

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

In the Matter of)
Weyerhaeuser Company)
- Barnesville Wood Products)
Title V Operating Permit Application)
No. TV-9171)
)
)
)
)
Proposed by the Georgia Environmental)
Protection Division)

Petition No: 04-01-_____

PETITION TO HAVE THE ADMINISTRATOR OBJECT TO WEYERHAEUSER -
BARNESVILLE'S TITLE V PERMIT

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I. INTRODUCTION

A recent scientific study claims that air pollution from just one industrial segment shortens the lives of over 1,600 people in Georgia each year.¹ The same study concluded that there are 1.7 million restricted activity days in Georgia from air pollution from one industrial segment. The United States Environmental Protection Agency (US EPA) claims that people suffer other adverse health effects caused by the polluted air. There are also significant economic consequences of air pollution. Georgia's air pollution problems have reached such levels as to catch the attention of the media including major local newspapers. *See e.g.* May 1, 2001 Atlanta Journal, "Bad air days: Atlanta ranks sixth in pollution."

Interposed between Georgians and the air pollution is the Clean Air Act. In simple terms, the Clean Air Act sets standards for safe ambient air and then requires agencies to issue permits to major stationary sources of air pollution as well as implement regulations to control pollution from mobile sources. The permits for major stationary sources are designed to ensure that aggregate air pollution does not exceed ambient air quality standards.

A major component of the Clean Air Act is the Title V permitting program.

According to the US EPA:

The purpose of title V permits is to reduce violations of air pollution laws and improve enforcement of those laws. Title V permits do this by:

1. recording in one document all of the air pollution control requirements that apply to the source. This gives members of the public, regulators, and the source a clear picture of what the facility is required to do to keep its air pollution under the legal limits.

¹ Death, Disease and Dirty Power, Clean Air Task Force, October 2000 at 1,630. at 22 available at http://www.cleartheair.org/fact/mortality/mortalitystudy.vtml?PROACTIVE_ID=cecfcfcecfccc6cdccc5cecfcfcf5cecf9cbccac6c6c7c9c5cf.

2. requiring the source to make regular reports on how it is tracking its emissions of pollution and the controls it is using to limit its emissions. These reports are public information, and you can get them from the permitting authority.
3. adding monitoring, testing, or record keeping requirements, where needed to assure that the source complies with its emission limits or other pollution control requirements.
4. requiring the source to certify each year whether or not it has met the air pollution requirements in its title V permit. These certifications are public information.
5. making the terms of the title V permit federally enforceable. This means that EPA and the public can enforce the terms of the permit, along with the State.

See <http://www.epa.gov/oar/oaqps/permits/index.html>. However, the Georgia Environmental Protection Division has derailed this purpose by issuing a Title V permit with numerous flaws that are discussed in more detail below.

II. PARTIES

The Sierra Club, a non-profit corporation, is one of the nation's oldest and largest environmental organizations. The Sierra Club has been involved in air pollution issues in Georgia and throughout the nation. The Georgia Chapter of the Sierra Club has over 14,000 members. Sierra Club members live, work, farm, recreate, grow food, own land and structures, and obtain spiritual and aesthetic pleasure from locations that are adversely affected by the air pollution from this facility. In addition, the Sierra Club requires the monitoring information mandated by its final Title V permit in order to conduct its work to clean up the air in Georgia. However, if the permit does not contain complete monitoring and reporting, the Sierra Club will not be able to obtain all of the information that it needs to do its work.

III. PREVIOUS PROCEEDINGS

The US EPA granted final approval of the Georgia Title V operating permit program on June 8, 2000. 65 FR 36398 (June 8, 2000). The Environmental Protection Division (EPD) of the Georgia Department of Natural Resources is the agency responsible for issuing Title V operating permits in Georgia. O.C.G.A. §§12-9-3(12), 12-9-4, 12-9-6(b)(3).

EPD issued a draft Title V operating permit for Weyerhaeuser Company - Barnesville Wood Products (“Weyerhaeuser”). *See* Ex. 1. EPD granted the public a thirty-day period to comment on this draft permit, which ended on July 19, 2001. *See* Ex. 2 at 2. On July 16, 2001, the Sierra Club submitted comments to EPD on the Weyerhaeuser draft permit. A copy of these comments is attached as Ex. 3.

The US EPA 45-day review period to object to the permit expired on September 3, 2001. 40 CFR § 70.8(c)(1). US EPA did not object. Therefore, the public’s period to petition the Administrator to object expires on November 2, 2001. 40 CFR § 70.8(d); *see also In re: Orange Recycling & Ethanol Production Facility*, II-2000-07 (EPA Administrator May 2, 2001) at 3. Thus, this petition is timely.

IV. FACTS

The operation of the Facility, which is the subject of this Petition, is described as follows:

Tree-length and precut logs are received and sent to the log processing area where the bark is removed by one of two debarkers. The removed bark is transported to a hog via mechanical conveyor, where it is reduced to a uniform size and then conveyed to an overhead truck-loading bin. The debarked logs are processed through the log yard and sawmill. The unusable ends of the log are cut off initially and then the log is cut to the desired length at the sawmill. The log ends are chipped and sent to an overhead truck-loading bin or a railcar-loading bin for use at pulp and paper mills. The logs that are cut to the

desired length are sawed into rough lumber which is conveyed to the green sorter where it is sorted by size and length. The sawdust generated by the sawmill is transported via a conveyor to trucks. The sorted green lumber is stored on carts and loaded into one of two direct natural gas-heated kilns for drying. [Note: Facility is permitted to construct and operate a third direct natural gas-heated kiln.] The dried lumber from the kilns is sent to the planer mill where rough surfaces are smoothed; the lumber is then graded and trimmed. The trimmed ends are sent to a hog where they are reduced to a uniform size and conveyed, along with the planer shavings, to an overhead truck-loading bin with a baghouse. The finished lumber is packaged and then shipped offsite.

Ex. 1 at 1.

This Facility is located in Barnesville, Georgia, in close proximity to both the Chattahoochee and Oconee National Forests and the Piedmont National Wildlife Refuge. It is also located near the Metro-Atlanta ozone non-attainment area and the Macon area, which consistently violates the National Ambient Air Quality Standards (NAAQS) for ozone. Furthermore, the Governor of Georgia has proposed the Macon area for designation as non-attainment. This facility is a major concern because it is a large source of VOCs near two areas that have serious problems with ozone. Ozone is formed by a chemical reaction between oxides of nitrogen (NO_x) and volatile organic compounds (VOCs). That Facility also puts out over 11 tons per year of hazardous air pollutants.

V. SUMMARY OF THE ARGUMENT

1. Weyerhaeuser has been a major source, to which the NSR PSD requirements apply, since EPD removed its operational cap in its preconstruction permit. Therefore, the Title V permit needs to have a compliance schedule to have the facility comply with the NSR PSD requirements.

2. The language in Weyerhaeuser's permit appears to limit what credible evidence can be used to prove a violation. Such a limitation is contrary to the US EPA's "any credible evidence" rule and therefore must be removed and replaced with language that makes clear that any credible evidence can be used.
3. EPD'S public participation procedures were not adequate because EPD did not inform the public where it can review all of the relevant documents and included incorrect information in the public notice.
4. The permit impermissibly limits who make take actions to enforce it to "citizens of the United States" in contrast to the Clean Air Act which provides that any person may take an enforcement action.
5. Weyerhaeuser's permit does not require it to report all of the results of its monitoring, contrary to the requirements of the Part 70 regulations.
6. The permit does not contain monitoring to ensure that the facility is complying with its sulfur limit.
7. EPD did not allow the public and EPA to review and submit comments on the Preventative Maintenance Program for the Baghouse. Rather, the permit allows the permittee to create the Preventative Maintenance Program after the final permit is issued and the comment period is over.
8. The monitoring frequency in the Title V permit for the pressure drop at the baghouse is less than in the preconstruction permit. As the monitoring frequency in the preconstruction permit was an applicable requirement, it must be in the Title V permit.

VI. ARGUMENT

A. LEGAL BACKGROUND AND STANDARD OF REVIEW

The Clean Air Act is “Congress’s response to well-documented scientific and social concerns about the quality of the air that sustains life on earth and protects it from . . . degradation and pollution caused by modern industrial society.” *Delaware Valley Citizens Council for Clean Air v. Davis*, 932 F.2d 256, 260 (3rd Cir. 1991). A key component to achieve the Clean Air Act’s goal of protecting our precious air is the Title V operating permit program. Title V permits are supposed to consolidate all of the requirements for a facility into a single permit and provide for adequate monitoring and reporting to ensure the regulatory agencies and the public that the permittee is complying with its permit. *See generally* S. Rep. No. 101-228 at 346-47; *see also In re: Roosevelt Regional Landfill*, (EPA Administrator May 11, 1999) at 64 FR 25336.

When a state or local air quality permitting authority issues a Title V operating permit, the US EPA will object if the permit is not in compliance with any applicable requirement or requirements under 40 CFR Part 70. 40 CFR § 70.8(c). However, if the US EPA does not object, then “any person may petition the Administrator within 60 days after the expiration of the Administrator’s 45-day review period to make such objection.” 40 CFR § 70.8(d); 42 U.S.C. § 7661d(b)(2)(CAAA § 505(b)(2)). “To justify exercise of an objection by US EPA to a [T]itle V permit pursuant to Section 505(b)(2), a petitioner must demonstrate that the permit is not in compliance with applicable requirements of the Act, including the requirements of Part 70. [40 CFR] § 70.8(d).” *In re: PacifiCorp’s Jim Bridger and Naughton Plants*, VIII-00-1 (EPA Administrator Nov. 16, 2000) at 4.

B. WEYERHAEUSER'S PERMIT IS NOT IN COMPLIANCE WITH APPLICABLE REQUIREMENTS OF THE CLEAN AIR ACT.

1. THE TITLE V PERMIT MUST INCLUDE A COMPLIANCE SCHEDULE FOR THE FACILITY TO COME INTO COMPLIANCE WITH NEW SOURCE REVIEW REQUIREMENTS.²

“[T]itle V assures (through permitting, monitoring, certification, etc.), compliance with all Clean Air Act requirements (including NSR, where applicable).” *In re: Orange Recycling* at 3. New Source Review (NSR) is divided into two programs, Prevention of Significant Deterioration (PSD) and Non-Attainment Area Review. In this case, we are only concerned with PSD. “Part C of the Clean Air Act establishes the prevention of significant deterioration (“PSD”) program, a preconstruction review program that applies to areas of the country that have [not been designated non-attainment]. 42 U.S.C. §§ 7470-7479. In such areas, a major stationary source may not begin construction or undertake certain modifications without first obtaining a PSD permit. 42 U.S.C. §§ 7475(a)(1), 7479(1) & (2)(C).” *Id.* at 13. “Specifically, the PSD program applies to the construction of major new stationary sources and modifications of existing stationary sources. Under the Act and EPA’s implementing regulations, sources . . . are considered major if they have the potential to emit [“PTE”] more than 250 tpy.” *Id.* “The PTE is a critical factor in determining the applicability of the CAA major source permitting requirements. Many large facilities are potentially subject to major source reconstruction requirements, unless they install pollution control equipment and/or accept operational constraints, such as limitations in the hours of operation, raw material throughput or production rate, that limit the facility’s PTE below major source thresholds.” *Id.* at 8. “In order to be cognizable as limits on the source’s PTE, such

constraints must always be stated in a practically enforceable form in a source's construction permit as well as its operating permit(s). Since the source is subject to title V permitting, any preconstruction permit requirements, including PTE limits, qualify as applicable requirements under part 70, and must be set forth in the source's operating permit." *Id.* at 8. "PTE is a source's maximum capacity (determined on an annual basis) to emit a pollutant under its physical and operational design. 40 CFR 52.21(b)(4)." *Id.* at 21

In this case, Weyerhaeuser was originally a synthetic minor for volatile organic compounds (VOCs). EPD accomplished this by issuing a construction permit in 1995 that contained an operational cap of 130 million board feet per any twelve-month consecutive period. *See* Ex. 3 at Exhibit One, at page 1 of 3, Condition 4. However, in June of 1999, EPD issued the Facility a new construction permit that did not contain this operational limit. *See* Ex. 3 at Exhibit Two. The 1999 permit rescinded the 1995 permit and its operational cap. Ex. 3 at Exhibit Two, page 4 of 4, Condition 10.2 Therefore, when EPD removed the operational cap, the Facility became a major source subject to the PSD requirements on June 2, 1999.³ Weyerhaeuser has operating a major facility without a PSD permit for over two years in violation of 42 U.S.C. § 7475(a). Thus, the Title V permit must contain a compliance schedule to require the Facility to go through NSR PSD. 40 CFR § 70.6(c)(3).

The Facility and EPD may claim that the Facility was actually a natural minor facility because it could only process 130 million board feet per year. However, this is not true. In fact, the two kilns (Emission Units 500A and 500B) have a potential throughput of 225

² This issue was raised in Petitioner's Comment 7 at pages 6-7, attached as Ex. 3. Therefore, Petitioner has satisfied the requirement of 40 CFR § 70.8(d) that the petition points were raised with reasonable specificity during the public comment period.

³ The Narrative states that the kilns were constructed in May of 1982, which is after August 7, 1977.

million board feet per year. *See* Ex. 4.⁴ Even using the conservative emission fact provided by EPD on page 6 of the Narrative of 3.5 pounds of VOCs per 1000 board feet, the potential to emit of the two kilns is significantly over the 250 tpy threshold.⁵

In September of 1999, the Facility obtained a construction permit that would allow it to construct and operate a third kiln. *See* Ex. 3 at Exhibit 3. EPD believed that the Facility did not have to go through NSR PSD at this point because it took advantage of the “one time doubling” exception to the major modification rule. However, this exception only applies to facilities that are truly minor. Because this Facility was not truly a minor source, it could not take advantage of the one time doubling exception. Rather, a modification is major if it has the potential to emit 40 tpy or more of VOCs. Again, even using EPD’s conservation emission factor of 3.5 lb/1000 board feet, the modification of adding the third kiln was major.⁶ Thus, the Title V permit must also include a compliance schedule to have the third kiln goes through NSR PSD. 40 CFR § 70.6(c)(3).

2. THE PERMIT APPEARS TO LIMIT CREDIBLE EVIDENCE FROM BEING USED IN AN ENFORCEMENT ACTION.⁷

As emphasized by the US EPA’s Credible Evidence Rule, 62 FR 8314 (Feb. 24, 1997), the Clean Air Act (CAA) allows the public, EPD, US EPA, and the regulated facility to rely upon any credible evidence to demonstrate violations of or compliance with the terms and conditions of a Title V operating permit. Specifically, US EPA revised 40 CFR § 51.212, 51.12. 52.30, 60.11 and 61.12 to “make clear that enforcement authorities can

⁴ 12,846 bf/hr * 8760 hrs/yr * 2 units = 225,061,920

⁵ 222,061,920 bf/yr * 3.5 lb/1000 bf / 2000 lb/ton = 393.85836 tpy VOCs.

⁶ 13,077 bf/hr * 8760 hrs/yr * 3.5 lb/1000 bf / 2000 lb/ton = 200.47041 tpy VOCs. The through put comes from Section .5.31 of the application, which is attached as Ex. 4.

⁷ This issue was raised in Petitioner’s Comment 4 at pages 4-6, attached as Ex. 3. Therefore, Petitioner has satisfied the requirement of 40 CFR § 70.8(d) that the petition points were raised with reasonable specificity during the public comment period.

prosecute actions based exclusively on any credible evidence, without the need to rely on any data from a particular reference test.” 62 FR at 8316. EPD has failed to ensure that no permit condition purports to limit the use of credible evidence. Moreover, EPD failed to include standard language in the permit stating that all credible evidence may be used.

a. **EPD MUST REMOVE LANGUAGE THAT PURPORTS TO LIMIT THE USE OF CREDIBLE EVIDENCE.**

US EPA has made it very clear that Title V permits must contain no language that could be interpreted to limit credible evidence. However, this permit does contain language that could easily be understood as limiting credible evidence. For example, condition 4.1.3. in the permit states that “[t]he methods for the determination of compliance with emissions limits listed under Sections 3.2,3.3,and 3.4 which pertain to the emission units listed in Section 3.1 are as follows:” One could read this provision to stand for the proposition that when a government agency or member of the public takes an enforcement action for a permittee violating its permit, the enforcer can only rely on information from the methods of determination listed in the permit. This position is directly contrary to the Clean Air Act requirements in CAA §§ 113(a), 113(e)(1) and 40 CFR § 51.212, 51.12. 52.30, 60.11 and 61.12 which allow anyone taking an enforcement action to rely on any credible evidence. Therefore, the aforementioned sentence in Section 4.1.3 should be stricken.

Another example of the permit’s attempt to limit credible evidence is found in the second sentence of condition 18.17.1. This condition claims to limit the usable evidence to information that is available to EPD. Of course, the public or US EPA may obtain information about a facility from sources other than EPD, such as information from a whistleblower or from people that live near the facility. As such, it is inappropriate to limit

credible evidence to exclude such information. Therefore, the aforementioned provision must be removed from the permit. Of course, the preferred option is to simply remove the sentence. A less desirable option is to re-write it to state that “EPD may determine . . .”

Similarly, Condition 6.1.3 of the permit, which states that “failures shall be determined through observation, data from any monitoring protocol, or by any other monitoring which is required by the permit,” could be considered to limit the use of credible evidence. To correct the problem, this Condition should include an additional clause requiring reporting of any failure based on any credible evidence, including observation, data from monitoring protocols and other monitoring required by the permit.

EPD claims that Rule 391-3-1.02(3)(a) and Procedures for Testing and Monitoring Sources of Air Pollutants (“Procedures Manual”) at Section 1.3(g) remove any limitation on the use of any credible evidence in enforcement actions. Even if these two items stood for the proposition for which EPD offers them, EPD ignores the permit shield provision in the permit. EPD also fails to explain why burying such a critical issue by incorporation by reference to a testing manual or Georgia state rules make this permit practicably enforceable. As the Administrator has recently stated,

One purpose of the title V program is to enable the source, EPA, States, and the public to **clearly** understand the regulatory requirements applicable to the source and whether the source is meeting those requirements. Thus, the title V operating permits program is a vehicle for assuring that existing air quality control requirements are appropriately applied to facility emission units in a single document and assuring compliance with these requirements.

In re: Orange Recycling, at 3 (emphasis added). Not only is EPD’s approach contrary to this purpose, it is difficult to see any rational basis for this approach and

EPD has certainly not offered one. *See also Id.* at 36 (rejecting incorporation by reference).

EPD relies upon two items to support its position. The first, Rule 391-3-1-.02(3)(a), is in fact another apparent limit on credible evidence rather than a removal of such a limitation. It states:

Any sampling, computation and analysis to determine the compliance with any of the emissions limitations or standards set forth herein shall be in accordance with the applicable procedures and methods specified in the Georgia Department of Natural Resources **Procedures for Testing and Monitoring Sources of Air Pollution**.

Rule 391-3-1-.02(3)(a)(emphasis in the original). A straightforward reading of this provision supports an interpretation that would exclude any evidence to determine compliance except evidence obtained through methods set forth in Georgia Procedures Manual. The fact that, with the exception of the undersigned, the only people in possession of this Procedures Manual are regulated entities, their contractors and a few other government agencies, does nothing to strengthen EPD's position.

Turning to Section 1.3(g), it states:

Notwithstanding any other provision of any applicable rule or regulation or requirement of this text, for the purpose of submission of compliance certifications or establishing whether or not a person has violated or is in violation of any emissions limitation or standard, nothing in these Procedures for Testing and Monitoring Sources of Air Pollutants or any Emission Limitation or Standard to which it pertains, shall preclude the use, including the exclusive use, of any credible evidence or information, relevant to whether a source would have been in compliance with applicable requirements if the appropriate performance or compliance test or procedure had been performed.

Again, even if we assume that this Section supported EPD's position, we would nevertheless have to overcome the seemingly insurmountable due process obstacle that a Procedures Manual cannot overcome the language of a permit with a

permit shield provision and a rule that has been promulgated following notice and comment. If we were able to overcome this obstacle, it is nevertheless extremely unclear that Section 1.3(g) helps to remove limitations on the use of credible evidence. The Section states that “nothing in these Procedures . . . or any Emissions Limitation or Standard.” Thus, this Section applies to the Procedures Manual and Emissions Limitations and Standards. This Section does not appear to apply to Title V permits or Georgia state rules. Worse yet, the Section does not state that one can use any credible evidence. It only states that one can use any credible evidence to show whether a source would have been in compliance “if the appropriate performance or compliance test or procedure had been performed.” Section 1.3(g). Whether the credible evidence one wants to use is the “**appropriate** performance or compliance test or procedure” is anyone’s guess. However, Title V was not created to encourage guessing. Therefore, rather than this morass, US EPA should require EPD to remove the language that appears to limit credible evidence.

- b. EPD SHOULD INCLUDE STANDARD LANGUAGE IN ITS PERMITS THAT EXPLICITLY STATES THAT ANYONE CAN USE ANY CREDIBLE EVIDENCE.

US EPA should further require EPD to affirmatively state in the permit that any credible evidence may be used in an enforcement action. US EPA supports the inclusion of credible evidence language in all Title V permits. As explained by the Acting Chief of US EPA’s Air Programs branch:

It is the United States Environmental Protection Agency’s position that the general language addressing the use of credible evidence is necessary to make it clear that despite any other language contained in the permit, credible

evidence can be used to show compliance or noncompliance with applicable requirements. . . . [A] regulated entity could construe the language to mean that the methods for demonstrating compliance specified in the permit are the only methods admissible to demonstrate violation of the permit terms. It is important that Title V permits not lend themselves to this improper construction.

Letter from Cheryl L. Newton, Acting Chief, Air Programs Branch, EPA, to Robert F. Hodanbosi, Chief, Division of Air Pollution Control, Ohio Environmental Protection Agency, dated October 30, 1998. In fact, US EPA apparently sent a letter in May 1998 specifically directing EPD to amend its SIP to include language clarifying that any credible evidence may be used. *See* Letter from Winston A. Smith to Ronald C. Methier. Nevertheless, while three years have elapsed since US EPA's request, the permit does not contain the necessary language.

While anyone may rely on *all* credible evidence regardless of whether this condition appears in the permit, EPD should include credible evidence language in the permits and permit template to make the point clear. Specifically, US EPA has recommended that the following language be included in all Title V permits:

Notwithstanding the conditions of this permit that state specific methods that may be used to assess compliance or noncompliance with applicable requirements, other credible evidence may be used to demonstrate compliance or noncompliance.

Letter from Stephen Rothblatt, Acting Director, Air and Radiation Division, US EPA, to Paul Deubenetzky, Indiana Department of Environmental Management, dated July 28, 1998. We request that US EPA object to this permit and modify the permit to include this provision to clarify the availability of any credible evidence to demonstrate noncompliance with permit requirements.

3. EPD'S PUBLIC PARTICIPATION PROCEDURES WERE NOT ADEQUATE.⁸

“Public participation is an important part of the title V process, and is an appropriate subject of an objection by EPA pursuant to 40 CFR § 70.8(c)(3)(iii).” *In Re: Orange Recycling & Ethanol Production Facility*, II-2000-07 (EPA Admin. May 2, 2001) at 4. In this case, EPD did not undertake the required public participation activities for this permit. Therefore, EPD may not issue the final permit. 40 CFR § 70.7(a)(1)(ii). Rather, based on the three reasons below, US EPA should object to this permit and require EPD to re-notice the draft permit for a new public comment period that follows, at a minimum, the public participation processes specified in the law.

40 CFR § 70.7(h)(2) states that the public notice will explain where the public can review all relevant supporting documents.

As the Administrator stated in the Borden Chemical Inc. petition response, petition VI-01-01, available at <http://www.epa.gov/region07/programs/artd/air/title5/petitiondb/petitions> (under Borden_response1999), “access to information is a necessary prerequisite to meaningful public participation.” Public involvement is required throughout the CAA title V permit process (see, e.g., CAA section 502(b), 503)(e) and 505(b)), EPA’s implementing regulations (see 40 CFR §§ 70.7 and 70.8) and New York regulations (6 NYCRR 621).

In re: Orange Recycling & Ethanol Production Facility at 5.

EPD’s public notice states that all relevant information is available at the Air Protection Branch in Suite 120. This is not accurate. Much of the information the public

⁸ This issue was raised in Petitioner’s Comment 1 at pages 2-3, attached as Ex. 3. Therefore, Petitioner has satisfied the requirement of 40 CFR § 70.8(d) that the petition points were raised with reasonable specificity during the public comment period.

needs to review to determine whether a compliance schedule is required or whether conditions are adequate are actually maintained at the facility rather than at EPD's office. For example, Condition 7.1 of the construction permit required the permittee to read and record the pressure drop across the new baghouse at least once a day and record that information in a log. Ex. 3 at Exhibit 2 at page 3 of 4, Condition 7.1. This is a relevant supporting document that the public needs to review to see if a compliance schedule is in order or if additional monitoring and reporting is needed. For example, if the permittee did not maintain the log or maintained the log with frequent omissions, then this manual log would not be adequate monitoring and an automatic recording device may be appropriate. However, EPD failed to inform the public about its right to review this information. Similarly, Condition 7.3 requires the permittee to maintain an on-site log of startups, shutdowns and malfunctions. This log of malfunctions may indicate whether the Facility is capable of complying with all of the emission limitations and thus is entitled to a Title V permit. It may also indicate whether additional monitoring and reporting is required. Thus, as a relevant document, the public notice was obliged to inform the public where they could review this document.

In addition, the public notice also contains inaccurate information. For example, the notice states “[t]his permit will be enforceable by the Georgia EPD and the U.S. Environmental Protection Agency.” *See* Ex. 5. This statement is incomplete. The permit will also be enforceable by any “person.” 42 U.S.C. § 7604(a). The Clean Air Act defines “person” to include an individual, corporation, partnership, association, State, municipality, and a political subdivision of a state. 42 U.S.C. § 7602(e).

While this oversight may appear insignificant, correcting this misstatement is important for at least two reasons. To begin with, it is inherently important for the government to always provide the public with accurate information regarding implementation of air pollution laws. In addition, EPD has recognized that public involvement in the Operating Permit program has been limited. The onus is on the state agency to involve people in this regulatory process. 40 CFR. § 70.7(h). It is only with full and meaningful public participation that we can hope to have clean air here in Georgia. *See generally* Ashley Schannauer, Science and Policy in Risk Assessment: The Need for Effective Public Participation, 24 Vermont Law Review 31 (1999). In order to involve the public in the Operating Permit program, an important first step is to convince the public that this program is a legitimate means by which the public can participate to achieve the goal of attaining clean air. If the public is aware of their right to enforce a permit, they are more likely to put effort into ensuring that the permit is adequately protective of the environment.

Furthermore, the public notice states that “[a]fter the comment period has expired, the EPD will consider all comments, make any necessary changes and issue the Title V operating permit.” This statement is inaccurate. Specifically, the statement suggests that, while changes may be made, in the end, the permit *will* be issued. However, under certain circumstances, EPD is required to refuse to issue a Title V permit. 40 CFR § 70.7(a). As such, the aforementioned statement could be interpreted as an indication of EPD’s predisposition to issue Title V permits regardless of whether the permit complies with the law. *See American Wildlands v. Forest Service*, CV 97-160-M-DWM (D.Mont. Apr. 16, 1999)(Denying government deference because of evidence of predisposition towards a

predetermined outcome). Therefore, EPA should object to this permit because the public notice contain inaccurate and misleading information.

4. THE PERMIT IMPERMISSIBLY LIMITS ENFORCEMENT TO “CITIZENS OF THE UNITED STATES.”⁹

“The Title V operating permits program is a vehicle for ensuring that existing air quality control requirements are appropriately applied to facility emission units in a single document and that compliance with these requirements is assured.” *In re: Roosevelt Regional Landfill*, (EPA Administrator May 11, 1999) at 64 FR 25336. There are three entities that are permitted to take action to assure compliance with a Title V permit: the EPA pursuant to 42 U.S.C. § 7413; the State pursuant to state law or 42 U.S.C. § 7604; and any “person” pursuant to 42 U.S.C. § 7604. Of course, 42 U.S.C. § 7604 is labeled “citizen suits.” However, “citizen” in this context includes all members of the public.

“Citizen suits,” as they have come to be know, are a particularly important method of assuring compliance with Title V permits. As the Supreme Court has noted:

Yet the pressures on agencies for favorable action one way or the other are enormous. The suggestion that Congress can stop action which is undesirable is true in theory; yet even Congress is too remote to give meaningful direction and its machinery is too ponderous to use very often. The federal agencies of which I speak are not venal or corrupt. But they are notoriously under the control of powerful interests who manipulate them through advisory committees, or friendly working relations, or who have that natural affinity with the agency, which in time develops, between the regulator and the regulated. As early as 1894, Attorney General Olney predicted that regulatory agencies might become 'industry-minded,' as illustrated by his forecast concerning the Interstate Commerce Commission:

⁹ This issue was raised in Petitioner’s Comment 2 at pages 3, attached as Ex. 3. Therefore, Petitioner has satisfied the requirement of 40 CFR § 70.8(d) that the petition points were raised with reasonable specificity during the public comment period.

'The Commission . . . is, or can be made, of great use to the railroads. It satisfies the popular clamor for a government supervision of railroads, at the same time that that supervision is almost entirely nominal. Further, the older such a commission gets to be, the more inclined it will be found to take the business and railroad view of things.' M. Josephson, *The Politicos* 526 (1938).

Years later a court of appeals observed, 'the recurring question which has plagued public regulation of industry (is) whether the regulatory agency is unduly oriented toward the interests of the industry it is designed to regulate, rather than the public interest it is designed to protect.' *Moss v. CAB*, 430 F.2d 891, 893.

Sierra Club v. Morton, 405 U.S. 727, 745-47 (1972). See also *Molokai Chamber of Commerce v. Kukui (Molokai), Inc.*, 891 F. Supp. 1389, 1402 (D. Haw. 1995) (Congress intended that citizen suits would serve as "an integral part of [the Clean Water Act's] overall enforcement scheme"); *Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d 1517, 1525 (9th Cir. 1987) ("citizens should be unconstrained to bring [Clean Water Act] actions") (quoting S. Rep. No. 92-414 (1971), reprinted in 1972 U.S. Code Cong. & Admin. News 3668, 3746); see also *id.* ("Congress intended Clean Water Act citizen suits to be "handled liberally, because they perform an important public function"); *Marbled Murrelet v. Babbitt*, 182 F.3d 1091, 1095 (9th Cir. 1999) (noting Congress' intent to promote citizen enforcement of ESA); *Pennsylvania v. Delaware Valley Citizens' Council*, 478 U.S. 546, 560, 106 S.Ct. 3088 (1986) (Congress enacted Clean Air Act's attorney's fees provision "to promote citizen enforcement of important federal policies.").

EPD's Title V permit seriously undermines the citizen suit provision of the Clean Air Act. Condition 8.2.1 of the permit states:

Except as identified as "State-only enforceable" requirements in this Permit, all terms and conditions contained herein shall be enforceable by the EPA and citizens **of the United States** under the Clean Air Act[.]

Ex. 1 at Condition 8.2.1 (Emphasis added). However, the relevant section of Part 70 provides that “all terms and conditions in a part 70 permit, are enforceable by the Administrator and citizens under the Act.” 40 CFR § 70.6(b)(1). This section clearly does not limit who may bring enforcement actions to citizens “of the United States.” Furthermore, the Clean Air Act ends any debate on this issue. It provides that “any person” may bring a citizen suit. 42 U.S.C. § 7604(a). The Act goes on to define person as including “an individual, corporation, partnership, association, State, municipality, political subdivision of a state” 42 U.S.C. § 7602(e). Thus, the impact of this oversight is significant. Specifically, “citizens of the United States” represents a small subset of those who fall under the statutory definition of “person.” As written, the EPD permit excludes corporations, both for and non-profit, counties, not to mention resident aliens and others whose immigration status is other than citizens of the United States.¹⁰

Nevertheless, EPD has argued on this same issue in the past that the use of the term “citizens of the United States,” does not affect the fact that any person, as authorized by the Act, can enforce the permit. EPD cites no authority for its argument. In addition, EPD ignores the permit shield in condition 8.16.1. Even assuming that EPD’s position is correct, a plaintiff may be forced to litigate the issue. Even if a court would ultimately rule that any person, and not only a citizen of the United States, can enforce this permit, what could possibly be the value of forcing parties to expend valuable resources litigating an issue that could have been expeditiously addressed in the context of the permit? Surely draining public and private resources through protracted litigation does nothing to assure compliance with the provisions of a Title V permit. Moreover, given the misleading language contained in the

¹⁰ The fact that Georgia’s Title V permits claim to limit the rights of non-citizens of the United States raises serious environmental justice and equal protection issues.

permit, an individual untrained in the law may actually conclude that he or she cannot enforce the permit based on the plain language of the permit. Again, there is no value in allowing room for this confusion. Rather, the purpose of Title V permits assuring compliance is served by modifying the language.

Of course, the remedy is so simple that it is difficult to conceive any legitimate reasons for EPD to refuse Petitioner's request to modify the language. EPD simply needs to delete the phrase "of the United States," out of condition 8.2.1.

Furthermore, the permit is misleading by including mention of the public's right to sue under a section entitled "EPA Authority." We recommend that EPD create a separate section, which discusses the public's right to sue under a heading such as "Public's Enforcement Authority."

5. WEYERHAEUSER'S PERMIT DOES NOT REQUIRE IT TO REPORT THE RESULTS OF ALL ITS MONITORING¹¹

40 CFR § 70.6(a)(3)(iii)(A) and 42 U.S.C. § 7661(c)(a) require that Title V permits issued by state agencies include a requirement for submittal of reports of any required monitoring at least every 6 months. Weyerhaeuser's permit does not contain any such requirement. *See* Ex. 1.

EPD has claimed in the past that condition 5.3.1 of the permit satisfies the requirements of § 70.6(a)(3)(iii)(A). However, condition 5.3.1 requires reporting of excess emissions, exceedances and/or excursions. Ex. 1 at 8, Condition 5.3.1. The reporting of these deviations is required by § 70.6(a)(iii)(B). However, § 70.6(a)(iii)(A) requires

¹¹ This issue was raised in Petitioner's Comment 3 at page 3-4 attached as Exhibit 3. Therefore, Petitioner has satisfied the requirement of 40 CFR § 70.8(d) that the petition points were raised with reasonable specificity during the public comment period.

reporting of all monitoring. It is a cardinal rule of statutory and regulatory interpretation that a regulation should be interpreted in such a manner as to not render any provision of the regulation meaningless. However, EPD's claim that reporting of deviations constitutes reporting of any required monitoring renders § 70.6(a)(iii)(A) meaningless as it would be redundant to § 70.6(a)(iii)(B).

It is true that Condition 6.1.4.b does require bi-annual reporting of total process operating time during each reporting period. Ex. 1 at 8. In addition, the permit requires reporting of 12-consecutive month totals of lumber dried. Ex. 1 at 12, Condition 6.2.3. While this certainly is a step towards compliance with § 70.6(a)(iii)(A), that regulation requires reporting of *all* monitoring. For example, Condition 5.2.2 requires operation and maintenance checks of various devices. The results of these checks should have to be reported bi-annually. Condition 5.1.1.a requires recording of the pressure drop reading for the baghouses. Condition 5.2.3 requires the permittee to record the results of the visible emission inspection of baghouse 702. These are exactly the types of monitoring that § 70.6(a)(iii)(A) requires to be reported at least bi-annually and that the permit does not require.

There is a related issue that will arise if EPA requires EPD to include a requirement of providing monitoring information. Therefore, it is the best use of resources to address this issue now rather than have Petitioner once again appeal this permit. EPD appears to take the position in its narrative that even if it did include a requirement to provide monitoring information, § 70.6(a)(iii)(A) only requires a report of the monitoring information rather than submission of the actual monitoring information. While this may be a fair interpretation of the regulation, Petitioner is not sure that there is any difference between a report on the

monitoring information and the actual monitoring information. It would seem that it would be the least onerous requirement on the permittee to have it simply photocopy the monitoring information, such as the log books, rather than having to convert the information into some unspecified report format. In conclusion, EPA should object to the permit and require EPD to include a permit provision that requires “submittal of reports of any required monitoring at least every 6 months.” 40 CFR § 70.6(a)(3)(iii)(A).

6. THE PERMIT DOES NOT CONTAIN MONITORING AND REPORTING FOR THE SULFUR LIMIT.¹²

40 CFR § 70.6(a)(3)(i) requires adequate monitoring for all permit limitations. 40 CFR § 70.6(a)(3)(iii)(A) requires reporting of *all* monitoring established by the permit. Condition 3.4.7 limits the sulfur percentage of the fuel used in the kilns. However, there is no monitoring or reporting for this requirement included in the permit. Moreover, EPD has offered no evidence why this standard will not be violated. EPA should object to the permit and modify the permit to add a condition that requires the facility to obtain invoices from the fuel provider that states the sulfur content and a provision reporting this data to EPD. In the alternative, EPA could add a condition into section 3 requiring that only pipeline quality natural gas be burned in the kilns.

7. EPD DID NOT ALLOW THE PUBLIC AND EPA AN OPPORTUNITY TO REVIEW AND COMMENT ON THE PREVENTATIVE MAINTENANCE PROGRAM FOR THE BAGHOUSE.¹³

¹² This issue was raised in Petitioner’s Comment 8 at page 7 attached as Ex. 3. Therefore, Petitioner has satisfied the requirement of 40 CFR § 70.8(d) that the petition points were raised with reasonable specificity during the public comment period.

The CAA and its implementing regulations at part 70 provide for public comment on “draft” permits and generally do not require permitting authorities to conduct a second round of comments when sending the revised “proposed” permit to EPA for review. It is a basic principle of administrative law that agencies are encouraged to learn from public comments and, where appropriate, make changes that are a “logical outgrowth” of the original proposal. *See, e.g., Sierra Club v. Costle*, 657 F.2d 298, 352 (DC Cir. 1981). However, there are well recognized limits to the concept of “logical outgrowth” in the context of Agency rulemaking that, by analogy, apply to title V permits as well. As the US Court of Appeals for the DC Circuit has explained, “if the final rule deviates too sharply from the proposal, affected parties will be deprived of notice and an opportunity to respond to the proposal.” *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (DC Cir. 1983) (vacating portion of final CAA rule governing leaded gasoline because agency notice was “too general” and did not apprise interested parties “with reasonable specificity” of the range of alternatives being considered). *See also Shell Oil Company v. EPA*, 950 F.2d 741 (DC Cir. 1991) (remanding final RCRA “mixture and derived from” rule because “interested parties cannot be expected to divine the EPA’s unspoken thoughts”); *Ober v. EPA*, 84 F.3d 304, 312 (9th Cir. 1996) (requiring an additional round of public comment on EPA’s approval of Arizona’s PM-10 Implementation Plan because public never had an opportunity to comment on state’s post-comment period justifications which were critical to EPA’s approval decision). Courts have noted that providing the public meaningful notice improves the quality of agency decisionmaking, promotes fairness to affected parties, and enhances the quality of judicial review. *Small Refiner*, 705 F.2d at 547. I find that these fundamental principles apply with equal force in the context of title V permitting. Otherwise, if a final permit no longer resembled the permit that the public commented upon, then the public would be deprived of the opportunity to comment guaranteed by the CAA and EPA’s rules.

In re: Orange Recycling, at 7-8. In *In re: Orange Recycling*, you held that because New York had changed the method of monitoring for the PTE between the draft and final permit, New York had to hold a second comment period on this issue. The present case is even more worthy of a second comment period than *In re: Orange Recycling*.

¹³ This issue was raised in Petitioner’s Comment 9 at page 7 attached as Ex. 3. Therefore, Petitioner has satisfied the requirement of 40 CFR § 70.8(d) that the petition points were raised with reasonable specificity during the public comment period.

Condition 5.2.4 of the draft permit requires the permittee to submit a plan 60 days after the permit is issued which includes the permittee's proposed plans for a Preventative Maintenance Program for the baghouses. The public and EPA are required to have an opportunity to comment on the merits of the draft permit. 40 CFR §§ 70.6(a) & (h). However, the public and EPA are not going to have an opportunity to comment on the Preventative Maintenance Program because it does not exist. Therefore, EPA should object to this permit and require EPD to hold a public comment period on the Preventative Maintenance Program before EPA or EPD issues the final permit.

8. THE PERMIT DOES NOT CONTAIN ALL APPLICABLE REQUIREMENTS.¹⁴

Title V permits must contain all terms and conditions of any preconstruction permit. *See* 40 CFR § 70.2. Condition 7.1 in the facility's June 2, 1999 preconstruction permit (221-171-0005-E-01-0) requires the facility to record the pressure drop in baghouse 901 at least once per day. However, EPD changed this requirement to once per week in Condition 5.2.1. in the Title V permit. Thus, EPD has deleted an applicable requirement from the Title V permit. In doing so, EPD has undermined one of Title V principle functions which is to provide sufficient monitoring to assure continuous compliance. Therefore, EPA should object to this permit and require that Condition 5.2.1. require at least daily recording of the pressure drop in baghouse 901. A better approach would be to require continuous, automatic recording of the pressure drop.

¹⁴ This issue was raised in Petitioner's Comment 10 at page 8 attached as Ex. 3. Therefore, Petitioner has satisfied the requirement of 40 CFR § 70.8(d) that the petition points were raised with reasonable specificity during the public comment period.

VII. CONCLUSION

For the reasons explained above, pursuant to 40 CFR § 70.8(d) the US EPA should object to this permit and modify it as explained above.

Respectfully Submitted,

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