

BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

_____	)	
IN THE MATTER OF:	)	
	)	
GEORGIA POWER COMPANY	)	
	)	
BOWEN STEAM-ELECTRIC GENERATING	)	
PLANT	)	
CARTERSVILLE, GEORGIA	)	
PERMIT No. 4911-015-0011-V-02-0	)	
	)	
BRANCH STEAM-ELECTRIC GENERATING	)	ORDER RESPONDING TO
PLANT	)	
MILLEDGEVILLE, GEORGIA	)	PETITIONERS' REQUESTS
PERMIT No. 4911-237-0008-V-02-0	)	THAT THE ADMINISTRATOR
	)	OBJECT TO ISSUANCE OF
HAMMOND STEAM-ELECTRIC GENERATING	)	STATE OPERATING PERMITS
PLANT	)	
COOSA, GEORGIA	)	
PERMIT No. 4911-115-0003-V-02-0	)	
	)	
SCHERER STEAM-ELECTRIC GENERATING	)	
PLANT	)	
JULIETTE, GEORGIA	)	
PERMIT No. 4911-207-0008-V-02-0	)	
	)	
ISSUED BY THE GEORGIA	)	
ENVIRONMENTAL PROTECTION	)	
DIVISION	)	
_____	)	

ORDER DENYING
PETITION FOR OBJECTION TO PERMIT

On December 22, 2005, the United States Environmental Protection Agency ("EPA") received two petitions from the Georgia Center for Law in the Public Interest ("GCLPI"), and on January 3, 2006, EPA received two more petitions from GCLPI. Each of the petitions asked the Administrator to object to one of four permits issued by the Georgia Environmental Protection Division ("EPD" or the "Department") to Georgia Power Company for the operation of a steam-electric generating plant. The permits targeted in the December 22, 2005 petitions were issued for the Bowen Steam-Electric Generating Plant located in Cartersville, Georgia ("Bowen") and the Branch Steam-

Electric Generating Plant located in Milledgeville, Georgia (“Branch”). The January 3, 2006 petitions addressed permits issued to the Hammond Steam-Electric Generating Plant located in Coosa, Georgia (“Hammond”) and the Scherer Steam-Electric Generating Plant located in Juliette, Georgia (“Scherer”).¹ The permits are state-issued operating permits, issued pursuant to title V of the Clean Air Act (“CAA” or the “Act”), 42 U.S.C. §§ 7661-7661f.

The Petitioner has raised two common issues in all four petitions. Petitioner alleges that each plant was noncompliant with opacity requirements at the time of permit issuance and therefore requires a compliance schedule to come into compliance with the standards. Petitioner also asserts that EPD did not provide an adequate statement of basis for any of the four permits. In the petitions for the Bowen and Scherer permits, Petitioner raises a third issue asserting that a compliance schedule is required to bring the plants into compliance with the Prevention of Significant Deterioration (PSD) Program. Petitioner has requested that EPA object to these permits pursuant to CAA section 505(b)(2), 42 U.S.C. § 7661d(b)(2).

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); Sierra Club v. Johnson, 436 F.3d 1269, 1280 (11th Cir. 2006); New York Public Interest Group v. Whitman, 321 F.3d 316, 333 n.11 (2d Cir. 2002).

Based on a review of the information before me, including the petition, the four plants’ proposed permits, and relevant statutory and regulatory authorities, I deny the petition for the reasons set forth in this Order.

I. STATUTORY AND REGULATORY FRAMEWORK

Section 502(d)(1) of the Act, 42 U.S.C. § 7661a(d)(1), calls upon each state to develop and submit to EPA an operating permit program intended to meet the requirements of CAA title V. The State of Georgia originally submitted its title V program governing the issuance of operating permits on November 12, 1993. EPA granted interim approval to the program on November 22, 1995. See 60 Fed. Reg. 57836 (November 22, 1995). Full approval was granted by EPA on June 8, 2000. See 65 Fed. Reg. 36358 (June 8, 2000). The program is now incorporated into Georgia’s Air Quality Rule 391-3-1-.03(10). 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 Act, including the applicable implementation plan. See CAA sections 502(a) and 504(a), 42 U.S.C. §§ 7661a(a) and 7661c(a).

¹ GCLPI filed the Bowen and Hammond petitions on behalf of the Sierra Club, the Georgia Public Interest Group (“Georgia PIRG”) and the Coosa River Basin Initiative (“CRBI”). GCLPI filed the Branch and Scherer petitions on behalf of the Sierra Club and Georgia PIRG. For the purposes of this Final Order, the joint petitioners will be referred to as the “Petitioner.”

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 conditions to assure compliance by sources with existing applicable emission control requirements. See 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 permit 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.

Under section 505(a) of the Act, 42 U.S.C. § 7661d(a), and 40 C.F.R. § 70.8(a), states are required to submit each proposed title V permit to EPA for review. Upon receipt of a proposed permit, EPA has 45 days to object to final issuance of the permit if it is determined not to be in compliance with applicable requirements or the requirements of title V. 40 C.F.R. § 70.8(c). If EPA does not object to a permit on its own initiative, section 505(b)(2) of the CAA, 42 U.S.C. § 7661d(b)(2), and 40 C.F.R. § 70.8(d) provide that any person may petition the Administrator, within 60 days of the expiration of EPA’s 45-day review period, to object to the permit.

Section 505(b)(2) of the Act, 42 U.S.C. § 7661d(b)(2), requires the Administrator to issue a permit objection if a petitioner demonstrates that a permit is not in compliance with the requirements of the Act, including the requirements of 40 C.F.R. Part 70 and the applicable implementation plan. Petitions must be based on objections to the permit raised with reasonable specificity during the public comment period (unless the petitioner demonstrates that it was impracticable to raise such objections within that period or the grounds for such objections arose after that period). 40 C.F.R. § 70.8(c)(1). If the permitting authority has not yet issued the permit, it may not do so unless it revises the permit and issues it in accordance with section 505(c) of the Act, 42 U.S.C. § 7661d(c). However, a petition for review does not stay the effectiveness of the permit or its requirements if the permitting authority issued the permit after the expiration of EPA’s 45-day review period and before receipt of the objection. 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), and 40 C.F.R. 70.8(d), for reopening a permit for cause.

II. BACKGROUND

The four facilities that are the subject of these permit petitions are all electric generating plants owned and operated by Georgia Power Company. The plants all burn fossil fuels, primarily coal, to generate electricity. The plants each include four steam electric generating units, each of which exhausts through a stack.

The title V permits at issue are renewal permits for these facilities. Georgia Power submitted applications for initial title V permits for the facilities on October 22, 1996. EPD issued draft title V permits on July 13, 1998 (Branch), October 23, 1998 (Scherer), and January 8, 1999 (Bowen and Hammond). The initial title V permits issued by Georgia EPD for the facilities were all effective on January 1, 2000.

Georgia EPD received applications for title V permit renewals for the four steam-electric generating plants on April 30, 2004 (Branch, Hammond and Scherer) and May 5, 2004 (Bowen). EPD proposed draft title V permits on October 26, 2005 (Bowen and Branch) and November 15, 2005 (Hammond and Scherer). EPD provided a public comment period, during which EPD received timely comments from, inter alia, the Petitioner. Georgia EPD proposed the Bowen and Branch permits to EPA on September 8, 2005, and the Hammond and Scherer permits on September 21, 2005. EPA did not object to the proposed permit within its 45-day review periods, which ended October 24, 2005 and November 7, 2005, respectively.²

III. THRESHOLD REQUIREMENTS

A. Timeliness of Petition

Section 505(b)(2) of the Act provides that a person may petition the Administrator of EPA, within sixty days after the expiration of EPA's 45-day review period, to object to the issuance of a proposed permit. As noted above, EPA's 45-day review periods expired on October 24, 2005, for the Bowen and Branch permits and on November 7, 2005, for the Hammond and Scherer permits. Thus, the sixty-day petition period for the Bowen and Branch permits ended on December 23, 2005, and the sixty-day petition period for the Hammond and Scherer permits ended on January 6, 2006. The Bowen and Branch petitions, dated December 20, 2005, were received by EPA on December 22, 2005, and the Hammond and Scherer petitions, dated January 3, 2006, were received by EPA on January 5, 2006. Accordingly, EPA finds that Petitioner timely filed its petitions.

B. Objections Raised with Reasonable Specificity During Public Comment Period

Section 505(b)(2) of the Act provides that a petition shall be based on objections raised with reasonable specificity during the public comment period provided by the permitting agency. EPA reviewed the comments submitted to EPD during the public comment period and found that the comments provide a sufficient basis for the Petition. The objections raised in the Petition were timely raised, with reasonable specificity, via Petitioner's written comments during the public comment period. Therefore, Petitioner has satisfied this statutory requirement.

IV. ISSUES RAISED BY THE PETITIONER

² Since the forty-fifth day after EPD proposed the permits to EPA fell on weekends, the expiration of EPA's 45-day review period rolled over to the following business day.

A. PSD Applicable Requirements and Compliance Schedule (Bowen and Scherer)

Petitioner's Comment: Petitioner asserts that the permits for the Bowen and Scherer plants are not in compliance with the Clean Air Act because they do not assure compliance with applicable PSD requirements and do not include a compliance schedule to bring the plants into compliance with applicable PSD requirements. The applicable requirements at issue are PSD program requirements found in the Clean Air Act and Georgia's State Implementation Plan. Petitioner points out that EPA issued a notice of violation (NOV) to Georgia Power, et al. for alleged PSD violations at the Bowen and Scherer plants, and EPA also filed a complaint in federal district court alleging similar violations. Petitioner asserts that where EPA has issued a NOV alleging CAA violations, the title V permits must include compliance schedules.

EPA's Response: EPA disagrees with Petitioner's conclusion. Petitioner has not sufficiently demonstrated to the Administrator that the permits are out of compliance with the Act, and the Petition is, therefore, denied with respect to this issue.

1. Enforcement and Regulatory History

EPA issued NOVs to Georgia Power on November 3, 1999, alleging PSD violations at the Bowen and Scherer plants. EPA filed an amended civil complaint in federal district court for the Northern District of Georgia on May 14, 2001, alleging the same violations. United States v. Ga. Power Co., 1:99:CV-2859 (N.D. Ga.).³ The alleged violations at Bowen arise from the installation of certain equipment at the facility, and the alleged violations at Scherer arise from the construction of new units at the facility. EPA alleges that both sets of projects constituted "major modifications" as defined in the Act and the Georgia SIP. EPA alleged in its NOV and complaint that Georgia Power did not obtain required PSD permits prior to constructing or operating these alleged major modifications and has subsequently operated Bowen and Scherer without installing or operating BACT, as required by the Act and the Georgia SIP.

As required by title V of the Clean Air Act, Part 70, and the Georgia SIP, Georgia Power submitted title V permit applications to Georgia EPD for its Bowen and Scherer plants. Title V requires a facility to include in its application a description of how the facility will comply with all applicable requirements and a schedule of compliance for requirements with which the source is not in compliance at the time of permit issuance. See CAA 503(b); 40 C.F.R. § 70.5(c); Ga. Rule 391-3-1-.03(10)(c)(2).

Georgia Power submitted the required Title V permit applications to Georgia EPD; however, Georgia Power did not include PSD requirements in the application as applicable requirements, nor a compliance schedule, because the company does not believe PSD requirements have been triggered at the plants.

³ The Court administratively closed this case on June 27, 2001, according to the Court's docket entry, "pending a decision from the [Multi-District Litigation Panel]." The Court denied, without prejudice, on August 21, 2002, a motion by the United States to re-open the case.

Petitioner requested that Georgia EPD include in the permits requirements to obtain PSD permits. As explained in its response to comments, Georgia EPD views the issue of PSD applicability as unresolved. Accordingly, EPD did not include PSD requirements in the Bowen and Scherer permits as applicable requirements. See Bowen Narrative Addendum at 7; Scherer Narrative Addendum at 11.

The Petitioner petitioned EPA to object, under CAA 505(b)(2), to the Bowen and Scherer permits and require compliance schedules. All sources subject to title V must have a permit to operate that assures compliance by the source with all applicable requirements. See CAA § 504(a); 40 C.F.R. § 70.1(b). If a source is not in compliance with applicable requirements, then the title V permit also must contain a schedule of compliance leading to the facility's compliance with applicable requirements. See CAA § 504(a); 40 C.F.R. §§ 70.1 (b), 70.6(c)(3). Such applicable requirements may include the requirement to obtain PSD permits that comply with applicable PSD requirements under the Act, EPA regulations, and state implementation plans. See generally CAA §§ 110(a)(2)(c), 160-69; 40 C.F.R. §§ 51.166, 52.21. If the State permitting authority includes in a title V permit a requirement that the source does not believe applies, the source may, after exhausting any applicable State administrative appeal processes, seek review in State court. That case would involve the source and the State permitting agency, but, absent intervention, not U.S. EPA.

The Petitioner based its petitions on the fact that the Agency has issued an NOV and filed a complaint in U.S. District Court alleging PSD violations. Petitioner argues that the NOV and the allegations therein, coupled with the complaint, establish the applicability of PSD to Plants Bowen and Scherer.⁴ Petitioner concludes, therefore, that the lack of any PSD terms or a compliance schedule demonstrates that the permit is not in compliance with the Act.

2. Discussion

The Petitioner filed these petitions pursuant to CAA § 505(b)(2), under which the Administrator will object to a permit if “the petitioner demonstrates to the Administrator that the permit is not in compliance with the requirements of this Act, including the requirements of the applicable implementation plan.” EPA considers whether the Petitioner has provided sufficient information to make the requisite “demonstrat[ion]” under the facts, circumstances, and legal issues of the particular case, viewed in light of the provisions and structure of title V and the relationship of those provisions with the enforcement provisions of title I.

Contrary to Petitioner's views, the issuance of an NOV and/or the filing of a complaint alone is not sufficient evidence to make the requisite “demonstrat[ion]” under section 505(b)(2). Under section 113(a)(1), “[w]henever, on the basis of any information available to the Administrator, the Administrator finds that any person has violated or is

⁴ In its petitions to object, Petitioner offers no evidence of PSD noncompliance, other than EPA's NOV and the United States' complaint.

in violation of any requirement or prohibition of an applicable implementation plan or permit, the Administrator shall [issue an NOV].” An NOV is simply one early step in the EPA’s process of determining whether a violation has, in fact, occurred. It is not a final agency action and is not subject to judicial review.⁵

A complaint is simply “a pleading which sets forth a claim for relief,” and includes a “short and plain statement of the claim that the [plaintiff] is entitled to relief....” See Fed. R. Civ. P. 8(a). While a plaintiff may be subject to sanctions for filing a complaint that includes inaccurate allegations, see Fed. R. Civ. P. 11, the complaint does not in-and-of itself prove the facts plead. Rather, as the Eleventh Circuit has noted, when EPA files a complaint in a civil enforcement action, “if the defendant believes that the EPA has reached its conclusions based upon erroneous facts or an incorrect understanding of the law, the defendant may make legal and factual arguments in an independent forum—one that enables the defendant to utilize a panoply of pre-established procedural rights.” See TVA v. Whitman, 336 F.3d 1236, 1241 (11th Cir. 2003).

Thus, both an NOV and a complaint are initial steps in the process of determining whether the source is in violation of any CAA requirements. These steps are commonly followed by additional investigation or discovery, information-gathering, and exchange of views that occur in the context of an enforcement proceeding and that are considered important means of fact-finding under our system of civil litigation. As a result, EPA believes that the fact of the issuance of an NOV or the filing of a complaint do not definitively establish the necessity of a compliance schedule for title V purposes.

Petitioner also points to the information contained in the NOV allegations, and appears to suggest that such information is sufficient to “demonstrate[]” PSD applicability, under CAA section 502(b)(2). However, information contained in an NOV (or a complaint) is not necessarily sufficient to demonstrate that a requirement is applicable for permitting purposes. EPA may consider an NOV’s filing or complaint’s issuance as a relevant factor when determining whether the overall information presented by the petitioner – in light of all the factors that may be relevant -- demonstrates the applicability of a requirement for title V purposes. Other factors that may be relevant in this determination include the quality of the information, whether the underlying facts are disputable, the types of defenses available to the source, and the nature of any disputed legal questions, all of which would need to be considered within the constraints of the title V process. If, in any particular case, these factors are relevant and the petitioner does not present information concerning them, then EPA may find that the petitioner has failed to present sufficient information to demonstrate that the requirement is applicable.

Another factor is the potential impact enforcement cases and title V decisions have on one another, as illustrated by the following example. As is the case here, EPA could bring a civil judicial enforcement action for violations by a source of a substantive rule.

⁵ It is well-recognized that no legal consequences flow from an NOV, and an NOV does not have the force or effect of law. See Pacificorp v. Thomas, 883 F.2d 661 (9th Cir. 1988); Asbestec Constr. Servs. v. EPA, 849 F.2d 765, 768-69 (2nd Cir. 1988); Union Elec. Co. v. EPA, 593 F.2d 299, 304-06 (8th Cir. 1979); West Penn Power Co. v. Train, 522 F.2d 302, 310-11 (3rd Cir. 1975).

In that case, the source and EPA would be engaged in litigation over the merits of the allegations of EPA's judicial complaint. Should EPA prevail in that enforcement proceeding, or should the source and EPA settle their differences, then the court would enter judgment in the form of an order or consent decree requiring the source achieve compliance with the law either pursuant to the terms of a compliance order, or, at a minimum, by a date certain. Separately, in the context of the issuance of a title V permit to the same source, the permitting authority may determine (on its own or as a result of an EPA objection) that the source is in non-compliance with the substantive rule (i.e., applicable requirement) that is the subject of the enforcement proceeding, and require in the title V permit that the source achieve compliance with the applicable requirement pursuant to a schedule of compliance. Under such circumstances the source could challenge the permit, petition EPA for relief, and appeal to the appropriate circuit court. In these circumstances, the source and EPA could find themselves in two separate fora litigating essentially the same issues -- whether the substantive rule was violated and the appropriateness of a compliance schedule -- which risks potentially different and conflicting results.

In the present case, EPA alleges in the NOV that at Plant Scherer, Georgia Power constructed two new units, beginning in 1979, and finishing in 1987 and 1989, that triggered the PSD requirements. Georgia Power contests liability on grounds that it commenced construction of the units in 1974, and therefore that the units are grandfathered from PSD requirements. Further, EPA alleges in the NOV that at Plant Bowen, “[o]n numerous occasions between 1979 and [1999],” Georgia Power made “modifications,” a claim that will require EPA to establish that these projects resulted in significant net emissions increases. Georgia Power contests liability on grounds that the methodology for calculating emissions increases is an hourly test that, in this case, shows no such increases. The methodology for calculating emissions is currently before the U.S. Supreme Court in *U.S. v. Duke Energy Corp.*⁶ The cases involving both plants may also address other PSD requirements and other defenses that the sources may assert.

In the present case, Petitioners have not shown the requisite facts and law to demonstrate, in light of the constraints of the title V process and its interaction with the enforcement process, that the NSR requirements are applicable to the sources. Accordingly, I conclude that the Petitioner has not made the requisite demonstration. For these same reasons, I find the existence of an NOV and complaint, and the information underlying them identified by Petitioner, insufficient to “demonstrate[]” that PSD applies to Plants Bowen and Scherer. Thus, Petitioner has not met its burden of showing that the permit is not in compliance with the Act.

I note that, while the permits do not contain PSD as applicable requirements, they also do not provide any safe harbor from enforcement of PSD requirements. Thus, the permit does not disturb any ongoing or future enforcement action against Georgia Power

⁶ 411 F.3d 539 (4th Cir.), cert. granted (cite, 2005). Indeed, the pending enforcement action in this case was administratively closed, as described above, pending guidance from the Multi-District Litigation Panel. In 2002, EPA moved to re-activate the case, but the motion was denied without prejudice.

for violations of PSD requirements. EPA believes that, considering these specific circumstances, the appropriate path is to allow the PSD applicability issue to be resolved by the federal district court through the enforcement process before determining that the title V permits must contain such requirements.

For the reasons explained herein, EPA denies the petition with respect to this issue.

B. Opacity Compliance Schedule (Bowen, Branch, Hammond and Scherer)

Petitioner's Comment: Petitioner asserts that all four plants are in intermittent, not continuous, compliance with opacity requirements and, therefore, requests that the Administrator object to the permits to require a compliance schedule for bringing the facilities into continuous compliance with the standard. All four petitions contain the following statements on this issue: "Rule 391-3-1-.03(10)(c)(2) of Georgia's Title V rule incorporates by reference 40 C.F.R. § 70.5(c). 40 C.F.R. § 70.5(c)(8)(iii)(C) requires that, if a facility is in violation of an applicable requirement at the time of permit issuance, the facility's permit must include a compliance schedule."⁷ Review of excess emissions reports and compliance certifications for this plant shows that the plant's opacity compliance is intermittent, not continuous. In their comments on this permit, Petitioners pointed out this plant's non-compliant status. Yet, Georgia EPD refused to incorporate a compliance schedule into this permit to bring the facility into compliance with opacity standards. Under these circumstances, EPA must object." Bowen Petition at 6; Branch Petition at 2-3; Hammond Petition at 2-3; Scherer Petition at 5-6.

EPA's Response: Petitioner has asked EPA to object to these permits and require a compliance schedule to ensure future compliance with opacity standards. Section 505(b)(2) of the Act states that the Administrator shall issue an objection if the petitioner demonstrates to the Administrator that the permit is not in compliance with applicable requirements of the Act. EPA will not object to a permit where, as here, the Petitioner has provided no specific evidence to demonstrate that the permit is not in compliance with the Act.

In the four petitions raising this issue, the Petitioner does not adequately support its allegations that the sources are out of compliance with opacity standards. Petitioner asks EPA to object to the title V permits and require EPD to include a compliance schedule based on Petitioner's assertion that a "review of excess emissions reports and compliance certifications for this plant shows that the plant's opacity compliance is intermittent, not continuous." Id. Petitioner neither provides documentation to support its allegations nor points EPA to any specific emission report or compliance certification in support of its allegation. Under the Act's title V

⁷ The Hammond and Branch petitions included the following statements: "The schedule must contain 'an enforceable sequence of actions with milestones, leading to compliance with any applicable requirements for which the source will be in noncompliance at the time of permit issuance.'" See 40 C.F.R. § 70.5(c)(8)(iii)(C)."

petition process, the petitioner bears the burden to affirmatively show that the title V permit is not in compliance with applicable requirements. A petitioner may not merely raise an issue for EPA and thereby obligate EPA to investigate and, if appropriate, object.

Similarly, in its comments on the four plants' proposed permits, Petitioner made the same bare allegations that the plants are out of compliance with opacity standards. In its response to this issue during the public comment period, EPD stated that it has made no determinations of noncompliance with respect to opacity. EPD further pointed out that such determinations require analysis under Permit Condition 8.14.4, which provides an exemption for excess emissions under certain circumstances.⁸ The authority for this Condition is Georgia's startup, shutdown and malfunction (SSM) rule contained in its State Implementation Plan (SIP), which the Eleventh Circuit Court of Appeals has recognized provides a potential affirmative defense to alleged opacity violations that occur during periods of startup, shutdown or malfunction. See Sierra Club v. Georgia Power Co., 443 F.3d. 1346 (11th Cir. 2006). Consistent with the Eleventh Circuit's ruling, this rule would have to be considered before any determination of noncompliance related to excess emissions is made.⁹

Petitioner has asked EPA to object to the permit issued by EPD on the grounds that compliance with opacity standards is not continuous; however, Petitioner has neither demonstrated that any opacity non-compliance exists nor addressed the potential defense to opacity exceedances provided by Georgia's SSM SIP rule. EPA will not object to a permit based on a Petitioner's bare allegation of noncompliance, especially where a potential defense has not been addressed. Because the Petitioner has not met its burden of demonstrating that a compliance schedule is necessary in this instance, EPA denies the petition with respect to this issue.

C. Statement of Basis (Bowen, Branch, Hammond and Scherer)

Petitioner's Comment: Petitioner asserts that the statement of basis (also referred to as the "Narrative") for each permit is inadequate and asks the Administrator to require EPD to revise the statements of basis to include additional information. In each petition, the Petitioner provides the following reason why it believes the statement of basis is insufficient. "[I]t does not contain sufficient information for EPA or the public to determine the applicability of certain requirements to specific sources. For example, in numerous places in the Narrative, the reviewer is referred to the Narrative for the initial title V permit for the reasoning behind permitting, monitoring, and testing requirements. The Narrative for the renewal permit for the [Bowen, Branch, Hammond, Scherer]

⁸ All four permits contain this Condition.

⁹ Petitioner Sierra Club has petitioned the Agency for rulemaking, asking that we require Georgia to amend its SIP to conform to EPA's SSM policy. The Eleventh Circuit Court of Appeals recognized, however, that Georgia's SSM Rule currently remains the law, and Georgia Power's title V permits must be read accordingly. Id. at 1357.

facility should contain information discussing the basis for permitting, monitoring and testing requirements rather than referring the reviewer to another document.”¹⁰

Bowen Petition at 8-9; Branch Petition at 4-5; Hammond Petition at 5; Scherer Petition at 8.

Petitioner continues, “One point of the Title V permit program was to create, for each Title V source, permits that collected in one place all applicable requirements with statements explaining how the permit’s terms relate to those applicable requirements. Requiring citizens to go through multiple documents in order to determine the source of permit terms defeats this purpose. Because the Narrative for the [Bowen, Branch, Hammond, Scherer] plant does not sufficiently set forth the legal and factual basis for the permit conditions as required by section 70.7(a)(5), the Narrative and the permit itself are deficient” Id.

EPA’s Response: The Petitioner has not demonstrated that the statement of basis provided by EPD for any of the subject permits requires revision. The crux of the Petitioner’s complaint about the statements of basis for these four renewal permits is that they do not specifically state certain information, and instead contain cross-references to the statements of basis for the initial title V permits (which in turn do specifically state that information and are readily accessible online and in hard copy through EPD). Petitioner argues that, therefore, the renewal statements of basis do not comply with 40 C.F.R. § 70.7(a)(5), which requires the permitting authority to provide “a statement that sets forth the legal and factual basis for the draft permit conditions (including references to the applicable statutory or regulatory provisions).” EPA is not persuaded that EPD’s cross-references to the initial permits’ statements of basis, in lieu of direct statements, is grounds for objection.

In support of its allegation that EPD has not complied with 40 C.F.R. § 70.7(a)(5), Petitioner cites to EPA Final Orders setting out five key elements of a statement of basis and various informal documents stating what type of information should be included in a statement of basis. Bowen Petition at 6-8; Branch Petition at 3-4; Hammond Petition at 3-4; Scherer Petition at 6-7. Petitioner does not, however, explain which element it believes is missing from the statements of basis and is not specific about which information it had difficulty locating. Nor does Petitioner question whether the statement of basis as provided by EPD, including the cross-referenced information, contains all the required elements of a statement of basis. Petitioner instead takes the position that since all cross-referenced information is absent from the statements of basis for the renewal permits, the statements of basis are insufficient; and Petitioner requests that all of the requisite information be contained in a new statement of basis for the renewal permit.

¹⁰ The Bowen and Branch petitions, dated December 20, 2005, ended this sentence *not* with, “to another document” but with the alternative phrasing, “to information which is difficult or impossible to ascertain,” and continued, “Without such information, neither the public nor EPA can discern what the applicable permitting, monitoring or testing requirements should be, and to which sources such requirements should apply.”

The applicable regulation provides that the permitting authority must, “provide a statement that sets forth the legal and factual basis of the draft permit conditions. . . .” 40 C.F.R. § 70.7(a)(5). EPA believes that EPD has met this requirement. There is no question that EPD provided a statement of basis for each renewal permit. Each statement of basis is a detailed document containing many pages of the requisite information, including summaries of all changes made by permit amendments. Under some headings, the reader is referred to the statement of basis for the initial title V permit. Reference is made only to the initial statement of basis, not to multiple documents.

It is true that the regulation refers to “a statement;” however, EPA does not interpret this language as precluding cross-references to another document,. . . EPA has stated in guidance that cross-referencing is an appropriate tool for streamlining and reducing the costs associated with writing title V permits. See White Paper Number 2 for Improved Implementation of the Part 70 Operating Permits Program, U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards (March 5, 1996) (stating that permits may utilize cross-references if the referenced document is readily available to the public and is specifically identified, and if the cross-reference is clear and unambiguous).¹¹

Petitioner asserts that it is too difficult for EPA or the public to find the information in the referenced documents. EPA disagrees. As EPD pointed out in its response to comments, the referenced narratives are available both in the EPD paper files and online through the EPD website. While the files and the website contain multiple narratives—not only for the initial and renewal permit but also for permit amendments—the referenced narratives are readily available and clearly distinguished by permit number. Further, since the narratives follow the same outline format, the referenced material is readily found under the same section heading in the referenced document. Consequently EPA does not believe it is too burdensome for the public to find this information.

In sum, EPA believes that cross-referencing in a statement of basis is not precluded by Part 70, and EPD used this tool appropriately in the four statements of basis at issue. Further, EPA disagrees with Petitioner’s characterization of the referenced information as “difficult or impossible to ascertain.” EPA is not persuaded that the statements of basis provided by EPD are in violation of 40 C.F.R. § 70.6(a)(5) simply because they cross reference the initial statements of basis. For the reasons set forth herein, the Petition is denied with respect to this issue.

Petitioner’s Comment (Bowen only): Petitioner also asserts in the Bowen petition that the statement of basis is insufficient because it does not contain a sufficient explanation of the reason for deeming the ash processing facility that is located on contiguous property as a separate facility for title V purposes.

¹¹ Furthermore, when EPA evaluates whether a permitting authority has provided sufficient basis for a title V permit, EPA will look to the entire permit record for such support. See, e.g., In Re Doe Run Company Buick Mill and Mine, Petition No. VII-1999-001, at pages 24-26 (July 31, 2002) (finding that the permit record, as a whole, constitutes the decision-making record for the purpose of satisfying 40 C.F.R. § 70.7(a)(5))

EPA's Response: As stated above, the Administrator will issue a permit objection if a petitioner demonstrates that a permit is not in compliance with the requirements of the Act, including the requirements of 40 C.F.R. Part 70 and the applicable implementation plan. CAA § 505(b)(2). In this instance, the Petitioner has alleged a deficiency in a procedural requirement. Section 70.7(a)(5) of EPA's title V regulations requires that the permitting authority, "provide a statement that sets forth the legal and factual basis for the permit conditions." 40 C.F.R. § 70.7(a)(5). Commonly referred to as the "statement of basis," and, in Georgia, the "Narrative," this provision is not part of the permit itself, but rather a separate document to be sent to EPA and to interested parties upon request.

EPA reviewed the Narrative accompanying the Bowen permit and determined that it satisfies the procedural requirement of section 70.7(a)(5). The Narrative provides both the facts and law underlying EPD's decision to permit the ash processing facility separately from the title V permit. As to the facts, the Narrative states that the ash processing is performed by a separate company but is located on the contiguous plant property. The Narrative also states, as the legal basis for EPD's decision, EPD's determination that the ash processing company and Georgia Power Company are separate sources for title V purposes because they are not under common control.¹² See Bowen Narrative at 2. Thus, EPD has provided the factual and legal basis of its decision, as required by section 70.7(a)(5).

While EPA is aware that this type of determination can be very fact-intensive, and there may be additional elements of EPD's analysis that Petitioner would like to see in the Narrative, EPD has provided an explanation of how it made its determination in light of relevant law and facts. Petitioner has not explained how the Narrative fails to meet the regulatory requirement or provided any reason why further elaboration is necessary. Likewise, Petitioner has provided no information to suggest that EPD's determination is incorrect. For the reasons stated herein, the petition is denied as to this issue.

CONCLUSION

For the reasons set forth above, and pursuant to section 505(b)(2) of the Clean Air Act, I deny the petitions from Georgia Center for Law in the Public Interest requesting objections to the issuance of title V permits for four power plants operated by Georgia Power Company.

Dated: January 8, 2007

/S/
Stephen L. Johnson
Administrator

¹² Under the Part 70 definition of "major source," common control is a required element of being deemed part of the same major source where two stationary sources are located on the same contiguous property. See 40 C.F.R. § 70.2.