

BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF)	
MIDWEST GENERATION, LCC)	
FISK, CRAWFORD, JOLIET, WILL)	ORDER RESPONDING TO PETITIONER'S
COUNTY AND POWERTON)	REQUEST THAT THE ADMINISTRATOR
GENERATING STATIONS)	OBJECT TO ISSUANCE OF STATE
)	OPERATING PERMITS
Petition number V-2005-3)	
CAAPP No. 95090081, 95090076,)	
95090046, 95090080, and 95090074)	
Proposed by the Illinois)	
Environmental Protection Agency)	
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ORDER DENYING PETITION
FOR OBJECTION TO PERMITS

On August 15, 2005, pursuant to its authority under the Illinois Clean Air Act Permitting Program ("CAAPP"), the Illinois Environmental Protection Act, 415 ILCS 5/39.5, Title V of the Clean Air Act ("Act"), 42 U.S.C. §§ 7661-7661f, and the United States Environmental Protection Agency's (USEPA's) implementing regulations in 40 C.F.R. part 70 ("part 70"), the Illinois Environmental Protection Agency ("IEPA") published proposed Title V operating permits for Midwest Generation, LLC, Fisk, Crawford, Joliet, Will County, and Powerton Generating Stations. The Fisk Generating Station operates one coal-fired boiler with a nominal capacity of 349 megawatts, an electrostatic precipitator (ESP) and low nitrogen oxide burners. Other equipment at the facility includes an auxiliary boiler, coal handling and processing units, turbines fired with diesel and natural gas, and a gasoline storage tank. The Crawford Generating Station operates two coal-fired boilers with a nominal capacity of 586 megawatts that are controlled by an ESP and low nitrogen oxide burners. Other equipment at the facility includes internal combustion engines, coal handling and processing equipment, turbines fired with diesel and natural gas, and a gasoline storage tank. The Joliet Generating Station operates three coal-fired boilers with a nominal capacity of 1435 megawatts, an ESP and low nitrogen oxide burners. Other equipment at the facility includes an auxiliary boiler, coal handling and processing units, fly ash processing units, and gasoline storage tanks. The Will County Generating Station operates four coal-fired boilers with a nominal capacity of 1183 megawatts, an ESP and low nitrogen oxide burners. Other equipment at the facility includes coal handling and processing units, fly ash processing units, and gasoline storage tanks. The Powerton Generating Station operates four coal-fired boilers with a nominal capacity of 1531 megawatts, an ESP and low nitrogen oxide burners. Other equipment at the facility includes coal handling and processing units, fly ash processing units, and gasoline storage tanks.

On November 25, 2005, the United States Environmental Protection Agency ("USEPA") received a petition from the Illinois Attorney General ("Petitioner"), requesting that USEPA object to issuance of Title V permits to the Fisk, Crawford, Joliet, Will County, and Powerton Generating Stations, pursuant to section 505(b)(2) of the Act and 40 C.F.R. § 70.8(d).

Petitioner alleges that the Fisk, Crawford, Joliet, Will County, and Powerton permits do not comply with the Act because (1) self-reporting by Midwest Generation based on continuous opacity monitoring provides clear, incontrovertible evidence that all five of the Midwest Generation facilities are in violation of their opacity limitations, yet the permits lack compliance schedules required by 40 C.F.R. § 70.5(c)(8)(iii)(C); and (2) IEPA failed to comply with the requirement that it obtain from the applicants the information necessary to determine compliance with New Source Review ("NSR") requirements, as required by 40 C.F.R. § 70.5(a)(2) and (c)(5). Petition at 1.

USEPA 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 Fisk, Crawford, Joliet, Will County, and Powerton proposed permits, project summaries, additional information provided by the permitting authority in response to inquiries, the information provided by Petitioner, and relevant statutory and regulatory authorities and guidance, I deny the Petitioner's request.

STATUTORY AND REGULATORY FRAMEWORK

Section 502(d)(1) of the Act requires each state to develop and submit to USEPA an operating permit program to meet the requirements of Title V. USEPA granted final full approval of the Illinois Title V operating permit program effective November 30, 2001. 66 *Fed. Reg.* 62946 (December 4, 2001).

Sections 502(a) and 504(a) of the Act make it unlawful for major stationary sources of air pollution and other sources subject to Title V to operate except in compliance with operating permits issued pursuant to Title V that include emission limitations and such other conditions necessary to assure compliance with applicable requirements of the Act.

A Title V operating permit program generally does not authorize permitting authorities to establish new substantive air quality control requirements (referred to as "applicable requirements"), but does require permits to contain monitoring, recordkeeping, reporting, and other compliance requirements to assure compliance by sources with existing applicable requirements. One purpose of the Title V program is to enable the source, USEPA, states, and the public to better understand the applicable requirements to which the source is subject and to determine whether the

source is meeting those requirements. 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. *See* 57 Fed. Reg. 32250, 32251 (July 21, 1992).

Section 505(a) of the Act, 42 U.S.C. § 7661d(a), and 40 C.F.R. § 70.8(a), through the state Title V programs, require states to submit all operating permits proposed pursuant to Title V to USEPA for review. USEPA may comment on and object to permits determined by the Agency not to be in compliance with applicable requirements or the requirements of part 70. If USEPA does not object to a permit on its own initiative, section 505(b)(2) of the Act, 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 USEPA's 45-day review period, to object to the permit. 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. Petitions must be based on objections to the permit that were raised with reasonable specificity during the public comment period, unless the petitioner demonstrates that it was impracticable to raise the objection within the public comment period, or unless the grounds arose after the close of the public comment period. If the Administrator objects to the permit and 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 USEPA's 45-day review period and before receipt of the objection. If, in response to a petition, USEPA objects to a permit that has been issued, 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).

BACKGROUND

Midwest Generation, LLC submitted applications for Title V permits for the five subject facilities on September 7, 1995. IEPA issued draft CAAPP permits on July 1, 2003 and proposed CAAPP permits on October 10, 2003. During the 30-day public comment period, IEPA received comments on the draft permits, including comments from the Petitioner. On December 8, 2004, IEPA issued "draft revised proposed permits" for each of the facilities. On August 15, 2005, IEPA proposed the permits and issued final permits on September 29, 2005.

IEPA notified the public that November 28, 2005 was the deadline to file a petition requesting that USEPA object to the issuance of the final permits. USEPA received Petitioner's November 22, 2005 petition to object to the issuance of the permits on November 25, 2005. USEPA finds that Petitioner timely filed this petition.

ISSUES RAISED BY THE PETITIONER

A. Opacity

The Petitioner alleges that the permits lack compliance schedules to bring the Fisk,

Crawford, Joliet, Will County, and Powerton plants into compliance with the opacity standards. Petitioner has included summaries of Midwest Generation's quarterly opacity reports. Petition at 1. Petitioner states that the chart demonstrates there have been violations at all units every year from 1999 through 2004. Petition at 1-2. The Petitioner asserts that the quarterly opacity reports "document more than 7,600 violations of the opacity limitation at all five facilities over the past 7 years." Petition at 2. The Petitioner further alleges that IEPA failed to require that Midwest Generation provide in its applications compliance schedules to bring the Midwest Generation plants into compliance with the opacity limitations. The Petitioner notes that section 503(b)(1) of the Act and 40 C.F.R. § 70.5(c)(8)(iii)(C) provide that a permit application must include a compliance plan describing how the source will comply with all applicable requirements under the Act. Petition at 4.

Petitioner and other commenters raised these and similar arguments in comments on the draft and re-proposed permits for these facilities, and submitted petitions requesting that the Administrator object to the proposed permits in a previous round of petitions filed on these permits. In responding to the previous petitions, USEPA concluded that IEPA had failed to respond to significant comments on the opacity issue and directed IEPA to respond to those comments. See In the Matter of Midwest Generation, LLC Fisk Generating Station, Petition V-2004-1, at 4-5 (March 25, 2005), In the Matter of Midwest Generation, LLC Crawford Generating Station, Petition V-2004-2, at 4-5 (March 25, 2005), In the Matter of Midwest Generation, LLC Waukegan Generating Station, Petition V-2004-5, at 4-5 (September 22, 2005), In the Matter of Midwest Generation, LLC Joliet Generating Station, Petition V-2004-3, at 32-33 (June 24, 2005), and In the Matter of Midwest Generation, LLC Romeoville Generating Station, Petition V-2004-4, at 30-31 (June 24, 2005) (collectively "Midwest Generation Orders").¹

IEPA responded to the public comments as directed in USEPA's orders when it re-proposed the Midwest Generation permits on August 15, 2005, and issued the final permits on September 29, 2005. In responding to the comments from the Petitioner and others concerning opacity exceedances, IEPA notes that commenters expressed concern about whether the coal fired boilers at the plants were fully compliant with the opacity limitations or particulate matter (PM) standards. Responsiveness Summary ("RS") at 15. IEPA states that the coal-fired boilers are subject to separate opacity and PM standards, and that compliance with the two requirements must be separately addressed. RS at 15. IEPA then states that "opacity is a practical means for determining whether PM emissions control equipment, which for the coal-fired boilers at these plants are typically ESPs, are being properly maintained and effectively operated to comply with applicable PM standards." (sic) RS at 15. IEPA maintains, however, that increased or excess opacity does not necessarily translate into non-compliance with the PM emissions standard and states that "while opacity levels may be used to assess compliance and noncompliance with PM standards, opacity levels do not provide a precise gage (sic) for distinguishing between compliant and noncompliant operations." RS at 16.

IEPA also states that, historically, emissions testing demonstrated that the PM emissions are "typically well within the applicable standard" and that "the ESPs at these plants can generally

¹ EPA did not receive a previous petition on the Powerton Generating Station.

ensure compliance with the PM standard even when a number of the fields in the ESP are not in service.” RS at 15. IEPA maintains that there is no evidence of noncompliance with the PM standard and, therefore, that a compliance schedule related to the PM standard is not warranted. RS at 15. IEPA then acknowledges that “[q]uarterly opacity reports submitted to the Agency by the sources, though not part of the permit applications, do indicate that the coal-fired boilers do, at times, exhibit excess opacity.” (sic) RS at 16. IEPA disputes the contention that the exceedance reports alone are sufficient to require the inclusion of a compliance schedule and notes that the sources certified compliance. RS at 16. IEPA then states:

Additionally, information in the quarterly opacity reports, as have been resubmitted to the Illinois EPA with certain public comments, is not determinative of whether these exceedances constitute violations, much less ongoing violations. Even to the extent these exceedances rise to the level of a violation, past exceedances do not necessarily constitute a sufficient basis to include a compliance schedule in these permits.

RS at 16.

IEPA does not agree with the Petitioner that the number of exceedances is significant, because COM data is measured and counted every six minutes, or ten times an hour. RS at 16. IEPA also states that the total number and the duration of exceedances are not directly equivalent, and points out that the past exceedances intermittently occur and then abate without a particular pattern or frequency. RS at 16. IEPA maintains that the boilers comply with the opacity limitations the vast majority of the time and “that exceedances, especially opacity exceedances, may occur intermittently is recognized by state and federal regulations and by federal guidance.” RS at 16. IEPA concludes that the circumstances do not warrant the imposition of a compliance schedule for opacity exceedances in the CAAPP permits.

Petitioner asserts that, in light of the statutory mandate to include a compliance schedule, USEPA must object to the permit. Petitioner raises the Second Circuit’s decision in NY PIRG v. Johnson, 427 F.3d 172 (2d Cir. October 24, 2005), in which the court held that issuance of an NOV and commencement of an enforcement action is sufficient demonstration of noncompliance to trigger the Title V requirement to include a compliance schedule in the Title V operating permit. Petition at 2-3, citing NY PIRG v. Johnson.

The Petitioner raises a number of issues with the explanations that IEPA included in its Responsiveness Summary to justify its decision that it was not necessary to include in the subject permits compliance plans to remedy the alleged opacity violations. First, Petitioner questions IEPA’s conclusion that there is no need for compliance schedules because the opacity exceedances may not all represent exceedances of particulate matter (PM) limitations. Petition at 3. The Petitioner notes that IEPA concedes that opacity violations are enforceable independently of the PM limitations, regardless of whether the opacity violations are proven to correlate with PM violations. Petition at 3. The Petitioner further notes that IEPA acknowledges that the strong correlation between opacity and PM allows for a determination that there is an opacity exceedance level below which the absence of a PM violation can be concluded with certainty. Petitioner asserts that the reverse is also true: that it is possible to determine an opacity exceedance level above which

the presence of a PM violation can be concluded with certainty. Petition at 3-4. Petitioner concludes that, because of the large portion of violations that exceeded 35, 45 and 60 percent opacity, IEPA cannot ignore the evidence. Petition at 4. Furthermore, Petitioner avers that the fact that the facilities at issue have demonstrated compliance with the 30 percent opacity and the PM emission limitation during stack tests merely proves that the sources are capable of ensuring that they can comply with the PM and opacity requirements. The stack test results, however, do not indicate that the pollution control equipment at the Midwest Generation facilities is sufficient to ensure compliance with the PM standard. Petition at 4.

Second, the Petitioner maintains that, contrary to IEPA's assertion in the Responsiveness Summary, it is possible to determine from the quarterly opacity reports the number of violations and whether the violations are continuing. Petition at 5. The Petitioner concedes that, "if the exceedances were truly 'past,' in the sense that the data demonstrated that the problem had been corrected at the Midwest Generation Facilities, then there would, indeed, be no need for a schedule of compliance." Petition at 5. However, Petitioner asserts, IEPA did not take any steps to ascertain whether the downward trend of exceedances is leading to permanent elimination of problems at the sources. Petition at 5. The Petitioner maintains that IEPA, therefore, had no basis to conclude that any of the subject facilities were in compliance at the time of permit issuance. Petition at 5. The Petitioner takes issue with IEPA's assertion in the Responsiveness Summary that state and federal regulations and federal guidance allow for intermittent exceedances, and notes that the regulatory requirement is for continuous compliance. The Petitioner asserts that "the fact that the facilities may be in compliance with their opacity limits a majority of the time, in the sense of violation time measured as a fraction of total operating time, is entirely beside the point," and that the opacity violations reflect a discharge of harmful pollutants, regardless of the percentage of time that they occur. Petition at 5.

Finally, the Petitioner claims that, given the overwhelming number of documented opacity violations, IEPA's reliance on the sources' certifications of compliance is entirely inappropriate. Petition at 5. Petitioner asserts that "principles of sound law enforcement do not generally counsel excusing violators because they deny the violations occurred, especially when their self-reported compliance data admits to thousands of violations." Petition at 5.

In CAA section 503(b), Congress directed EPA to promulgate regulations that require applicants for Title V permits to submit a compliance plan "describing how the source will comply with all applicable requirements," and including a schedule of compliance. 42 U.S.C. § 7661b(b)(1). These regulations, promulgated in 1992, state that if the source is in compliance with an applicable requirement, a statement in the permit application that the source will continue to comply is sufficient. 40 C.F.R. § 70.5(c)(8). If the source is not in compliance, on the other hand, the source must provide, among other items, a schedule of remedial measures, including an enforceable sequence of actions with milestones, leading to compliance." 40 C.F.R. § 70.5(c)(8)(iii)(C). The compliance schedule should "resemble and be at least as stringent as that contained in any judicial consent decree or administrative order to which the source is subject." Petition at 5. *See also* 40 CFR 70.5(c)(6)(iii)(C). Thus, under EPA's regulations, a schedule of enforceable remedial steps is only required if a source is *not* in compliance with an applicable requirement. Where a source is in compliance with a requirement, the schedule of remedial steps is

not required. USEPA will grant an objection in a Title V petition if “the petitioner demonstrates to the Administrator that the permit is not in compliance with the requirements of this Act.” 42 U.S.C. § 7661d(b)(2). As stated above, USEPA’s petition orders for four of the subject Midwest Generation, LLC’s coal fired power plants required IEPA to “address Petitioner’s significant comments.” See Fisk, Crawford, Romeoville, and Joliet. IEPA responded to USEPA’s orders and addressed the comments concerning the need to include a compliance schedule for the opacity exceedances as reported in the sources quarterly reports. Petitioner questions the sufficiency of IEPA’s explanation and again requests that USEPA order IEPA to include a compliance schedule to address what Petitioner claims are ongoing opacity violations.

First, as discussed above, IEPA states in the responsiveness summary that the quarterly opacity reports are not determinative proof of opacity violations. Petitioner argues, however, that it can determine when an exceedance is eligible for the eight minute exemption contained in the State Implementation Plan (SIP) and that the chart that Petitioner included with the comments did not include the exceedances eligible for the eight minute exemption. Petition at 4. The eight minute exemption provision is contained in Illinois’ SIP at 35 Ill. Admin. Code § 212.123. That provision sets the opacity standard at thirty percent, but exempts opacity emissions greater than thirty percent and less than sixty percent for an aggregate of eight minutes in any sixty minute period, if there are no more than three such exceedances in a twenty-four hour period. *Id.* In addition to the eight minute exception, however, the Illinois SIP at 35 Ill. Admin. Code § 212.124 contains an affirmative defense for excess opacity during startup, malfunction and breakdown. Petitioner asserts that “only a fraction” of the exceedances are potentially eligible for the startup, malfunction or breakdown affirmative defense. Petition at 2.

Second, Petitioner challenges IEPA’s claim that there is no evidence that there are continuing violations of opacity at the sources and IEPA’s reliance on the compliance certifications submitted by the sources. Petition at 4-5. Petitioner directs IEPA to the most recent quarterly reports to demonstrate that the opacity exceedances are ongoing at the facilities, and questions IEPA’s reliance on the sources’ compliance certifications. Petition at 2, footnote 2 and 3-4. USEPA regulations require sources to submit a compliance certification at the time of application. 40 C.F.R. § 70.5(c)(9). In this case, the sources re-submitted compliance certifications with their updated Title V applications in 2003, and reaffirmed the certifications in 2005. USEPA does not agree with Petitioner’s general assertion that reliance on a compliance certification is never appropriate. The Title V program requires self-monitoring, self-reporting and annual compliance certification. The permitting authority can rely on the assertions of sources and, absent a clear demonstration of non-compliance, is not required to question each compliance certification it receives. When a source’s compliance certification is up-to-date, USEPA agrees that it generally is appropriate for a permitting authority to consider the certification when deciding whether or not a compliance schedule is required. Nonetheless, because in this case there is information contained in COMs reports indicating numerous exceedances of the opacity standard, some of which may not be excused, IEPA should not just accept the certifications certifying compliance with the opacity standard as dispositive without undertaking some additional review.

Petitioner asserts that IEPA allows intermittent compliance based on state and federal regulations and federal guidance. That assertion mischaracterizes the states responsiveness

summary. In fact, IEPA indicated that state and federal regulations and federal guidance contemplate that “opacity exceedances may occur intermittently.” RS at 16. We note that the Illinois SIP does not consider all exceedances of opacity limitations to be violations. *See* 35 Ill. Admin. Code §§ 212.123 and 212.124.

Federal, state, and local authorities must exercise discretion when determining the appropriate course of action when assessing potential violations of applicable requirements. Such decisions are highly discretionary. It is USEPA’s policy that information that may indicate non-compliance, such as the evidence provided by Petitioner, be given to the enforcement arm of USEPA. A state or federal enforcement office will then investigate and determine if any violations occurred and if so, whether further action is warranted, as resources and environmental priorities allow. If USEPA’s or the state’s enforcement office initiates enforcement proceedings, and those enforcement proceedings result in a settlement or adjudicated finding of non-compliance, the Title V permit will be re-opened and the appropriate compliance schedule put into the Title V permit.

USEPA’s and a state’s enforcement investigations and the state’s permitting process timelines often do not coincide, therefore the Title V permit must be carefully crafted to avoid shielding the permittee from any potential enforcement action that may result from an investigation of alleged violations. The Midwest Generation power plant permits do not shield the sources from enforcement for past violations of the opacity standard. Nor do the permits shield the sources from an enforcement action for future violations of the opacity or other requirements. In addition, in the event of any future exceedances, the permits require Midwest Generation to submit a report containing a detailed explanation of the causes of excess opacity, and a detailed explanation of the corrective actions taken to lessen the opacity and to evaluate any possibility of ongoing opacity issues at these facilities. *See* permit condition 7.1.10-2.d.iii.

On October 19, 2006, IEPA submitted to USEPA a letter summarizing its activities to address the opacity exceedances reported by Midwest Generation. IEPA clarified in the letter that, in response to a number of comments, its Division of Air Pollution Control Permits Section reviewed opacity data for 22 coal-fired power plants. IEPA determined in its review that it was appropriate to require in the Title V permits for these plants additional monitoring, recordkeeping and reporting requirements, but that “neither this review nor the record in total provided a sufficient basis to support the inclusion of compliance schedules in the CAAPP permits.” IEPA stated, however, that the review did not conclude that there were no opacity standard violations, and did not foreclose future action on the part of IEPA. IEPA pledged to “continue to review quarterly opacity reports submitted by these sources, together with the existing information, to determine whether enforcement action is warranted. As part of such future action, Illinois EPA will make a determination as to whether the frequency and pattern of the opacity *exceedances* at these sources warrant enforcement action, e.g., they meet USEPA’s criteria for high priority *violation(s)*, and ... proceed accordingly per our existing compliance guidance and agreements.” IEPA further stated that, where an enforcement action is initiated and results in a settlement or finding of non-compliance, it would revise the CAAPP permit for the subject source to incorporate any relevant requirements contained in a settlement agreement or order into the permit.

The USEPA finds that IEPA reasonably concluded that a compliance schedule was not

warranted at the time of permit issuance. IEPA did not rely on the source's compliance certification only, and record reflects that the IEPA undertook the necessary additional review of opacity data and did not find a sufficient basis to support the inclusion of a compliance schedule in these permits. USEPA finds that Petitioner has not demonstrated noncompliance at the time of permit issuance as required by the Act and that IEPA's commitments meet USEPA's policy for handling potential non-compliance issues in the Title V permitting process. The USEPA maintains that the Title V petition process is not the appropriate venue to drive discretionary enforcement decisions of the permitting authority, particularly when the petitioner fails to demonstrate that a violation of the Act has occurred. It is reasonable for a state to resolve matters like this through diligent monitoring of potential non-compliance, and enforcement actions as necessary, and to make necessary adjustments to the Title V permit when any such actions are resolved. For these reasons, the petition is denied on this issue.

B. New Source Review

The Petitioner alleges that, despite being in possession of information strongly indicating that the Midwest Generation facilities are in violation of NSR requirements, IEPA never required the applicant to submit sufficient information to determine whether the NSR rules apply or to evaluate the sources' NSR compliance. Petition at 6. The Petitioner notes that it has provided IEPA with extensive publicly-available information concerning significant modifications at the Midwest Generation facilities. Petition at 6. The Petitioner describes the information in detail, and claims that it contains detailed admissions by Commonwealth Edison, Midwest Generation's predecessor in interest, that it performed extensive, non-routine structural replacement and maintenance at the Midwest Generation facilities. Petition at 6. The Petitioner asserts the "CAA expressly requires that an applicant provide all information 'sufficient to evaluate the subject source and its applications and to determine *all* applicable requirements' under the CAA and regulations." Petition at 8, citing 40 C.F.R. § 70.5(a)(2).

These and similar arguments were raised in petitions to the Administrator to object to the first proposed permits for Midwest Generation's facilities. See, e.g., In the Matter of Midwest Generation, LLC Fisk Generating Station at 4-5 (March 25, 2005). In responding to those previous petitions, EPA concluded that IEPA had failed to respond to significant comments on the issue, and directed IEPA to respond to those comments. *Id.* at 5. IEPA included in the permit record a summary responding to the comments received on the June 4, 2003 draft permits.

In response to USEPA's objections, IEPA stated in its responsiveness summary that "the application and public comments do not provide information of the type that is necessary as a matter of law, to show that NSR, as a matter of fact, has been triggered by activities at these plants and is an applicable requirement for any of these plants, much less whether NSR control technology requirements are applicable." RS at 17. IEPA goes on to say that the question of what constitutes a modification subject to new source review is the focus of continued litigation. "Because the investigation and litigation continue, ... and because the records for the 22 CAAPP permits lack information clearly showing noncompliance with NSR, it is premature, unnecessary, and inappropriate to attempt to make NSR applicability determinations for these plants and to include compliance schedules in the CAAPP permits." RS at 17. Petitioner maintains that IEPA's

argument that the permit applications and comments do not prove NSR violations begs the question. Petitioner asserts that the “CAA regulations specifically make it IEPA’s job to find out” whether NSR violations occurred. Petition at 8. The Petitioner states that IEPA does not have the option to “passively rely on the information submitted to it – by public commenters without access to necessary information and by sources with every incentive not to provide it – without digging deeper and asking for what it needs to determine whether the law has been violated.” Petition at 8. Petitioner further asserts that the fact that the investigation of NSR matters is complex and potentially time-consuming does not create an exception to the requirement that IEPA gather sufficient information to evaluate an applicant’s compliance with all applicable requirements. Petition at 9. Petitioner claims that, similarly, the Act does not create an exception for matters that are being contemporaneously investigated by USEPA, or that are the subject of litigation elsewhere against sources other than the permittees. Petitioner states that “Congress and the Illinois General Assembly were clear that all items of non-compliance must be dealt with in Title V permits, and suggested no abeyance of these specific requirements in the event of enforcement review regarding those items.” Petition at 10. Finally, the Petitioner asserts that it is “entirely inappropriate for IEPA to rely on the sources’ certification of compliance as a basis for declining further investigation,” and that the failure of Midwest Generation to include all information in its permit applications is “clear grounds for permit denial.” Petition at 10.

As stated above, USEPA will grant an objection in a Title V petition if “the petitioner *demonstrates* to the Administrator that the permit is not in compliance with the requirements of this Act.” 42 U.S.C. § 7661d(b)(2) (*emphasis added*). The USEPA finds that IEPA has not reached a final determination in this permitting context that PSD is an applicable requirement for these sources, that the USEPA has not determined otherwise, and that a court has not issued a determination in the litigation context. Accordingly, there is no requirement under the facts of this case for the permits to include either PSD limits or a compliance schedule for the source to come into compliance with such limits at this time. USEPA believes that the allegations made by the Petitioner do not contain sufficient specific information to determine whether the Fisk, Crawford, Joliet, Will county or Powerton CAAPP permits are deficient. While Petitioner provided some information relevant to an inquiry into whether or not NSR violations may have occurred, the Petitioner itself recognizes that the information is not sufficient to prove a violation, which is why it argues that IEPA should be required to undertake further investigation. Petition at 8. Petitioner is required to demonstrate that NSR actually applies, and not merely allege its application through insufficient information. As stated above, the state has the flexibility to decide whether to pursue further investigation on its own, and if so, whether to do so through the permitting action or an enforcement investigation. Thus, even if IEPA were to recognize that the potential for non-compliance exists, it is not required to pursue inquiries further in the Title V context. To ensure that these sources are not shielded from enforcement for potential NSR non-compliance, however, IEPA added to each of the subject Midwest Generation permits condition 5.2.7, which states:

This permit and the terms and conditions herein do not affect the Permittee's past and/or continuing obligation with respect to statutory or regulatory requirements governing major source construction or modification under Title I of the CAA. Further, neither the issuance of this permit nor any of the terms or conditions of the permit shall alter or affect the

liability of the Permittee for any violation of applicable requirements prior to or at the time of permit issuance.

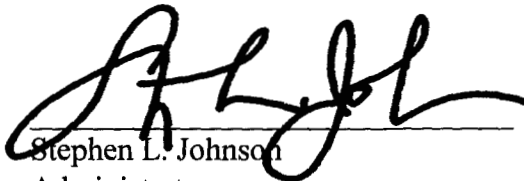
USEPA maintains that the Title V petition process is not the appropriate venue to drive discretionary enforcement decisions of the permitting authority, particularly when the petitioner fails to demonstrate that a violation of the Act has occurred. For these reasons, the petition is denied on this issue.

CONCLUSION

For the reasons set forth above, and pursuant to section 505(b)(2) of the Clean Air Act, I deny the petition of the Illinois Attorney General requesting the Administrator to object to issuance of the title V CAAPP permits to Midwest Generation, LCC Fisk, Crawford, Joliet, Will County, and Powerton Generating Stations.

JUN 20 2007

Dated: _____



Stephen L. Johnson
Administrator