

BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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| IN THE MATTER OF |) | |
| |) | |
| APPLETON COATED, LLC |) | |
| COMBINED LOCKS MILL |) | PETITION NUMBERS V-2013-12 |
| OUTAGAMIE COUNTY, WISCONSIN |) | AND V-2013-15 |
| |) | |
| PERMIT No. 445031290-P10 |) | ORDER RESPONDING TO THE |
| |) | PETITIONERS' REQUESTS THAT THE |
| ISSUED BY THE WISCONSIN DEPARTMENT |) | ADMINISTRATOR OBJECT TO THE |
| OF NATURAL RESOURCES |) | ISSUANCE OF A STATE OPERATING |
| |) | PERMIT |
| |) | |

ORDER DENYING PETITIONS FOR OBJECTION TO PERMIT

This order responds to issues raised in two petitions to the U.S. Environmental Protection Agency (EPA). The first petition was from Sierra Club, Clean Water Action Council, and Midwest Environmental Defense Center (collectively Sierra Club Petitioners), dated October 28, 2013 (Sierra Club Petition). The second petition was from Appleton Coated, LLC (Appleton) and the Wisconsin Paper Council, Inc. (WPC) (collectively Appleton/WPC Petitioners), dated November 19, 2013 (Appleton/WPC Petition). Both Petitions request that the EPA object to the title V operating permit proposed on August 6, 2013, by the Wisconsin Department of Natural Resources (WDNR), for the Appleton facility in Outagamie County, Wisconsin (Proposed Permit). The operating permit was issued pursuant to title V of the Clean Air Act (CAA or Act) §§ 501–507, 42 U.S.C. §§ 7661–7661f, and Wis. Stat. §§ 285.60–285.69. *See also* the EPA’s implementing regulations at 40 C.F.R. part 70. This type of CAA operating permit is also referred to as a title V permit or part 70 permit.

I. INTRODUCTION

Based on review of the Petitions and other relevant materials, including the Proposed Permit, the permit record, and relevant statutory and regulatory authorities, and as explained below, the EPA denies both of the Petitions requesting that the EPA object to the Proposed Permit.

II. STATUTORY AND REGULATORY FRAMEWORK

A. Title V Permits

Section 502(d)(1) of the CAA, 42 U.S.C. § 7661a(d)(1), requires each state to develop and submit to the EPA an operating permit program to meet the requirements of title V of the CAA and the EPA’s implementing regulations at 40 C.F.R. part 70. The EPA granted full approval of

Wisconsin's title V operating permit program on December 4, 2001. 66 Fed. Reg. 62951. This program is codified at Wis. Stat. §§ 285.60–285.69 and Wis. Adm. Code §§ 407.01–407.16.

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 CAA, including a Prevention of Significant Deterioration (PSD) permit. CAA §§ 502(a), 504(a), 42 U.S.C. §§ 7661a(a), 7661c(a). The title V operating permit program generally does not impose new substantive air quality control requirements, but does require permits to contain adequate monitoring, recordkeeping, reporting, and other requirements to assure sources' compliance with applicable requirements. 57 Fed. Reg. 32250, 32251 (July 21, 1992). One purpose of the title V program is to “enable the source, States, the EPA, and the public to understand better the requirements to which the source is subject, and whether the source is meeting those requirements.” *Id.* Thus, the title V operating permit program is a vehicle for ensuring that air quality control requirements are appropriately applied to facility emission units and for assuring compliance with such requirements.

B. Review of Issues in a Petition

State and local permitting authorities issue title V permits pursuant to the EPA-approved title V programs. Under CAA § 505(a), 42 U.S.C. § 7661d(a), and the relevant implementing regulations found at 40 C.F.R. § 70.8(a), states are required to submit each proposed title V operating permit to the EPA for review. Upon receipt of a proposed permit, the EPA has 45 days to object to final issuance of the permit if the EPA determines that the permit is not in compliance with applicable requirements of the CAA. CAA § 505(b)(1), 42 U.S.C. § 7661d(b)(1); *see also* 40 C.F.R. § 70.8(c) (providing that the EPA will object if the EPA determines that a permit is not in compliance with applicable requirements or requirements under 40 C.F.R. part 70). If the EPA does not object to a permit on its own initiative, § 505(b)(2) of the Act and 40 C.F.R. § 70.8(d) provide that any person may petition the Administrator, within 60 days of the expiration of the EPA's 45-day review period, to object to the permit.

Such a petition shall 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). CAA § 505(b)(2), 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d). In response to such a petition, the Act requires the Administrator to issue an objection if a petitioner demonstrates to the Administrator that a permit is not in compliance with the requirements of the Act. CAA § 505(b)(2), 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(c)(1); *see also New York Public Interest Research Group, Inc. (NYPIRG) v. Whitman*, 321 F.3d 316, 333 n.11 (2nd Cir. 2003). Under § 505(b)(2) of the Act, the burden is on the petitioner to make the required demonstration to the EPA. *MacClarence v. EPA*, 596 F.3d 1123, 1130–33 (9th Cir. 2010); *Sierra Club v. Johnson*, 541 F.3d 1257, 1266–67 (11th Cir. 2008); *Citizens Against Ruining the Environment v. EPA*, 535 F.3d 670, 677–78 (7th Cir. 2008); *WildEarth Guardians v. EPA*, 728 F.3d 1075, 1081–82 (10th Cir. 2013); *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. In evaluating a petitioner's claims, the EPA considers, as appropriate, the adequacy of the permitting authority's rationale in the permitting record, including the response to comments (RTC) document.

The petitioner's demonstration burden is a critical component of CAA § 505(b)(2). As courts have recognized, CAA § 505(b)(2) contains both a "discretionary component," to determine whether a petition demonstrates to the Administrator that a permit is not in compliance with the requirements of the Act, and a nondiscretionary duty to object where such a demonstration is made. *NYPIRG*, 321 F.3d at 333; *Sierra Club v. Johnson*, 541 F.3d at 1265–66 ("[I]t is undeniable [CAA § 505(b)(2)] also contains a discretionary component: it requires the Administrator to make a judgment whether a petition demonstrates a permit does not comply with clean air requirements."). Courts have also made clear that the Administrator is only obligated to grant a petition to object under CAA § 505(b)(2) if the Administrator determines that the petitioners have demonstrated that the permit is not in compliance with requirements of the Act. *See, e.g., Citizens Against Ruining the Environment*, 535 F.3d at 667 (stating § 505(b)(2) "clearly obligates the Administrator to (1) determine whether the petition demonstrates noncompliance and (2) object *if* such a demonstration is made" (emphasis added)); *NYPIRG*, 321 F.3d at 334 ("§ 505(b)[2] of the CAA provides a step-by-step procedure by which objections to draft permits may be raised and directs the EPA to grant or deny them, *depending on* whether non-compliance has been demonstrated." (emphasis added)); *Sierra Club v. Johnson*, 541 F.3d at 1265 ("Congress's use of the word 'shall' ... plainly mandates an objection *whenever* a petitioner demonstrates noncompliance." (emphasis added)). When courts review the EPA's interpretation of the ambiguous term "demonstrates" and its determination as to whether the demonstration has been made, they have applied a deferential standard of review. *See, e.g., Sierra Club v. Johnson*, 541 F.3d at 1265–66; *Citizens Against Ruining the Environment*, 535 F.3d at 678; *MacClarence*, 596 F.3d at 1130–31. A more detailed discussion of the petitioner demonstration burden can be found in *In the Matter of Consolidated Environmental Management, Inc. – Nucor Steel Louisiana*, Order on Petition Numbers VI-2011-06 and VI-2012-07 (June 19, 2013) (*Nucor II Order*) at 4–7.

The EPA has looked at a number of criteria in determining whether the petitioner has demonstrated noncompliance with the Act. *See generally Nucor II Order* at 7. For example, one such criterion is whether the petitioner has addressed the state or local permitting authority's decision and reasoning. The EPA expects the petitioner to address the permitting authority's final decision, and the permitting authority's final reasoning (including the RTC), where these documents were available during the timeframe for filing the petition. *See MacClarence*, 596 F.3d at 1132–33; *see also, e.g., In the Matter of Noranda Alumina, LLC*, Order on Petition No. VI-2011-04 (December 14, 2012) (*Noranda Order*) at 20–21 (denying title V petition issue where petitioners did not respond to state's explanation in RTC or explain why the state erred or the permit was deficient); *In the Matter of Kentucky Syngas, LLC*, Order on Petition No. IV-2010-9 (June 22, 2012) (*2012 Kentucky Syngas Order*) at 41 (denying title V petition issue where petitioners did not acknowledge or reply to state's RTC or provide a particularized rationale for why the state erred or the permit was deficient). Another factor the EPA has examined is whether a petitioner has provided the relevant analyses and citations to support its claims. If a petitioner does not, the EPA is left to work out the basis for the petitioner's objection, contrary to Congress' express allocation of the burden of demonstration to the petitioner in CAA § 505(b)(2). *See*

MacClarence, 596 F.3d at 1131 (“[T]he Administrator’s requirement that [a title V petitioner] support his allegations with legal reasoning, evidence, and references is reasonable and persuasive.”); *In the Matter of Murphy Oil USA, Inc.*, Order on Petition No. VI-2011-02 (September 21, 2011) (*Murphy Oil Order*) at 12 (denying a title V petition claim where petitioners did not cite any specific applicable requirement that lacked required monitoring). Relatedly, the EPA has pointed out in numerous orders that, in particular cases, general assertions or allegations did not meet the demonstration standard. *See, e.g., In the Matter of Luminant Generation Co. – Sandow 5 Generating Plant*, Order on Petition Number VI-2011-05 (January 15, 2013) (*Luminant Sandow Order*) at 9; *In the Matter of BP Exploration (Alaska) Inc., Gathering Center #1*, Order on Petition Number VII-2004-02 (April 20, 2007) (*BP Order*) at 8; *In the Matter of Chevron Products Co., Richmond, Calif. Facility*, Order on Petition No. IX-2004-10 (March 15, 2005) (*Chevron Order*) at 12, 24. Also, if the petitioner did not address a key element of a particular issue, the petition should be denied. *See, e.g., In the Matter of Public Service Company of Colorado, dba Xcel Energy, Pawnee Station*, Order on Petition No. VIII-2010-XX (June 30, 2011) (*Pawnee Order*) at 7–10; and *In the Matter of Georgia Pacific Consumer Products LP Plant*, Order on Petition No. V-2011-1 (July 23, 2012) (*Georgia Pacific Order*) at 6–7, 10–11, 13–14.

C. New Source Review

Applicable requirements for a new “major stationary source” or for a “major modification” to a major stationary source include the requirement to obtain a preconstruction permit that complies with applicable new source review (NSR) requirements. For major stationary sources, the NSR program is comprised of two core types of preconstruction permit programs. Part C of the CAA establishes the PSD program, which applies to areas of the country that are designated as attainment or unclassifiable for a given national ambient air quality standard (NAAQS). CAA §§ 160–169, 42 U.S.C. §§ 7470–7479. Part D of the Act establishes the nonattainment NSR program, which applies to areas that are designated as nonattainment for a given NAAQS. Where it applies, the PSD program requires a source to obtain a PSD permit before beginning construction of a new major stationary source or undertaking a major modification of a major stationary source and to comply with other PSD requirements. CAA § 165(a), 42 U.S.C. § 7475(a); 40 C.F.R. 52.21(a)(2). In issuing a PSD permit, permitting authorities must address several requirements, including: (1) an evaluation of the impact of the proposed new or modified major stationary source on ambient air quality in the area, and (2) the application of the Best Available Control Technology (BACT) for each pollutant subject to regulation under the Act. CAA §§ 165(a)(3), (4), 42 U.S.C. §§ 7475(a)(3), (4); 40 C.F.R. § 52.21(j), (k).

The EPA has two largely identical sets of regulations implementing the PSD program, one set, found at 40 C.F.R. § 51.166, contains the requirements that state PSD programs must meet to be approved as part of a State Implementation Plan (SIP). The other set of regulations, found at 40 C.F.R. § 52.21, contains the EPA’s federal PSD program, which applies in areas without a SIP-approved PSD program. The EPA granted final approval of Wisconsin’s PSD program on May 27, 1999, which became effective on June 28, 1999. *See* 64 Fed. Reg. 28745; 40 C.F.R. § 52.2570(c) (discussing approval of Wisconsin’s PSD provisions); *see also* 40 C.F.R. §§ 52.2569(c), 52.2581. On December 31, 2002, the EPA published revisions to the federal PSD regulations, which are commonly referred to as the NSR Reform Rule and became effective on

March 3, 2003. On May 25, 2006, WDNR submitted revisions to the EPA adopting the NSR Reform Rule. The EPA approved these revisions to Wisconsin's PSD program on December 17, 2008, which became effective on January 16, 2009. *See* 73 Fed. Reg. 76561.

Where a petitioner's request that the Administrator object to the issuance of a title V permit is based in whole, or in part, on a permitting authority's alleged failure to comply with the requirements of its approved PSD program (as with other allegations of inconsistency with the Act), the burden is on the petitioner to demonstrate to the Administrator that the permitting decision was not in compliance with the requirements of the Act, including the requirements of the SIP. *Georgia Pacific Order* at 6-7; *In the Matter of Cemex - Lyons Cement Plant*, Order on Petition No. VIII-2008-01 (April 20, 2009) (*Cemex Order*) at 3. As the EPA has explained in describing its authority to oversee the implementation of the PSD program in states with approved programs, such requirements include that the permitting authority: (1) follow the required procedures in the SIP; (2) make PSD determinations on reasonable grounds properly supported on the record; and (3) describe the determinations in enforceable terms. *See, e.g., In the Matter of Wisconsin Power and Light, Columbia Generating Station*, Order on Petition No. V-2008-01 (October 8, 2009) at 8. As the permitting authority for Wisconsin's SIP-approved PSD program, WDNR has substantial discretion in issuing PSD permits. Given this discretion, in reviewing a PSD permitting decision in the title V petition context, the EPA generally will not substitute its own judgment for that of Wisconsin. Rather, consistent with the decision in *Alaska Dep't of Env't'l Conservation v. EPA*, 540 U.S. 461 (2004), in reviewing a petition to object to a title V permit raising concerns regarding a state's PSD permitting decision, the EPA generally will look to see whether the petitioner has shown that the state did not comply with its SIP-approved regulations governing PSD permitting, or whether the state's exercise of discretion under such regulations was unreasonable or arbitrary. *See In the Matter of Seneca Energy*, Order on Petition No. II-2012-01 (June 29, 2015) at 3.

III. BACKGROUND

A. The Appleton Facility

The Appleton facility is a paper mill located in Combined Locks, Outagamie County, Wisconsin (the Facility). The Facility includes five paper machines, which are used to produce coated paper. 2012 Analysis and Preliminary Determination for the Renewal of Operation Permit at 7.¹ All paper machines have on-machine coaters; in addition, there is one off-machine coater. *Id.* Five boilers provide steam and electricity for the Facility. *Id.* The Facility also has a cogeneration combustion turbine. *Id.*

B. Permitting History

WDNR issued an initial title V permit to Appleton for the Facility on June 17, 2002. On December 15, 2006, Appleton submitted a renewal application to WDNR. WDNR issued and

¹ The EPA's regulations governing the issuance of title V permits by approved state programs require permitting authorities to prepare a statement of basis for each title V permit. 40 C.F.R. § 70.7(a)(5). The "Analysis and Preliminary Determination for the Renewal of Operation Permit" prepared and issued by WDNR in conjunction with the title V permit constitutes such a statement.

published notice of the draft renewal permit on February 19, 2010, along with a Preliminary Determination for the Draft Permit. On April 13, 2012, WDNR issued a public notice of a revised draft renewal permit (Draft Permit). On August 6, 2013, WDNR submitted the Proposed Permit and RTC to the EPA for its 45-day review period. The EPA's 45-day review period on the Proposed Permit ended on September 20, 2013. The EPA did not object to the Proposed Permit. On September 20, 2013, WDNR issued the final title V renewal permit (Final Permit) for the Facility.

C. Timeliness of Petition

Pursuant to the CAA, if the EPA does not object during its 45-day review period, any person may petition the Administrator within 60 days after the expiration of the 45-day review period to object. CAA § 505(b)(2); 42 U.S.C. § 7661d(b)(2). Thus, any petition seeking the EPA's objection to the Proposed Permit was due on or before November 19, 2013. The Sierra Club Petition was dated October 28, 2013, and the Appleton/WPC Petition was dated November 19, 2013. The EPA finds that both Petitions were timely filed.

IV. EPA DETERMINATIONS ON THE ISSUES RAISED BY THE PETITIONER

Sierra Club Petition Claim. The Title V Permit Lacks Applicable PSD Requirements for the 2005 Superheater Project.

The Sierra Club Petition Claim is found on pages 8–30 (Sections D–G) of the Sierra Club Petition and includes several sub-claims. Because these claims include substantially overlapping issues, the summary of the Sierra Club Petitioners' claim and the EPA's response address all the Sierra Club Petition issues together.

Sierra Club Petitioners' Claim.

The Sierra Club Petitioners generally claim that the Proposed Permit lacks applicable NSR requirements because WDNR applied an erroneous interpretation of the routine maintenance, repair, or replacement (RMRR) exemption to determine that PSD did not apply to the replacement of the superheater tubes of Boiler 10 that occurred sometime after September 2005 (Superheater Project). Sierra Club Petition at 3–4 (citing *In the Matter of the Tennessee Valley Authority – Paradise Fossil Fuel Plant*, Order on Petition No. IV-2010-1 (May 2, 2011) (*TVA Paradise Order*)). The Sierra Club Petitioners describe the PSD program, citing 42 U.S.C. §§ 7470–7479; 40 C.F.R. §§ 51.166 and 52.21; and Wis. Admin. Code § NR 405, and claim that the PSD program's requirements are applicable requirements of title V, citing to 42 U.S.C. § 7661b(b); 40 C.F.R. §§ 70.2 and 70.8(c)(1). Sierra Club Petition at 4–6. The Sierra Club Petitioners contend that in reviewing title V permits, the “EPA determines whether the state's application of the PSD program requirements was unreasonable or arbitrary.” Sierra Club Petition at 3 (citing *In the Matter of Wisconsin Power and Light - Columbia Generating Station*, Order on Petition No. V-2008-I (October 8, 2009) (*WPL Columbia Order*) at 2–3; 42 U.S.C. §§ 7661a(a), 7661c(a); 40 C.F.R. § 70.1; *In the Matter of Entergy Louisiana - Monroe Electric Generating Plant*, Order on Petition No. 6-99-2 (June 11, 1999); 54 Fed. Reg. 32250, 32250–51 (July 21, 1992)). As detailed below, the Sierra Club Petitioners claim that the EPA should object

to the title V permit because the Superheater Project was a major modification under Wis. Adm. Code § NR 405 that resulted in a significant emissions increase and a significant net emissions increase, and, therefore, “the PSD requirements in NR 405 are applicable requirements for the purposes of Title V and must be included in the permit.” Sierra Club Petition at 6, 8–30.

The Sierra Club Petitioners assert that their public comments specifically raised the issues regarding the Superheater Project, that WDNR’s determination that the Superheater Project was routine maintenance² was incorrect, and that the Draft Permit did not ensure compliance with PSD requirements. Sierra Club Petition at 6–7 (citing Sierra Club, Clean Water Action Council, and Midwest Environmental Defense Center Public Comments (May 12, 2012) (2012 Sierra Club Public Comments)). In addition, the Sierra Club Petitioners note that WDNR’s RTC acknowledged the public comments but “asserted that it would not reconsider its preliminary determination that the superheater replacement was ‘routine.’” Sierra Club Petition at 7 (citing RTC at 3).

Petitioners’ Assertion that WDNR Erred in Applying the RMRR Exemption to the Superheater Project

The Sierra Club Petitioners claim that WDNR incorrectly determined that the Superheater Project qualified for the RMRR exemption. Petition at 4–5, 30. The Sierra Club Petitioners first explain the history and legal precedent for the RMRR exemption. Petition at 8–10. Specifically, the Sierra Club Petitioners assert that the RMRR exemption depends on a four-factor assessment: (1) the nature and extent of the project; (2) the project’s purpose; (3) the frequency of the project; and (4) the project’s cost. Sierra Club Petition at 11 (citing to *Wisconsin Electric Power Co. v. Reilly*, 893 F.2d 901, 909–11 (7th Cir. 1990) (*WEPCO*); *U.S. v. Southern Indiana Gas & Electric Co.*, 245 F.Supp. 2d 994, 1008 (S.D. Ind. 2003); *U.S. v. Ohio Edison*, 276 F. Supp 2d 829, 855 (S.D. Ohio 2003); *U.S. v. Cinergy Corp.*, 495 F. Supp. 2d 909, 930 (S.D. Ind. 2007); Memorandum from Don R. Clay, Acting Assistant Administrator for Air and Radiation, EPA, to David A. Kee, Air and Radiation Division, Region V, EPA (September 9, 1988) at 3).

As background on WDNR’s RMRR determination of the Superheater Project, the Sierra Club Petitioners assert that WDNR initially assessed the Superheater Project as being exempt from Wisconsin’s PSD program pursuant to the RMRR exemption. Sierra Club Petition at 4–5. The Sierra Club Petitioners claim that WDNR “asked for EPA’s concurrence, which was never provided.” Sierra Club Petition at 5 (citing Letter from Steven Dunn, WDNR, to Susan Siepkowski, EPA, Region 5 (August 13, 2004) (2004 WDNR Letter)). The Sierra Club Petitioners also assert that the EPA sent a letter to WDNR on June 25, 2012, stating, “[A]fter carefully reviewing all the information, and in light of relevant factors, EPA believes WDNR may have incorrectly determined that the [Superheater Project] was ‘routine.’” Sierra Club Petition at 7 (quoting Letter from Genevieve Damico, EPA, Region 5, to Andrew Stewart, WDNR (June 25, 2012) (2012 EPA Letter)). The Sierra Club Petitioners assert that, contrary to

² The phrases “routine maintenance” and “RMRR exemption” have been used interchangeably to refer to the provisions in the PSD regulations at 40 C.F.R.: §§ 51.166(b)(2)(iii)(a), 52.21(b)(2)(iii)(a) that exempt certain projects from the definition of “modification” under the PSD regulations. In other words, if a project qualifies as “routine maintenance, repair or replacement” under these provisions, then the project will not be considered a “modification” and will not trigger PSD applicability at the facility.

statements in WDNR's August 10, 2012, response to the EPA, WDNR "never made a formal 'determination of routine maintenance'" because the 2004 WDNR Letter was only "a preliminary opinion from a [WDNR] staff engineer to EPA Region 5." Sierra Club Petition at 5, n. 5 (citing Letter from Cathy Stepp, WDNR, to Susan Hedman, EPA (August 10, 2012) (2012 WDNR Letter)).

The Sierra Club Petitioners then provide their own analysis of whether the Superheater Project should have qualified for the RMRR exemption and contend that WDNR did not correctly apply each of the four factors in its RMRR exemption analysis in the 2004 WDNR Letter. *See* Sierra Club Petition at 12–16 (explaining the legal precedent for the "nature and extent" factor and claiming that the nature and extent of the Superheater Project was not routine maintenance); *Id.* at 16–18 (explaining the legal precedent for the "purpose" factor and claiming that the purpose of the Superheater Project was not routine maintenance); *Id.* at 18–21 (explaining the legal precedent for the "frequency" factor and claiming that the frequency of the Superheater Project was not routine maintenance); *Id.* at 21–24 (explaining the legal precedent for the "cost" factor and claiming that the cost of the Superheater Project was not routine maintenance). Consequently, the Sierra Club Petitioners claim that the "EPA has never found a superheater replacement to be routine, no court applying the correct analysis has found a superheater replacement to be routine." Sierra Club Petition at 24–26 (citing to *In the Matter of Tennessee Valley Authority*, 9 E.A.B. 357, Appx A (EAB September 15, 2000); *Cinergy*, 495 F. Supp. 2d at 945–48; Letter from Steven Dunn, WDNR, to Neil Howell, Wisconsin Department of Administration (August 14, 2004)). In addition, the Sierra Club Petitioners contend that Appleton "has the burden to show that it qualifies for the [RMRR] exemption." Sierra Club Petition at 26 (citing to *Sierra Club v. Morgan*, 2007 U.S. District LEXIS 82760, at *33–34 (W.D. Wis. 2007)).

Petitioners' Assertion that the Superheater Project Resulted in a Significant Emissions Increase

As an initial matter, the Sierra Club Petitioners assert that the emission increase requirements for PSD applicability "were not analyzed by the state agency and need not be found by EPA for an object [sic]." Sierra Club Petition at 26–27. For support, the Sierra Club Petitioners contend that in the *WPL Columbia Order*, the EPA objected to an "improper analysis by [WDNR] on one aspect of PSD applicability and requir[ed] the state agency to 'reexamine its decision in light of the correct standard.'" Sierra Club Petition at 27 (quoting *WPL Columbia Order* at 7–10.)

In the alternative, the Sierra Club Petitioners claim that the Superheater Project resulted in significant emissions increases for SO₂, PM, PM₁₀, and NO_x under the actual-to-potential test, and, therefore, the Superheater Project triggered PSD requirements for those four pollutants. Sierra Club Petition at 26–28. The Sierra Club Petitioners contend that the actual-to-potential test is the appropriate analysis for determining whether a significant emissions increase occurred as a result of the Superheater Project. Sierra Club Petition at 27–28. For support that the actual-to-potential test applies, the Sierra Club Petitioners cite to various letters from the EPA to permitting authorities regarding PSD applicability determinations. Sierra Club Petition at 27 (citing Letter from Robert Miller, EPA, to Steven Dunn, WDNR (January 29, 2003) at 2; Letter from Sam Portanova, EPA, to Steven Dunn, WDNR (September 24, 2005) at 4; Letter from R.

Douglass Neeley, EPA, to Donald R. van der Vaart, North Carolina Department of Natural Resources (August 8, 2001)). The Sierra Club Petitioners also state that the “EPA has already determined that the actual-to-potential test applies to the [Superheater Project].” Sierra Club Petition at 28 (citing to 2012 EPA Letter). For support, the Sierra Club Petitioners provide a table of what they claim are actual emissions from Boiler 10 from 2004 to 2007 and potential emissions from Boiler 10 after the Superheater Project. Sierra Club Petition at 28 (citing Preliminary Determination for Permit No. 07-DCF-019 (June 10, 2008) at 45). Based on these data, the Sierra Club Petitioners calculated the emission increase from the Superheater Project and claim that significant emissions increases occurred for SO₂, PM, PM₁₀, and NO_x. Sierra Club Petition at 28.

Petitioners’ Assertion that the Superheater Project Resulted in a Significant Net Emissions Increase

The Sierra Club Petitioners claim that “if the emission increase from the Superheater Project is significant for the first step—as shown above for PM, PM₁₀, SO₂, NO_x, and CO—adding ‘[a]ny other increases . . . in actual emission’ in step two would always show a significant increase.” Sierra Club Petition at 29 (quoting Wis. Admin. Code § NR 405.02(24)(a)(2)).³ Further, the Sierra Club Petitioners state, “[T]he only truly relevant inquiry for purposes of this petition is whether there were any decreases that were contemporaneous and otherwise credible.” Sierra Club Petition at 29. The Sierra Club Petitioners next assert, “There is no evidence in the record, in DNR’s permit database, or anywhere else, that emission reductions occurred during the five years prior to the [Superheater Project].” Sierra Club Petition at 30 (citing to Permits 02-DCF-170, 00-RV-162-R1, and 04-DCF-069).

EPA’s Response. For the reasons described below, the EPA denies the Sierra Club Petitioners’ claim that the EPA must object to the permit on the bases described in the Sierra Club Petition Claim above.

Relevant Legal Background

The CAA requires major stationary sources to obtain PSD permits prior to construction or modification, which requires a BACT review and the development of appropriate emission limits, as well as an air quality impacts analysis. Wis. Admin. Code § NR 405; 42 U.S.C. § 7479(2)(C); CAA § 169(2)(C); 40 C.F.R. § 51.166. Determining whether a “major modification” has occurred for PSD purposes is a two-step process. First, there must be a physical or operational change (or a change in the method of operation) from the project at issue. Wis. Admin. Code § NR 405.02(21); 40 C.F.R. §§ 51.166(b)(2)(i). The PSD regulations provide for some exemptions to the physical or operational change requirements, one of these being the RMRR exemption.⁴ Wis. Admin. Code § NR 405.02(21)(b); 40 C.F.R. §§ 51.166(b)(2)(iii). Second, the project must result in a “significant emissions increase” of a regulated NSR pollutant

³ The EPA notes that the table provided in the Sierra Club Petition does not show a significant emission increase for CO. Sierra Club Petition at 28.

⁴ As described by the Sierra Club Petitioners, the four-factor assessment for determining whether the RMRR exemption applies includes the following: (1) the nature and extent of the project; (2) the project’s purpose; (3) the frequency of the project; and (4) the project’s cost. See *WEPCO*, 893 F.2d at 909–11; *TVA Paradise Order* 6–11.

and a “significant net emissions increase” of that pollutant from the source. Wis. Admin. Code § NR 405.02(21); 40 C.F.R. §§ 51.166(b)(2)(i). Federal and Wisconsin regulations define a “significant emissions increase” as “an increase in emissions that is significant (as defined in paragraph (b)(23) of this section) for that pollutant.” Wis. Admin. Code § NR 405.02(27M); 40 C.F.R. §§ 51.166(b)(39). Further, the regulations define a “significant net emissions increase” as:

[T]he amount by which the sum of the following exceeds zero:

(a) The increase in emissions from a particular physical change or change in the method of operation at a stationary source as calculated pursuant to paragraph (a)(2)(iv) of this section; and

(b) Any other increases and decreases in actual emissions at the major stationary source that are contemporaneous with the particular change and are otherwise creditable...

Wis. Admin. Code § NR 405.02(24); 40 C.F.R. § 51.166(b)(3).

In 2005, the appropriate test in Wisconsin to determine a significant emissions increase and a significant net emissions increase for a modification of an existing unit other than an electrical generating unit was the actual-to-potential test. *See* Wis. Admin. Code § NR 405.02(1), (21), (25) (2005). Although the EPA revised its rules in 2002 to permit states to apply an “actual-to-projected-actual test,” Wisconsin did not adopt that approach until several years later. Wis. Admin. Reg. No. 618 (June 30, 2007) (adopting the NSR Reform Rule, including the replacement of the actual-to-potential test with the actual-to-projected-actual test for determining a significant emission increase); 73 Fed. Reg. 76560 (December 17, 2008) (approving the Wisconsin rule changes adopting the NSR Reform Rule, including the replacement of the actual-to-potential test with the actual-to-projected-actual test for determining a significant emission increase). Under rules in effect in 2005, the actual-to-potential test provided that a significant emissions increase occurs if the potential emissions after the project exceeds the actual emissions during a 2-year period that precedes the project.⁵

⁵ Applicability of the PSD provisions must be determined in advance of construction and on a pollutant-by-pollutant basis. Specifically, to determine whether a proposed change at an existing source will result in an increase in actual emissions, the source must first determine a baseline level of actual emissions. The regulations applicable in Wisconsin in 2005 defined actual emissions on a particular date as “average rate, in tons per year, at which the unit actually emitted the pollutant during a 2-year period which precedes the particular date and which is representative of normal source operation. *See* Wis. Admin. Code § NR 405.02(1)(a) (2004); *See also*, 40 CFR 52.166(b)(21)(ii) (2001). Under the rules, the EPA has “typically used the 2 years immediately preceding the physical or operational change to establish the baseline.” *See* 57 Fed Reg. 32314, 32317 (July 21, 1992). Because the applicability determination must be made in advance of construction, the applicable regulations provided that when an emissions unit “has not begun normal source operations,” actual emissions equal the “potential-to-emit” of the unit. *See* Wis. Admin. Code § NR 405.02(1)(C) (2004); 40 CFR 52.166(b)(21)(iv) (2001). In other words, to determine if there is an emissions increase, the regulations required that the permitting authority compare the source’s actual emissions before the change and its potential emissions after the change. This is the so-called “actual-to-potential” test. *See* 45 Fed. Reg. 52676, 52705, 52718; 57 Fed Reg. at 32316–17 (describing the actual-to-potential test).

EPA's Analysis

As explained in the Relevant Legal Background section above, determining whether a physical change would result in a major modification that triggers the requirements of PSD is a two-step process. First, the permitting authority must determine whether the change qualifies for an exemption; in this case, whether the Superheater Project was a routine replacement. If the permitting authority determines that the project is not routine, then the permitting authority must next determine whether the change would have resulted in: (1) a significant emissions increase and (2) a significant net emissions increase. For the reasons stated below, the EPA finds that the Sierra Club Petitioners have not demonstrated that the Superheater Project was a major modification for which PSD should have applied.

Petitioners' Assertion that WDNR Erred in Applying the RMRR Exemption to the Superheater Project

With regard to whether the Superheater Project was a routine replacement, the EPA finds that the Sierra Club Petitioners have not acknowledged or addressed WDNR's final reasoning in the RTC. The Sierra Club Petitioners only acknowledge WDNR's response "that it would not reconsider its preliminary determination that the superheater replacement was 'routine.'" Petition at 7 (citing RTC at 3). However, the Sierra Club Petitioners have not addressed WDNR's response on page 5 of the RTC or the information provided in the July 10, 2013, memorandum that was prepared in response to the Sierra Club Petitioners' comments and attached to the RTC. *See* RTC at 5 ("In response to this comment, the Department made an effort to confirm the information used to determine that this project qualified for the RMRR exemption and prepared a memorandum dated July 10, 2013 (attached).") The July 10, 2013, memorandum provides additional information regarding WDNR's 2004 analysis of PSD applicability to the Superheater Project that the Sierra Club Petitioners did not address in their petition. For example, further information on "post-project activities that occurred as part of the tube replacement project" as well as updated cost and timing estimates are included. Memorandum entitled "Confirmation of Facts used to determine that a superheater tube replacement project undertaken by Appleton Coated," from Kristin Hart, WDNR, to Steve Dunn, WDNR (July 10, 2013) at 1-3 (July 10, 2013 Memo). Therefore, as a procedural matter, the Sierra Club Petitioners have not met the demonstration burden required by CAA § 505(b)(2) because they have not addressed the state's final reasoning in the RTC. *See MacClarence*, 596 F.3d at 1132-33; *see also, e.g., Noranda Order* at 20-21 (denying title V petition issue where petitioners did not respond to state's explanation in RTC or explain why the state erred or the permit was deficient); *2012 Kentucky Syngas Order* at 41 (denying title V petition issue where petitioners did not acknowledge or reply to state's RTC or provide a particularized rationale for why the state erred or the permit was deficient). In finding that, as a procedural matter, the Sierra Club Petitioners have not addressed WDNR's final reasoning in the RTC (including the attached July 10, 2013 memorandum), the EPA is not making a determination on the adequacy of WDNR's administrative record concluding that the Superheater Project was routine, but, rather, has determined that the Sierra Club Petitioners have not technically analyzed all the relevant material required to be addressed in a title V petition.

Additionally, with regard to the Sierra Club Petitioners' statements concerning the 2004 WDNR Letter and the 2012 EPA Letter, the Sierra Club Petitioners have not demonstrated that their

claims related to these letters demonstrate that the Superheater Project was a major modification for the purposes of PSD. First, the Sierra Club Petitioners have not demonstrated that WDNR did not make a formal determination that the Superheater Project qualified for the RMRR exemption. The Sierra Club Petitioners claim the 2004 WDNR Letter is a “preliminary opinion.” Sierra Club Petition at 5. However, the 2012 WDNR Letter explained that WDNR “concluded that [the Superheater Project] did not trigger PSD requirements in its 2004 letter.” 2012 WDNR Letter at 2. The Sierra Club Petitioners have not demonstrated how WDNR’s own interpretation of its 2004 letter is incorrect. Further, the Sierra Club Petitioners have not explained what they believe is required for a “formal ‘determination of routine maintenance’” or why the 2004 WDNR Letter does not meet such requirements. The EPA has pointed out in numerous orders that, in particular cases, general assertions or allegations do not meet the demonstration standard. *See, e.g., Luminant Sandow Order* at 9; *BP Order* at 8; *Chevron Order* at 12, 24. Here, the Sierra Club Petitioners have provided no citations or analysis to explain why the 2004 WDNR Letter was not a formal determination that the Superheater Project did not trigger PSD requirements. Further, as discussed above, the Sierra Club Petitioners have not addressed or acknowledged the July 10, 2013, Memo attached to the RTC. In particular, the Sierra Club Petitioners have not addressed whether the WDNR made a formal determination that the Superheater Project was routine in the July 10, 2013, Memo attached to the RTC.⁶

Petitioners’ Assertion that the Superheater Project Resulted in a Significant Emissions Increase

With regard to the significant emissions increase analysis, the EPA finds that the Sierra Club Petitioners have not demonstrated that the Superheater Project resulted in a significant emission increase using the actual-to-potential test. Specifically, the Sierra Club Petitioners have not demonstrated that the Facility’s potential emissions after the Superheater Project would have exceeded the actual emissions during a 2-year period preceding the 2005 Superheater Project. The table provided on page 28 of the Sierra Club Petition provides the highest two-year annual average emissions for PM, PM₁₀, SO₂, NO_x, CO, and VOC from Boiler 10 from 2004 to 2007; however, the Sierra Club Petitioners have not provided any factual basis or source for the alleged actual emissions data. Thus, the Sierra Club Petitioners have not provided the relevant citations or analysis to support its assertion of actual emissions data, a key part of the analysis of whether a significant increase occurred. *See MacClarence*, 596 F.3d at 1131 (“[T]he Administrator’s requirement that [a title V petitioner] support his allegations with legal reasoning, evidence, and references is reasonable and persuasive.”); *Murphy Oil Order* at 12. Even if the Sierra Club Petitioners had provided evidence of its actual emissions data, the Sierra Club Petitioners have not presented the necessary years of actual emissions data to determine if a significant emission increase has occurred. As explained earlier, the actual-to-potential test under Wisconsin’s regulations in 2005 required actual emission data for a 2-year period prior to the commencement of the project. Assuming that the Superheater Project occurred in September 2005, as claimed by the Sierra Club Petitioners, the actual-to-potential test under regulations in effect at that time would require actual emissions data from August 2003 to August 2005 or a prior 2-year period. *See supra* p. 10 n. 4; 45 Fed. Reg. 52676, 52705, 52718; 57 Fed Reg. at 32317. The Sierra Club

⁶ With regard to the Sierra Club Petitioners’ statements in the Sierra Club Petition concerning the EPA’s 2012 Letter, the EPA notes that its 2012 Letter was not a finding-of-fact or a case-by-case determination of PSD applicability made by a permitting authority.

Petitioners do not claim to provide any actual emissions data prior to 2004 as would be necessary to properly apply the actual-to-potential test for the Superheater Project under Wisconsin's regulations at the time. In addition, the Sierra Club Petitioners claim that a significant increase of CO emissions would have occurred; however, the table in the Sierra Club Petition shows an apparent *decrease* in CO emissions under the actual-to-potential test. Petition at 28–29. Therefore, the Sierra Club Petitioners have not demonstrated that the Superheater Project would have resulted in a significant emissions increase using the actual-to-potential test under Wisconsin regulations in 2005.

Petitioners' Assertion that the Superheater Project Resulted in a Significant Net Emissions Increase

With regard to the significant net emissions increase, the EPA finds that the Sierra Club Petitioners' significant net emissions increase analysis was not raised with reasonable specificity during the public comment period, as required by CAA § 505(b)(2) and 40 C.F.R. § 70.8(d). In addition, the Sierra Club Petitioners have not demonstrated that it was impracticable to raise such objections during the comment period, and there is no basis for finding that grounds for such objection arose after that period. The public comments asserted that Boiler 10 was modified and that PSD applied. 2010 Public Comments at 3. Specifically, the public comments raised the RMRR exemption (2010 Public Comments at 3–11) and significant emissions increase (2010 Public Comments at 11–13) issues as presented in the Sierra Club Petition. However, the public comment did not provide any argument, evidence, or analysis of a key element of a PSD applicability analysis - the significant net emission increase. The significant net emissions increase analysis provided in the Sierra Club Petition is not expressly identified in either the May 24, 2012, public comments or the March 19, 2010, public comments. Thus, WDNR did not have an opportunity to consider and respond to a key element of the Sierra Club Petitioners' claim that PSD applied to the Superheater Project because the project was a major modification that resulted in a significant emissions increase *and a significant net emissions increase*. See, e.g., Luminant Sandow Order at 5 (“A title V petition should not be used to raise issues to the EPA that the State has had no opportunity to address.”); see also *Luminant Sandow Order* at 11, 12, (denying a claim on the basis that very specific and detailed objections were not raised with reasonable specificity); *Operating Permit Program*, 56 Fed. Reg. 21712, 21750 (May 10, 1991) (“Congress did not intend for Petitioners to be allowed to create an entirely new record before the Administrator that the State has had no opportunity to address.”).

The remainder of the Sierra Club Petitioners' claim that the Superheater Project was “modified” and resulted in a significant emissions increase is not sufficient to meet the CAA's requirement of providing evidence or analysis to WDNR during the public comment period that the Superheater Project resulted in a “major modification.” As the EPA has previously explained, the public comments must present the “the evidence that would support a finding of noncompliance with the Act,” and in this case, the public comments did not present the evidence to WDNR that the Superheater Project resulted in a “major modification,” including a significant net emissions increase. 56 Fed. Reg. at 21750; *Georgia Pacific Order* at 8–9. Thus, the EPA denies the Sierra Club Petitioners' claim of PSD applicability on the grounds that this aspect of Sierra Club's objection was not raised with reasonable specificity during the comment period.

Even if the public comments had presented all of the Sierra Club Petitioners' claim in the petition, the Sierra Club Petitioners, for the reasons stated above (in regard to the RMRR analysis and significant emissions increase analysis) and below (in regard to the significant net emission increase analysis), have not demonstrated that the Superheater Project was a major modification for the purposes of PSD nor that the title V permit does not comply with the requirements of the CAA. *See Georgia Pacific Order* at 10.

With regard to the significant net emission increase analysis, the Sierra Club Petitioners have not demonstrated that the Superheater Project would have resulted in a significant net emissions increase. Specifically, the Sierra Club Petitioners have not analyzed if there were "any other increases and decreases in actual emissions at the source that are contemporaneous with the particular change and are otherwise creditable" as required to determine whether PSD should apply. Wis. Admin. Code NR 405.02(24)(a)(2); 51.166(b)(3) and (23); *Georgia Pacific Order* at 10; *Pawnee Order* at 7–10. The Sierra Club Petitioners assert, but do not demonstrate, that the only relevant inquiry is whether there were any other decreases in actual emissions because the Sierra Club Petitioners have not demonstrated that there was a significant emission increase as described above. *Pawnee Order* at 8. Relatedly, the Sierra Club Petitioners did not look at whether there were any other increases elsewhere at the Facility. In addition, the Sierra Club Petitioners claim that there are no credible decreases; however, the Sierra Club Petitioners have not provided any substantiation for this assertion. The EPA has pointed out in numerous orders that, in particular cases, general assertions or allegations do not meet the demonstration standard. *See, e.g., Luminant Sandow Order* at 9; *BP Order* at 8; *Chevron Order* at 12, 24. Here, the Sierra Club Petitioners have provided no citations or analysis to demonstrate that no other contemporaneous increases or decreases in actual emissions occurred at the facility 5 years prior to the Superheater Project.⁷ Thus, the Sierra Club Petitioners have not demonstrated that the Superheater Project resulted in a significant net emissions increase.

The Sierra Club Petitioners suggest that they need not satisfy the demonstration burden, stating that "[f]urther findings regarding the applicability of PSD requirements, such as the emission increase, were not analyzed by the state agency and need not be found by EPA for an object [sic]." Sierra Club Petition at 27. However, nothing in the Act places a mandatory duty on the EPA to object in such a situation. CAA § 505(b)(2) states that the Administrator "shall issue an objection ... if the Petitioner demonstrates to the Administrator that the permit is not in compliance with the requirements of [the CAA]." The EPA has previously determined that

⁷ The Sierra Club Petitioners also state that "There is no evidence in the record, in DNR's permit database, or anywhere else that emission reductions occurred during the five years prior to the superheater replacement at issue." Petition at 29-30. In FN 22 of the Sierra Club Petition, the Sierra Club Petitioners state that "There were permits issued for projects that increased emissions in the 5 years prior to the superheater replacement, see e.g., Permit 02-DCF-170, OORV-162-RI; 04-DCF-069, but no evidence of any federally enforceable emission reductions." The Sierra Club Petitioners have not identified which records or evidence in DNR's permit database that they relied on to make these assertions. In making these general assertions, the Sierra Club Petitioners have identified certain permit actions, but have not explained how they determined that the identified permit actions constituted the relevant administrative record. Furthermore, in their analysis of whether a significant net emissions increase would have occurred, the Sierra Club Petitioners have only addressed emissions from Boiler 10, which is only one of several emission units at the source.

failure to address a key component of applicability analyses is a reasonable rationale for the EPA to deny a petition. *Georgia Pacific Order* at 11. This is particularly true where, as here, a petition claim involves an alleged modification from years ago. *Id.*

As explained in Section II of this order, where a petitioner's request that the Administrator object to the issuance of a title V permit is based in whole, or in part, on a permitting authority's alleged failure to comply with the requirements of its approved PSD program (as with other allegations of inconsistency with the Act), the burden is on the petitioner to demonstrate to the Administrator that the permitting decision was not in compliance with the requirements of the Act. *Georgia Pacific Order* at 6–7; *Cemex Order* at 3. Specifically in the case where a permitting authority determined that a project was not subject to PSD requirements, the petitioner must demonstrate that a project resulted in a “major modification,” including the requisite emission increases. *Georgia Pacific Order* at 6–7. The EPA has acknowledged that PSD applicability determinations are complex (and are likely to be more so if they involve physical or operational changes that occurred many years ago). *Id.* at 11. In particular, determining whether a significant emissions increase or a significant net emissions increase would occur in the context of PSD can be particularly challenging. *Id.* at 11. The EPA is mindful that supplying emissions increase and significant net emissions increase information for projects such as the Superheater Project in the Sierra Club Petition may be a complex exercise for petitioners, as it would be for permitting authorities or for the EPA. *Id.* at 11. Nevertheless, examining whether the requisite emissions increases would occur are basic elements of a PSD applicability determination. *Id.* at 11. The EPA is under no duty to object where, as is the case here, commenters had not raised all of these elements before the state permitting authority. *Id.* at 11. Further, where petitioners do not provide an adequate demonstration with regard to these elements, as is the case here, the EPA is under no duty to object. *Id.* at 11. Thus, the EPA finds that the Sierra Club Petitioners have not demonstrated that PSD should have applied to the Superheater Project.

For the foregoing reasons, the EPA denies the Sierra Club Petition as to this claim.

Appleton/WPC Petition Claim. The Permit Lacks a Permit Shield for the 2005 Superheater Project.

The Appleton/WPC Petition Claim is found on pages 2–7 of the Appleton/WPC Petition.

Appleton/WPC Petitioners' Claim.

The Appleton/WPC Petitioners generally claim that the EPA should object to the Proposed Permit because it fails to conclude within the permit shield section that PSD requirements are not applicable requirements for the 2005 Superheater Project. *See* Appleton/WPC Petition at 5–7 (citing CAA § 504(f); Wis. Stat. § 285.62(10)(b); Wis. Admin. Code § 407.05(5)). The Appleton/WPC Petitioners concede that this claim was not raised with reasonable specificity during the public comment period. *Id.* at 3. However, in support of the claim, the Appleton/WPC Petitioners claim that grounds for the objection arose after the comment period. *Id.*

The Appleton/WPC Petitioners claim that the Proposed Permit is required to contain a permit shield for the Superheater Project pursuant to CAA § 504(f) and 40 C.F.R. § 70.6(f), as well as Wis. Stat. § 285.62(10)(b) and Wis. Admin. Code § 407.05(5), because WDNR determined in

writing in 2004 that the Superheater Project did not trigger PSD construction permitting requirements, and reaffirmed that determination during the reissuance process for the title V permit. *Id.* at 6. Specifically, the Appleton/WPC Petitioners contend that “pursuant to the EPA-approved SIP, ‘An operation permit shall include a provision pursuant to and consistent with [the permit shield] § 285.62(10)(b).’” *Id.* Additionally, the Appleton/WPC Petitioners claim that the 7th Circuit decision in *U.S. v. Midwest Generation LLC*, 7th Cir., Nos. 12-1026 and 12-1051, 44 ER 2049 (July 8, 2013) (*Midwest Generation*) “unequivocally secures for Appleton to operate as though no construction permit was required for the Project and Appleton is entitled to have that right reflected in the permit.” *Id.* at 3.

The Appleton/WPC Petitioners acknowledge that the claim was not raised with reasonable specificity during the public comment period. However, the Appleton/WPC Petitioners cite two events as grounds for objection that did not arise until after the comment period closed on May 14, 2012. First, the Appleton/WPC Petitioners contend that the EPA did not express disagreement with WDNR’s 2004 determination until June 25, 2012, concluding that the Appleton/WPC Petitioners “could not have reasonably anticipated that the EPA would so belatedly question the preclusive effect of WDNR’s decision – 8 years after the fact.” *Id.* at 3. Second, the Appleton/WPC Petitioners claim that the holding in *Midwest Generation*, occurring on July 8, 2013, subsequent to the expiration of the public comment period, represents additional grounds for objection that arose after the comment period. *Id.* at 3–4. In arguing that the *Midwest Generation* holding represents grounds for objection that arose after the comment period, the Appleton/WPC Petitioners state:

The central holding of *Midwest Generation* is that there is a five year statute of limitations on actions alleging a failure to obtain a PSD construction permit. [*Midwest Generation*] at 5–6. Because the project was commenced more than five years ago, in reliance on WDNR’s final determination it did not trigger PSD, the statute of limitations has long run out on the Project.

Id. at 3.

EPA’s Response. For the reasons described below, the EPA denies the Appleton/WPC Petitioners’ claim that the EPA must object to the permit on the bases described in the Appleton/WPC Petition Claim above.

The EPA denies the Appleton/WPC Petitioners’ request for an objection to the Permit on this claim on the basis that this claim was not raised with reasonable specificity during the public comment period, as required by CAA § 505(b)(2) and 40 C.F.R. § 70.8(d). The Appleton/WPC Petitioners have not demonstrated that it was impracticable to raise this objection within such period, and as explained in detail below, the EPA finds that there is no basis for finding that the alleged grounds for such objection arose after such period. *See Luminant Sandow Order* at 6. Additionally, the EPA denies the Appleton/WPC Petitioners’ request for an objection to the Proposed Permit on this claim on the alternative basis that the Appleton/WPC Petitioners have not demonstrated that the Proposed Permit is not in compliance with the requirements of the Act; specifically, that it was required for WDNR to include a permit shield provision in the Proposed Permit regarding PSD applicability with respect to the Superheater Project. *See* CAA § 505(b)(2), 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(c)–(d).

Reasonable Specificity

Section 505(b)(2) of the Act, 42 U.S.C. § 7661d(b)(2), and 40 C.F.R. § 70.8(d) state that a petition to object to a title V permit shall be based only on objections to the permit that were raised with reasonable specificity during the public comment period unless the petitioner demonstrates that it was impracticable to raise such objections during the public comment period or unless the grounds for such objection arose after the public comment period. The EPA has previously found that the grounds for an objection regarding PSD applicability arises when construction commences. *In the Matter of Public Service Company of New Mexico San Juan Generating Station*, Order on Petition No. VI-2010-XX (Feb. 15, 2012) (*San Juan Order*) at 6–7. In the *San Juan Order*, the EPA found:

As a factual matter, the grounds for this claim arose when the Units were originally constructed in the 1970s and 1980s, allegedly without required PSD permits. The fact that Petitioners may have only now realized that they have questions regarding PSD applicability for the initial construction of the Units does not mean that the grounds or the basis for this issue arose after the public comment period. The grounds for this particular claim in this permit action were clearly present during the public comment period. Petitioners also cannot show that it was impracticable for them to have raised this claim in their public comments. Information was available in the record to alert Petitioners to this potential concern.

Id. at 6–7.

The Appleton/WPC Petitioners concede that they did not raise this claim during the public comment period that ended on May 14, 2012. Appleton/WPC Petition at 3. However, the Appleton/WPC Petitioners argue that the grounds for this claim “did not arise until well after the public comment period on the [Proposed] Permit closed.” *Id.* The Appleton/WPC Petition cites two events as arguable grounds for the objection that arose after the public comment period: (1) a letter from the EPA to WDNR in 2012, advising that PSD may indeed apply as a result of the Superheater Project. Appleton/WPC Petition at 3–4 and (2) the issuance of the 7th Circuit *Midwest Generation* holding in 2013. The Appleton/WPC Petitioners have not demonstrated that either of these events represents a ground for the objections raised in the Appleton/WPC Petition that arose after the public comment period nor that it was otherwise impracticable to raise this objection during the public comment period.

The 2012 EPA Letter does not change the fact that the grounds for this claim arose when the Draft Permit was issued without a conclusion within the permit shield section that PSD requirements are not applicable requirements for the 2005 Superheater Project. Whether or not the Appleton/WPC Petitioners were aware of the grounds does not change the fact that the grounds were reasonably ascertainable. However, as the permittee, Appleton was provided copies and was aware of the issuance of the Draft Permit when issued, and thus, should have been aware that the permit shield provision did not include a statement regarding the non-applicability of PSD with regard to the Superheater Project. Additionally, Appleton was consulted by WDNR when WDNR conducted its RMRR analysis in 2004. *See* 2004 WDNR

Letter at 1 (highlighting Appleton's involvement in the process: "Appleton Coated has requested that the Department make a determination ... Appleton Coated has provided the following information ..."). There is nothing in the record, nor have the Appleton/WPC Petitioners indicated that they were under the impression, that the EPA had responded to WDNR's 2004 request. Moreover, the issue of PSD applicability regarding the Superheater Project was raised in the 2010 Public Comments on the initial draft renewal permit issued on February 19, 2010. 2010 Public Comments at 3–11. Therefore, the issue was part of the public record in this permit proceeding well before the issuance of the Draft Permit in 2012 and subsequent additional public comment period. The Appleton/WPC Petitioners could have easily raised this issue during the public comment period on the Draft Permit. Further, as discussed above, the 2012 EPA Letter was not a formal determination in regards to PSD applicability and the grounds for the Appleton/WPC Petitioners' claim arose prior to and do not rely upon the 2012 EPA Letter to exist. Therefore, the 2012 EPA Letter cannot serve as grounds for objection that arose after the comment period for the claim.

The issue raised by the Appleton/WPC Petitioners is one that was reasonably ascertainable and could have been raised before the public comment period closed. *See In the Matter of Public Service Company of Colorado, dba Xcel Energy, Hayden Station*, Order on Petition VIII-2009-01 (March 24, 2010) at 10–13 (finding that the issue of PSD compliance was "one that was reasonably ascertainable and could have been raised by the Petitioner before the public comment period closed"). Nothing prevented the Appleton/WPC Petitioners from making arguments based on these provisions during the public comment period. For the reasons stated above, the EPA concludes that the Appleton/WPC Petitioners could have raised comments during the public comment period for the Draft Permit based on its allegation that the Draft Permit did not contain a permit shield for PSD applicability to the Superheater Project. Neither the 2013 *Midwest Generation* decision nor the 2012 EPA Letter give rise to independent grounds for the Appleton/WPC Petitioners to raise this issue for the first time in this petition. The Appleton/WPC Petitioners also have not demonstrated that it was impracticable for them to have raised this claim during the public comment period. Information was available in the record to alert the Appleton/WPC Petitioners to their concern that the title V permit did not contain a permit shield provision regarding the PSD applicability of the Superheater Project. WDNR guidance available at the time stated that WDNR would "not put shield statements in an operation permit that have not been specifically requested by the applicant." 2011 WDNR Memorandum, Policy on Permit Shield Statements in Operating Permits. Further, the Appleton/WPC Petitioners could have relied on the absence of a permit shield provision in the Draft Permit regarding the PSD applicability of the Superheater Project to raise this issue during the public comment period. As the permittee, Appleton was obviously aware of the history regarding the Superheater Project, including the absence of a permit shield provision regarding this project in the Draft Permit, and the Appleton/WPC Petitioners have not demonstrated that they could not have raised this particular claim during the public comment period, or even as a request in their permit application. Therefore, the EPA denies the Appleton/WPC Petitioners' request for an objection to the Proposed Permit on this claim.

In this case, as a factual matter, the grounds for the Appleton/WPC Petitioners' claim arose on February 11, 2010 when the Draft Permit was issued without a conclusion within the permit shield section that PSD requirements are not applicable requirements for the 2005 Superheater

Project. *See San Juan Order* at 6–7. The grounds for the Appleton/WPC Petitioners’ claim that the Proposed Permit lacked a permit shield for PSD applicability arose once the project had commenced and the Draft Permit was issued, and, therefore, the grounds were clearly present during the public comment period. Assuming for the sake of argument that the EPA were to accept at face value the Appleton/WPC Petitioners’ interpretation of the *Midwest Generation* holding as summarized above, such an interpretation would not demonstrate that grounds for the Appleton/WPC Petitioners’ objection arose after the comment period. The Appleton/WPC Petitioners state that since the project commenced over seven years prior to the date of their petition “[t]he statute of limitations has long run on any PSD permitting claim that could arise from the Project.” Appleton/WPC Petition at 7.⁸ To the extent that the *Midwest Generation* holding is relevant to the Appleton facility, the Appleton/WPC Petitioners’ interpretation of the opinion would seem to negate, rather than create, the need for a permit shield regarding PSD applicability. The Appleton/WPC Petitioners have not explained or otherwise demonstrated how the *Midwest Generation* case constitutes grounds for objection.

The Petitioners’ Assertion that the Proposed Permit Must Contain a Permit Shield

In the alternative, even if the EPA determined that the claim had been raised with reasonable specificity or that grounds arising after the end of the public comment period justified the present claim, which is not the case for the reasons described above, the Appleton/WPC Petitioners have not demonstrated that a permit shield provision regarding the Superheater Project is required in the Proposed Permit. Therefore, for the reasons described below, the EPA denies the Appleton/WPC Petitioners’ claim on the alternative basis that the Appleton/WPC Petitioners have not demonstrated that the Proposed Permit is not in compliance with the requirements of the Act or the approved title V program. Specifically, the Appleton/WPC Petitioners have not demonstrated that it was necessary to include a permit shield provision in the Proposed Permit regarding PSD applicability with respect to the 2005 Superheater Project.

As discussed above, the Act requires the Administrator to issue an objection if a petitioner demonstrates that a permit is not in compliance with the requirements of the Act (including the requirements of the applicable implementation plan). CAA § 505(b)(2), 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(c)(1); *see* 60 Fed. Reg. 3538, at 3541⁹, *see also NYPIRG*, 321 F.3d at 333. Under § 505(b)(2) of the Act, the burden is on the petitioner to make the required demonstration to the EPA. *MacClarence v. EPA*, 596 F.3d 1123, 1130–33 (9th Cir. 2010); *Sierra Club v. Johnson*, 541 F.3d 1257, 1266–67 (11th Cir. 2008); *Citizens Against Ruining the Environment v. EPA*, 535 F.3d 670, 677–78 (7th Cir. 2008); *WildEarth Guardians v. EPA*, 728 F.3d 1075, 1081–82 (10th Cir. 2013); *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. The Appleton/WPC Petitioners did not demonstrate that either the Act or the applicable Wisconsin implementation plan require that a permit shield provision be included in the Proposed Permit regarding the Superheater Project.

⁸ Pursuant to Appleton/WPC Petitioners’ interpretation of the *Midwest Generation* holding the statute of limitations regarding the Superheater Project would have lapsed 5 years after the commencement of the Superheater Project, presumably in 2010.

⁹(On January 14, 1994, WDNR submitted the regulations, statutory changes, and administrative framework for the Operation Permits rule, NR 407, as a revision to the Wisconsin SIP.

Section 504(f) of the Act explains that:

the [title V] permit *may* also provide that compliance with the permit shall be deemed compliance with other applicable provisions of this chapter that relate to the permittee if—

- (1) the permit includes the applicable requirements of such provisions, or
- (2) the permitting authority in acting on the permit application makes a determination relating to the permittee that such other provisions (which shall be referred to in such determination) are not applicable and the permit includes the determination or a concise summary thereof.

(emphasis added) *See also* 40 C.F.R. § 70.6(f). Both the Act and the accompanying regulatory text clearly state that the permitting authority “may” include such a provision. CAA § 504(f); 40 C.F.R. § 70.6(f); 56 Fed. Reg. at 21744 (“While use of the shield remains discretionary with the permitting authority, EPA believes that the section 504(f) permit shield provision of the Act brings about certain benefits to a permittee, as well as to the permitting program.”). The permitting authority’s responsibility pursuant to the Act is clearly discretionary, and the Appleton/WPC Petitioners have not identified a mandate in the Act itself that would require the permitting authority to include a permit shield in a title V permit under any circumstance.¹⁰

Because the Act itself does not support the Appleton/WPC Petitioners claim, the only remaining relevant authority are the requirements of the approved title V program. However, even an analysis solely of the approved Wisconsin title V program does not support the Appleton/WPC Petitioners’ claim. Wis. Stat. § 285.62(10)(b) states:

Unless precluded by the administrator of the federal environmental protection agency under 42 USC 7661c (f), compliance with all emission limitations included in an operation permit is considered to be compliance with all emission limitations established under this chapter and emission limitations under the federal clean air act that are applicable to the stationary source as of the date of issuance of the operation permit if the permit includes the applicable emission limitations or the department, in acting on the application for the operation permit, determines in writing that the emission limitations do not apply to the stationary source and the operation permit includes that determination.¹¹

¹⁰ Notwithstanding the EPA’s determination whether WDNR acted consistently with its approved title V program in this instance, the EPA observes that as a general matter whether a permit shield should be included in a particular title V permit for a particular applicable requirement is a matter for the permitting authority to determine in consideration of the application that the source has submitted.

¹¹ WDNR has developed guidance regarding these provisions explaining that “[a]ll permit shield statements must be based on a diligent review performed by the applicant and reviewed by the department” and that WDNR will “not put shield statements in an operation permit that have not been specifically requested by the applicant.” Memorandum entitled “Policy on Permit Shield Statements in Operating Permits,” from Andrew Stewart, WDNR, to Barbara Pavliscak, WDNR (December 12, 2011).

Wis. Admin. Code § NR 407.09(5), part of the approved Wisconsin SIP, requires that “[a]n operation permit *shall* include a provision pursuant to and consistent with [Wis. Stat. § 285.62(10)(b)]” (emphasis added). A reasonable interpretation of this provision is that a permit simply must contain a provision identifying any permit shields, not that a permit shield for specific applicable limitations or emissions limitations deemed not to apply is required under any certain circumstance. In this matter, WDNR has included the following provision in the Proposed Permit:

Permit Shield. Unless precluded by the Administrator of the US EPA, compliance with all emission limitations in this operation permit is considered to be compliance with all emission limitations established under ss. 285.01 to 285.87, Wis. Stats., and emission limitations under the federal Clean Air Act, that are applicable to the source if the permit includes the applicable limitation or if the Department determines that the emission limitations do not apply. The following emission limitations were reviewed in the analysis and preliminary determination and were determined not to apply to this stationary source: *None*

Proposed Permit at 4 (emphasis added). If Wis. Admin. Code § NR 407.09(5) is read to require the inclusion of a provision identifying any permit shields, then the Proposed Permit appears to be in compliance with this requirement. WDNR issued the Proposed Permit with the above provision and its interpretation of the requirements under its statutes and regulations appear reasonable and consistent with the requirements under the CAA. *See Nucor II Order* at 6 (“When carrying out our title V review responsibilities under the CAA, it is our practice, consistent with that relationship, to defer to permitting decisions of state and local agencies with approved title V programs where such decisions are not inconsistent with the requirements under the CAA. The EPA does not seek to substitute its judgment for the state or local agency.”).

Even if the word “shall” in Wis. Admin. Code § NR 407.09(5) were read to require the inclusion of a specific permit shield (in this case for emissions limitations deemed not to apply) rather than, as discussed above, merely requiring a provision identifying any permit shields in the Proposed Permit, the Appleton/WPC Petitioners have still not demonstrated that such a provision is required in regards to the Superheater Project. Wis. Stat. § 285.62(10)(b) contains two requirements for emissions limitations deemed not to apply: “the department, in acting on the application for the operation permit, determines in writing that the emission limitations do not apply to the stationary source *and* the operation permit includes that determination” (emphasis added). A basic principle of statutory interpretation is that “[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant....” *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (citing N. Singer, *Statutes and Statutory Construction* § 46.06, pp. 181–186 (rev. 6th ed. 2000)). If the only requirement to trigger the mandatory inclusion of a permit shield provision for emissions limitations deemed not to apply was that a written determination has been made, as is contended by the Appleton/WPC Petitioners, the additional language “and the operation permit includes that determination” would have no meaning. The Proposed Permit does not include any such determination. Thus, the Appleton/WPC Petitioners have not demonstrated that the permit shield provision in the Proposed Permit is inconsistent with the Wisconsin title V program requirement. Further, as noted above, the inclusion of a permit shield provision is discretionary pursuant to the CAA.

Wis. Admin. Code § NR 407.09(5), the approved title V program , as discussed above, also provides the permitting authority with discretion as to whether or not to include the written determination in the permit via the statement “and the operation permit includes that determination” (incorporated from Wis. Stat. § 285.62(10)(b) by reference in Wis. Admin. Code § NR 407.09(5)) and this is consistent with the Act. That is, while Wisconsin’s approved title V program requires the permit to include a permit shield condition, it does not expressly require the permit condition to provide a permit shield. Therefore, the Appleton/WPC Petitioners have not demonstrated that the Proposed Permit is not in compliance with the requirements of the Act (including the requirements of the applicable implementation plan).

Finally, even if the approved title V program, including the applicable implementation plan requirements in Wis. Admin. Code § NR 407.09(5), were read to require inclusion of a permit shield for emissions limitations deemed not to apply if WDNR makes a written determination, regardless of the determination’s inclusion in the permit, the Appleton/WPC Petitioners have not demonstrated that WDNR made such a written determination (that PSD did not apply to the Superheater Project) “in acting on the application for the operating permit.” Wis. Stat. § 285.62(10)(b). The Appleton/WPC Petitioners point to a 2004 WDNR determination to satisfy this alleged requirement, noting that the determination was “reaffirmed” during the reissuance process. *See* Appleton/WPC Petition at 6. However, the application for the operation permit was not received by WDNR until December 15, 2006. Temporally, a 2004 determination cannot be made “in acting on the application for the operation permit” that was received in late 2006. *See* Wis. Stat. § 285.62(10)(b). The Appleton/WPC Petitioners have failed to identify a written determination by WDNR made in acting upon receipt of the 2006 application.¹² Therefore, the Appleton/WPC Petitioners have not demonstrated, even under the most favorable interpretation of the applicable requirements (one that appears to be inconsistent with that of the permitting authority’s own interpretation and guidance regarding its regulations), that a permit shield provision regarding the lack of PSD applicability for the Superheater Project was required in the Proposed Permit.

For the foregoing reasons, the EPA denies the Appleton/WPC Petition as to this claim.

¹² While the Appleton/WPC Petitioners have not identified it in any fashion, the EPA notes that WDNR did provide a memorandum with the RTC that identified “information provided to [WDNR] by Appleton Coated prior to the August 13, 2004, letter being written and compare[d] that information to the actual post-project activities that occurred as part of the tube replacement project.” Memorandum entitled “Confirmation of Facts used to determine that a superheater tube replacement project undertaken by Appleton Coated,” from Kristin Hart, WDNR, to Steve Dunn, WDNR (July 10, 2013). Regarding this memorandum, WDNR stated “[t]his memo is only a discussion of a [sic] the relevant facts concerning the tube replacement project and is not a review or endorsement of any of the arguments presented by Appleton Coated in the February 15, 2013 letter.” *See id.* Given this statement and the title of the memo) (i.e., confirmation of facts used in the 2004 determination), even had Appleton/WPC Petitioners noted the existence of this memo, it is certainly not clear that it represents a separate written determination of whether the Superheater Project was a routine replacement made in acting on the application for the operation permit, rather than, as it states, serving merely as a confirmation of the facts used in the 2004 determination.

V. CONCLUSION

For the reasons set forth above and pursuant to CAA § 505(b)(2), and 40 C.F.R. § 70.8(d), I hereby deny the Sierra Club Petition and the Appleton/WPC Petition as to the claims described herein.

Dated: OCT 14 2016



Gina McCarthy
Administrator