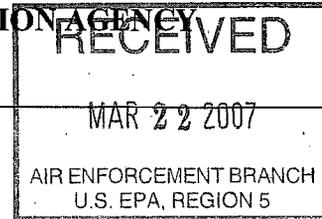


BEFORE THE ADMINISTRATOR

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY



In the Matter of the Final Operating Permits for

MIDWEST GENERATION EME, LLC to operate
FISK AND CRAWFORD GENERATING STATIONS
located in Chicago, Illinois

I.D. Nos. 031600AIN,
and 031600AMI, respectively
Application Nos. 95090076
and 95090081, respectively

Issued by the Illinois Environmental Protection Agency

**PETITION REQUESTING THAT THE ADMINISTRATOR OBJECT TO ISSUANCE
OF THE FINAL TITLE V OPERATING PERMITS FOR THE FISK AND CRAWFORD
GENERATING STATIONS**

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On behalf of:

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METROPOLITAN CHICAGO

CITIZENS AGAINST RUINING THE
ENVIRONMENT

ENVIRONMENTAL LAW AND POLICY
CENTER

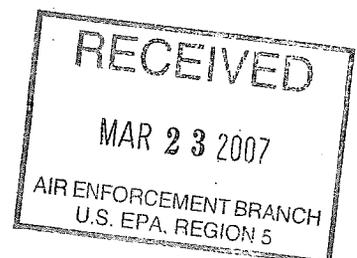
ILLINOIS PUBLIC INTEREST RESEARCH
GROUP

LAKE COUNTY CONSERVATION
ALLIANCE

LITTLE VILLAGE ENVIRONMENTAL
JUSTICE ORGANIZATION

SIERRA CLUB

Date: November 23, 2005



Pursuant to Clean Air Act § 505(b)(2) and 40 C.F.R. § 70.8(d), the Illinois Environmental and Public Health Organizations listed above hereby petition the Administrator (“the Administrator”) of the United States Environmental Protection Agency (“U.S. EPA”) to object to the final Title V Operating Permits for the Fisk and Crawford Generating Stations.¹ The petitioning organizations provided comments to the Illinois Environmental Protection Agency on the draft permits. A true and accurate copy of those comments is attached. The permits were then proposed to U.S. EPA by the Illinois Environmental Protection Agency. This petition is filed within sixty days following the end of U.S. EPA’s 45-day review period as required by Clean Air Act § 505(b)(2). The Administrator must grant or deny this petition within sixty days after it is filed.

If the U.S. EPA Administrator determines that these permits do not comply with the requirements of the Clean Air Act (“CAA”) or 40 C.F.R. Part 70, he must object to issuance of the permits. *See* 40 C.F.R. § 70.8(c)(1) (“The [U.S. EPA] Administrator will object to the issuance of any permit determined by the Administrator not to be in compliance with applicable requirements or requirements of this part.”). The permits fail to comply with the applicable requirements because they lack a compliance schedule required by 40 C.F.R. § 70.5(c)(8)(iii)(C).

I. THE ADMINISTRATOR MUST OBJECT TO IEPA’S FINAL TITLE V OPERATING PERMITS FOR FISK AND CRAWFORD BECAUSE THEY FAIL TO INCLUDE COMPLIANCE SCHEDULES.

A fundamental purpose of the Title V permitting program is to ensure that regulated entities comply with requirements in the Clean Air Act. Under 40 C.F.R. § 70.1(b) and Clean Air

¹ Petitioners address the two separate permits for the two separate facilities of Fisk and Crawford jointly here because the issues raised are virtually identical for the two facilities. Petitioners, however, in no way view this as conceding that facilities may be grouped for permitting purposes. To the contrary, it is never appropriate to address two or more facilities together in one permit. Facilities always require individually tailored permits due to the many distinctions between facilities which, at a minimum, include age; location (both geographic and demographic); size; throughput; fuel type and mix; equipment, including type, age, functioning, and nature of control equipment; operational characteristics such as personnel; etc.

Act § 504(a), each regulated major source must obtain a permit that “assures compliance by the source with all applicable requirements.” A Title V permit must disclose its compliance status and either certify compliance or enter into an enforceable schedule of compliance to remedy violations. 42 U.S.C. § 7661b(b); 40 C.F.R. § 70.5(c)(8-9). Because there are ongoing and continuous opacity and potential New Source Review violations taking place at these facilities, these permits must include a compliance schedule for opacity and IEPA must conclude whether NSR violations have taken place and, if so, also include a compliance schedule for those violations. 40 CFR § 70.5(c)(8)(iii)(C). Pursuant to this section, if a facility is in violation of an applicable requirement at the time of permit issuance, the facility’s permit must include a schedule leading to compliance with that requirement. The only exemption is if the reported violation has been corrected prior to permit issuance. Applicable requirements include, among others, the requirement to comply with state implementation plan (“SIP”) requirements. *See* 40 C.F.R. § 70.2. If a facility is in violation of an applicable requirement at the time that it receives an operating permit, the facility’s permit must include a compliance schedule. *See* 40 C.F.R. § 70.5(c)(8)(iii)(C). The compliance schedule must contain “an enforceable sequence of actions with milestones, leading to compliance with any applicable requirements for which the source will be in noncompliance at the time of permit issuance.” *See* 40 C.F.R. § 70.5(c)(8)(iii)(C). Thus, if a power plant is in violation of NSR or SIP requirements, the plant’s operating permit must include an enforceable compliance schedule designed to bring the plant into compliance with those requirements. The plant is then bound to comply with that schedule or risk becoming the target of an enforcement action for violating the terms of its permit. (This violation would be in addition to the original violation resulting from the plant’s failure to obtain a NSR permit).

In the present permit proceedings, the applicant has certified compliance with all the requirements that apply to these facilities. In its proposed permits, the IEPA accepts this certification, and consequently does not incorporate any schedule of compliance or other remedial measures in the Title V/CAAPP permits. Concurrent with its release of the Draft Revised Proposed Permits, IEPA provided a responsiveness summary in which it states its justification for not including a compliance schedule in the permits. Among other things, IEPA explains that “the objective of the [Title V] permit is to assure compliant operations and ‘flag’ potentially noncompliant operations.” By ignoring the continuous and ongoing opacity and potential New Source Review violations, IEPA itself is failing to meet this objective, is not assuring compliant operations at these facilities as required by the CAA and regulations, and is ignoring the explicit documentation of non-compliant operations taking place at these facilities. Consequently, the Administrator must object to the deficient permits for their failure to include a compliance schedule to address opacity violations and avoidance of New Source Review.

1. Opacity Violations

IEPA possesses evidence of non-compliance at this facility. The source of this information is Midwest Generation itself. Since it became the operator of this facility, Midwest Generation has regularly submitted information to IEPA detailing ongoing violations of opacity standards at these and its other coal burning power plants. The evidence of the ongoing opacity violations is contained in Midwest Generation’s quarterly opacity reports for the facilities. The violations at Fisk and Crawford are summarized in the table below, which is current through quarter 2 of 2005, the most recent quarter for which data are available.

UNIT	Year	Q1	Q2	Q3	Q4
7	1999	27	26	2	1
7	2000	9	7	9	5
7	2001	6	6		
7	2002	30	1		3
7	2003			3	2
7	2004		7		
7	2005	3			
8	1999	21			1
8	2000	6	9	19	4
8	2001	3			
8	2002			1	
8	2003	3			1
8	2004		10	3	2
8	2005	7			
Fisk	1999	12	6		
Fisk	2000	3	14	2	5
Fisk	2001	14	17	14	13
Fisk	2002		12	11	8
Fisk	2003	29	44	9	33
Fisk	2004	11	21	3	4
Fisk	2005	11	4		

The chart does not include any exceedances eligible for the regulatory exemption for exceedances totaling 8 minutes in a one-hour period. *Id.* Further, only a fraction of these are potentially eligible for the affirmative defense of startup, breakdown, or malfunction. *Id.*

Consequently, most—if not all—of the exceedances documented in the chart above are violations per se. As pointed out by the Illinois Attorney General in their letter to IEPA of August 1, 2005 (attached), it is indisputable that these violations occurred. Further, as this chart demonstrates, at Fisk and Crawford, there have been violations at all units every year from 1999 through 2005. They have not been corrected at the present time or at any time when draft or

proposed Title V permits were issued by IEPA.² Consequently, these violations are not isolated but instead are continuous and ongoing.

All of the justifications and explanations in IEPA's responsiveness summary do not negate these violations or excuse its failure to include a compliance schedule in the permits. For instance, IEPA makes the bizarre statement that "information in the quarterly opacity reports . . . is not determinative of whether these exceedances constitute violations much less ongoing violations." No further evidence than that provided above is needed to demonstrate these violations. As discussed above, numerous—if not all—reported exceedances did not qualify for any exemptions and are, on their face, unequivocal violations. IEPA also concedes that documented exceedances may be violations but goes on to say that "[e]ven to the extent these exceedances rise to the level of a violation, past exceedances do not necessarily constitute a sufficient basis to include a compliance schedule in these permits." However, violations—meaning all of the exceedances that do not qualify for a lawful exemption—do not merely take place in the past but have been continuous and regular over the last six years and continue up through the most recently available quarterly opacity reports. This covers the period throughout which IEPA issued draft, proposed, revised proposed, draft revised proposed, and final permits over the past two years. As a result, these continuous and ongoing violations constitute not just a sufficient basis to include a compliance schedule in the permits but actually mandate such inclusion.

IEPA also states that "neither the applications nor comments provide information evidencing noncompliance with the PM standard. Accordingly, a factual basis has not been

² IEPA also states that "the statistics for total numbers of exceedances at a plant do not accurately reflect the extent of exceedances by individual boilers." Petitioners are perplexed by this statement because quarterly opacity reports break down exceedances according to individual units/boilers and Petitioners also indicated exceedances according to unit/boiler in both Petitioners' original comments and subsequent petition.

presented upon which to include compliance schedules in these CAAPP permits related to PM emissions from the coal-fired boilers.” First, it is irrelevant whether there is non-compliance with the PM standard. The CAA requires a compliance schedule whenever there is a violation, no matter what type of violation it is—PM, opacity, or other. Here there is an opacity violation so a compliance schedule is required that would include the steps that the facility would take to come into compliance with its opacity limits. Further, IEPA’s statement also runs counter to its own regulations that provide that opacity violations are an independently enforceable indicator of particulate emission violations. 35 Ill. Admin. Code § 212.124.

IEPA acknowledges that “[q]uarterly opacity reports submitted to the Agency by the sources, though not part of the permit applications, do indicate that the coal-fired boilers do, at times, exhibit excess opacity.” But IEPA goes on to say “[h]owever, . . . each source certified compliance.” It’s like a police officer pulling someone over for speeding when the radar detector shows a speed in excess of the limit but the officer lets the violator off without a ticket because the violator says “I wasn’t speeding, I swear.” IEPA is abdicating its responsibility as the permitting authority by blindly relying upon Midwest Generation’s compliance certifications while having prima facie evidence of violations in Midwest Generation’s quarterly emissions reports.

IEPA goes on to say that “for the vast majority of time, the coal-fired boilers comply with opacity limitations.” Again, this goes back to the example of a police officer letting off someone from a speeding ticket because the violator says, “But officer, most of the time I don’t break the speed limit.” Compliance with the law “for the vast majority of time” does not provide a shield for the times when the facility is in violation of the law. Nor does it ensure that the health of the public is being protected under the law. As the Seventh Circuit has noted, a violation is a

violation. The number of violations is irrelevant. "Compliance means an end to violations, not merely a reduction in the number or size of them." *Friends of Milwaukee's Rivers and Lake Michigan Federation v. Milwaukee Metropolitan Sewerage District*, 382 F. 3d 743, 764 (7th Cir. 2004). There is no *de minimus* threshold required for quantity of violations when there are continuous and ongoing violations.

Finally, IEPA seeks to excuse the violations on the basis that some unnamed federal policy allows a certain number of opacity violations. IEPA is simply wrong on this count. There is no federal policy that allows or otherwise excuses any opacity violations. To the extent IEPA is referring to a decade-old policy relating to enforcement priorities that reliance is misplaced. That policy served to direct enforcement resources it did not excuse non-compliance. Title V requires continuous compliance. Absent continuous compliance, a compliance schedule in a Title V permit is mandatory.

In sum, none of IEPA's numerous excuses or justifications can get around the clear-cut requirements of the law: if there are violations, a compliance schedule is required. Consequently, because the permits are deficient in their failure to contain compliance schedules and because IEPA has abdicated its responsibility to adequately administer the Title V permitting program, the Administrator must object.

A recent decision in the Second Circuit Court of Appeals affirms the requirement that EPA must object to a permit that fails to include a compliance schedule in the face of evidence of violations. The Second Circuit has held that where there is a violation by a permittee, an agency may not circumvent the inclusion of a compliance schedule in the Title V permit. In *NY PIRG v. Johnson*, slip op., no. 03-40846 (2d Cir. Oct. 24, 2005), the court held that issuance of an NOV and commencement of a suit "is a sufficient demonstration to the Administrator of non-

compliance for purposes of the Title V permit review process.” *Id.* at 11. Likewise, a permittee’s documentation of its own violations in its quarterly reports to the agency is similarly incontrovertible evidence of violations that must be viewed as a “sufficient demonstration to the Administrator of non-compliance.” Once there is conclusive evidence that a source is non-compliant, “the EPA is obligated to include a compliance schedule.” *Id.* at 15. As pointed out by the Court and as is evident from the statutory language, this is a mandatory duty of EPA’s, not a discretionary one.

While the statutory language alone is sufficient to conclude that a compliance schedule is required in the present case, this case reinforces the EPA’s mandatory duty here. Once the agency possesses evidence of a violation, the duty to include a compliance schedule in the permit is mandatory, not discretionary. Consequently, since a compliance schedule is mandatory, the Administrator must object.

2. New Source Review Violations

The Administrator must also object to the permits because IEPA never required the applicant to submit sufficient information to evaluate the sources’ NSR compliance and determine the applicability of NSR compliance. Title V permit applications must include all information “sufficient to evaluate the subject source and its application and to determine all applicable requirements” under the CAA and regulations, and a “schedule of compliance for sources that are not in compliance with all applicable requirements at the time of permit issuance.” 40 C.F.R. 71.5(a)(2); 40 C.F.R. 70.5(c)(8)(ii)(C). *See also* 415 ILCS 5/39.5(5)(d) (applicant must submit a “compliance plan” that includes “a schedule of compliance, describing how each emission unit will comply with *all* applicable requirements”) (emphasis added).

IEPA also argues that it is not required to include compliance schedules in the Title V permits for Fisk and Crawford for New Source Review violations. IEPA states that “the application and public comments do not provide information of the type that is necessary as a matter of law, to show that NSR, as a matter of fact, has been triggered by activities at these plants and is an applicable requirement for any of these plants, much less whether NSR control technology requirements are applicable.” This is a conclusory statement that ignores the prima facie evidence of violations provided by the Illinois Attorney General and Petitioners. The relevant question is not whether NSR has been triggered or whether NSR control technology requirements are applicable but whether IEPA conducted a sufficient investigation of NSR applicability. Once again, IEPA abdicated its responsibility to do so. In their comments to IEPA on the draft permits, Petitioners provided evidence consisting of (1) the evidence being generated as a part of the ongoing U.S. EPA investigation of Midwest Generation;³ (2) the PCI Energy Services article discussing the Fisk steam chest replacement; (3) the documents obtained from the Illinois Commerce Commission that have been put into the record; and (4) Clean Air Markets database data on emissions trends (specifically increases following the steam chest replacement). Petitioners’ evidence showed that, at a minimum, IEPA should have investigated whether NSR has been triggered.

IEPA states that “because the 22 sources certified compliance and included no compliance schedules in their respective applications for CAAPP permit, and because the records for the 22 CAAPP permits lack information clearly showing noncompliance with NSR, it is premature, unnecessary, and inappropriate to attempt to make NSR applicability determinations for these plants and to include compliance schedules in the CAAPP permits.”

³ Petitioners reiterate their request that the U.S. EPA review the information received in response to that Section 114 request under its obligation to administer and enforce the NSR program.

Again, IEPA is leaving the fox to guard the hen house. By blindly accepting the facilities' compliance certification and ignoring evidence of modifications that potentially trigger NSR, IEPA is not meeting its obligations as the permitting authority for both the Title V permit program and the NSR permit program.⁴ The question is one of burden of proof. IEPA seems to view the burden of proof to be on the Petitioners to conclusively show NSR noncompliance.⁵ However, the CAA places the burden on the agency as the permitting authority to conduct an investigation sufficient to be able to conclusively demonstrate NSR compliance, especially in light of the persuasive evidence to the contrary put forward by Petitioners and the Illinois Attorney General.

IEPA goes on to state that “[t]he potential NSR issues posed at these plants are complex and investigation of these issues is not amenable to resolution during permitting.” Under 40 C.F.R. § 70.1(b) and Clean Air Act § 504(a), each facility that is subject to Title V permitting requirements must obtain a permit that “assures compliance by the source with all applicable requirements.” It is IEPA’s responsibility to actively “assure compliance” by Fisk and Crawford with NSR requirements as such requirements are applicable requirements and IEPA explicitly acknowledges that responsibility.⁶ Assuring such compliance, especially in the face of evidence of non-compliance, involves more than accepting a compliance certification and stating that it is inconvenient for the agency to investigate these violations at this time. The complexity of the issues and the administrative burden of resolving them in this proceeding are of no relevance and do not negate the CAA’s requirement that IEPA assure CAA and NSR compliance by these facilities during this permitting process under 40 C.F.R. § 70.1. Since the IEPA declined to

⁴ 35 Ill. Admin. Code Part 203, 35 Ill. Admin. Code 201.142.

⁵ In fact, IEPA is requiring Petitioners to do the impossible. Petitioners cannot make out a complete case demonstrating noncompliance when unable to access the complete records of modifications that IEPA has in its possession.

⁶ IEPA begins the responsiveness summary by saying that “the objective of the CAAPP permit is to assure compliant operations and ‘flag’ potentially noncompliant operations.”

require the application to include all information “sufficient to . . . determine all applicable requirements”, 40 C.F.R. 71.5(a)(2), under NSR, the Administrator must object to the permits.

II. CONCLUSION

In sum, IEPA’s Final Title V Permits for Fisk and Crawford fail to meet the legal requirements of the CAA, 40 C.F.R. § 70.5(c)(8)(iii)(C), and Illinois’ SIP, due to the lack of a compliance schedule regarding opacity violations and potential NSR violations. By issuing draft proposed permits in the face of extensive evidence of noncompliance, IEPA is, in essence, providing a permit shield to noncompliant sources. This undercuts the entire basis for having a permit program in the first place. Petitioners respectfully request that the Administrator object to the Title V Permits for Fisk and Crawford as required under Title V and 40 C.F.R. § 70.8(c)(1).