C., for the Woodside Landfill and Recycling Center (WLRC) in Walker, Livingston Parish, Louisiana.

Petitioners have requested that the Administrator object to the WLRC permit because Petitioners allege that the permit does not comply with the CAA and implementing regulations at 40 C.F.R. part 70 in that: (1) the title V permit fails to include monitoring requirements sufficient to assure compliance with permit limits; (2) LDEQ erred in determining the amount of carbon monoxide (CO) emissions for purposes of assessing the applicability of Prevention of Significant Deterioration (PSD) requirements; (3) the title V permit fails to include nonattainment new source review (NNSR); and (4) LDEQ failed to meet the public notice requirements before issuing the title V permit.

In considering the allegations made by Petitioners, EPA reviewed several documents including the title V operating permit (1740-00025-V1), the statement of

basis, the public comment response summary, the LDEQ Basis of Decision dated December 5, 2008, and the permit records for this permitting action.[1] For the reasons detailed in this Order, I grant in part and deny in part the issues raised by Petitioners.

II. 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 EPA an operating permit program intended to meet the requirements of CAA title V. The state of Louisiana submitted a title V program governing the issuance of operating permits on November 15, 1993, and revised this program on November 10, 1994. 40 C.F.R. Part 70, Appendix A. In September 1995, EPA granted full approval to Louisiana's title V operating permits program. 60 Fed. Reg. 47296 (September 12, 1995); 40 C.F.R. Part 70, Appendix A. This program, which became effective on October 12, 1995, is codified in Louisiana Administrative Code (L.A.C.), Title 33, Part III, Chapter 5.

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 such other conditions as are necessary to assure compliance with applicable requirements of the CAA, including the requirements of the applicable State Implementation Plan (SIP). *See* CAA §§ 502(a) and 504(a), 42 U.S.C. §§ 7661a(a) and 7661c(a), *see also* 40 C.F.R. §§ 70.5 and 70.6. The title V operating permit program does not generally impose new substantive air quality control requirements (referred to as "applicable requirements"), but does require permits to contain monitoring, recordkeeping, reporting, and other requirements to assure compliance by sources with existing applicable emission control requirements. 57 Fed. Reg. 32,250, 32,251 (July 21, 1992) (EPA final action promulgating Part 70 rule). 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 permits program is a vehicle for ensuring that existing air quality control requirements are appropriately applied to facility emission units and that compliance with these requirements is assured.

Under Section 505(b) of the Act, the Administrator of the EPA is authorized to review state operating permits issued under title V, and to object to permits that fail to comply with the applicable requirements of the Act, including the requirements of a SIP and 40 C.F.R. Part 70.[2] In this case, provisions to be considered in determining what constitutes the "applicable requirements" include Louisiana's New Source Review

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[1] The referenced documents are included in the LDEQ Electronic Data Management System (EDMS) which is available to the public at http://www.deq.louisiana.gov/portal/tabid/2604/Default.aspx.

[2] Under 40 C.F.R. § 70.1(b), "all sources subject to [title V must] have a permit to operate that assures compliance by the source with all applicable requirements." "Applicable requirements" are defined in 40 C.F.R. § 70.2 to include "(1) any standard or other requirement provided for in the applicable implementation plan approved or promulgated by EPA through rulemaking under Title I of the [Clean Air] Act that implements the relevant requirements of the Act, including any revisions to that plan promulgated in [40 C.F.R.] Part 52." The State's definition of applicable requirements is substantially the same. *See* L.A.C. 33:III.502.

("NSR") Procedures, codified at L.A.C. 33:III.504 and 509 (the Nonattainment New Source Review and Prevention of Significant Deterioration regulations, respectively).[3]

Under section 505(a), 42 U.S.C. § 7661d(a), of the CAA and the relevant implementing regulations (40 C.F.R. § 70.8(a)), states are required to submit each proposed title V operating permit to EPA for review. Upon receipt of a proposed permit, EPA has 45 days to object to final issuance of the permit if it is determined not to be in compliance with applicable requirements or the requirements under title V. 42 U.S.C. §7661d(b)(1), *see also* 40 C.F.R. § 70.8(c). If EPA does not object to a permit on its own initiative, section 505(b)(2) of the Act provides that any person may petition the Administrator, within 60 days of expiration of 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)." Section 505(b)(2) of the Act, 42 U.S.C. § 7661d(b)(2), *see also* 40 C.F.R. §70.8(d). In response to such a petition, the CAA requires the Administrator to issue an objection if a petitioner demonstrates that a permit is not in compliance with the requirements of the CAA. 42 U.S.C. § 7661d(b)(2). *See also* 40 C.F.R. § 70.8(c)(1); *New York Public Interest Research Group (NYPIRG) v. Whitman*, 321 F.3d 316, 333 n.11 (2nd Cir. 2003). Under section 505(b)(2), the burden is on the petitioner to make the required demonstration to 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) (discussing the burden of proof in title V petitions); *see also NYPIRG*, 321 F.3d at 333 n.11. If, in responding to a petition, EPA objects to a permit that has already been issued, 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) and (5)(i) – (ii), and 40 C.F.R. § 70.8(d).

III. BACKGROUND

A. Description of the Facility

The WLRC is a four hundred and eighty eight (488) acre municipal solid waste disposal facility located in Walker, Livingston Parish, Louisiana. (Walker is located within the boundaries of the Baton Rouge air quality control region.) The facility has been in operation since 1987. The facility receives a variety of non-hazardous solid wastes (including municipal solid wastes, such as residential and commercial solid waste, and industrial waste), which are disposed of in the landfill. A gas collection and control system (GCCS) was installed in 2003 to comply with the EPA New Source Performance

[3] Sections 110(a)(2)(C) and 172(c) of the Act require each state to revise its SIP to include NSR. EPA has approved NSR as part of the Louisiana SIP. *See* 62 Fed. Reg. 52948 (Oct. 10, 1997); 64 Fed. Reg. 415 (Jan. 5, 1999); 64 Fed. Reg. 35930 (July 2, 1999); 66 Fed. Reg. 29,491 (May 31, 2001). LDEQ makes its determination of applicability of NSR permit rules at the time a permit application is deemed administratively complete.

Standards (NSPS), Subpart WWW. The GCCS consists of an active landfill gas extraction/collection (wells) system operated at a slight vacuum which is equipped with a flare that destroys, among other things, volatile organic compounds (VOC). The landfill is supported by a variety of operations and maintenance related activities including operation of mobile and non-mobile equipment powered by internal combustion engines, leachate handling and the storage of motor fuels and lubricants. A proposed bioremediation unit for non-hazardous hydrocarbon contaminated soils and sludge will also be part of the operation of the facility.

B. Baton Rouge Ozone Attainment Status History

EPA first designated the Baton Rouge area as an ozone nonattainment area in 1978. 43 Fed. Reg. 8964, 8998 (March 3, 1978). The Baton Rouge 1-hour ozone nonattainment area contains five parishes: East Baton Rouge; West Baton Rouge; Ascension; Iberville; and Livingston Parishes (40 C.F.R. § 81.319). In 1991, the Baton Rouge area was designated nonattainment by operation of law and EPA classified the Baton Rouge area as a "serious" ozone nonattainment area with a statutory attainment deadline of November 15, 1999. 56 Fed. Reg. 56694 (November 6, 1991). The Baton Rouge area did not attain by that deadline. However, consistent with EPA's interpretation of the statute that areas affected by transported pollution from another area could be provided a later attainment date without being given a higher classification,[4] EPA approved a "serious" area attainment demonstration SIP for the area and extended the attainment date for the Baton Rouge area to November 15, 2005, without reclassifying the area from "serious" to "severe." 67 Fed. Reg. 61786 (October 2, 2002). On December 11, 2002, the U.S. Court of Appeals for the Fifth Circuit rejected EPA's statutory interpretation as it was applied to extend the 1-hour ozone attainment deadline for the Beaumont-Port Arthur, Texas area. Thereupon, EPA on April 24, 2003, published in the Federal Register a notice withdrawing its approval of the Baton Rouge area's revised attainment demonstration, including the extended attainment deadline; finalizing its finding of the area failing to attain the standard by the "serious" area deadline; and reclassifying the Baton Rouge area, by operation of law, to "severe" nonattainment, effective June 23, 2003. See 68 Fed. Reg. 20077 (April 24, 2003).

In 1997, EPA promulgated a more stringent 8-hour ozone standard. However, due to litigation over that standard, EPA did not designate areas until 2004. In 2004, EPA designated the Baton Rouge area as nonattainment for the 1997 8-hour ozone standard and it was classified as "marginal" by operation of law. 69 Fed. Reg. 23858 (April 30, 2004). The 8-hour nonattainment area is composed of the same five parishes as the 1-hour ozone nonattainment area. In 2004, EPA also published a rule governing the transition from the 1-hour ozone standard to the 1997 8-hour ozone standard. 69 Fed. Reg. 23951(April 30, 2004). In that rule, although EPA determined that the 1-hour standard should no longer apply (i.e., that it should be revoked), EPA also determined that areas designated nonattainment for the 1-hour standard at the time of designation as nonattainment for the 1997 standard would remain subject to most of the 1-hour standard

[4] Guidance on Extension of Attainment Dates for Downwind Transport Areas (July 16, 1998), *see* 64 Fed. Reg. 14,441 (March 25, 1999).

requirements that applied at the time of designation for the 8-hour standard. Thus, although the area was classified as "marginal" for the 1997 8-hour ozone standard, the "severe" area requirements that applied to the area based on its 1-hour classification at the time of designation for the 1-hour standard continued to apply. We note that, although EPA's rule provided that three 1-hour requirements would no longer apply after revocation of the 1-hour standard, the court in *South Coast Air Quality Management District v. EPA*, 472 F. 3d 882 (D.C. Cir. 2006), vacated those waiver provisions. Thus, EPA interprets the Act to require States to adopt SIPs that include those three requirements as well as the requirements specifically retained in the rule.

C. The Permit

WLRC submitted an initial title V permit application as a 100 tons per year (tpy) VOC source on October 12, 1996. On March 21, 2001, LDEQ received a revised part 70 application from WLRC. The revised permit application stated WLRC's intent to engineer and install landfill gas controls that comply with the requirements of 40 C.F.R. § 60, Subpart WWWW, utilizing either a flare or reciprocating engines. WLRC submitted additional information supplementing the March 21, 2001 application several times prior to LDEQ's issuance of the initial title V permit for the facility in 2004. On June 17, 2002, WLRC submitted a request for authorization to construct an emission reduction project, a GCCS, in accordance with a design plan approved by LDEQ. LDEQ issued an Authorization to Construct/Approval to Operate the GCCS (the Authorization to Construct), pursuant to LAC 33:III.511 and LAC 33:III.501.C.3 for emission reduction projects, on May 2, 2003. The letter accompanying the Authorization to Construct indicates that the installation of the GCCS is exempt from NSR based on the project qualifying as an environmentally beneficial Pollution Control Project (PCP) per EPA guidance,[5] resulting in WLRC being exempt from otherwise applicable PSD permit requirements for CO emissions. Construction of the GCCS commenced on June 17, 2003, and was completed in September 2003. At the time LDEQ approved construction of the GCCS, LDEQ did not have SIP-approved rules implementing the provisions of 40 C.F.R. § 51.166(f) (authorizing the exclusion of PCPs from PSD), but were in the process of submitting these rules to EPA as part of the Louisiana NSR Reform SIP. LDEQ issued the initial title V permit, which included the GCCS, on December 17, 2004.

On February 24, 2005, Petitioners filed suit against LDEQ in state district court challenging the State's issuance of an exemption from the obligation to perform a PSD review for the GCCS, and seeking to overturn the title V permit issued to WLRC. On December 12, 2005, the Nineteenth Judicial District Court denied Petitioners' challenge to the permit. On August 22, 2007, the Louisiana First Circuit Court of Appeals overruled the Nineteenth Judicial District Court and vacated the title V permit on the grounds that the State regulations did not include a PSD exemption for environmentally beneficial PCPs. WLRC appealed the decision of the First Circuit Court of Appeals, and the Louisiana Supreme Court denied Waste Management's petition for writ, thereby

[5] July 1, 1994 John Seitz memo on "Pollution Control Projects and New Source Review Applicability." Note: this provision was vacated by the U.S. Court of Appeals for the D.C. Circuit on June 24, 2005. *See State of New York, et al v. U. S. Environmental Protection Agency*, 413 F.3d 3 (D.C. Cir. 2005).

affirming the vacatur, on June 18, 2008. On October 19, 2007, while the Louisiana Supreme Court ruling was pending, WLRC submitted an application to LDEQ to revise the 2004 title V permit. WLRC's application to revise the 2004 title V permit included revisions to the CO emission estimate that reduced CO emissions to minor source levels, thus making WLRC a minor PSD source. The proposed revisions were designed to respond to the vacatur of the 2004 title V permit. LDEQ published notices of the draft title V permit on February 14 -17, 2008, and held a public hearing on March 25, 2008.[6] The hearing and public comment period afforded the public an opportunity to comment on the draft title V permit. LDEQ submitted the proposed title V permit with the public comment summary document to EPA on September 18, 2008. EPA did not object to the proposed permit during its 45 day review period. On December 5, 2008, LDEQ issued a new title V permit to WLRC pursuant to state regulatory provisions implementing the Act, 42 U.S.C. §§ 7401, *et seq.*

IV. THRESHOLD REQUIREMENTS

A. Timeliness of Petition

Section 505(b)(2) of the Act provides that a person may petition the Administrator of EPA, within sixty days after expiration of EPA's 45-day review period, to object to the issuance of a proposed permit. 42 U.S.C. § 7661d(b)(2), *see also* 40 C.F.R. §70.8(d). In this instance, EPA's 45-day review period started upon receipt of the proposed permit on September 18, 2008, and ended on November 2, 2008. The statutory timeframe in section 505(b)(2) of the Act to file a petition requesting that EPA object to the issuance of the permit, therefore, ran from November 3, 2008, to January 2, 2009. The subject petition was received January 2, 2009. EPA, therefore, finds that Petitioners timely filed their petition.

V. ISSUES RAISED BY PETITIONERS

A. Inadequate Monitoring

Petitioners contend that EPA must object to the permit because it fails to include monitoring sufficient to assure compliance with permit limits and specifically allege that "[t]he Permit provides no way for [WLRC] to monitor compliance with its emissions limits, and it is therefore illegal." Petition at 4. Petitioners note that there are both annual, average pounds per hour, and maximum pounds per hour permit limits for CO, nitrogen oxide (NO_x), particulate matter (PM_{10}), sulfur dioxide (SO_2), VOC, and 30 toxic and/or hazardous air pollutants in the permit. *Id.* Petitioners then state:

> Even though the Permit sets emissions limits for 5 criteria pollutants and 30 toxic and/or hazardous air pollutants that [WLRC] can emit from its flare, the Permit does not require [WLRC] to gather data to demonstrate its compliance with those limits. Instead, the Permit only requires [WLRC] to monitor 'the continuous

[6] EPA submitted comments on the draft permit by letter dated April 28, 2008, from Jeffrey Robinson (EPA) to Bryan Johnston (LDEQ).

> presence of a flame,' the 'gas flow rate' to the flare, the gauge pressure at the gas collection wells, the temperature of each wellhead, the nitrogen or oxygen concentration in each wellhead, and methane concentrations at the surface of the landfill. *See*, Response to public comment at 9 – 10. That monitoring allows [WLRC] to show that it is complying with the requirement that it have a gas collection and control system, but not that it is complying with the emission limits in its permit. For example, none of the required data will allow [WLRC] to demonstrate whether it is complying with its Carbon Monoxide permit limit of a maximum of 47.61 pounds per hour from the flare. None of the monitoring [in] the Permit requires [WLRC] to demonstrate compliance with any of its emissions limits.

Petition at 4-5 (emphasis in original).

Petitioners also state that "LDEQ must require [WLRC] to continuously monitor the composition of the gas entering the flare in order to determine the pollutants exiting the flare and assure compliance with hourly emissions limits." Petition at 6. Petitioners maintain that LDEQ erred when it refused to consider whether additional monitoring was required by title V and EPA's regulations at 70.6(c)(1), because LDEQ relied on EPA's title V interpretative rule (71 Fed. Reg. 75422 (Dec. 15, 2006)), which was vacated before LDEQ issued the final title V permit to WLRC. *See Sierra Club v. EPA*, 536 F.3d 673 (D.C. Cir. 2008). For all of these reasons, Petitioners maintain that the Administrator must object to the Permit and direct LDEQ to add monitoring necessary for WLRC to demonstrate compliance with the emissions limits in the title V permit.

EPA's Response. For the reasons described below, the Petition is granted with respect to the above claims.

In responding to Petitioners' comments on the draft permit making similar claims, LDEQ maintained that it required monitoring consistent with all applicable regulations as required by 40 C.F.R. § 70.6(a)(3)(i). *See*, LDEQ Response to public comment at 9. Specifically, LDEQ stated that it included the NSPS monitoring requirements established in 40 C.F.R. Part 60, Subpart WWW – Standards of Performance for Municipal Solid Waste Landfills. *Id.* In discussing Petitioners' claims that 40 C.F.R. § 70.6(c)(1) requires LDEQ to include additional monitoring, LDEQ stated:

> [EPA's] position on the correct interpretation of 40 C.F.R. § 70.6(c)(1) is that this provision does not establish a separate regulatory standard or basis for requiring or authorizing review and enhancement of existing monitoring independent of any review and enhancement that may be required under other provisions of the rules. [citing 71 FR 75422 (December 15, 2006)]. Instead, 40 C.F.R. § 70.(c)(1) simply requires the permitting authority to include in Title V permits a number of elements (e.g., reporting, recordkeeping, compliance certifications) related to compliance, among these elements is the monitoring as specified in 40 C.F.R. § 70.6(a)(3) (i.e., monitoring defined by the applicable requirements and periodic monitoring, if needed).

LDEQ Response to Public Comments at 10.

LDEQ then acknowledged the August 19, 2008, decision of the U.S. Court of Appeals for the District of Columbia Circuit (*Sierra Club v. EPA*, No. 04-1243), but maintained that the decision was not yet binding. Id. Furthermore, LDEQ indicated that the monitoring issue was central to the state court action challenging the title V permit issued in 2004, and that neither the Nineteenth Judicial District Court nor the Louisiana First Circuit Court of Appeals found the monitoring deficient. *See* LDEQ Response to Public Comments at 10; *see also* Petition at 2, footnote 1.

Before turning to the specific claims, it is important to provide a summary of the current state of the law on monitoring requirements under title V of the Act in light of the August 2008, U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) decision that section 504(c) of the Act requires *all* title V permits to contain monitoring requirements to assure compliance with permit terms and conditions. *Sierra Club v. EPA*, 536 F.3d 673 (D.C. Cir. 2008); see also 40 C.F.R. §§ 70.6(a)(3)(i)(B) and 70.6(c)(1)). This decision vacated EPA's interpretative rule, signed December 15, 2006, which had taken the position that permitting authorities were prohibited from adding monitoring requirements to title V permits where the applicable requirements contained some periodic monitoring, even if that periodic monitoring was not sufficient to assure compliance with permit terms and conditions. 71 Fed. Reg. 75422 (Dec. 15, 2006).[7] The Court held that EPA's interpretative rule violated the statutory directive in Section 504(c) of the Act that each permit must include monitoring requirements to assure compliance with the permit terms and conditions. *Sierra Club.* 536 F.3d at 678. If an applicable requirement contains a periodic monitoring requirement that is inadequate to assure compliance with a term or condition of the title V permit, the Court concluded, title V of the Act requires that "somebody must fix these inadequate monitoring requirements." *Id.* at 678. The Court overturned EPA's interpretative rule, but found that EPA's current regulation at 40 C.F.R. § 70.6(c)(1) – requiring that each permit contain monitoring requirements sufficient to assure compliance with permit terms and conditions – may, and must, be interpreted consistent with the Act. *Id.* at 680.

To summarize, EPA's part 70 monitoring rules (40 C.F.R. §§ 70.6(a)(3)(i)(A) and (B) and 70.6(c)(1)) are designed to satisfy the statutory requirement that "[e]ach permit issued under [title V] shall set forth . . . monitoring . . . requirements to assure compliance with the permit terms and conditions." CAA § 504(c). As a general matter, permitting authorities must take three steps to satisfy the monitoring requirements in EPA's part 70 regulations. First, under 40 C.F.R. § 70.6(a)(3)(i)(A), permitting authorities must ensure that monitoring requirements contained in applicable requirements are properly incorporated into the title V permit. Second, if the applicable requirement contains no

[7] The effective date of the interpretive rule was January 16, 2007. The WLRC permit was proposed in February 14, 2008 and issued in December 5, 2008.

periodic monitoring, permitting authorities must add "periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit." 40 C.F.R. § 70.6(a)(3)(i)(B). Third, if there is some periodic monitoring in the applicable requirement, but that monitoring is not sufficient to assure compliance with permit terms and conditions, permitting authorities must supplement monitoring to assure such compliance. 40 C.F.R. § 70.6(c)(1). EPA notes that periodic monitoring that meets the requirements of 40 C.F.R. § 70.6(a)(3)(i)(B) will be sufficient to satisfy the requirements of 40 C.F.R. § 70.6(c)(1) (i.e., will be sufficient to assure compliance with permit terms and conditions). In addition, in many cases, monitoring from applicable requirements will be sufficient to assure compliance with permit terms and conditions.

The determination of whether the monitoring is adequate in a particular circumstance generally will be a context-specific determination. The monitoring analysis should begin by assessing whether the monitoring required in the applicable requirement is sufficient to assure compliance with permit terms and conditions. In many cases, monitoring from the applicable requirement itself will be sufficient. Some factors that permitting authorities may consider in determining appropriate monitoring are (1) the variability of emissions from the unit in question; (2) the likelihood of a violation of the requirements; (3) whether add-on controls are being used to allow the unit to meet the emission limit; (4) the type of monitoring, process, maintenance, or control equipment data already available for the emission unit; and (5) the type and frequency of the monitoring requirements for similar emission units at other facilities. The preceding list of factors is only intended to provide the permitting authority with a starting point for their analysis of the adequacy of the monitoring. As stated above, such a determination generally will be made on a case-by-case basis and other site-specific factors may be considered.

In all cases, the rationale for the selected monitoring requirements must be clear and documented in the permit record.[8] 40 C.F.R. § 70.7(a)(5). Here, however, LDEQ did not articulate a rationale for its conclusions that the permit provides for monitoring sufficient to ensure compliance with all applicable requirements. LDEQ also failed to respond to Petitioners' contention that continuously monitoring the composition of the gas entering the flare is necessary to determine the pollutants being emitted and thereby assure compliance with permit limits. Instead, LDEQ stated that the monitoring contained in the title V permit was sufficient because it contained the monitoring required by NSPS WWW and no additional monitoring was required pursuant to EPA's 2006 interpretive rule. LDEQ did not explain how the monitoring required by NSPS WWW would assure compliance with other permit limits contained in the title V permit pursuant to applicable requirements other than NSPS WWW. LDEQ erred when it concluded that the D.C. Circuit's August 2008 vacatur of EPA's interpretive rule was not binding when it issued the title V permit to WLRC in December 2008. In light of LDEQ's failure to respond to the issues raised by Petitioners, EPA grants the petition.

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[8] See the Premcor and Citgo orders dated May 28, 2009, regarding sufficiency in monitoring. See pp. 7-8 of the Citgo order and p. 9 to end of the Premcor order.

EPA directs LDEQ to address the monitoring issues raised by Petitioners. Specifically, LDEQ must explain how the monitoring contained in the permit is sufficient to ensure compliance with the permit limits that are included in the permit pursuant to applicable requirements. LDEQ must also explain why it is not necessary to continuously monitor the composition of the gas entering the flare to ensure compliance with the applicable requirements. If LDEQ concludes that the monitoring in the permit is not sufficient, it must add monitoring requirements to ensure compliance with the applicable requirements. If LDEQ determines that additional monitoring is required, it must revise the title V permit and issue a new draft permit for public review and comment.

B. Revised CO emission rates and PSD applicability

Petitioners take issue with LDEQ's decision after vacatur of WLRC's 2004 title V permit to revise the CO limit from 621.06 tons per year to 237.73 tons per year. Petitioners maintain that WLRC requested this change to avoid PSD permitting for CO in light of the state court vacatur of the 2004 title V operating permit and that the change was based on insufficient evidence, and, therefore, it was improper for LDEQ to approve the new CO limit. Petitioners argue generally that the emissions from the WLRC were never measured and the new emission limits are arbitrary and not supported by substantial evidence. Petition at 10. Petitioners conclude that WLRC ultimately will not have to comply with the lower CO limit because the title V permit does not contain monitoring sufficient to assure compliance with the emission limit. In support of their contentions, Petitioners make several specific claims in their challenge to LDEQ's decision.

Petitioners first allege that even though the GCCS has been in place since 2003, LDEQ has never required WLRC to monitor the landfill gas composition so that it could determine actual emissions from the GCCS. Petitioners maintain that because there is no data to demonstrate the emissions from the GCCS over the years since its installation, LDEQ has no basis to assert that CO emissions were nearly 400 tpy less than originally estimated. Petition at 8. Petitioners note that LDEQ and WLRC admit that they are not claiming that an emissions reduction has occurred, but instead are basing the reduction on estimates that Petitioners contend are not supported by new emissions data. *Id.*

Petitioners also allege that the revised CO emissions limit in the Permit is based on AP-42 factors from 1998 and results from a 2000 source test. Petitioners state that EPA recognizes that AP-42 factors are not appropriate to establish source-specific permit limits. Petitioners also state that EPA recommends using emissions estimates from vendors only if representative source-specific data cannot be obtained. Petitioners claim that LDEQ has not determined that such data cannot be obtained. Petitioners also claim that Waste Management ran tests in 2000 and 2004 to determine the constituents of the landfill gas, and that LDEQ has not explained why it refuses to require Waste Management to perform those tests on a regular basis to determine emissions from the flare system. Petition at 9 -10.

Petitioners' final claim is that LDEQ has regulations that address modification of a permit to accommodate test results and that WLRC failed to comply with those regulations. Petition at 9. Specifically, LAC 33:III § 523 states that a facility owner or operator shall request a permit modification to reflect results from required testing if the testing demonstrates that the terms of a permit are inappropriate or inaccurate, but that such request must be submitted within 45 days of obtaining the test results. *Id.* Petitioners note that here the test results were from 1998 and 2000. *Id.*

EPA's Response. For the reasons described below, we grant in part and deny in part Petitioners' claims concerning the revised CO emissions limit.

LDEQ responded to comments on the revision to the CO emissions limit issue from both Petitioners and EPA. In response to the comments, LDEQ stated that the reduction in the CO emissions estimates used to establish the limit in the 2008 title V permit reflects a recalculation of potential emissions and that the recalculation was performed according to the EPA protocol. LDEQ Response to comments at 7. The Landfill Gas Emissions Model (LandGEM) was used to determine the emission rates for the total landfill gas from the solid waste and the March 2004 flare tests measured the concentrations and heating value for the landfill gas to the flare per the general control device test requirements contained in EPA regulations at 40 C.F.R. § 60.18. (Section 60.18 is part of what is referred to as the part 60 General Provisions and as such applies to all NSPS unless the NSPS itself specifically provides otherwise. *See*, 40 C.F.R. § 60.1.) *Id.*

LDEQ added that, for the 2004 permit limit, the "test data" for the emission factor for landfills in AP-42 Chapter 2.4, Table 2.4-5 (used in the original permit application) was taken from enclosed flares and that the actual flare used at Woodside is an open utility flare. LDEQ Response to comments at 3. Therefore, in estimating the CO emissions for the 2008 title V permit, LDEQ claims it was proper to use the emission factor in AP-42 Supplement D, Table 13.5-1, as specified by the flare vendor. *Id.* LDEQ cited to several other landfill permits and noted that none of those permits used the emission factor in AP-42 Chapter 2.4 (Table 2.4-5). LDEQ Response to comments at 4.

Neither EPA's regulations at 40 C.F.R. § 51.166 nor LAC:III:33.509 prohibit the use of the correct AP-42 Chapter 2.4, Table 2.4-5 emission factor in determining potential to emit for purposes of determining major NSR applicability. AP-42 Chapter 2.4 (Table 2.4-5) continues to be the Agency's recommended emission factor for use in determining landfill gas emissions. As EPA noted in its April 28, 2008, comment letter, the emission factor in AP-42 Chapter 2.4 represents the landfill gases from a variety of landfill sources and wastes. According to the current version of AP-42, the test data used to develop the emission factor in Table 2.4-5 were taken from enclosed flares, but control efficiencies are assumed to be equally representative of open flares.[9] Enclosed and open flares are comparable in their emissions and control efficiencies. The difference in the

[9] AP-42 Chapter 2-4, pg. 15, November 1998. (Currently approved version.)

flares is that enclosed flares are more amenable to testing while open flares present a number of safety and sampling problems. In contrast to AP-42 Chapter 2.4 (Table 2.4-5) which is tailored specifically for use in determining landfill gas emissions, the emission factor in AP-42 Supplement D, Table 13.5-1, is for industrial flares (refineries, oil wells, blast furnaces, coke ovens, chemical industries), and, therefore, LDEQ erred when it allowed the use of that emission factor to estimate CO emissions from WLRC's flare.

LDEQ has not provided a reasonable technical basis for the revised determination of CO emissions. EPA grants Petitioners' claim on this issue and directs LDEQ to provide a sound technical rationale for concluding that the emission factors it is proposing to use are replicable and are representative of the waste and gas production for the lifetime of this facility, and that the CO emissions from the GCCS are in fact below the major source threshold. LDEQ's analysis must be included in the WLRC title V permit record and made available to the public. If LDEQ determines that CO emissions will exceed the major source threshold, WLRC must either obtain a synthetic minor NSR permit limit limiting its potential CO emissions to below the major source threshold or undergo PSD review, and LDEQ must revise the title V permit to include the appropriate CO emission limit and issue a new draft permit for public review and comment.

Finally, Petitioners' allegation that WLRC failed to comply with the procedures under LAC 33:III §523 was not raised during the public comment period and we are, therefore, denying the petition on that issue. EPA's review of title V permits in response to a petition for review is limited to only those "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 is was impracticable to raise such objections within such period or unless the grounds for such objection arose after such period)." CAA Section 505(b)(2); see also 40 C.F. R. 70.8(d).

C. Nonattainment major NSR was not conducted for VOC and NO_x.

Petitioners' Claims

Petitioners maintain that because WLRC emits over 25 tons per year each of NO_x and VOC and is located in Livingston Parish (Baton Rouge), which is classified as nonattainment for ozone, WLRC is a major stationary source subject to NNSR and offset requirements. Petitioners argue that LDEQ may not issue a preconstruction and initial title V permit to WLRC until the source comes into compliance with NNSR. Petition at 11.

In support of their contention, Petitioners note that EPA revised the Baton Rouge ozone nonattainment classification for the 1-hour ozone standard from "serious" to "severe" by Federal Register notice dated April 24, 2003. 68 Fed. Reg. 20077 (The notice states that the reclassification is effective June 23, 2003). Petition at 11. Pursuant to the reclassification, the major source thresholds went from 50 tons per year to 25 tons per year for NO_x and VOC. Petitioners also discuss the promulgation of the revised 8-hour ozone standard and how the attainment deadlines for that standard differ

from those applied under the 1-hour standard. Id. Petitioners contend, however, that the major source threshold of 25 tons per year applicable in "severe" nonattainment areas continues to apply based on the Clean Air Act's anti-backsliding protections, and, in support of this claim, Petitioners cite the D.C. Circuit's decision in *South Coast Air Quality Management Dist. v. EPA*, 472 F. 3d 882 (D.C. Cir. 2006). Petition at 12.

Petitioners argue that LDEQ is impermissibly exempting WLRC from complying with NNSR based on a title V permit application that was deemed administratively complete before December 20, 2001.[10] Petition at 13. Specifically, Petitioners take issue with LDEQ's alleged reliance on a NO_x increase exemption for applications deemed complete before that date. *Id.* Petitioners note that such an exemption, even if it applies, would not apply to VOC emissions. *Id.* Petitioners also note that LDEQ already acted on that application when it issued a title V permit to WLRC on December 17, 2004. *Id.* Petitioners state that the 2004 title V permit was subsequently vacated by the Louisiana First Circuit Court of Appeals and that WLRC submitted a new application on October 19, 2007. Petition at 13-14. Petitioners note that WLRC claims that the 2007 title V permit application is both a revision to the 2004 title V permit and a resubmission of the initial application. Petition at 14. Petitioners argue that WLRC cannot rely on the 2001 title V permit application as it is stale pursuant to Louisiana law. *Id.* Petitioners argue that WLRC is seeking a permit for a landfill that is vastly different than the landfill that existed in 2001 because of the addition of the GCCS and a near doubling of the size of the landfill. *Id.*

Petitioners argue that LDEQ is now issuing a preconstruction and initial title V permit to WLRC, and that LDEQ may not refuse to comply with the requirements of NNSR by relying on the law that applied when the WLRC submitted its application to construct the GCCS. Petition at 14. For these reasons, Petitioners maintain that LDEQ must perform NNSR for the ozone precursors NO_x and VOC. Petition at 15.

EPA's Response. For the reasons described below, the Petition is denied with respect to Claim C.

EPA denies Petitioners' claim with respect to NNSR as it relates to VOC emissions because the issue was not raised with reasonably specificity during the public comment period. EPA's review of title V permits in response to a petition for review is limited to only those "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 is was impracticable to raise such objections within such period or unless the grounds for such objection arose after such period)." CAA Section 505(b)(2); see also 40 C.F. R. 70.8(d). In their comments dated April 25, 2008, Petitioners stated only that Woodside is subject to nonattainment new source review because of its NO_x emissions. Neither Petitioners nor any other commenter raised the issue of the need for NNSR for VOC emissions during

[10] The revised title V permit application initially included NO_x emissions increases associated with WLRC's proposal to install either a GCCS or reciprocating engines. After construction of the GCCS, the application was revised to account for its construction.

the public comment period.

In addition to this procedural flaw, we note that there are also substantive reasons for denying Claim C as it relates to VOC emissions. Specifically, installation and operation of the GCCS resulted in a 63.66 tpy net reduction in VOC emissions, not an increase in VOC emissions. (See, May 2, 2003 Authorization to Construct and Approval to Operate). Thus, regardless of the level of the nonattainment major source threshold for VOC emissions then in effect, the physical change at issue, installation and operation of the GCCS, did not result in an increase in VOC emissions and, therefore, cannot trigger NNSR.

EPA also denies Petitioners' claims concerning NO_x emissions from WLRC and the increase in such emissions associated with installation of the GCCS. We note that both the WLRC preconstruction and title V permit application and permitting history and the ozone non-attainment status of Baton Rouge are complicated. But Petitioners have failed to demonstrate that this complexity leads to the source triggering NNSR for NO_x. Even assuming, for the sake of argument, that all of Petitioners' allegations are true – (1) that as of June 23, 2003, and at all times thereafter the severe area classification of 25 tons per year applied as the major source threshold and significance rate; (2) that the facility emits more than 25 tons per year of both NO_x and VOC; (3) that WLRC undertook a project that increased NO_x emissions by more that 25 tons; and (4) that the March 2001 permit application is stale and thus cannot be relied on in determining the impact of the increase in NO_x emissions – these facts do not demonstrate that the facility was required to obtain a major source NNSR permit. As Petitioners implicitly acknowledge, prior to June 23, 2003, the major source thresholds for the ozone precursors NO_x and VOC were 50 tons per year. Petitioners never allege that installation of the GCCS increased WLRC's emissions of either NO_x or VOC by more than 50 tons per year. Also, the record reflects that WLRC obtained its approval to construct on May 2, 2003, and Petitioners do not allege that construction on the GCCS commenced after June 23, 2003. In addition, we have information that WLRC began construction on June 17, 2003. Accordingly, as Petitioners have failed to demonstrate that the relevant physical change occurred after the lower major source and significance thresholds of 25 tons per year could have been effective, they have failed to demonstrate that there was a major modification to a major stationary source.

D. LDEQ did not provide adequate public notice and opportunity to comment.

Petitioners contend that LDEQ never publicly noticed or accepted comment on the preconstruction and initial part 70 operating permit it issued on December 5, 2008. Petitioners maintain that LDEQ could not act on the title V permit application before it, an application to revise WLRC's 2004 title V permit, because that title V permit was vacated by the First District Court of Appeals for Louisiana. Petitioners maintain that, because the 2004 title V permit no longer existed, LDEQ was required to: 1) review WLRC's application to ensure it contained all necessary information for a preconstruction and an initial title V operating permit; 2) revise the draft title V permit to reflect that the permit it previously issued had been vacated; and 3) re-notice the revised

draft title V permit for public comment to acknowledge that the title V permit was now a preconstruction and initial operating permit instead of a permit revision. Petition at 15.

In support of this argument, Petitioners cite to LAC:III:33.531.A.2.a, which provides that "public notice shall be published by the permitting authority prior to the issuance of any permit which is the initial permit issued in accordance with a federally approved operating permit program" and LAC:III:33.531.A.2.b, which requires that the public notice identify "the activities involved in the permit action" and include "copies of the proposed permit [and] the application." Id. Petitioners then state that "[t]he public was notified that [WLRC] was seeking a revision to an existing permit, not a preconstruction and initial Part 70 Operating Permit," and quote from the public notice and the air permit briefing sheet in support of the statement. Petition at 16. Petitioners close by arguing that "[t]he public must be afforded an opportunity to comment on an initial permit, and they must be afforded an opportunity to comment on the significantly changed conditions at the landfill – namely, the fact that the court vacated the air permit." Id.

EPA's response. For the reasons stated below, the Petition is denied with respect to this claim.

In February 2008, LDEQ provided notice and took comment on a draft title V permit that was the same as the permit that was issued on December 5, 2008. Petitioners do not argue otherwise. Instead, Petitioners appear to argue that the final vacatur of the 2004 title V permit nullified the prior notice and comment period because LDEQ characterized WLRC's draft permit as a revised title V permit. Petitioners maintain that an entirely new notice and comment period was required before LDEQ could issue a "new" title V permit to WLRC.

Petitioners' allegation that LDEQ failed to comply with the procedures for issuing a new title V permit to WLRC, including ability to act on the title V permit application before it, was not raised during the public comment period and Petitioners have not demonstrated that it was impracticable to raise such objections during the public comment period. On that basis, we are denying the petition on this issue. EPA's review of title V permits in response to a petition for review is limited to only those "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 is was impracticable to raise such objections within such period or unless the grounds for such objection arose after such period)." CAA Section 505(b)(2); see also 40 C.F. R. 70.8(d).

In this case, Petitioners were clearly aware of the decision of the Louisiana First Circuit Court of Appeals vacating WLRC's title V permit, as they cited the decision in their comments. Thus, Petitioners were on notice that the 2004 permit was going to be vacated unless the Louisiana Supreme Court overturned the decision. If Petitioners felt that the vacatur of the 2004 permit would necessitate changes to the draft permit that was out for public comment such that it would necessitate a new notice and opportunity to

comment, they could, and should, have said so in their comments. Petitioners failed to make such comments and thereby provide LDEQ an opportunity to respond to those claims. Petitioners are precluded from raising the issue for the first time in a Petition to Object to the title V permit. Because the Louisiana First Circuit Court of Appeals vacated the permit before the draft permit was noticed for public comment, Petitioners cannot legitimately claim that it was impracticable to raise the issue because the Louisiana Supreme Court had not yet denied WLRC's writ of appeal.

Assuming for the sake of argument that Petitioners could show that it was impracticable to raise the issue, we would still deny the Petition to object on this claim. LDEQ publicly noticed and accepted comment on a draft title V permit for WLRC, and the permit it ultimately issued as an initial title V permit on December 5, 2008, was the same permit which was available for public comment. Regardless of the nomenclature used in the notice, LDEQ provided notice and an opportunity to comment on, and held a public hearing on, the draft permit which formed the basis for the December 5, 2008 permit. As evidenced by the comments attached to the Petition to Object, Petitioners availed themselves of the opportunity to comment; therefore, even if Petitioners are correct that LDEQ should have undertaken all of the specified actions, Petitioners have not demonstrated that they were in any way prejudiced by LDEQ's failure to do so. Petitioners also have not shown that their rights were prejudiced by LDEQ's decision not to re-name the title V permit and then re-notice the exact same title V permit for public comment. Because the permits were the same, any issues Petitioners might have raised during a new comment period could have been raised in the comments they did submit.

VI. CONCLUSION

For the reasons set forth above, and pursuant to Section 505(b) of the Act, 42 U.S.C. § 7661d (b), and 40 C.F.R. § 70.8(d), I partially deny and partially grant the petition and remand the permit to LDEQ for revisions consistent with this Order.

Dated: 5/27/10

Lisa P. Jackson
Administrator