

BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF:)	
)	
LOUIS DREYFUS AGRICULTURAL)	
INDUSTRIES, LLC)	ORDER RESPONDING TO PETITIONER'S
Kosciusko County, Indiana)	REQUEST THAT THE ADMINISTRATOR
)	OBJECT TO ISSUANCE OF A STATE
)	OPERATING PERMIT
)	
PERMIT NO. TO85-21297-00102)	PETITION NO. V-2006-1
)	
Issued by the Indiana)	
Department of Environmental Management)	
_____)	

ORDER DENYING
PETITION FOR OBJECTION TO PERMIT

On January 24, 2006, pursuant to its authority under Title 326, Article 2 of the Indiana Administrative Code (IAC), the approved Indiana operating permit program, title V of the Clean Air Act ("CAA" or "the Act"), CAA §§ 501-507, 42 U.S.C. §§ 7661-7661f, and the U.S. Environmental Protection Agency's ("EPA") implementing regulations at 40 C.F.R. part 70 ("part 70"), the Indiana Department of Environmental Management ("IDEM") issued Louis Dreyfus Agricultural Industries, LLC ("Dreyfus" or "the facility") a state operating permit.

On February 16, 2006 the EPA received a document styled as a petition pursuant to section 505(b)(2) of the Act, 42 U.S.C. §§ 7661a(b)(2), and 40 C.F.R. § 70.8(d), in which Bungee North America (referred to herein as "Petitioner") requested that EPA either (1) object to the permit, or (2) clarify that EPA is in agreement with the approach taken by IDEM in issuing the permit.

The Petitioner raises two objections to the permit: (1) IDEM failed to respond adequately to comments filed on the draft permit; and (2) EPA's comments on the permit, summarized in IDEM's response to comments failed to provide clarity with respect to regulatory and policy determinations used in drafting the permit.

EPA has reviewed these allegations pursuant to the standard set forth in section 505(b)(2) of the Act, which requires the Administrator to issue an objection if the petitioner demonstrates to the Administrator that the permit is not in compliance with the applicable requirements of the Act. *See also* 40 C.F.R. § 70.8(d); *New York Public Interest Research Group v. Whitman*, 321 F.3d 316, 333 n.11 (2nd Cir. 2002).

Based on a review of the available information, including the petition, the Dreyfus permit, and the information provided by the Petitioner, I deny the Petitioner's request for the reasons set forth in this Order.

I. STATUTORY AND REGULATORY FRAMEWORK

Section 502(d) (1) of the Act requires each State to develop and submit to EPA an operating permit program which meets the requirements of CAA title V. EPA granted final full approval of the Indiana title V operating permit program effective November 30, 2001. 66 *Fed. Reg.* 62969 (December 4, 2001).

All major stationary sources of air pollution and other sources covered by title V are required to apply for an operating permit that includes emission limitations and such other conditions necessary to assure compliance with all applicable requirements of the Act. CAA §§ 502(a) and 504(a), 42 U.S.C. §§ 7661a(a) and 7661c(a).

The title V operating permit program does not generally impose new substantive air quality control requirements (which are referred to as "applicable requirements"), but does require permits to contain monitoring, recordkeeping, reporting, and other requirements to assure compliance by sources with existing applicable requirements. 40 C.F.R. § 70.1(b); 57 *Fed. Reg.* 32250, 32251 (July 21, 1992). One purpose of the title V program is to "enable the source, States, EPA, and the public to better understand the requirements to which the source is subject, and whether the source is meeting those requirements." *Id.* Thus, the title V operating permits program is a vehicle for ensuring that existing air quality control requirements are appropriately applied to facility emission units in a single document, thereby enhancing compliance with the requirements of the Act. *Id.*

Under section 505(a) of the Act, 42 U.S.C. § 7661d(a), and 40 C.F.R. § 70.8(a), permitting authorities are required to submit all proposed title V operating permits to EPA for review. Section 505(b)(1) and 40 C.F.R. 70.8(c)(1) authorize EPA to object to a proposed title V permit within 45 days if the permit contains provisions that are not in compliance with the applicable requirements of the Act, including the requirements of an applicable implementation plan,¹ or the requirements of part 70. If EPA does not object to a title V permit on its own initiative, section 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 after the

¹ Under 40 C.F.R. § 70.1(b), "all sources subject to [title V must] have a permit to operate that assures compliance by the source with all applicable requirements," which include the requirements of an applicable state implementation plan.

expiration of EPA's 45-day review period, to object to the issuance of the permit. A petitioner must demonstrate that the permit is not in compliance with the requirements of the Act, including the requirements of part 70. Section 505(b)(2) and 40 C.F.R. § 70.8(d) also provide that petitions shall be based only on objections that were raised with reasonable specificity during the public comment period on the draft permit (unless the petitioner demonstrates that it was impracticable to raise such objections within that period or the grounds for objection arose after that period).

Section 505(b)(2) requires the Administrator to object to a permit if a petitioner demonstrates that the permit is not in compliance with the requirements of the Act, including the requirements of part 70 and the applicable implementation plan. See 40 C.F.R. § 70.8(c)(1); New York Public Interest Research Group, Inc. v. Whitman, 321 F.3d 316, 333 n.11 (2d Cir. 2003). In addition to substantive flaws, failure to process a permit, permit modification (except for minor permit modifications), or permit renewal in accordance with the procedural requirements of 40 C.F.R. § 70.7(h) constitutes grounds for an EPA objection. See 40 C.F.R. § 70.8(c)(3)(iii); Sierra Club v. Johnson, 436 F.3d. 1269, 1280 (11th Cir. 2006) ("It is clear that Congress intended for EPA to object to a permit when the public participation requirements for issuing it have not been met") (citing 42 U.S.C. § 7661d(b)(2) and 40 C.F.R. § 70.7(a)(1)(ii)). If, in responding to a petition, EPA objects to a permit that has already been issued, EPA or the permitting authority will modify, terminate, or revoke and reissue the permit consistent with the procedures in 40 C.F.R. §§ 70.7(g)(4) or (5)(i) and (ii) for reopening a permit for cause. A petition or an objection does not stay the effectiveness of the permit or its requirements if the permit was issued after the expiration of EPA's 45-day review period. 42 U.S.C. § 7661d(b)(2)-(b)(3); 40 C.F.R. § 70.8(d).

II. BACKGROUND

Dreyfus submitted to IDEM an application for a New Source Construction and title V permit to build a soybean oil, soybean meal and biodiesel manufacturing plant in Claypool, Indiana. IDEM issued a draft title V permit on November 12, 2005. The public comment period for the Dreyfus permit ended December 11, 2005. During the public comment period, IDEM received comments on the draft permit, including comments from the Petitioner dated December 9, 2005. EPA did not object to the proposed permit within its 45-day review period and IDEM issued a permit to Dreyfus on January 24, 2006.

Petitioners submitted a document styled as a request that EPA object to the issuance of the Dreyfus permit on February 16, 2006 which was within the 60 days time frame specified in section 505(b)(2). Accordingly, EPA finds that Petitioners timely filed its document.

III. ISSUES RAISED BY PETITIONERS

Before addressing the issues which Petitioner raised as “objections” to the permit, we note that it is not entirely clear that the document submitted by Petitioner is a true petition to object to the permit, as contemplated by section 505(b)(2) and 40 C.F.R. §70.8(d). Throughout the document, Petitioner notes that it agrees with IDEM’s decisions in issuing the permit, and that the real reason Petitioner filed its petition was not to get EPA to object to the permit but to “ensure that IDEM and USEPA take consistent regulatory positions with regard to the permitting of oilseed processing facilities.” Petition at 2. In fact, in its request for relief, Petitioner “respectfully requests that USEPA *deny this petition . . .*” Id. at 6 (emphasis added). Thus, it appears that Petitioner is using the title V petition process in order to get a general policy statement from EPA regarding permitting of oilseed processing facilities, and not to get EPA to object to an individual permit. Neither the statute nor EPA’s regulations contemplate a person using the title V petition process to *not* obtain an objection to a permit. EPA does not believe that the title V petition process is the proper venue for obtaining general policy statements, especially when the petitioner does not want EPA to object to the permit. Nonetheless, for a variety of reasons, we are responding to this petition as if it were a proper petition to object to a permit. By our response herein we are not indicating that we will treat similar documents requesting a policy statement in lieu of an objection to a permit in the same manner.

As noted previously, the Petitioner raises two “objections” to the permit: (1) IDEM failed to respond adequately to comments filed on the draft permit; and (2) EPA’s comments failed to provide clarity with respect to regulatory and policy determinations used in drafting the permit. Both are addressed below.

A. Response to Comments regarding quantification of fugitive emissions

Petitioner alleges that IDEM did not adequately respond to their concerns that IDEM’s calculation of fugitive emissions differs from EPA’s approach in “similar situations”. The Petitioner agrees with IDEM’s approach of not counting fugitive emissions toward a determination of applicability of the Prevention of Significant Deterioration (PSD) requirements under the CAA. However, the Petitioner states “it is our understanding that in other situations USEPA has disagreed with IDEM’s approach and taken the position that VOC emissions which IDEM is treating as fugitive for the purposes of evaluating PSD applicability to the Dreyfus facility are not fugitive.” The Petitioner alludes generally to “other situations in which EPA has counted such emissions in determining PSD applicability.” The Petitioner does not provide any specific examples or cases to support its allegations or understanding.

IDEM’s response indicated that they based their approach on available EPA guidance. Not only does Petitioner not provide any information showing that IDEM incorrectly cited or applied generally appropriate guidance, Petitioner actually agrees with IDEM’s approach. Moreover, the Petitioner did not provide specific information on where and how EPA allegedly made inconsistent determinations or how EPA’s approach

allegedly differs from IDEM's. Thus, we believe that IDEM responded adequately. Accordingly, the petition is denied on this issue.

B. Regulatory clarity regarding fugitive emissions

Petitioner alleges that EPA's comments on the draft permit with respect to the inclusion of fugitive emissions in determining PSD applicability and whether certain emissions can be classified as "fugitive" will leave the permit "in its currently objectionable condition" unless EPA provides additional clarification. The Petitioner specifically points to EPA's statement that soybean processing does not fall within one of the categories for which fugitive emissions are to be counted for PSD applicability, as well as a later EPA statement that excluding certain bound-in-product and byproduct emission by the IDEM was not consistent with EPA's position related to emissions at other soybean processing plants.

As stated above, IDEM's decision that fugitive emissions from the soybean processing are not to be included in determining whether the Dreyfus facility is a major stationary source for PSD applicability purposes is identical to EPA's own conclusions in comments submitted to IDEM on this permit. Decisions on whether a particular source of emissions is "fugitive" at a proposed facility generally are made on a case-by-case basis. EPA has defined fugitive emissions as those emissions which could not reasonably pass through a stack, chimney, vent or other functionally equivalent opening. See, e.g., 40 C.F.R. § 51.166(b)(20). IDEM followed this language in making its determinations on which emissions were fugitive related to the Dreyfus facility.

Rather than provide any evidence of improper decisionmaking on the part of IDEM, or of any resulting flaw in the permit, Petitioner relies on vague allegations of prior EPA positions to support its request for additional clarification from EPA. As noted above, the title V petition process is not the proper venue for a person, in particular one who agrees that the title V permit is correct, to obtain policy statements from EPA.

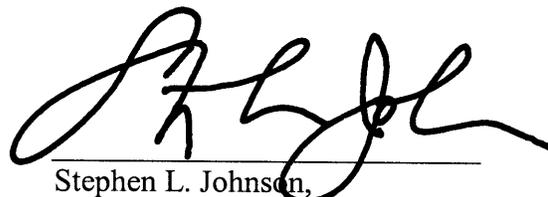
The Petitioner has failed to demonstrate how the decisions made by IDEM on the Dreyfus facility are in any way inconsistent with EPA PSD regulations. The Petitioner does not specify any specific information which demonstrates any conflict between IDEM's decisions and EPA's PSD regulations, instead relying on vague, unsubstantiated statements that EPA has taken contrary positions in the past. IDEM responded to the Petitioner's concerns in their response to comment by stating they followed EPA's regulations and policies on determining what emissions are fugitive. Because there is no

evidence of any flaw in either IDEM's decisions or in the Dreyfus permit, the petition is denied on this issue.¹

IV. CONCLUSION

For the reasons set forth above and pursuant to Section 505(b) of the Act and 40 C.F.R. § 70.8(d), I hereby deny the petition with respect to all allegations.

Dated: JUL 21 2006



Stephen L. Johnson,
Administrator.

¹ We are not following Petitioner's recommendation that we state that our failure to object to the permit ourselves during our 45-day objection period demonstrates positive agreement with IDEM's position regarding bound-in-product and byproduct emissions. EPA's failure to object to a permit on which it has filed comments indicating concerns does not necessarily mean that EPA agrees with how those concerns were resolved in the final permit. Moreover, when filing a petition to object, it is the petitioner's responsibility to show why the permit was wrong, which, for the reasons discussed herein, Petitioner has failed to do with regard to this permit.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

AUG 10 2006

THE ADMINISTRATOR

The Honorable Mitch Daniels, Jr.
Office of the Governor
206 State House
Indianapolis, Indiana 46204

Dear Governor Daniels:

Thank you for your letter of March 29, 2006, in which you request that the United States Environmental Protection Agency (EPA) respond in a timely manner to a petition filed by Bunge North America regarding a Clean Air Act (CAA) Title V permit issued to a competitor. Bunge's petition requested that EPA either (1) issue a policy statement regarding emissions from oilseed processing plants, or (2) object to an air permit issued by the Indiana Department of Environmental Management (IDEM) to Louis Dreyfus Agricultural Industries, LLC for a new soybean processing/bio-diesel plant near Claypool, Indiana. Specifically, Bunge claims that while it agrees with how IDEM treats certain emissions for this industry, it believes EPA may have a different position. We understand that the proposed new plant is a valuable investment for Indiana and furthers our nation's goals for energy independence.

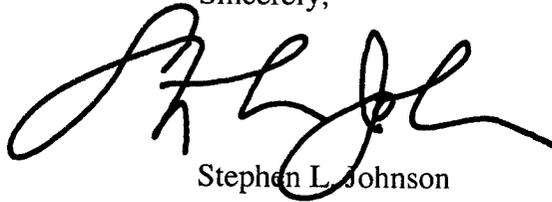
EPA issued an order denying Bunge's petition on July 21, 2006. A copy is enclosed for your reference. EPA agrees with IDEM and Bunge that fugitive emissions from the soybean oil extraction process are not counted when determining whether the source qualifies as a "major source" for air permitting purposes under IDEM's rules for Prevention of Significant Deterioration (PSD). EPA also believes that any volatile organic compound (VOC) emissions that are bound in product and emitted after the product has left the facility for distribution should not be included in the major source determination calculation, regardless of whether they are fugitive emissions.

In the petition response EPA does not take a position regarding the accuracy of either IDEM's characterization of certain emissions as fugitive, or its estimate of the level of non-fugitive emissions at the proposed Dreyfus facility. EPA has seen no evidence that IDEM's characterization of certain emissions as fugitive or the estimates calculated are flawed or inconsistent with EPA policies. The proposed Dreyfus facility is permitted as a "minor" new source under the Indiana rules for PSD because it is required to maintain non-fugitive VOC emissions below 250 tons per year (tpy). The facility's non-fugitive VOC emissions are limited to 238.4 tons per year, 11.6 tons below the 250 tpy major source threshold. We recommend that Dreyfus ensure its non-fugitive emissions remain below the major source threshold. Failure to

do so could possibly result in Dreyfus being subject to further permitting requirements under PSD and possible enforcement action.

Again, thank you for your letter. If you have further questions, please contact me or your staff may contact Pamela Luttner, in EPA's Office of Congressional and Intergovernmental Relations, at (202) 564-3107.

Sincerely,

A handwritten signature in black ink, appearing to read 'S. L. Johnson', written in a cursive style.

Stephen L. Johnson