

BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF)
ONYX ENVIRONMENTAL SERVICES)
) ORDER RESPONDING TO PETITIONERS'
Petition number V-2005-1) REQUEST THAT THE ADMINISTRATOR
CAAPP No. 163121AAP) OBJECT TO ISSUANCE OF A STATE
Proposed by the Illinois) OPERATING PERMIT
Environmental Protection Agency)
_____)

ORDER PARTIALLY DENYING AND PARTIALLY GRANTING
PETITION FOR OBJECTION TO PERMIT

On November 6, 2003, 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 United States Environmental Protection Agency’s (“U.S. EPA”) implementing regulations in 40 C.F.R. part 70 (“part 70”), the Illinois Environmental Protection Agency (“IEPA”) published a proposed draft title V operating permit for Onyx Environmental Services (“Onyx permit”). Onyx Environmental Services (“Onyx”) operates a hazardous waste combustor.

On February 18, 2004, U.S. EPA received a petition from the Sierra Club and American Bottom Conservancy (“Petitioners”) requesting that U.S. EPA object to issuance of the Onyx permit, pursuant to section 505(b)(2) of the Act and 40 C.F.R. § 70.8(d).

Petitioners allege that the Onyx permit: (1) violates the Agency’s commitments and obligations to address environmental justice issues; (2) lacks a compliance schedule and certification of compliance; (3) does not address modifications Onyx allegedly took that triggered New Source Review (“NSR”) requirements; (4) is based on an eight-year old application; (5) lacks practically enforceable conditions; (6) contains a permit shield that broadly insulates it from ongoing and recent violations; (7) fails to include conditions that meet the legal requirements for monitoring; (8) does not contain a statement of basis; (9) does not require prompt reporting of violations; and (10) fails to establish annual mercury and lead limits.

U.S. 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 Onyx proposed permit, and the information provided by Petitioners, I grant the Petitioners’ request in part and deny it in part 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 U.S. EPA an operating permit program to meet the requirements of title V. U.S. 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, U.S. 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. *See* 57 *Fed. Reg.* 32250, 32251 (July 21, 1992). 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. *Id.*

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 U.S. EPA for review. U.S. 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 U.S. 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 U.S. 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 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 U.S. EPA's 45-day review period and before receipt of the objection. If, in response to a petition, U.S. EPA objects to a permit that has been issued, U.S. 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).

BACKGROUND

Onyx submitted to IEPA on September 7, 1995, an application for a title V permit for its hazardous waste combustor in Sauget, Illinois. IEPA issued a draft title V permit on June 6, 2003 and proposed a revised permit to U.S. EPA on November 6, 2003. The public comment period for the Onyx permit ended September 12, 2003. During the public comment period, IEPA received comments on the draft permit, including comments from the Petitioners dated September 11, 2003. U.S. EPA is reviewing and responding to the Petitioners' issues based on the November 6, 2003 proposed Onyx permit. U.S. EPA did not object to the proposed permit within its 45-day review period, which ended December 21, 2003.

February 19, 2004 was the deadline, under the statutory time frame in section 505(b)(2) of the Act, to file a petition requesting that U.S. EPA object to the issuance of the proposed Onyx permit. Petitioners submitted their request that U.S. EPA object to the issuance of the Onyx permit on February 18, 2004. Accordingly, U.S. EPA finds that Petitioners timely filed this petition.

ISSUES RAISED BY THE PETITIONERS

As noted previously, Petitioners allege that the permit does not meet the requirements of the Act for several reasons. Specifically, Petitioners allege that the permit: (1) violates the Agency's commitments and obligations to address environmental justice issues; (2) lacks a compliance schedule and certification of compliance; (3) does not address modifications Onyx allegedly took that triggered NSR review; (4) is based on an eight-year old application; (5) lacks practically enforceable conditions; (6) contains a permit shield that broadly insulates it from ongoing and recent violations; (7) fails to include conditions that meet the legal requirements for monitoring; (8) does not contain a statement of basis; (9) does not require prompt reporting of violations; and (10) fails to establish annual mercury and lead limits.

I. Environmental Justice and the Resource Conservation and Recovery Act

The Petitioners allege that the proposed Onyx permit and the process leading up to its issuance violate the Agency's commitments and obligations to address environmental justice issues. Petition at 2. Petitioners state that the Onyx facility is located in an environmental justice area in Sauget, Illinois; that granting Onyx permits to continue to operate its toxic waste incinerator is an environmental justice issue; that Onyx has one of the worst compliance records in Illinois; and that it is surrounded by other facilities that are also unable to comply with Clean Air Safeguards. Petition at 2-4.

The Petitioners also state that U.S. EPA has the authority to object to the proposed title V permit and block issuance of any other permits on the basis that this facility presents an unreasonable threat of harm and that the threat is disproportionately borne by low-income and minority residents. Petition at 4. Citing Executive Order ("EO") 12898, the Act, and the Resource Conservation and Recovery Act ("RCRA"), Petitioners maintain that U.S. EPA can establish permit limits in order to avoid disparate impact on low-income and minority communities. *Id.*

The Petitioners discuss a December 1, 2000, memorandum signed by then U.S. EPA General Counsel Gary Guzy (“Guzy memorandum”) that outlines U.S. EPA’s authority to address environmental justice issues in RCRA permitting decisions. Petition at 4-5. Petitioners indicate that the Guzy memorandum focuses on RCRA's Omnibus Provision, Section 3005(c)(3), and, quoting the memorandum, Petitioners state that denial of a permit is appropriate “to address the following health concerns in connection with hazardous waste management facilities that may affect low-income communities or minority communities: 1) [c]umulative risks due to exposure from pollution sources in addition to the applicant facility; 2) [u]nique exposure pathways (e.g. subsistence fishers, ...); and 3) [s]ensitive populations (e.g. children with levels of lead in their blood, ...).” Petition at 5-6. Petitioners argue that a low-income and minority community located near the Onyx incinerator is suffering from all three high-risk scenarios. Petition at 6. Petitioners conclude that, because Onyx is unwilling or unable to comply with public health protections, RCRA 3005(c)(5) mandates that U.S. EPA close the Onyx facility. Petition at 7-8.

RCRA § 3005(c)(3) broadly grants U.S. EPA (or an authorized state) the authority to require “terms and conditions . . . necessary to protect human health and the environment.” RCRA §3005(c)(3), 42 U.S.C. § 9625(c)(3). This omnibus provision may be used to implement Executive Order 12898. *In re Chemical Waste Management of Ind., Inc. (CMW 1)*, 6 E.A.D. 66, 74-75 (EAB 1995). However, the RCRA § 3005(c)(3) omnibus provision is clearly limited to “permit[s] issued under this section,” i.e., RCRA treatment, storage, or disposal of hazardous waste permits. In addition, objections by U.S. EPA to a title V permit are limited to noncompliance with applicable requirements under the Act. 42 U.S.C. § 7661d; *see also* 40 C.F.R. § 70.2 (defining "applicable requirement" to include specified standards or requirements promulgated pursuant to the Clean Air Act). Accordingly, U.S. EPA may not object to the issuance of a title V permit on the basis of the omnibus provision in RCRA.

The Petitioners conclude that U.S. EPA has not complied with its legal obligations to consider and resolve the environmental justice issues implicated by Onyx’s proposed permits. *Id.* Petitioners argue that U.S. EPA failed to complete a health assessment before it or the state issued draft permits for public review. Petition at 9. Additionally, the Petitioners state that U.S. EPA did not assure early and ongoing public involvement opportunities and failed to require IEPA to consider environmental justice concerns. Petition at 11.

Executive Order 12898, signed on February 11, 1994, focuses federal attention on the environmental and human health conditions of minority populations and low-income populations with the goal of achieving environmental protection for all communities. The Executive Order also is intended to promote non-discrimination in federal programs substantially affecting human health and the environment, and to provide minority and low-income communities access to public information on, and an opportunity for public participation in, matters relating to human health or the environment. It generally directs federal agencies to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority and low-income populations.

Environmental justice issues can be raised and considered in a variety of actions carried out under the Act; for example, when U.S. EPA or a delegated state issues a NSR permit. Unlike NSR permits, however, title V generally does not impose new, substantive emission control requirements, but rather requires that all underlying applicable requirements be included in the operating permit. Title V also includes important public participation provisions as well as monitoring, compliance certification, and reporting obligations intended to assure compliance with the applicable requirements.

To justify exercising an objection by U.S. EPA to a title V permit pursuant to section 505(b)(2) of the Act, 42 U.S.C. § 7661d(b)(2), Petitioners must demonstrate that the permit is not in compliance with the applicable requirements of the Act, including the requirements of the Illinois State Implementation Plan (“SIP”).

Petitioners first present environmental justice arguments as support for the position that the Administrator must object to the permit. The Petitioners also raise concerns with the proposed RCRA permit to be issued to Onyx. Petitioners argue that the Administrator is required under RCRA to close down the Onyx incinerator because of past violations and environmental justice concerns.¹ Petitioners have not shown that their particular civil rights concerns are grounds under the Act for objection to the Onyx permit.² Likewise, the RCRA permit and its requirements by themselves are not applicable title V permit requirements under the Act. For these reasons, the petition is denied on these issues.

At one point in the discussion of RCRA and environmental justice issues, the Petitioners acknowledge that title V does not generally impose new substantive emission control requirements on facilities. Petition at 8. Petitioners maintain, however, that at least one applicable requirement is relevant to this issue. *Id.* Petitioners state that Illinois SIP includes a provision stating that “no person shall cause or threaten or allow the discharge or emission of any contaminant into the environment in any State so as, either alone or in combination with other sources, to cause or tend to cause air pollution in Illinois.” 35 Ill. Admin. Code § 201.141. *Id.* Petitioners then state that the term “air pollution” is defined to mean “the presence in the atmosphere of one or more air contaminants in sufficient quantities

¹ Onyx is subject to the requirements of 40 C.F.R. Part 63, Subpart EEE - National Emission Standards for Hazardous Air Pollutants from Hazardous Waste Combustors. The new Subpart EEE requirements will generally integrate the monitoring, compliance testing, and record keeping requirements for air emissions from a RCRA permit into the title V operating permit. The Petitioners have not shown that any particular permit condition requirement is deficient under Subpart EEE or the Act.

² As a recipient of U.S. EPA financial assistance, the programs and activities of IEPA, including its issuance of the Onyx permit, are subject to the requirements of title VI of the Civil Rights Act of 1964, as amended, and EPA’s implementing regulations, which prohibit discrimination by recipients of U.S. EPA assistance on the basis of race, color, or national origin. 42 U.S.C. 2000d et seq.; 40 C.F.R. part 7. The Petitioners may file a complaint under title VI and EPA’s title VI regulations if they believe that the state discriminated against them in violation of those laws by issuing the permit to Onyx. The complaint, however, must meet the jurisdictional criteria that are described in U.S. EPA’s title VI regulations in order for U.S. EPA to accept the complaint for investigation.

and of such characteristics and duration as to be injurious to human, plant, or animal life, to health, or to property, or to unreasonably interfere with the enjoyment of life or property." 35 Ill. Admin. Code § 201.102. *Id.* Petitioners argue that these provisions of the Illinois SIP are implicated because Onyx will be discharging such contaminants as mercury, lead, and dioxin into the environment at levels that are injurious to human health and the environment. *Id.* Petitioners did not raise this issue in their public comments and did not identify other comments on the draft permit that identified this issue or offer any explanation why it could not have been raised to IEPA at the appropriate time. Accordingly, the petition is denied on this issue. *See* section 505(b)(2) of the Act, 42 U.S.C. § 7661d(b)(2), 40 C.F.R. § 70.8(d).

II. Compliance schedule and certification

The Petitioners argue that an applicant for a title V permit must disclose its compliance status and either certify compliance or enter into an enforceable compliance schedule to remedy any violations pursuant to 42 U.S.C. § 7661b(b) and 40 C.F.R. § 70.5(c)(8-9). Petition at 13. The Petitioners have asserted that, because Onyx has not certified compliance with all the requirements applicable to the facility and IEPA has not required an updated certification, IEPA must include a schedule of compliance or other remedial measures in the proposed title V permit. *Id.* Petitioners cite to IEPA's enforcement referrals to the Illinois Attorney General's office and to the Illinois Attorney General's comments on the Onyx proposed permit as evidence of Onyx's alleged violations. Petitioners maintain that, because of the referrals, the Onyx permit must contain a compliance schedule to address the alleged violations and the Administrator must object to the permit because of the lack of a compliance schedule.

A. Compliance measures

The Petitioners state that, based on a letter from the Illinois Attorney General ("IAG") to IEPA,³ the Administrator should object to the Onyx permit. Petition at 14. Petitioners cite comments on the proposed permit from the IAG that criticize IEPA for its failure to include measures in the proposed permit to assure future compliance by Onyx with the requirements of the Illinois Environmental Protection Act. *Id.* The IAG comments included two specific measures that the former operator of the Onyx facility stated were necessary to prevent future violations. *Id.* The IAG stated that the permit application had to be reviewed to ensure that all the necessary actions were included as permit conditions. *Id.* The Petitioners quote the IAG's letter, which states that "[a]s currently written, the permits will not assure that operation of this facility will not violate the Environmental Protection Act or regulations" *Id.* Petitioners argue that, because the permit does not address the compliance issues raised by the IAG, the proposed permit is unlawful and the Administrator should object to the permit. *Id.*

40 C.F.R. §§ 70.5(c)(8)(iii)(C) and 70.6(c)(3) require that, if a facility is in violation of an applicable requirement and it will not be in compliance at the time of permit issuance, its permit must include a compliance schedule that meets certain criteria. For sources that are not in compliance with applicable requirements at the time of permit issuance, compliance schedules

³ The Petitioners cite to a comment letter dated February 17, 2004. However, the Illinois Attorney General's office submitted comments on the draft Onyx permit to IEPA on September 11, 2003. The September 2003 letter contains the language to which Petitioners refer.

must include “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). If the reported violation has been corrected prior to permit issuance, a compliance schedule is no longer necessary.

Petitioners brought to IEPA’s notice the history of violations at the facility, and the IAG questioned during the public comment period on the draft permit whether measures necessary to prevent future violations were incorporated into the permit. In addition to the Petitioners’ comments, the IAG has commented that the proposed title V permit does not include the very measures that Onyx had identified as necessary to prevent the repeat of the violations that previously occurred. IEPA, however, did not respond to the Illinois Attorney General’s or other petitioners’ comments regarding the necessity of a compliance schedule for the violations alleged in their comments.

It is a general principle of administrative law that an inherent component of any meaningful notice and opportunity for comment is a response by the regulatory authority to significant comments. *Home Box Office v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977) (“the opportunity to comment is meaningless unless the agency responds to significant points raised by the public.”). Accordingly, IEPA has an obligation to respond to significant public comments. U.S. EPA concludes that IEPA’s failure to respond to significant comments may have resulted in one or more deficiencies in the Onyx permit. As a result, U.S. EPA is granting the petition on this issue and requiring IEPA to address Petitioner’s significant comments concerning the possible need for a compliance schedule in the proposed permit.

B. Compliance certification

40 C.F.R. § 70.5(c)(9)(i) requires an applicant to submit “[a] certification of compliance with all applicable requirements by a responsible official” It does not appear from the record that Onyx submitted a compliance certification at the time of application. The State, U.S. EPA, and the public are deprived of meaningful compliance information that is necessary for the development of a comprehensive permit when a compliance certification is not provided at the time of application.

In determining whether an objection is warranted for alleged flaws in the procedures leading up to permit issuance, U.S. EPA considers whether a Petitioner has demonstrated that the alleged flaws resulted in, or may have resulted in, a deficiency in the permit’s content. *See* section 505(b)(2) of the Act, 42 U.S.C. § 7661d(b)(2), (requiring an objection “if the petitioner demonstrates . . . that the permit is not in compliance with the requirements of this Act”). Here, IEPA did not consider Onyx’s compliance history and alleged failure to submit a compliance certification as required by 40 C.F.R. § 70.5(c)(8)-(9). IEPA’s failure to consider this information may have resulted in flaws in the proposed title V permit. For this reason, the petition is granted on this issue. IEPA must require Onyx to submit a current compliance certification. If Onyx cannot certify compliance with all applicable requirements, IEPA must include in the title V permit a compliance schedule designed to bring Onyx into compliance. 40 C.F.R. §§ 70.5(c)(8)(iii)(C) and 70.6(c)(3).

C. New Source Review (“NSR”)

The Petitioners state that, based on the IAG’s letter, the Administrator should object to the Onyx permit because there is strong evidence that Onyx undertook modifications that triggered requirements arising from NSR. Petition at 15. The Petitioners allege that Onyx avoided permitting requirements and the requirement to install modern pollution control equipment. *Id.* Petitioners further assert that, in the absence of a determination whether NSR applies, IEPA cannot know what emissions and operational standards apply to Onyx. Petition at 14 -16.

Petitioners discuss in some detail why a determination of whether Onyx unlawfully avoided NSR is directly relevant to title V permitting. *Id.* Petitioners argue that ensuring compliance with the requirements originating in the Act is a fundamental goal of the title V permitting process. Petition at 15. Petitioners assert that the NSR permitting program serves two important purposes: it ensures that subject entities comply with air quality standards when components are modified or added to these facilities and it requires that new plants or existing plants undergoing a major modification install state-of-the-art control technology. 42 U.S.C. § 7401(a)(1) and (2). *Id.* Petitioners maintain that a determination that NSR has been triggered by site modifications would require the source to comply with new source requirements and apply state-of-the-art pollution controls, which are much more stringent than emission limits proposed without a NSR permit. *Id.* Petitioners argue that IEPA developed the proposed permit conditions and standards based on the applicant’s representations that it is not subject to new source standards. *Id.* Petitioners continue by stating that if Onyx were subject to NSR requirements, entirely different emission and operational standards would apply than those included by IEPA in the proposed permit. *Id.* Petitioners conclude that IEPA cannot know what standards and conditions apply without determining if NSR applies. *Id.* Petitioners state that the Administrator must object to the permit because IEPA failed to determine whether NSR applies. *Id.*

The issues raised here were brought to IEPA’s attention during the public comment period on the draft permit. Under section 505(b)(2) of the Act, 42 U.S.C. § 7661d(b)(2), any person may petition the Administrator to object to the issuance of a title V permit so long as the petition is based on objections that were raised with reasonable specificity during the public comment period.⁴ In this case, both the Petitioners and the IAG raised significant issues during the comment period that were not addressed by IEPA. IEPA has an obligation to respond to significant public comments.

U.S. EPA concludes that IEPA’s failure to respond to the Petitioner’s comments may have resulted in a deficiency in the permit. As a result, U.S. EPA is granting the petition on this issue and requiring IEPA to address these significant comments concerning modifications made at the Onyx facility and the potential applicability of NSR requirements.

⁴ A petitioner may also demonstrate that it was impracticable to raise the objection issue during the comment period or that the grounds for the objection arose after the close of the comment period. 42 U.S.C. § 7661d(b)(2).

III. Eight-year old application

The Petitioners state that the Administrator must object to the proposed Onyx permit because it was based on an eight-year old application that Onyx never updated. The Petitioners assert that Onyx must be required to update its application to include any new information, such as new equipment and other information that is highly relevant to issuing a meaningful permit. Petition at 16.

The Petitioners have not raised any specific information about which Onyx should have updated its title V permit application. The fact that eight years passed between the date that Onyx submitted its permit application and the date IEPA issued the draft permit does not, in itself, necessarily mean the application is deficient, or that a new application is required. However, 40 C.F.R. § 70.5 requires applicants to provide additional information necessary to address any requirements that become applicable to the source after the date it filed a complete application but prior to release of a draft permit. In the present case, since Onyx submitted its title V permit application, 40 C.F.R. part 63, subpart EEE, the National Emission Standards for Hazardous Air Pollutants from Hazardous Waste Combustors, has taken effect. These regulations, which required compliance no later than September 30, 2002, apply to Onyx. Therefore, since these new standards were put into place, it is clear that Onyx should have updated its permit application to reflect the applicability and methodology of compliance with the standards. For these reasons, the petition is granted on this issue. IEPA must require Onyx to submit an updated application that reflects all applicable requirements for the source. IEPA should use the information from the updated application, and the initial compliance certification required above, to make any necessary changes to the permit.

IV. Practical Enforceability

The Petitioners state that the Administrator must object to the proposed Onyx permit because it contains conditions that are not practically enforceable. The Petitioners cite five conditions from the permit that they believe are not practically enforceable. The Petitioners cite U.S. EPA Region 9's Title V Permit Review Guidance, September 9, 1999, as a basis for this claim. Petition at 17.

U.S. EPA has reviewed the specific conditions raised by the Petitioners and provided its decision below on each specific condition cited.

A. Condition 7.1.6.b.ii

Petitioners note that page 28 of the permit, Condition 7.1.6.b.ii, requires Onyx to “notify the Illinois EPA of the intent to incinerate [dioxin-listed hazardous waste].” Petitioners argue that this condition does not indicate when the notification is to occur or in what format the notification must be and question how the public can monitor compliance with the provision. Petition at 17.

The permit condition cited by Petitioners sets the required destruction and removal efficiency (“DRE”) level for five dioxin-listed hazardous wastes and requires the permittee to

demonstrate that the required DRE will be achievable for four other hazardous wastes. Thereafter, the permit requires the permittee to notify IEPA of *its intent* to combust six hazardous wastes. The language from permit condition 7.1.6.b.ii cited by the Petitioners is taken directly from U.S. EPA's regulation in 40 C.F.R. § 63.1203(c)(2). This language makes clear that Onyx is in violation of its permit if it incinerates the listed hazardous wastes before notifying IEPA. Under 40 C.F.R. § 70.6(a)(3)(iii), a permit must include "all applicable reporting requirements." Because the permit language is identical to the language of the underlying requirement, the petition is denied on this issue.

B. Condition 7.1.7.g.

Petitioners state that Condition 7.1.7.g. is a new provision that requires Onyx to operate the incinerator during the performance test under "normal conditions (or conditions that will result in higher emissions)." Petitioners note that there also are similar provisions in the subsections 7.1.7.g.i. and 7.1.7.g.ii. Petitioners argue that it is unclear whether Onyx must conduct the performance test under "normal conditions" or "conditions that result in higher emissions." Petitioners also state that it is unclear which pollutants are at issue. Petition at 17.

Permit condition 7.1.7.g. sets forth comprehensive performance testing requirements. The condition requires the permittee to operate the combustor under normal or higher than normal emissions rates during testing. Condition 7.1.7.g.i. requires the permittee to feed *normal or higher levels* of chlorine during the dioxin/furan test, and condition 7.1.7.g.ii. requires the permittee to feed *normal or higher than normal levels* of ash when testing the hazardous waste incinerators.

The permit condition clearly states that the testing covered is dioxin/furan performance testing and testing of the hazardous waste incinerators. Although demonstration of compliance in a "worst-case" scenario will also demonstrate compliance under normal operating conditions, the permit does not make clear what IEPA considers "normal" operating conditions. Therefore, U.S. EPA is granting on this issue. IEPA must make clear either in the permit or statement of basis what constitutes "normal" operating conditions for purposes of this test.

C. Condition 7.1.7.p.

Petitioners note that Condition 7.1.7.p. requires Onyx to "cease hazardous waste burning immediately" if it fails to "postmark a Notification of Compliance." Petitioners assert that this must be a simple but important drafting error. Petition at 17.

The language from permit condition 7.1.7.p. cited by the Petitioners is taken directly from U.S. EPA's regulation in 40 C.F.R. § 63.1207(k). The regulation, in relevant part, states:

Failure to submit a timely notification of compliance. (1) If you fail to postmark a Notification of Compliance by the specific date, you must cease hazardous waste burning immediately.

Because the permit language is identical to the language of the underlying requirement, the petition is denied on this issue.

D. Condition 7.1.9.a.ii.

Petitioners note that Condition 7.1.9.a.ii. uses the term “you” rather than “Permittee,” which is the term that is used everywhere else in the permit. Petitioners suggest that this is probably just a simple, but confusing, drafting error. Petitioners note that in this same section, there is reference to “owners and operators of lightweight aggregate kilns” and “cement kilns.” Petitioners posit that these provisions do not have anything to do with Onyx, but, instead, highlight IEPA’s failure to tailor the applicable statutory and regulatory requirements to this facility. Petition at 18.

Petitioners are correct that the permit uses the term “you” in this section and the term “Permittee” throughout the rest of the permit; however, the use of the term “you” in the proposed permit does not diminish the enforceability of the permit. It is clear that the provision at issue is referring to the permittee. The petition is denied on this issue.

The reference to “owners and operators of lightweight aggregate kilns” and “cement kilns” is cited directly from 40 C.F.R. § 63.1200, “*Who is subject to these regulations?*” (stating, in part, that “[t]he provisions of this subpart apply to all hazardous waste combustors: hazardous waste incinerators, hazardous waste burning cement kilns, and hazardous waste burning lightweight aggregate kilns.”). The provisions of this condition appear to allow Onyx to elect to comply with alternative requirements, such as the “emissions averaging requirements utilized by cement kilns with in-line raw mills.” Permit at 85. The alternative regulatory requirements that Onyx is apparently allowed to elect under the permit are cross referenced; but the regulations referenced are not applicable to Onyx’s facility. Onyx must comply with the regulations applicable to hazardous waste incinerators and may not be allowed through its permit to elect to comply with requirements that are applicable only to hazardous waste burning cement kilns or hazardous waste burning lightweight aggregate kilns. For these reasons, the petition is granted on this issue. IEPA is directed to amend the permit to limit Onyx’s elections to regulatory requirements applicable to hazardous waste incinerators.

E. Condition 7.1.5

Petitioners assert that the terms “container,” “containerized solids,” or “manufacturer’s specifications” in Condition 7.1.5 must be defined. Petition at 18.

The permit terms listed above are not defined in the title V permit. The terms are used in the *operating requirements and work practices* section of the proposed permit. The permit condition states, in part, “the following physical forms and feed rates of the waste feed shall not exceed the following limits, as established by the RCRA permit B-29R.” The reference to the RCRA permit is inappropriate in this condition because the RCRA permit is not an applicable requirement of the title V permit program. In addition, determining the parameters for incinerating wastes stored in “containers” or as “containerized solids” is not possible absent a definition of those terms from the underlying applicable requirements. The petition is granted

on this issue. U.S. EPA directs IEPA to define the above terms, “container” and “containerized solids,” or explain in the statement of basis where the terms are defined. U.S. EPA also directs IEPA to respond the Petitioners' comments on the manufacturer’s specifications by providing information on where the applicable specifications can be located.

V. Permit shield

The Petitioners state that the Administrator must object to the proposed Onyx permit because it contains a permit shield that broadly insulates Onyx from ongoing and recent violations. Petition at 18. Petitioners argue that condition 8.1 is a broad permit shield that is unwarranted and threatens to undermine the Illinois Attorney General’s pending enforcement cases against Onyx. Petitioners maintain that a title V permit shield is not available for noncompliance that occurred prior to or continues after the submission of an application.

Section 8.1 of the Onyx permit states:

Pursuant to Section 39.5(7)(j) of the Act, the Permittee has requested and has been granted a permit shield. This permit shield provides that compliance with the conditions of this permit shall be deemed compliance with applicable requirements which were applicable as of the date of the proposed permit for this source was issued, provided that either the applicable requirements are specifically identified within this permit, or the Illinois EPA, in acting on this permit application, has determined that other requirements specifically identified are not applicable to this source and this determination (or a concise summary thereof) is included in this permit.

This permit shield does not extend to applicable requirements which are promulgated after November 20, 2002 (the date of issuance of the draft permit) unless the permit has been modified to reflect such new requirements.

The language of Condition 8.1 is consistent with the language of 40 C.F.R. § 70.6(f). This language makes clear that the permit shield extends only to requirements which are identified specifically in the title V permit, either as an applicable requirement or in a non-applicability determination.⁵ This language does not extend the shield to compliance with or violation of applicable requirements that are not specifically included in the permit or non-applicability determination. Petitioners have not demonstrated that Condition 8.1 could preclude an appropriate enforcement action for alleged violations of those requirements raised by IAG. While the permit shield would be clearer if the state included in a statement of basis its explanation of the extent of the shield, the language in the permit is consistent with part 70; therefore, the petition is denied on this issue.

VI. Monitoring

The Petitioners argue that the Administrator must object to the proposed Onyx permit because it fails to include conditions that meet the legal requirements for monitoring. The Petitioners cite condition 7.1.8.b.ii. on page 56 of the proposed Onyx permit, which provides that

⁵ There do not appear to be any non-applicability determinations in the permit.

Onyx must install, calibrate, maintain, and operate a PM CEMs to demonstrate compliance. Petitioners note that the next clause provides that the permittee need not comply with the requirement to “install, calibrate, maintain, and operate the PM CEMs until such time that U.S. EPA promulgates all performance specifications and operational requirements for PM CEMs.” Petitioners argue that there are no PM monitoring requirements established in the permit without the obligation to install and operate the PM CEMs, which is contingent on future U.S. EPA action. Petition at 18.

U.S. EPA promulgated the performance specification for PM CEMs (Performance Standard 11) on January 12, 2004. Because U.S. EPA promulgated the performance specifications and Onyx is required to install PM CEMs per condition 7.1.8.b.ii., there is no flaw in the permit. Therefore, the permit is denied on this issue.

VII. Statement of basis

The Petitioners state that the Administrator must object to the Onyx permit because it does not contain a statement of basis. Petition at 19. A statement of basis is required by 40 C.F.R. § 70.7(a)(5) and Section 39.5(8)(b) of the Illinois Environmental Policy Act. A statement of basis must set forth the legal and factual basis for the draft permit conditions. Petitioners assert that the statement of basis is particularly important in this case because the applicability determinations are difficult and not clear. Petitioners maintain that there is no clear explanation of how limitations and requirements apply to the permit and that makes it difficult to determine if Onyx is complying with the permit conditions. Petition at 19

U.S. EPA's title V regulations state that “the permitting authority shall 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).” The permitting authority shall send this statement to EPA and to any other person who requests it.” 40 C.F.R. § 70.7(a)(5)); *see also* 415 ILCS § 39.5(8)(b). Commonly referred to as a “statement of basis,” this document is not part of the permit itself, but rather a separate document which is to be sent to U.S. EPA and to interested parties upon request.

A statement of basis must describe the origin or basis of each permit condition or exemption. However, it is more than just a short form of the permit. It should highlight elements that U.S. EPA and the public would find important to review.⁶ Rather than restating

⁶ U.S. EPA Region 5 provided additional guidance in a December 20, 2001 letter to the State of Ohio on the content of an adequate statement of basis, which is available at <http://www.epa.gov/rgytgrnj/programs/artd/air/title5/t5memos/sbguide.pdf>. Region 5's letter recommends the same five elements outlined in a Notice of Deficiency (“NOD”) recently issued to the State of Texas for its title V program. *See*, 67 Fed. Reg. at 732 (January 7, 2002). These five key elements of a statement of basis are (1) a description of the facility; (2) a discussion of any operational flexibility that will be utilized at the facility; (3) the basis for applying the permit shield; (4) any federal regulatory applicability determinations; and (5) the rationale for the monitoring methods selected. *Id.* at 735. In addition to the five elements identified in the Texas NOD, the Region 5 letter further recommends the inclusion of the following topical discussions in the statement of basis: (1) monitoring and operational restrictions requirements; (2) applicability and exemptions; (3) explanation of any

the permit, it should list anything that deviates from simply a straight recitation of applicable requirements. The statement of basis should highlight items such as the permit shield, streamlined conditions, or any monitoring that is required under 40 C.F.R. § 70.6(a)(3)(i)(B). Thus, it should include a discussion of the decision-making that went into the development of the title V permit and provide the permitting authority, the public, and U.S. EPA a record of the applicability and technical issues surrounding the issuance of the permit. *See, e.g., In Re Port Hudson Operations, Georgia Pacific*, Petition No. 6-03-01, at pages 37-40 (May 9, 2003) (“*Georgia Pacific*”); *In Re Doe Run Company Buick Mill and Mine*, Petition No. VII-1999-001, at pages 24-25 (July 31, 2002) (“*Doe Run*”); *In Re Fort James Camas Mill*, Petition No. X-1999-1, at page 8 (December 22, 2000) (“*Ft. James*”).

The failure of a permitting authority to meet the procedural requirements of § 70.7(a)(5), however, does not necessarily demonstrate that the resulting title V permit is substantively flawed. As noted above, in reviewing a petition to object to a title V permit because of an alleged failure of the permitting authority to meet all procedural requirements in issuing the permit, U.S. EPA considers whether the petitioner has demonstrated that the permitting authority’s failure resulted in, or may have resulted in, a deficiency in the content of the permit. Where the record as a whole supports the terms and conditions of the permit, flaws in the statement of basis generally will not result in an objection. *See, e.g., Doe Run* at 24-25. In contrast, where flaws in the statement of basis resulted in, or may have resulted in, deficiencies in the title V permit, U.S. EPA will object to the issuance of the permit. *See, e.g., Ft. James* at 8; *Georgia Pacific* at 37-40. U.S. EPA has made exceptions from the statement of basis requirement, but only when the permit at issue is clear on its face and no additional detail is necessary to understand the legal and factual basis for the draft permit conditions. *See In re Los Medanos Energy Center*, at page 11 (May 24, 2004).

IEPA typically prepares a project summary when it drafts a title V permit, and posts it with the draft permit on its permit website. IEPA has developed the project summary to act as its statement of basis. However, in this instance, IEPA failed to post the project summary on its website. Although part 70 does not require a permitting authority to post statements of basis on a website, IEPA’s failure either to post the Onyx project summary on the site where it posts draft permits and all other summaries, or to indicate on the site where the public could find the summary in effect made the summary unavailable to the public. U.S. EPA believes that the Onyx facility and its permitting history are complex enough that a statement of basis is necessary

conditions from previously issued permits that are not being transferred to the title V permit; (4) streamlining requirements; and (5) certain other factual information as necessary. In a letter dated February 19, 1999 to Mr. David Dixon, Chair of the CAPCOA Title V Subcommittee, the EPA Region IX Air Division provided a list of air quality requirements to serve as guidance to California permitting authorities that should be considered when developing a statement of basis for purposes of EPA Region IX’s review. This guidance is consistent with the other guidance cited above. Each of the various guidance documents, including the Texas NOD and the Region V and IX letters, provides generalized recommendations for developing an adequate statement of basis rather than “hard and fast” rules on what to include in any given statement of basis. Taken as a whole, they provide a good roadmap as to what should be included in a statement of basis on a permit-by-permit basis, including such considerations as the technical complexity of the permit, the history of the facility, and the number of new provisions being added at the title V permitting stage.

in order to support the basis for IEPA's permitting decisions. *See, e.g., In re Los Medanos* at page 4 (May 24, 2004). For these reasons, the petition is granted on this issue. IEPA is directed to provide a statement of basis that complies with the requirements of U.S. EPA regulations at 40 C.F.R. § 70.7(a)(b), Section 39.5(8)(b) of the Illinois Environmental Protection Act, and this order. IEPA either must post its statements of basis (or project summaries, if they meet the statement of basis criteria) on the website or make available to the public on the website a notice telling the public where it can obtain statements of basis.

VIII. Prompt reporting

The Petitioners assert that the Administrator must object to the proposed Onyx permit because it does not require prompt reporting of violations. The Petitioners maintain that the reporting requirements in condition 7.1.10. are not prompt because the permit gives Onyx 30 days to file deviation reports with IEPA. Petition at 19.

Title V permits must provide for prompt reporting of deviations from permit requirements. 40 C.F.R. § 70.6(a)(3)(iii)(B) states that “[t]he permitting authority shall define ‘prompt’ in relation to the degree and type of deviation likely to occur and the applicable requirement.” Permitting authorities may specify prompt reporting requirements for each permit term on a case-by-case basis, or may adopt general reporting requirements by rule, or both. Moreover, permitting authorities must consider whether the reporting requirements of applicable requirements constitute prompt reporting. Therefore, whether IEPA has addressed prompt reporting sufficiently in a specific permit is a case-by-case determination under the rules applicable to the approved program.

The permit record does not include IEPA's explanation of why the deviation reporting required for the applicable emissions limitations is prompt “in relation to the degree and type of deviation likely to occur and the applicable requirement.” In this case, Onyx incinerates hazardous and toxic materials and IEPA has not explained why it considers a thirty day reporting period to be prompt for all deviations. For this reason, U.S. EPA is granting on this issue. U.S. EPA directs IEPA to explain how a thirty day reporting requirement for all deviations is prompt or require a shorter reporting period for deviations as is provided for in 40 C.F.R. Part 71.⁷

IX. The Administrator must object to the proposed permit because it fails to establish annual mercury and lead limits

⁷ U.S. EPA's rules governing the administration of federal operating permit programs require, inter alia, that permits contain conditions providing for the prompt reporting of deviations from permit requirements. Under 40 C.F.R. § 71.6(a)(3)(iii)(B), deviation reporting is governed by the time frame specified in the underlying applicable requirement unless the applicable requirement does not provide for deviation reporting. In such a case, the part 71 regulations set forth the minimum deviation reporting requirements that must be included in the permit. For example, emissions of a hazardous or toxic air pollutant that continue for more than an hour in excess of permit requirements must be reported to the permitting authority within 24 hours of the occurrence. And, if excess emissions of any regulated air pollutant, other than hazardous or toxic air pollutant, continue for more than two hours, the facility must report these deviations within 48 hours.

The Petitioners state that the Administrator must object to the Onyx permit because it fails to establish annual mercury and lead limits. (Petition p. 19).

The Petitioners have not alleged in this section that an applicable requirement is either missing or incorrectly applied in the Onyx permit. 40 C.F.R. § 70.6(a)(1) requires that title V permits include “emission limitations and standards, including those operational requirements and limitations that assure compliance with all applicable requirements at the time of permit issuance.” Furthermore, title V generally does not authorize a permitting authority to impose substantive new requirements. *See* 40 C.F.R. § 70.1(b). Since the Petitioners have not provided information demonstrating that IEPA has failed to include or incorrectly applied any emission limitations and standards applicable to the Onyx facility, 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 grant in part and deny in part the petition of the Sierra Club and American Bottom Conservancy requesting the Administrator to object to issuance of the title V CAAPP permit to Onyx Environmental Services.

Dated: February 1, 2006

/S/
Stephen L. Johnson
Administrator