BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF CHEYENNE LIGHT, FUEL & POWER, WYGEN II POWER PLANT PERMIT NO. 3-0-229 ISSUED BY THE WYOMING DEPARTMENT OF ENVIRONMENTAL QUALITY, AIR QUALITY DIVISION	PETITION NO. VIII-2011-02

ORDER DENYING PETITION FOR OBJECTION TO PERMIT

On August 4, 2011, the United States Environmental Protection Agency (the EPA) received a petition from WildEarth Guardians (WEG or the Petitioner) pursuant to section 505(b)(2) of the Clean Air Act (CAA or the Act), 42 U.S.C. § 7661d. The Petition requests that the EPA object to the issuance of Permit 3-0-229 (Permit). The Permit allows Cheyenne Light, Fuel & Power (CLF&P) to operate the Wygen II Power Plant (Wygen II), a coal-fired power plant located in Campbell County, Wyoming. The Wyoming Department of Environmental Quality, Air Quality Division (WDEQ) issued the Permit on June 7, 2011, pursuant to Wyoming Air Quality Standards and Regulations, Chapter 6, Section 3, Operating Permits.

This Order contains the EPA's response to the Petitioner's request that the EPA object to the Permit on the basis that WDEQ failed to respond to comments on the draft permit. The EPA has reviewed this allegation 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 requirements of the Act. *See also* 40 C.F.R. § 70.8(d); *New York Public Interest Research Group (NYPIRG) v. Whitman,* 321 F.3d 316, 333 n.11 (2d Cir. 2003). Based on a review of the Petition and other relevant materials, including the Permit and permit record, and relevant statutory and regulatory authorities, and as explained more fully below, I deny the Petition requesting that the EPA object to the Permit.

I. STATUTORY AND REGULATORY FRAMEWORK

Section 502(d)(1) of the Act, 42 U.S.C. § 7661a(d)(1), calls upon each state to develop and submit to the EPA an operating permit program intended to meet the requirements of title V of the CAA. The EPA granted interim approval to the title V operating permit

program submitted by WDEQ effective November 22, 1994. 59 Fed. Reg. 48802 (Sept. 23, 1994); 40 C.F.R. Part 70, Appendix A. *See also* 60 Fed. Reg. 3766 (Jan. 19, 1995) (revising interim approval). Effective April 23, 1999, the EPA granted full approval to WDEQ's title V operating permit program. 64 Fed. Reg. 8523 (Feb. 22, 1999).

All major stationary sources of air pollution and certain other sources are required to apply for title V operating permits that include emission limitations and such other conditions as are necessary to assure compliance with applicable requirements of the CAA, including the requirements of the applicable State Implementation Plan (SIP). *See* CAA §§ 502(a), 504(a), 42 U.S.C. §§ 7661a(a), 7661c(a). The title V operating permit program does not generally impose new substantive air quality control requirements (referred to as "applicable requirements"), but does require permits to contain monitoring, recordkeeping, reporting, and other conditions to assure compliance by sources with applicable emission control requirements. *See* 57 Fed. Reg. 32250, 32250-51 (July 21, 1992). One purpose of the title V program is to "enable the source, States, the EPA, and the public to better understand the applicable requirements to which the source is subject, and whether the source is meeting those requirements." *Id.* Thus, the title V operating permit program is a vehicle for ensuring that air quality control requirements are appropriately applied to facility emission units and that compliance with these requirements is assured.

Under section 505(a) of the CAA, 42 U.S.C. § 7661d(a), and the relevant implementing regulations, 40 C.F.R. § 70.8(a), states are required to submit each proposed title V operating permit to the EPA for review. Upon receipt of a proposed permit, the EPA has 45 days to object to final issuance of the permit if it is determined not to be in compliance with applicable requirements or the requirements under title V. *See* 40 C.F.R. § 70.8(c). If the EPA does not object to a permit on its own initiative, section 505(b)(2) of the Act provides that any person may petition the Administrator, within 60 days of expiration of the EPA's 45-day review period, to object to the permit. 42 U.S.C. § 7661d(b)(2); *see also* 40 C.F.R. § 70.8(d). The petition must "be based only on objections to the permit that were raised with reasonable specificity during the public comment period provided by the permitting agency (unless the petitioner demonstrates in the petition to the Administrator that it was impracticable to raise such objections within such period or unless the grounds for such objection arose after such period)." CAA § 505(b)(2), 42 U.S.C. § 7661d(b)(2). In response to such a petition, the CAA requires the Administrator to issue an objection if a petitioner demonstrates that a permit is not in compliance with the requirements of the CAA. 42 U.S.C. § 7661d(b)(2); *see also* 40 C.F.R. § 70.8(c)(1); *NYPIRG*, 321 F.3d at 333 n.11. Under section 505(b)(2) of the Act, the burden is on the petitioner to make the required demonstration to the EPA. *MacClarence v. EPA*, 596 F.3d 1123, 1130-33 (9th Cir. 2010); *Sierra Club v. Johnson*, 541 F.3d. 1257, 1266-67 (11th Cir. 2008); *Citizens Against Ruining the Environment v. EPA*, 535 F.3d 670, 677-78 (7th Cir. 2008); *Sierra Club v. EPA*, 557 F.3d 401, 406 (6th Cir. 2009) (discussing the burden of proof in title V petitions); *see also NYPIRG*, 321 F.3d at 333 n.11. If, in responding to a petition, the EPA objects to a permit that has already been issued, the EPA or the permitting authority will modify, terminate, or revoke and reissue the permit consistent with the procedures set forth in 40 C.F.R. §§ 70.7(g)(4) and (5)(i) – (ii), and 40 C.F.R. § 70.8(d).

II. BACKGROUND

A. The Facility

Wygen II, which is owned and operated by CLF&P, a wholly owned subsidiary of Black Hills Corporation, is located approximately 4 miles east of the city of Gillette at Section 27, Township 50 North, Range 71 West, in Campbell County, Wyoming. The area in which the plant operates is designated as attainment or unclassifiable for all criteria pollutants. There are no federal Class I areas within 100 kilometers of this facility.

B. Permit History

On September 15, 2008, CLF&P submitted an initial title V application to WDEQ. WDEQ published a notice of the draft initial title V permit on March 17, 2011. Petition Exhibit 4, Attachment 2. The notice stated that all written comments received by 5:00 p.m., April 18, 2011, would be considered. The notice instructed the public to direct written comments to the Administrator of the Air Quality Division, provided an address and fax number, and noted a Wyoming regulation requiring WDEQ to allow thirty days for the public to submit comments. According to a United States Postal Service (USPS) tracking slip, the Petitioner sent comments on the draft permit via certified, priority mail from Denver, Colorado at 6:14 p.m., Friday, April 15, 2011.[1] Petition Exhibit 4, Attachment 1. The comments arrived at the Cheyenne, Wyoming, postal unit at 2:45 a.m., Monday, April 18, 2011, and were delivered to WDEQ at 7:01 a.m., April 19, 2011. *Id.* On May 12, 2011, WDEQ sent a letter to the Petitioner stating that the comments had not been received until April 19, 2011, and therefore WDEQ was not responding to them. Petition Exhibit 4. No other comments on the draft permit were received by WDEQ. WDEQ proposed the Permit to the EPA on April 21, 2011; the EPA did not object to the Permit. On June 6, 2011, WDEQ issued the Permit to CLF&P for the operation of Wygen II.

C. Background on Public Participation Requirements

Section 502(b) of the Act requires the Administrator to promulgate regulations establishing the "minimum elements of title V permitting programs." 42 U.S.C. § 7661a(b). Among these elements are "[a]dequate, streamlined, and reasonable procedures ... for public notice, including offering an opportunity for public comment and a hearing. . . . ." 42 U.S.C. § 7661a(b)(6); *see also* 57 Fed. Reg. 32250, 32290 (July 21, 1992) (preamble section on public participation). Under the regulations, "all permit proceedings ... shall provide *adequate* procedures for public notice including offering an opportunity for public comment and a hearing on the draft permit." 40 C.F.R. § 70.7(h) (emphasis added). In particular, "[t]he permitting authority shall provide at least 30 days for public

[1] The comments touched on several substantive issues, including (among others) case-by-case Maximum Achievable Control Technology standards, particulate matter monitoring, and the definition of "stationary source" and its application to Wygen II. Petition Exhibit. 3. The comments did not, however, address the language of the public notice or its requirement of receipt by 5:00 p.m., April 18, 2011, beyond stating that the comments were "submitted by April 18, 2011, as required by the public notice." *See id.* at 1.

comment." 40 C.F.R. § 70.7(h)(4). This requirement for 30 days for public comment is one of "the minimum elements of public participation that must be included in a State program." 57 Fed. Reg. 32250, 32290 (July 21, 1992). Neither CAA § 502(b)(6) nor the federal title V regulations at 40 C.F.R. § 70.7(h) specify the means by which public comments must be received. Therefore, permitting authorities have discretion to develop their own procedures for submission and receipt of public comments, so long as the procedures are reasonable, adequate, and satisfy the minimum elements required under the Act.

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. *In re U.S. Steel Corp., Granite City Works*, Petition No. V-2009-3, at 7 (Order on petition) (Jan. 31, 2011) (citing *Home Box Office v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977)). It is also a general principle of administrative law that a regulatory authority is not required to respond to untimely comments, regardless of significance. *See In re Denver Regional Landfill South*, Petition No. VIII-2006-01, at 9-12 (Order on Petition) (Dec. 22, 2006) (untimely comments on issues outside of scope of reopening); *Reytblatt v. NRC*, 105 F.3d 715, 723 (D.C. Cir. 1997) ("We have determined that '[a]gencies are free to ignore ... late filings.'") (quoting *Personal Watercraft Indus. Ass'n v. Dept. of Commerce*, 48 F.3d 540, 543 (D.C. Cir. 1995)).

III. EPA DETERMINATIONS

A. Failure to Respond to Comments

The Petitioner contends generally that WDEQ failed to respond to comments submitted by the Petitioner and that WDEQ's grounds for not responding do not comply with the CAA and applicable requirements under the Act. Specifically, the Petitioner asserts that: 1) WDEQ in fact received the comments before the 5:00 p.m., April 18, 2011, deadline and was therefore obligated to respond to them; and 2) both the notice and WDEQ's practice, by requiring receipt of comments within 30 days, violate 40 C.F.R. § 70.7(h)(4) and a parallel Wyoming provision, Wyoming Air Quality Standards and Regulations (WAQSR), Ch. 6, § 3(d)(ix)(D). These claims are discussed in detail below.

1. The Comments Were Received by the Deadline

The Petitioner alleges that the comments were "in all likelihood" received by WDEQ before 5:00 p.m., April 18, 2011, and that WDEQ "cannot reasonably claim" otherwise. Petition at 2-3. The Petitioner bases this allegation on the arrival of the comments at the Cheyenne, Wyoming, postal unit at 2:45 a.m. on April 18, 2011. The USPS tracking slip designates this event as "Arrival at Unit," which, the Petitioner notes, is defined by the USPS as "the item was scanned at the final postal unit where delivery will take place." *Id.* at 3. In the Petitioner's view, the 28-hour period between arrival at the final postal unit and delivery to WDEQ at 7:01 a.m., April 19, 2011, is a "major lapse in time" that is "exceptionally odd, especially in Cheyenne, Wyoming, which is not a large town." *Id.* The Petitioner concludes that the comments were in fact "received" by WDEQ before 5:00 p.m., April 18, 2011, but for some reason, such as WDEQ's unavailability to accept

the comments, the comments were not considered by the USPS as "delivered" until April 19. *Id.*

EPA's Response: I deny the Petitioner's request for an objection on the basis that its comments were actually timely received by WDEQ. The Petitioner has failed to demonstrate that the comments were timely received by WDEQ, and by extension the Petitioner has not demonstrated that WDEQ's failure to consider the comments was in contravention of the CAA or any applicable requirement. The Petitioner's theory is contradicted by two items of direct evidence in the record: 1) WDEQ's statement that the comments did not arrive until the morning of April 19, 2011; and 2) the USPS tracking slip's confirmation of the arrival at 7:01 a.m., April 19, 2011. In opposition, the Petitioner offers only a circumstantial, speculative theory that is faulty for several reasons. For example, the Petitioner provides no indication that the USPS guarantees delivery to the recipient the same day as arrival at the final postal unit. In addition, the Petitioner does not explain why, under the Petitioner's theory, the USPS tracking slip would not indicate an attempted delivery on April 18. Petitioner's theory thus falls far short of meeting the demonstration burden, particularly in light of considerable and credible opposing evidence. *Cf. In re Los Medanos Energy Ctr.*, at 9 (Order on Petition) (May 24, 2004) ("Petitioners' allegation is too speculative to provide a basis for an objection to a title V permit."). The Petitioner has not demonstrated that the comments were received before 5:00 p.m., April 18, 2011. Therefore, the EPA denies the Petition with respect to this claim.

2. WDEQ's Notice Was Inconsistent with Title V and Wyoming Regulations

The Petitioner contends that Wyoming's notice, by requiring receipt of comments rather than submission of comments, by the close of the comment period, was inconsistent with title V and Wyoming regulations. Petition at 2-3. The Petitioner similarly contends that WDEQ's practice of requiring receipt rather than submission by the close of the comment period, as reflected in its refusal to consider the Petitioner's comments, is inconsistent with the same regulations. The Petitioner cites 40 C.F.R. § 70.7(h)(4), which requires permitting authorities to "provide at least 30 days for comment" on draft permits, and also cites the approved Wyoming title V regulation, WAQSR Ch. 6, § 3(d)(ix)(D), which requires WDEQ to "provide for a 30-day period for public comment" on draft operating permits. The Petitioner argues that the notice and WDEQ's practice violate these regulations by effectively shortening the comment period to less than thirty days, given the time necessary for postal mail to reach its destination. The Petitioner argues that the Petitioner submitted the comments within the thirty days by having them postmarked on the 29th day. In support of this argument the Petitioner states that the "EPA regularly interprets deadlines under [t]itle V based on postmark dates." As an example, the Petitioner offers one title V order in which the EPA determined timeliness of a title V petition based on the postmark.[2] The Petitioner provides no additional support for the Petitioner's claim that Wyoming's practice of requiring receipt of comments within 30 days of public notice is not adequate.

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[2] Petition at 4 (citing *In the Matter of Georgia Power Company Bowen Steam-Electric Generating Plant, et. al.*, Petitions IV-2002-3 and IV-2002-6 at 7 (Order on Petition) (March 15, 2006)).

EPA's Response: For the reasons given below, I deny the Petition with respect to this issue. The EPA finds that the Petitioner's argument does not demonstrate a defect with respect to WDEQ's public participation process. As noted earlier, neither CAA § 502(b)(6) nor the federal title V regulations at 40 C.F.R. § 70.7(h) require a particular means by which public comments must be received. Therefore, permitting authorities have some flexibility to develop their own procedures for submission and receipt of public comments, so long as the procedures are reasonable, adequate, and satisfy the minimum elements required under the Act. The Petitioner does not address—or for that matter even acknowledge the existence of—the other available means of submitting comments, such as facsimile, hand delivery, same-day courier delivery and next-day delivery options. All of these means of delivery other than postal mail, available to the Petitioners and other members of the public consistent with Wyoming's public notice on March 17, 2011, provided for more than thirty days to comment, consistent with the CAA, the federal title V regulations, and Wyoming's approved title V program. For example, a comment could have been faxed on the morning of April 18, 2011, a full 32 days after the notice was published, and still would have been timely received. Parties also could have emailed their comments on the last day of the comment period to a local resident for hand delivery to the agency. The Petitioner does not address these other means of delivery that were consistent with Wyoming's public notice, and fails to demonstrate that they were not available or were not "adequate" and "reasonable." *See* CAA § 502(b)(6) (requiring "adequate, streamlined, and reasonable procedures"); *see also* 40 C.F.R. § 70.7(h) (requiring "adequate" procedures). As a result, even allowing *arguendo* the Petitioner's position with respect to comments sent by postal mail, the Petitioner has still failed to demonstrate that the public was not provided thirty days to comment by other means.

The Petitioner's argument with respect to the EPA's use of the postmark is also unavailing. Neither 40 C.F.R. § 70.7(h)(4) nor Wyoming's parallel provision, WAQSR, Ch. 6, § 3(d)(ix)(D), specify that the postmark must be used to determine timeliness; instead, they both merely require WDEQ to provide thirty days for comment. Wyoming could reasonably have decided that Wyoming's approach was preferable because it allows the permitting authority to know for certain by a specific date and time the universe of comments it will need to address. That the EPA has chosen, at its discretion, to use the postmark to determine timeliness of petitions under 40 C.F.R. § 70.8(d) does not compel permitting authorities to similarly do so for comments on draft permits. The Petitioner provides no authority to the contrary. Instead, the Petitioner's argument for requiring use of the postmark reverts to the Petitioner's argument that WDEQ did not "provide" thirty days for comment. As discussed above, that argument is insufficient to demonstrate that the Permit was not issued in compliance with the CAA. The Petitioner has failed to demonstrate that Wyoming failed to provide for an adequate public comment period of at least 30 days consistent with 40 C.F.R. § 70.7(h)(4) and WAQSR, Ch. 6, § 3(d)(ix)(D).

Furthermore, pursuant to section 505(b)(2) of the CAA, a petition "shall be based only on objections to the permit that were raised with reasonable specificity during the public comment period provided by the permitting agency (unless the petitioner demonstrates in

the petition to the Administrator that it was impracticable to raise such objections within such period or unless the grounds for such objection arose after such period)." 42 U.S.C. § 7661d(b)(2). No parties raised the issue during the public comment period that WDEQ violated 40 C.F.R. § 70.7(h)(4) or the parallel Wyoming provision WAQSR, Ch. 6, § 3(d)(ix)(D), by publishing a notice that required receipt of comments by the stated deadline, rather than postmark by that deadline. *See* 42 U.S.C. §7661d(b)(2). Nor did the Petitioner make any demonstration in the petition that it was impracticable to raise an objection to the notice's deficiency during the comment period or that the grounds for an objection to the notice arose after the comment period. *See id.*; *see also In re Cash Creek Generation, LLC*, Petition No. IV-2010-4, at 7 (Order on Petition) (June 22, 2012); *cf. In re Cargill, Inc.*, 4 E.A.D. 31, 32 (May 18, 1992) (failure to comment on alleged defective public participation procedure for RCRA permit). The Petitioner does not argue that the notice was unclear with respect to its requirement of receipt by 5:00 p.m., April 18, 2011, and that the Petitioner therefore did not know to make an argument challenging the notice in its comments. To the contrary, the petition appears to provide that the Petitioner found WDEQ's directive that comments must be received by the deadline to be both unambiguous and facially unacceptable. Petition at 3 ("Although the published notice stated that comments were to be received by 5:00 p.m. on April 18, 2011, this notice . . . is contrary to [Wyoming's] own Title V permitting rules and 40 C.F.R. § 70.7(h)(4).").

As discussed above, the Petitioner has failed to demonstrate that the public (including the Petitioner) was not provided with thirty days to comment by adequate and reasonable means. The Petitioner has also failed to demonstrate that any unacceptable ambiguity or facial deficiency that the Petitioner had with the notice could not have been raised during the comment period. The EPA therefore denies the Petition with respect to this claim.

IV. CONCLUSION

For the reasons set forth above and pursuant to §505(b)(2) of the Clean Air Act and 40 C.F.R. §70.8(d), I hereby deny the petition from WildEarth Guardians requesting objection to the title V permit issued by WDEQ to CLF&P for the Wygen II Power Plant.

Dated: AUG 23 2012

Lisa P. Jackson
Administrator