

**BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

IN THE MATTER OF THE PROPOSED TITLE V)	
PERMIT FOR)	
)	
SCRUBGRASS GENERATING CO.)	PERMIT ID NO.
)	61-00181
)	
PROPOSED TITLE V/STATE OPERATING PERMIT)	
IN KENNERDELL, PENNSYLVANIA)	
)	
ISSUED BY THE PENNSYLVANIA DEPARTMENT)	
OF ENVIRONMENTAL PROTECTION)	
)	

**PETITION TO OBJECT TO THE PROPOSED TITLE V PERMIT FOR
SCRUBGRASS GENERATING COMPANY,
ISSUED BY THE PENNSYLVANIA DEPARTMENT OF
ENVIRONMENTAL PROTECTION**

As per Section 505 of the Clean Air Act (“CAA”), the Sierra Club hereby respectfully petitions the Environmental Protection Agency (“EPA”) to object to the proposed Title V permit issued by the Pennsylvania Department of Environmental Protection (“DEP”) for Scrubgrass Generating Company (“Scrubgrass”) at 2151 Lisbon Road, Kennerdell, Pennsylvania. As discussed in comments timely filed by Sierra Club before DEP concerning the draft permit, the Title V permit as issued contains provisions that are not in compliance with applicable requirements under the CAA, and accordingly objection by the EPA is proper. 42 U.S.C. § 7661d(b). Specifically, the permit improperly and illegally seeks to grant a three-year extension of the compliance deadline for certain aspects of the Mercury and Air Toxics Standards (“MATS”) rule. Such a proffered extension is not valid, and cannot change the date by which the Scrubgrass facility is to comply with MATS. Accordingly, the EPA should object to the permit’s issuance by DEP.

I. INTRODUCTION

A. Legal Background

1. General Requirements

The Clean Air Act (“CAA”) is intended to protect and enhance the public health and public welfare of the nation. *See* 42 U.S.C. § 7401(b)(1). All major stationary sources of air pollution are required to apply for operating permits under Title V of the CAA. 40 C.F.R. § 70.5(a); *see* 42 U.S.C. § 7661a(a) (“[I]t shall be unlawful . . . to operate . . . a major source . . . except in compliance with a permit issued by a permitting authority under this subchapter.”).

Title V permits must provide for all federal and state regulations in one legally enforceable document, thereby ensuring that all CAA requirements are applied to the facility and that the facility is in compliance with those requirements. *See* 42 U.S.C. §§ 7661a(a) and 7661c(a); 40 C.F.R. § 70.6(a)(1). These permits must include emission limitations and other conditions necessary to assure a facility's continuous compliance with all applicable requirements of the CAA, including the requirements of any applicable state implementation plan, or SIP. *See id.* Title V permits must also contain monitoring, recordkeeping, reporting, and other requirements to assure continuous compliance by sources with emission control requirements. *See* 40 C.F.R. § 70. It is unlawful for any person to violate any requirement of a Title V operating permit. *See* 42 U.S.C. § 7661(a).

A Title V permit is issued for a term of no more than five years, 40 C.F.R. § 70.6(a)(2), with a timely and complete application for renewal filed by the source at least six months prior to the date of permit expiration, 40 C.F.R. § 70.5(a)(1)(iii). Once a complete renewal application has been submitted, the existing permit governs the source's operation until the application is acted upon by the permitting agency. *See* 40 C.F.R. § 70.7(b); 40 C.F.R. § 70.7(a)(2) (“[T]he program shall provide that the permitting authority take final action on each permit application (including a request for permit modification or renewal) within 18 months . . . after receiving a complete application.”). Permit modifications and renewals are subject to the same procedural requirements, including those for public participation and federal review, which apply to initial permit issuance. *See* 40 C.F.R. § 70.7(c)(1)(i).

The EPA has delegated to Pennsylvania, through the Pennsylvania Department of Environmental Protection (“DEP”), the authority to administer the Title V operating permit program within the State. Title V permits issued by DEP must include enforceable emission limitations and standards and such other conditions as are necessary to assure compliance with all applicable requirements at the time of permit issuance. *See* 42 U.S.C. § 7661c(a); 40 C.F.R. § 70.6(a)(1). “All applicable requirements” include standards or other requirements in state or federal regulations required under the CAA, including those that have been promulgated or approved by EPA through rulemaking at the time of issuance of a permit but that have future effective compliance dates, as well as standards provided for in Pennsylvania's SIP that are effective at the time of permit issuance. *See* 40 C.F.R. § 70.2

B. Factual and Procedural Background

The Scrubgrass facility is a waste coal-fired facility first brought online in 1993, located near Kennerdell, Pennsylvania, with a nameplate rating of 95 megawatts. It typically operates at a very high capacity factor: in recent years, it has averaged between 60 and 80%, and historically has had capacity factors upwards of 90%. It is equipped with controls for sulfur dioxide (“SO₂”) emissions, in the form of a dry scrubber.

In the December 15, 2015 Review of Application for Modification of the Title V Operating Permit memorandum [“the Memo”] authored by then-Facilities Permitting Chief Matthew Williams, DEP correctly noted that the “requirements of the MATS rule are applicable to [Scrubgrass].”

MATS, codified at 40 C.F.R. § 63 Subpart UUUUU, sets several requirements for coal-fired generating units like Scrubgrass, including emission limits for particulate matter, hydrochloric acid (“HCl”) or SO₂, and mercury. Although MATS requires compliance by regulated sources by April 16, 2015, facilities may apply for a one-year extension to April of 2016. 40 C.F.R. § 63.9984(b). According to the Memo, Scrubgrass applied to DEP to obtain this one-year extension on March 7, 2014 and it was approved by DEP on April 14, 2014.

As described in the Memo, on December 31, 2014 (during the lame duck administration of outgoing Pennsylvania Governor Tom Corbett), Scrubgrass requested an additional three-year extension of the HCl/SO₂ requirements from DEP. The request was purportedly made under Section 112(i)(3)(B) of the Clean Air Act to “provide sufficient time for the facility to dry and cover mining waste in order to reduce emissions of certain substances listed as Hazard Air Pollutants (HAPs).” On January 21, 2015, DEP purported to grant the three-year extension request. However, as discussed below, DEP does not have the authority to grant such an extension under Section 112 of the Clean Air Act; nor—even if it did have such authority—did DEP adequately justify any necessity for such an extension.

1. Timeline

According to the Memo, the Notice of Intent to Issue the Operating Permit was published in the Pennsylvania Bulletin on November 7, 2015, indicating there was a 30-day comment period, and that no comments were received. However, the Notice was not actually published in the Pennsylvania Bulletin on this date. Instead, the Notice was published in the Pennsylvania Bulletin on January 23, 2016. *See* 46 Pa.B. 467. The purpose of the proposed modification to the Scrubgrass Title V permit was, among other things, for “incorporation of the Mercury and Air Toxics (MATS) Rule.” *Id.* The Department further noted that “[a] 30-day comment period, from the date of this publication, will exist for the submission of comments.” Sierra Club submitted timely comments to DEP on February 21, 2016. A true and correct copy of these comments is attached hereto as Exhibit 1.

Although the Memo states that the draft permit was sent to EPA on October 22, 2015 (thus beginning the 45-day review period), the first date of this review period is the same day the Notice was actually published in the Pennsylvania Bulletin (January 23, 2016) due to this publication error. As such, the 60-day public petition period ends on May 9, 2016, making this petition timely. *See* U.S. EPA Region 3, Title V Operating Permit Public Petition Deadlines, *available at* <https://www.epa.gov/caa-permitting/title-v-operating-permit-public-petition-deadlines>, attached hereto as Exhibit 2.

DEP has not yet released its comment response document. Sierra Club reserves the right to provide supplemental comments to DEP and to EPA pursuant to this Petition following any such forthcoming comment response document.

II. GROUND FOR OBJECTION TO SCRUBGRASS’S PROPOSED PERMIT

Sierra Club hereby petitions EPA to object to the Scrubgrass proposed Title V permit on the following grounds: the permit improperly and illegally seeks to grant a three-year extension

to comply with certain aspects of MATS, as DEP does not have the authority to grant such an extension under Section 112 of the Clean Air Act, and both DEP and Scrubgrass fail to justify why such an extension would be warranted. Thus, this extension is invalid and cannot change the date by which the Scrubgrass facility is to comply with MATS. *See* Sierra Club Comments at 2-3.

A. DEP Lacks the Authority to Grant a MATS Compliance Extension to Scrubgrass under Section 112

In Site-Level Requirements Nos. 16 and 17, DEP proposes that Scrubgrass comply with the requirements of MATS by April 16, 2016, except for the HCl/SO₂ requirements, for which the draft modification proposes an April 16, 2019 compliance date. However, DEP is without authority to grant such an additional three-year extension of the MATS compliance date; the proposed 2019 extension is thus *ultra vires*, and invalid.

Under MATS, permitting authorities can offer at most a single one-year extension of compliance dates for facilities who meet the requirements for such an extension.¹ Nonetheless, DEP now attempts to grant an additional three-year extension for Scrubgrass's HCl/SO₂ emissions on the incorrect theory that Section 112 of the Clean Air Act allows for such an extension.

Under Section 112, a Title V permitting authority can offer “[a]n additional extension of up to 3 years,” but only as pertains to “mining waste operations,” and only then where the one-year compliance extension “is insufficient to **dry and cover mining waste in order to reduce emissions**” of hazardous air pollutants. 42 U.S.C. § 7412(i)(3)(B) (emphasis added).² In other words, the three-year extension is available only if it is needed to provide the time necessary to eliminate emissions from undried and uncovered mining waste. *Id.*

However, Scrubgrass does not qualify for such an extension as it does not dry and cover mining waste “in order to reduce” HAP emissions, but instead combusts waste coal, which is the very action that produces the HAPs at issue. Indeed, by proposing this extension, DEP is

¹ A separate extension mechanism exists under Section 113 by which EPA can issue administrative orders to offer a one-year compliance extension in instances where the additional time is necessary for electrical grid reliability. However, a Section 113 administrative order is not at issue here, as DEP is purporting to grant a three-year extension, and not a one-year, no agency has found that Scrubgrass is necessary for reliability, no application for such a Section 113 administrative order has been made, and only EPA, not DEP, may grant such an order.

² *Accord* 40 C.F.R. § 63.6(i)(4)(i)(A) (“... An additional extension of up to 3 years may be added for mining waste operations, if the 1-year extension of compliance is **insufficient to dry and cover mining waste in order to reduce emissions** of any hazardous air pollutant.”) (emphasis added). Notably, extensions under this provision are to be incorporated into a source's Title V permit. *See id.* (party seeking extension must “apply to have the source's title V permit revised to incorporate the conditions of the extension” and the “conditions of an extension of compliance granted under this paragraph will be incorporated into the affected source's title V permit”). *See also* White House Presidential Memorandum for the Administrator of the Environmental Protection Agency, “Flexible Implementation of the Mercury and Air Toxics Standards Rule” (Dec. 21, 2011) (observing that “section 112(i)(3)(B) of the Act allows the issuance of a permit granting a source **up to one additional year**” for MATS compliance, and that further extensions should be contemplated under the Section 113 structure (emphasis added)), *available at* <https://www.whitehouse.gov/the-press-office/2011/12/21/presidential-memorandum-flexible-implementation-mercury-and-air-toxics-s>.

attempting to argue that Scrubgrass needs three extra years to comply with HCl/SO₂ limits *from the boiler's emissions stack* because it will take that long to “dry and cover mining waste” that is not even the source of the emissions in question. Yet if Scrubgrass only dried and covered mining waste, as Section 112 addresses (or indeed, simply left its waste coal fuel alone), and did not combust it, Scrubgrass would not produce the HAPs emissions of concern nor need an extension to comply with MATS.

Moreover, MATS does not even concern emissions from mining waste, but rather emissions from the combustion of coal and oil in power plants. *See* 40 C.F.R. § 63.9984 (MATS “establishes national emission limitations and work practice standards for hazardous air pollutants (HAP) **emitted from coal- and oil-fired electric utility steam generating units**”) (emphasis added). An extension in Section 112 concerning HAPs from *mining waste* cannot be applied to a rule that concerns emissions from coal and oil combustion. Scrubgrass simply does not qualify for an extension under Section 112(i)(3)(B) (and its corollary in 40 C.F.R. § 63.6(i)(4)(i)(A)) and it cannot be used to justify a three-year extension of MATS requirements to April 16, 2019.

B. DEP and Scrubgrass Fail to Justify Why a MATS Compliance Extension to Scrubgrass Is Warranted

This extension and draft Title V permit are improper also because neither DEP nor Scrubgrass itself justify in any way why the facility needs such an extension. Indeed, the extension provisions have nothing to do with operations at Scrubgrass. DEP's purported grant of a three-year extension comes in a single-page, perfunctory letter that observes that DEP has received Scrubgrass's three-year extension request, and that DEP is granting the request. Nowhere in the letter does DEP explain why it would grant the request, or provide any justification under governing law why the requested extension would be permissible or proper. DEP further does not try justify the extension in the draft permit or memo, and instead merely offers a cryptic approval for Scrubgrass's request.³

Nor is such a justification present in the application from Scrubgrass itself. Although, as noted above, Section 112(i)(3)(B) only offers a three-year extension if the time is needed to dry and cover mining wastes so as to prevent HAP emissions from those undried and uncovered mining wastes, Scrubgrass's December 2014 request does not even bother arguing that extra time is needed to “dry and cover” wastes in order to reduce MATS-regulated emissions from those wastes. Instead, Scrubgrass pleads that “Scrubgrass was not designed to meet the MATS emission standard,” that adding controls so that it would comply could “have adverse economic consequences on Scrubgrass,” and therefore Scrubgrass would like an extra three years of

³ *See* Letter from Krishnan Ramamurthy to Todd Shirley (Jan. 21, 2015) at 1, attached hereto as Exhibit 3. Notably, DEP does not explain how it is that Scrubgrass is inherently different from other similar waste coal plants in Pennsylvania who have not sought or received such extensions. For example, the following Pennsylvania waste coal plants have not requested a similar extension of MATS compliance requirements: John B. Rich, Northampton, Panther Creek, Seward, St. Nicholas Cogen, WPS Westwood and Wheelabrator Frackville Energy. Lacking critical details and justification, this extension is invalid and cannot be incorporated into the plant's Title V permit.

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