BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF MIDWEST GENERATION, LCC WAUKEGAN GENERATING STATION Petition number V-2006-2 CAAPP No. 95090047 Proposed by the Illinois Environmental Protection Agency	)	ORDER RESPONDING TO PETITIONER'S REQUEST THAT THE ADMINISTRATOR OBJECT TO ISSUANCE OF A STATE OPERATING PERMIT

ORDER DENYING PETITION
FOR OBJECTION TO PERMIT

On December 23, 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 Environmental Protection Agency's implementing regulations in 40 C.F.R. part 70 ("part 70"), the Illinois Environmental Protection Agency ("IEPA") published a proposed title V operating permit for Midwest Generation, LLC, Waukegan Generating Station ("Waukegan permit"). The Waukegan Generating Station operates three coal-fired boilers with a nominal capacity of 805 megawatts, an electrostatic precipitator and low nitrogen oxide burners. Other equipment at the facility includes four turbines, coal handling and processing units, and fly ash processing units.

On April 5, 2006, the United States Environmental Protection Agency ("EPA") received a petition from the Illinois Attorney General ("Petitioner") requesting that EPA object to issuance of the Waukegan permit, pursuant to section 505(b)(2) of the Act and 40 C.F.R. § 70.8(d).

Petitioner alleges that, in issuing the Waukegan permit, IEPA failed to comply with the Act because (1) self-reporting by Midwest Generation based on continuous opacity monitoring provides clear, incontrovertible evidence that the Waukegan facility is in violation of its opacity limitations, nevertheless, the permit does not contain a compliance schedule 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 applicant the information necessary to determine compliance with New Source Review (NSR) requirements, as required by 40 C.F.R. § 70.5(a)(2), (c)(5). Petition at 1.

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 Waukegan proposed permit, project summary, 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 for the reasons set forth in this Order.

STATUTORY AND REGULATORY FRAMEWORK

Section 502(d)(1) of the Act requires each state to develop and submit to EPA an operating permit program to meet the requirements of title V. EPA 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 an operating permit issued pursuant to title V that includes 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, EPA, 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 EPA for review. EPA 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 EPA 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 EPA'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 EPA's 45-day review period and before receipt of the objection. If, in response to a petition, EPA 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 an application for Waukegan's title V permit on September 7, 1995. IEPA issued a draft CAAPP permit on July 1, 2003 and proposed a CAAPP permit on October 10, 2003. During the 30-day public comment period, IEPA received comments on the draft permit, including from Petitioner. On December 8, 2004, July 19, 2005, and December 1, 2005, IEPA issued "draft revised proposed permits" for the Waukegan facility. On August 15, 2005 and December 23, 2005, IEPA proposed a permit for the Waukegan facility, and issued the final permit on February 7, 2006.

IEPA notified the public that April 7, 2006 was the deadline to file a petition requesting that EPA object to the issuance of the final permit. EPA received Petitioner's April 5, 2006 petition to object to the issuance of the permit on April 6, 2006. Accordingly, EPA finds that Petitioner timely filed this petition.

ISSUES RAISED BY THE PETITIONER

A. Opacity

The Petitioner alleges that the permit lacks a compliance schedule to bring the Waukegan plant into compliance with the opacity standards. Petitioner has included a summary of Waukegan'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 2,300 violations of the opacity limitation at the Facility's 3 units over the past 7 years." Petition at 1. The Petitioner further alleges that IEPA failed to require that Midwest Generation provide in its application a compliance schedule to bring the Waukegan plant into compliance with the opacity limitations. Petition at 2. The Petitioner notes that section 503(b)(1) of the Clean Air 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.

The Petitioner raised these and similar arguments in comments on the draft and re-proposed permit for this facility. Lake County Conservation Alliance petitioned the Administrator to object to the Waukegan proposed permit in a previous round of petitions filed on these permits. See In the Matter of Midwest Generation, LLC Waukegan Generating Station, Petition V-2004-5, at 4-5 (September 22, 2005) ("Waukegan Order"). In responding to the previous petition, EPA concluded that IEPA had failed to respond to significant comments on the opacity issue, and directed IEPA to respond to those comments. Id. at 5.

IEPA responded to the public comments as directed in EPA's September 2005 order, when it re-proposed the Waukegan permit on December 23, 2005, and issued the final permit on February 7, 2006. In responding to the comments from the Petitioner 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 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." 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 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 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." 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 "[t]hat 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, EPA 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 3, citing NY PIRG v. Johnson. The Petitioner maintains that the "straightforward self-reported COM-generated opacity exceedance data is as strong evidence of non-compliance as the NOVs at issue in NYPIRG." Petition at 3.

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 Waukegan permit a compliance plan to remedy alleged opacity violations. First, Petitioner questions IEPA's conclusion that there is no need for a compliance schedule 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 Waukegan facility has demonstrated compliance with the 30 percent opacity and the PM emission limitation during stack tests merely proves that the source is capable of ensuring that it can comply with the PM and opacity requirements. The stack test results, however, do not indicate that the pollution control equipment at the Waukegan facility 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, "[i]f the exceedances were truly 'past,' in the sense that the data demonstrated that the problem had been corrected at the Midwest Generation Facility, then there would, indeed, be no need for a schedule of compliance." Petition at 4. 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 source. Petition at 4. The Petitioner maintains that IEPA, therefore, had no basis to conclude that the Waukegan facility was in compliance at the time of permit issuance. Petition at 4-5. 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 "[t]he 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 source's certification of compliance is "entirely inappropriate." Petition at 5. Petitioner asserts that "[p]rinciples 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.

40 C.F.R. § 70.6(c)(3) requires that title V permits include a schedule of compliance consistent with 40 C.F.R. § 70.5(c)(8). 40 C.F.R. § 70.5(c)(8) prescribes the requirements for compliance plans to be submitted as part of permit applications. These include, for sources that are not in compliance with applicable requirements at the time of permit issuance, compliance schedules with 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." EPA 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, EPA's September 2005 petition order for the Waukegan coal fired power plant required IEPA to "address Petitioner's significant comments." See Waukegan Order at 4-5. IEPA responded to EPA's order 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 requests that EPA 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 they can determine when an exceedance is eligible for the eight minute exemption contained in the 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 source and IEPA's reliance on the compliance certification submitted by the source. Petitioner directs IEPA to the most recent quarterly reports to demonstrate that the opacity exceedances are ongoing at the facility, and questions IEPA's reliance on the source's compliance certifications. Petition at 4-5. EPA 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 source re-submitted a compliance certification with its updated title V applications in 2003 and reaffirmed the certification in 2005. EPA 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. Permitting authorities can rely on the assertions of sources, and, absent a clear demonstration of non-compliance, are not required to question each compliance certification it receives. When a source's compliance certification is up-to-date, EPA 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 to be excused, IEPA should not just accept the certification 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 EPA's policy that information that may indicate non-compliance, such as the evidence provided by Petitioner, be given to the enforcement arm of EPA.

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 EPA's or the state's enforcement office initiates enforcement proceedings, and those enforcement proceedings result in a settlement or adjudicated finding non-compliance, the title V permit will be re-opened and the appropriate compliance schedule put in to the title V permit.

EPA'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 Waukegan permit does not shield the source from enforcement for past violations of the opacity standard. Nor does the permit shield the source from an enforcement action for future violations of the opacity or other requirements. In addition, in the event of any future exceedances, the permit requires Waukegan 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 EPA 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 violation, 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 U.S. EPA'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 include 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. EPA finds that Petitioner has not demonstrated noncompliance at the time of permit issuance as required by the CAA and that IEPA's commitments meet EPA'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, EPA denies the petition on this issue

B. Requirements under New Source Review

The Petitioner alleges that, despite being in possession of information strongly indicating that Waukegan is in violation of New Source Review (NSR) requirements, IEPA never required the applicant to submit sufficient information to determine whether the NSR rules apply or to evaluate the source's NSR compliance. Petition at 6. The Petitioner notes that it has provided IEPA with extensive publicly-available information concerning significant modifications at this facility. 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 facility. 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).

Lake County Conservation Alliance raised these and similar arguments in a petition to the Administrator to object to the first proposed permit for Waukegan. See Waukegan Order at 4-5. In responding to the previous petition, 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 permit (responsiveness summary).

In response to EPA's September 2005 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. However, the 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 EPA, 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, EPA 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. EPA believes that the allegations made by the Petitioner do not contain sufficient specific information to determine whether the Waukegan CAAPP permit is 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 the Waukegan permit 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.

EPA 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 permit to Midwest Generation, LCC Waukegan Generating Station.

Dated: JUN 14 2007

Stephen L. Johnson
Administrator