

BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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| IN THE MATTER OF |) | |
| |) | |
| SOUTHWESTERN ELECTRIC POWER |) | |
| COMPANY |) | PETITION NUMBER VI-2014-01 |
| |) | |
| H.W. PIRKEY POWER PLANT |) | |
| HARRISON COUNTY, TEXAS |) | |
| PROPOSED PERMIT NUMBER |) | ORDER RESPONDING TO THE |
| O31 |) | PETITIONERS' REQUESTS THAT THE |
| |) | ADMINISTRATOR OBJECT TO THE |
| ISSUED BY THE TEXAS COMMISSION |) | ISSUANCE OF STATE OPERATING |
| ON ENVIRONMENTAL QUALITY |) | PERMIT |

**ORDER GRANTING IN PART AND DENYING IN PART PETITION FOR
OBJECTION TO PERMIT**

I. INTRODUCTION

On October 30, 2014, the United States Environmental Protection Agency (EPA) received a Petition from the Environmental Integrity Project (EIP) and Sierra Club (Petitioners) pursuant to section 505(b)(2) of the Clean Air Act (Act or CAA), 42 U.S.C. § 7661d(b)(2) and 40 C.F.R. § 70.8(d) and 30 Texas Administrative Code (T.A.C.) § 122.360. The Petition requests that the EPA object to the title V operating permit (Permit No. O31) issued by the Texas Commission on Environmental Quality (TCEQ) to the Southwestern Electric Power Company (SWEPCO) H.W. Pirkey Power Plant (Pirkey Plant), located in Hallsville, Harrison County, Texas.

II. STATUTORY AND REGULATORY FRAMEWORK

A. Title V Permits

Section 502(d)(1) of the CAA, 42 U.S.C. § 7661a(d)(1), requires each state to develop and submit to the EPA for approval an operating permit program that meets the requirements of title V of the CAA and the implementing regulations at 40 C.F.R. part 70. The EPA granted interim approval to Texas for the title V (part 70) operating permits program on June 25, 1996. 61 *Fed. Reg.* 32693. The EPA granted full approval to Texas for its operating permit program on December 6, 2001. 66 *Fed. Reg.* 66318. The EPA-approved program is found in 30 T.A.C. Chapter 122.

All major stationary sources of air pollution and certain other sources are required to apply for title V operating permits that include emission limitations and other conditions as necessary to assure compliance with applicable requirements of the CAA, including a Prevention of Significant Deterioration (PSD) permit. CAA §§ 502(a) and 504(a), 42 U.S.C. §§ 7661a(a) and

7661c(a). The title V operating permit program generally does not impose new substantive air quality control requirements, but does require permits to contain adequate monitoring, recordkeeping, reporting, and other requirements to assure sources' compliance with applicable requirements. 57 *Fed. Reg.* 32250, 32251 (July 21, 1992). One purpose of the title V program is to "enable the source, States, the EPA, and the public to understand better the requirements to which the source is subject, and whether the source is meeting those requirements." *Id.* Thus, the title V operating permit program is a vehicle for ensuring that air quality control requirements are appropriately applied to facility emission units and for assuring compliance with such requirements.

B. Review of Issues in a Petition

State and local permitting authorities issue title V permits pursuant to the EPA-approved title V programs. Under CAA § 505(a), 42 U.S.C. § 7661d(a), and the relevant implementing regulations found at 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 the EPA determines that the permit is not in compliance with applicable requirements of the Act. CAA § 505(b)(1), 42 U.S.C. § 7661d(b)(1); *see also* 40 C.F.R. § 70.8(c) (providing that the EPA will object if the EPA determines that a permit is not in compliance with applicable requirements or requirements under 40 C.F.R. part 70). If the EPA does not object to a permit on its own initiative, § 505(b)(2) of the Act and 40 C.F.R. § 70.8(d) provide that any person may petition the Administrator, within 60 days of the expiration of the EPA's 45-day review period, to object to the permit.

The 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). CAA § 505(b)(2), 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d). In response to such a petition, the Act requires the Administrator to issue an objection if a petitioner demonstrates to the Administrator that a permit is not in compliance with the requirements of the Act. CAA § 505(b)(2), 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(c)(1); *see also New York Public Interest Research Group, Inc. (NYPIRG) v. Whitman*, 321 F.3d 316, 333 n.11 (2nd Cir. 2003). Under § 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); *WildEarth Guardians v. EPA*, 728 F.3d 1075, 1081–82 (10th Cir. 2013); *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. In evaluating a petitioner's claims, the EPA considers, as appropriate, the adequacy of the permitting authority's rationale in the permitting record, including the response to comments (RTC) document.

The petitioner's demonstration burden is a critical component of CAA § 505(b)(2), 42 U.S.C. § 7661d(b)(2). As courts have recognized, CAA § 505(b)(2), 42 U.S.C. § 7661(b)(2), contains both a "discretionary component," to determine whether a petition demonstrates to the

Administrator that a permit is not in compliance with the requirements of the Act, and a nondiscretionary duty to object where such a demonstration is made. *NYPIRG*, 321 F.3d at 333; *Sierra Club v. Johnson*, 541 F.3d at 1265–66 (“[I]t is undeniable [CAA § 505(b)(2)] also contains a discretionary component: it requires the Administrator to make a judgment whether a petition demonstrates a permit does not comply with clean air requirements.”). Courts have also made clear that the Administrator is only obligated to grant a petition to object under CAA § 505(b)(2) if the Administrator determines that the petitioners have demonstrated that the permit is not in compliance with requirements of the Act. *See, e.g., Citizens Against Ruining the Environment*, 535 F.3d at 667 (stating § 505(b)(2) “clearly obligates the Administrator to (1) determine whether the petition demonstrates noncompliance and (2) object if such a demonstration is made”) (emphasis added); *NYPIRG*, 321 F.3d at 334 (“§ 505(b)[2] of the CAA provides a step-by-step procedure by which objections to draft permits may be raised and directs the EPA to grant or deny them, depending on whether non-compliance has been demonstrated.”) (emphasis added); *Sierra Club v. Johnson*, 541 F.3d at 1265 (“Congress’s use of the word ‘shall’ ... plainly mandates an objection whenever a petitioner demonstrates noncompliance.”) (emphasis added). When courts review the EPA’s interpretation of the ambiguous term “demonstrates” and its determination as to whether the demonstration has been made, they have applied a deferential standard of review. *See, e.g., Sierra Club v. Johnson*, 541 F.3d at 1265–66; *Citizens Against Ruining the Environment*, 535 F.3d at 678; *MacClarence*, 596 F.3d at 1130–31. A more detailed discussion of the petitioner demonstration burden can be found in *In the Matter of Consolidated Environmental Management, Inc. – Nucor Steel Louisiana*, Order on Petition Numbers VI-2011-06 and VI-2012-07 (June 19, 2013) (*Nucor II Order*) at 4–7.

The EPA has looked at a number of criteria in determining whether the petitioner has demonstrated noncompliance with the Act. *See generally Nucor II Order* at 7. For example, one such criterion is whether the petitioner has addressed the state or local permitting authority’s decision and reasoning. The EPA expects the petitioner to address the permitting authority’s final decision, and the permitting authority’s final reasoning (including the RTC document), where these documents were available during the timeframe for filing the petition. *See MacClarence*, 596 F.3d at 1132–33; *see also, e.g., In the Matter of Noranda Alumina, LLC*, Order on Petition No. VI-2011-04 (December 14, 2012) (*Noranda Order*) at 20–21 (denying title V petition issue where petitioners did not respond to state’s explanation in RTC or explain why the state erred or the permit was deficient); *In the Matter of Kentucky Syngas, LLC*, Order on Petition No. IV-2010-9 (June 22, 2012) (*2012 Kentucky Syngas Order*) at 41 (denying title V petition issue where petitioners did not acknowledge or reply to state’s RTC or provide a particularized rationale for why the state erred or the permit was deficient). Another criterion the EPA has examined is whether a petitioner has provided the relevant analyses and citations to support its claims. If a petitioner does not, the EPA is left to work out the basis for the petitioner’s objection, contrary to Congress’ express allocation of the burden of demonstration to the petitioner in CAA § 505(b)(2). *See MacClarence*, 596 F.3d at 1131 (“[T]he Administrator’s requirement that [a title V petitioner] support his allegations with legal reasoning, evidence, and references is reasonable and persuasive.”); *In the Matter of Murphy Oil USA, Inc.*, Order on Petition No. VI-2011-02 (September 21, 2011) (*Murphy Oil Order*) at 12 (denying a title V petition claim where petitioners did not cite any specific applicable requirement that lacked required monitoring). Relatedly, the EPA has pointed out in numerous orders that, in particular cases, general assertions

or allegations did not meet the demonstration standard. *See, e.g., In the Matter of Luminant Generation Co. – Sandow 5 Generating Plant*, Order on Petition Number VI-2011-05 (January 15, 2013) (*Luminant Sandow Order*) at 9; *In the Matter of BP Exploration (Alaska) Inc., Gathering Center #1*, Order on Petition Number VII-2004-02 (April 20, 2007) (*BP Order*) at 8; *In the Matter of Chevron Products Co., Richmond, Calif. Facility*, Order on Petition No. IX-2004-10 (March 15, 2005) (*Chevron Order*) at 12, 24. Also, if the petitioner did not address a key element of a particular issue, the petition should be denied. *See, e.g., In the Matter of Public Service Company of Colorado, dba Xcel Energy, Pawnee Station*, Order on Petition No. VIII-2010-XX (June 30, 2011) at 7–10; and *In the Matter of Georgia Pacific Consumer Products LP Plant*, Order on Petition No. V-2011-1 (July 23, 2012) at 6–7, 10–11, 13–14.

III. BACKGROUND

A. The H.W. Pirkey Power Plant

Located in Harrison County, Texas, the Pirkey Plant generates electricity through the combustion of coal or natural gas. Pirkey Plant Statement of Basis for the draft title V minor modification permit (2013 Draft Title V Permit) (Draft Statement of Basis), May 1, 2013, at 2. The Pirkey Plant utilizes one boiler to produce up to 721 megawatts (MW) of power. TCEQ Executive Director’s Response to Public Comments (TCEQ RTC), July 15, 2014, at 1. The Pirkey Plant is a major stationary source subject to the requirements of title V of the Act (42 U.S.C. §§ 7602 and 7661) and the EPA-approved title V program for Texas, codified at 30 T.A.C. Chapter 122. Draft Statement of Basis at 2.

B. Permit History

As discussed below, both the title V permit issued pursuant to the approved Texas title V regulations at 30 T.A.C. Chapter 122 and the New Source Review (NSR) permit issued pursuant to the approved Texas State Implementation Plan (SIP) at 30 T.A.C. § 116.160 are relevant to the issues raised in the Petition.

On February 3, 2012, the TCEQ issued revised NSR Permit 6269 (2012 NSR Permit). This 2012 NSR Permit revised the Maximum Achievable Emission Rates Table (MAERT) of the permit and included permit terms for requirements during periods of planned maintenance, startup, and shutdown (MSS).¹ As the 2012 NSR Permit states, the MAERT were set pursuant to the approved Texas PSD SIP at 30 T.A.C. § 116.160 and are based on Best Available Control Technology (BACT).

The TCEQ initially issued Pirkey’s title V permit (Permit No. O31) on March 31, 1999. Since initial issuance, the title V permit has had numerous minor revisions. The TCEQ issued a draft minor title V modification permit for Permit No. O31 on May 14, 2013 (2103 Draft Title V Permit). The 2013 Draft Title V Permit incorporated by reference the 2012 NSR Permit. The

¹ In its RTC on the 2013 Draft Title V Permit, the TCEQ refers to the 2012 NSR Permit revision as the MSS Amendment. The TCEQ subsequently revised NSR Permit 6269 on August 12, 2014. The 2014 NSR Permit is not incorporated by reference into the 2014 Proposed Title V Permit or the 2014 Final Title V Permit.

TCEQ published notice of the 2013 Draft Title V Permit on May 14, 2013. The EIP and the Sierra Club submitted comments to the TCEQ on the 2013 Draft Title V Minor Modification Permit on June 13, 2013. The TCEQ submitted the Proposed Title V Minor Modification Permit (2014 Proposed Title V Permit) and the RTC document to the EPA on July 22, 2014. The EPA's 45-day review period ended on September 5, 2014, and the EPA did not object to the 2014 Proposed Title V Permit. The TCEQ issued the Title V Minor Modification Permit on September 17, 2014 (2014 Title V Permit).

C. Timeliness of Petitions

Pursuant to the CAA, if the EPA does not object during its 45-day review period, any person may petition the Administrator within 60 days after the expiration of the 45-day review period to object. CAA § 505(b)(2), 42 U.S.C. § 7661d(b)(2). Thus, any petition seeking the EPA's objection to the 2014 Proposed Title V Permit was due on or before November 4, 2014. The Petition on the 2014 Title V Proposed Permit was dated October 30, 2014. The EPA finds the Petition was timely filed.

IV. EPA DETERMINATIONS ON THE ISSUES RAISED BY THE PETITIONERS

A. Petitioners' Claim 1. "Issues Raised During the Draft Permit Public Comment Period."

Pages seven through the top of page 10 include the first claim in the Petition, although additional background is provided in previous pages. The Petitioners' first claim is summarized below. The response to these issues is provided below.

Petitioners' Claim. The Petitioners claim generally that the 2014 Proposed Title V Permit, which incorporates the previously issued 2012 NSR Permit, "creates improper exemptions" from the 20 percent opacity limit in the approved Texas SIP at 30 T.A.C. § 111.111(a)(1)(B)² and the 0.3 lb/MMBtu particulate matter (PM) limit of the approved Texas SIP at 30 T.A.C. § 111.153(b) during planned MSS activities. Petition at 6-7. In support of this assertion, the Petitioners claim that Special Condition 18.B. of the 2012 NSR Permit "purports to create an exemption" to the 20 percent opacity limit of 30 T.A.C. § 111.111(a)(1)(B); that the 2012 NSR Permit authorizes Pirkey to emit 1457 lbs/hr of PM during periods of planned MSS, a level at which the Petitioners claim would exceed the PM limit at 30 T.A.C. § 111.153(b); and that Special Condition 18.D. makes it clear that Pirkey is "exempted" from the SIP opacity and PM limits of 30 T.A.C. §§ 111.111(a)(2)(B) and 111.153(b) during periods of planned MSS. *Id.* at 5. The Petitioners claim that these SIP opacity and PM limits are applicable requirements of the CAA and that the 2014 Proposed Title V Permit, by incorporating the 2012 NSR Permit, fails to assure compliance with these requirements.

The Petitioners also claim that the TCEQ's response to comment on this issue, which was raised during the public comment period for the 2013 Draft Title V Permit, did not address Petitioners'

² The Petitioners cite to 30 T.A.C. § 111.111(a)(2)(B) as the authority for the 20 percent opacity limit in the Texas SIP. However, the relevant SIP opacity limit is provided in 30 T.A.C. § 111.111(a)(1)(B).

concerns described above. Specifically, referring to the TCEQ's Response to Comment 1 of the RTC, the Petitioners point out that the TCEQ relied on an EPA-approved SIP rule, 30 T.A.C. § 101.221(d), as the basis for the alternative opacity and PM limits provided in the 2012 NSR Permit for periods of planned MSS. *Id.* at 8-9. In further support of their claim, the Petitioners cite to the EPA's approval of 30 T.A.C. § 101.221(d) into the Texas SIP, which stated in relevant part "the State may not exempt a source from complying with any requirement of the federally-approved SIP." *Id.* at 9 n.33 (citing to 75 Fed. Reg. 68989, 68998 (2010), a final rule in which the EPA partially approved and partially disapproved certain revisions into the Texas SIP ("2010 Texas SIP Approval")). Further, the Petitioners assert that in "TCEQ's on-the-record interpretation of [30 T.A.C. § 101.221(d)] with respect to SIP requirements[,] 'the TCEQ agrees that this rule cannot be used by the agency to grant any requested relief from compliance with any State Implementation Plan requirements.'" *Id.* n.32. The Petitioners assert that the CAA "forbids state permitting agencies from issuing permits that modify SIP requirements." *Id.* at 7 n.21 (citing to 42 U.S.C. § 7410(i)). The Petitioners further assert that the 20 percent SIP opacity limit and the 0.3 lb/MMBtu PM SIP limit apply at all times, including during periods of planned MSS. In support of their petition, the Petitioners assert, among other things, that: (1) 30 T.A.C. §§ 111.111(a)(2)(B) and 111.153(b) do not provide any exception for planned MSS events; and that (2) "these are SIP limits and SIP limits are not subject to exemptions during maintenance, startup, shutdown, and malfunction activities." *Id.* at 8 n.29. The Petitioners also state "EPA's long standing position ... that it is not appropriate to provide exemptions from compliance with emission limits in SIPs that are developed for the purpose of demonstrating how to attain and maintain the public health-based NAAQS." *Id.* (quoting 75 Fed. Reg. at 68992).

The Petitioners also claim that it was inappropriate for the TCEQ to use its title V minor modification permit provisions to incorporate terms and conditions of the 2012 NSR Permit "that purport to create exemptions to Texas SIP requirements" into the title V permit. The Petitioners state that the SIP opacity and PM limits of 30 T.A.C. §§ 111.111(a)(2)(B) and 111.153(b) are applicable title V requirements, and under the approved Texas title V rules at 30 T.A.C. § 122.215 and the federal title V regulations at 40 C.F.R. § 70.7(e)(2), a minor modification cannot be used for revisions that would "violate an applicable requirement." Petition at 7-8.

With regard to the remedy, the Petitioners request that the title V permit be revised to state, "any condition in any incorporated NSR permit that purports to modify an applicable requirement contained in the Texas SIP or a federal rule is ineffective and does not excuse non-compliance with the requirement." *Id.* at 9-10. The Petitioners also request that the statement of basis for the title V permit clarify that "SIP limits apply at all times, regardless of what may be indicated in NSR permits incorporated by reference into the title V permit." *Id.*

EPA's Response. The EPA is responding to the entirety of Claim 1 together. For the reasons described below, the EPA grants the Petition on this claim.

Relevant Legal Background

In support of the EPA's response to Claim 1, below is a brief overview of the relevant legal background related to this claim. Claim 1 involves three provisions of the Texas SIP. These three SIP provisions are 30 T.A.C. § 111.111(a)(1)(B), 30 T.A.C. § 111.153(b), and 30 T.A.C.

§ 101.221(d). The first SIP provision, 30 T.A.C. § 111.111(a)(1)(B), regards visible emissions and requires that “Opacity shall not exceed 20% averaged over a six-minute period for any source on which construction was begun after January 31, 1972.” The second SIP provision, 30 T.A.C. § 111.153(b), requires that “no person may cause, suffer, allow, or permit emissions of particulate matter from any solid fossil fuel-fired steam generator to exceed 0.3 pound of total suspended particulate per million Btu heat input, averaged over a two-hour period.” Neither 30 T.A.C. § 111.111(a)(1)(B) nor 30 T.A.C. § 111.153(b) provide for the establishment of alternative standards during periods of planned MSS.³ As required by the federal title V regulations at 40 C.F.R. §§ 70.2 and 70.6(a)(1) and the approved Texas title V program at 30 T.A.C. §§ 122.142(b)(2)(A) and 122.10, these two SIP rules are title V applicable requirements for which the relevant emission limitations and standards must be included in the title V permit. See 40 C.F.R. § 70.6(a)(1).

The EPA also approved into the Texas SIP the third provision, 30 T.A.C. § 101.221(d), based on the conditions that EPA specified in its 2010 Texas SIP Approval. 75 *Fed. Reg.* 68989 (November 10, 2010). As the EPA stated in that final action, 30 T.A.C. § 101.221(d) may not be used to exempt sources from federal requirements, including requirements approved into the SIP. *Id.* at 68998. Rather, as explained in that final action, EPA approval is required for any source-specific alternative to an emission limit in an approved SIP rule. 75 *Fed. Reg.* at 68995. The EPA noted that “[the Agency’s] long-standing position has been that States may not include in their SIPs provisions that allow a State Director or Board to modify the federally applicable terms of the SIP without review and approval by the EPA. This is because the emission reduction requirements in the SIP are relied on to attain and maintain the NAAQS, and exemptions or modifications to those requirements could undermine this fundamental purpose of the SIP.” *Id.* at 68998. The TCEQ’s approved SIP includes 30 T.A.C. §§ 111.111(a)(1)(B) and 111.153(b). Therefore, when identifying applicable requirements under the CAA, the provisions of 30 T.A.C. § 101.221(d) are not a basis under federal law for establishing alternative emission limits to the 20 percent opacity requirement in 30 T.A.C. § 111.111(a)(1)(B) or to the 0.3 lb/MMBtu PM emission limit in 30 T.A.C. § 111.153(b) during periods of planned MSS. Further, As the EPA explained in its 2010 Texas SIP Approval, “maintenance activities can and should be scheduled during process shutdown.” *Id.* at 68992.

The permit record for the 2012 NSR Permit indicates that the 1457 lb/hr PM/PM10/PM2.5 limit during periods of planned MSS was established pursuant to the EPA-approved Texas PSD

³ The Petitioners assert that the SIP opacity and PM limits at 30 T.A.C. §§ 111.111(a)(1)(B) and 111.153(b) apply at all times. Petition at 8. With regard to the SIP opacity limit, the Petitioners’ assertion may conflict with another provision at 30 T.A.C. § 111.111. Specifically, 30 T.A.C. § 111.111(a)(1)(E), which the EPA has approved into the Texas SIP, states that “[v]isible emissions during the cleaning of a firebox or the building of a new fire, soot blowing, equipment changes, ash removal, and rapping of precipitators may exceed the limits set forth in this section for a period aggregating not more than six minutes in any 60 consecutive minutes, nor more than six hours in any 10-day period.” However, while this provision may allow exceedance of the opacity limit at 30 T.A.C. § 111.111(a)(1)(B) under the activities specified, it does not broadly exempt the Pirkey Plant from complying with the opacity limit during periods of planned MSS. To the extent that some or all of the events specified in 30 T.A.C. § 111.111(a)(1)(E) occur during planned MSS, we are aware of no indication that the list includes all activities that occur during planned MSS. In its RTC document, the TCEQ identified 30 T.A.C. § 101.221(d), not 111.111(a)(1)(E), as the authority for establishing the alternative emission limits and opacity limits during startup and shutdown in the 2012 NSR permit. TCEQ RTC at Response 1.

program at 30 T.A.C. § 116.160 and intended by the TCEQ to be an alternative limit for MSS periods based on the application of the BACT. Thus, the following information regarding the PSD program is also relevant in considering the Petitioners' claims. Sections 165(a)(4) and 169(3) of the CAA, 42 U.S.C. §§ 7475(a)(4) and 7479(3), require that a PSD permit include emissions limitations based on the application of BACT, which is derived on a case-by-case basis considering several factors. The EPA has consistently stated that a BACT limitation must apply at all times and that PSD permits may not contain blanket exemptions from such limits during periods of startup, shutdown, or malfunction. *See, In re Cash Creek Generation, LLC*, Order on Petition No. IV-2010-4 (June 15, 2012) (2012 Cash Creek Order), at 21 (stating that BACT limits apply at all times, including during periods of shutdown and malfunction events.); *In re Louisville Gas and Electric Co.*, Order on Petition (Sept. 10, 2008) (LG&E Order), at 10 (stating that "[a] PSD BACT limit must apply at all times"); *see also, In re Indeck-Elwood, LLC*, 13 E.A.D. 126, 174 (EAB 2006) (stating that "EPA has, since 1977, disallowed automatic or blanket exemptions for excess emission during startup, shutdown, maintenance, and malfunction"); *In re Tallmadge Generating Station*, PSD Appeal No. 0-12, at 24 (EAB 2003) (stating that "BACT requirements cannot be waived or otherwise ignored during periods of startup and shutdown"). However, the EPA has also recognized that a PSD permit may contain secondary or alternative BACT limits that apply during periods of startup and shutdown when the permitting authority determines (based on the permitting record) that compliance with a primary BACT limit is infeasible during periods of operation when a source is starting up or shutting down. Such alternative or secondary BACT limits must be justified as BACT for the alternative or secondary operating conditions to which it applies. *LG&E Order* at 10; *In re Prairie State Generating Co.*, 13 E.A.D. 1, 87 (EAB 2006); *In re RockGen Energy Center*, 8 E.A.D. 536, 554 (EAB 1999). Whether they are primary or alternative limits, the BACT limits in a PSD permit are applicable requirements and, therefore, must be accounted for in a title V permit. *See* 40 C.F.R. §§ 70.2, 70.6(a)(1).

The TCEQ's approved PSD program at 30 T.A.C. § 116.160(a) requires that major stationary sources, such as Pirkey, comply with the PSD regulations of 40 C.F.R. § 52.21. Regarding BACT, CAA Section 169(3), 42 U.S.C. § 7479(3), and 40 C.F.R. § 52.21(b)(12) provide that the application of BACT cannot result in emissions of any pollutant that would exceed the emissions allowed by any applicable standard under 40 C.F.R. parts 60 and 61.

TCEQ's Response to Comments on the Issues in Claim 1

In responding to comments regarding the issues described in this claim in the Petition, the TCEQ stated that the Texas SIP includes 30 T.A.C. § 101.221(d), which "'provides that sources emitting air contaminants that cannot be controlled or reduced due to a lack of technological knowledge may be exempt from the applicable rules when so determined and ordered by the Commission,' and allows the Commission to 'specify limitations and conditions as to the operation of such exempt sources.'" TCEQ RTC at Response to Comment 1. The TCEQ explained that the 2012 NSR Permit "does not modify permit requirements in a way that violates the SIP," but specifies limitations and conditions for certain specific operational phases. *Id.* The TCEQ explained that the 2012 NSR Permit specifies the "emission limits and opacity limits" that apply during startup and shutdown, stating that during periods of startup and shutdown the boiler passes through phases of operation where it is unsafe to operate the electrostatic precipitator

(ESP), and there is no technological knowledge available to ensure safe operation of the ESP during these specific periods. *Id.* The TCEQ's response did not identify the authority for applying the alternative limits and conditions during planned maintenance. With regard to maintenance activities of the 2012 NSR Permit, the TCEQ stated that they resulted in small quantities of emissions, generally occur infrequently, and usually last for short periods of time. They also stated that the nature and frequency of these activities makes testing difficult and relevant data from similar facilities could be used to calculate emissions. TCEQ RTC at Response to Comment 2.

The TCEQ stated that the 2012 NSR Permit was issued in a "SIP-approved program and does not require additional EPA approval for it to be incorporated in Title V FOP No. 031 as a federally enforceable condition." *Id.* The TCEQ further responded that the incorporation of the 2012 NSR Permit into the 2014 Proposed Title V Permit meets the requirements of the approved Texas title V program at 30 T.A.C. § 122.215 as the 2014 Proposed Title V Permit, including the terms and conditions of the 2012 NSR Permit incorporated by reference, does not violate any applicable requirements. *Id.*

EPA's Analysis

For the reasons explained below, the EPA finds that the Petitioners have demonstrated that the 2014 Title V Permit and permit record are unclear regarding whether the SIP opacity and PM limits of 30 T.A.C. §§ 111.111(a)(1)(B) and 111.153(b) apply during periods of planned MSS, as required.

Under the federal title V regulations at 40 C.F.R. §§ 70.2 and 70.6(a)(1) and the approved Texas title V program at 30 T.A.C. §§ 122 and 122.142(b)(2)(A), the Texas SIP opacity and PM limits at 30 T.A.C. §§ 111.111(a)(1)(B) and 111.153(b), respectively, are title V applicable requirements. Therefore, the 2014 Title V Permit must include relevant emission limitations and standards for those provisions. As required, the 2014 Title V Permit includes the 20 percent opacity limit of 30 T.A.C. § 111.111(a)(1)(B) and the 0.3 lb/MMBtu PM limit, averaged over a 2-hour period, in 30 T.A.C. § 111.153(b) as applicable requirements. 2014 Title V Permit at 37. Special Condition 3A(i) on page 3 of the 2014 Title V Permit also requires compliance with 30 T.A.C. § 111.111(a)(1)(B). The 2014 Title V Permit, on page 41, requires compliance with 30 T.A.C. § 111.153(b). Consistent with 30 T.A.C. §§ 111.111(a)(1)(B) and 111.153(b), these title V permit terms and conditions do not provide for alternative standards for these SIP opacity and PM limits during periods of planned MSS.

However, in addition to the above-referenced title V permit conditions on the SIP opacity and PM limits, the 2014 Title V Permit also incorporates provisions from the 2012 NSR Permit. As the Petitioners noted, the 2012 NSR Permit includes Conditions 18.B. and 18.D. Condition 18.B. allows opacity greater than 20 percent during periods of planned MSS, and Condition 18.D. states that "[f]or periods of MSS other than those subject to Paragraphs A-C of this condition, 30 T.A.C. §§ 111.111, 111.153, and Chapter 101, Subchapter F apply." Because Conditions 18.B. and 18.D., allow opacity and PM emissions during planned MSS to exceed the limits required under 30 T.A.C. §§ 111.111(a)(1)(B) and 111.153(b), these NSR permit conditions appear to

conflict with 30 T.A.C. §§ 111.111(a)(1)(B) and 111.153(b), which provide no such allowance during planned MSS.⁴

In its response to public comment on the proposed title V permit, the TCEQ appeared to identify 30 T.A.C. § 101.221(d) as the authority for the alternative opacity and PM limits provided in the 2012 NSR Permit for periods of planned MSS. However, as the EPA emphasized in the 2010 Texas SIP Approval, 30 T.A.C. § 101.221(d) does not provide for the setting of alternative limits during periods of planned MSS for federally applicable emission limits of regulations in the approved SIP. Federally applicable emission limits of the Texas SIP include the opacity and PM limits of 30 T.A.C. §§ 111.111 (a)(1)(B) and 111.153(b). In addition, the EPA explained in the 2010 Texas SIP Approval that EPA approval is required for any source-specific alternative to an emission limit in an approved SIP rule. 75 *Fed. Reg.* at 68995. However, in this case, no source-specific alternative emission limits to the federally applicable emission limits of 30 T.A.C. §§ 111.111(a)(1)(B) and 111.153(b) during periods of planned MSS have been submitted to the EPA for approval as a source-specific SIP revision.

The EPA finds that the 2014 Title V Permit is unclear as to whether the federally applicable opacity and PM emission limits of 30 T.A.C. §§ 111.111 (a)(1)(B) and 111.153(b) apply during periods of planned MSS, as required.

While it appears that the TCEQ identified 30 T.A.C. § 101.221(d) as the authority for the alternative opacity and PM limits provided in the 2012 NSR Permit for periods of planned MSS, the record for the 2012 NSR Permit indicates that the 1457 lb/hr PM/PM10/PM2.5 limits in the 2012 NSR Permit for periods of MSS are alternative BACT limits established pursuant to 30 T.A.C. § 116.160.⁵ As mentioned above, BACT limits (including alternative BACT limits) established in accordance with the EPA-approved Texas PSD program at 30 T.A.C. § 116.160, are applicable requirements of the CAA and must be accounted for in a title V permit. See 40 C.F.R. §§ 70.2 and 70.6(a)(1). Generally, the mere inclusion of both an alternative PM BACT limit and a SIP PM limit in a title V permit would not affect the status of the SIP limit since the title V permit would require compliance with both applicable requirements. However, in this case, Condition 18.D. of the 2012 NSR Permit appears to conflict with and, therefore, renders unclear the applicability of the SIP PM limit.⁶

For the reasons stated above, the EPA concludes that the Petitioners have demonstrated that the 2014 Title V Permit and permit record are unclear whether the SIP opacity and PM limits at 30

⁴ We note in footnote 3 that 30 T.A.C. § 111.111(a)(1)(E), which the EPA has approved into the Texas SIP, allows excess opacity emission under the activities specified in that provision. The provision, however, does not broadly allow excess opacity emissions during all planned MSS events and does not allow any excess PM emission in any event.

⁵ The first page of the 2012 NSR Permit states that the emission limits in the permit's MAERT are established pursuant to 30 T.A.C. §§ 116.116(b) and 116.160. The MAERT includes an alternative limit during periods of planned MSS of 1457 lb/hr of PM/PM10/PM2.5 during periods of planned MSS for the main boiler.

⁶ Unlike PM, the TCEQ did not identify another authority for the alternative opacity limits in the 2012 NSR permit. Opacity is not a regulated NSR pollutant subject to BACT for purposes of 40 C.F.R. § 52.21 or 30 T.A.C. § 116.160. Further, the New Source Performance Standards (NSPS) opacity regulation at 40 C.F.R. § 60.42(a), which is an applicable requirement for Pirkey, does not include alternative opacity standards for periods of planned startup and shutdown.

T.A.C. §§ 111.111(a)(1)(B) and 111.153(b) apply during periods of planned MSS, as required. Therefore, the Petitioners have demonstrated that the title V permit does not assure compliance with these applicable requirements.

The EPA also finds that the TCEQ's response in the RTC document to the public comment on issues in Claim 1 is inadequate because it fails to address the comment on the enforceability of the SIP opacity and PM limits at 30 T.A.C. §§ 111.111(a)(1)(B) and 111.153(b) during periods of MSS as a result of the incorporation of the 2012 NSR Permit. As an initial matter, the TCEQ's response makes no mention of these SIP limits at issue in the comment. Further, the TCEQ appears to justify its authority to issue the 2012 NSR Permit under 30 T.A.C. § 101.221(d), which is inconsistent with the record for the 2012 NSR Permit. The latter indicates that the 1457 lb/hr PM/PM10/PM2.5 alternative PM limits in the 2012 NSR Permit for periods of MSS are alternative BACT limits established pursuant to 30 T.A.C. § 116.160. In addition, as explained above, 30 T.A.C. § 101.221(d) does not authorize the TCEQ to exempt sources from, or provide alternative limits for, federal requirements (including SIP limits) during periods of planned MSS. In any event, EPA approval is required for any source-specific alternative limit that would exceed those limits approved into the SIP. *75 Fed. Reg.* at 68995. That has not occurred with respect to the special conditions at issue in the 2012 NSR Permit.

For the foregoing reasons, the EPA grants the Petition as to Claim 1.⁷

EPA's Direction to TCEQ

In responding to this objection, the EPA directs the TCEQ to revise Pirkey's 2014 Title V Permit to ensure that it requires that the opacity and PM limits of 30 T.A.C. §§ 111.111(a)(1)(B) and 111.153(b) apply during periods of planned MSS. The EPA also directs the TCEQ to revise the title V permit record accordingly.⁸ To the extent that the title V permit incorporates by reference conditions from an NSR permit, such incorporation may not supersede the opacity and PM limits of 30 T.A.C. §§ 111.111(a)(1)(B) and 111.153(b), which are distinct applicable requirements derived from the SIP. Because the SIP contains no source-specific exception, the title V permit must still ensure that the SIP opacity and PM limits apply during periods of planned MSS. The TCEQ may address the EPA's objection in various ways, including, but not limited to, revising only the title V permit. One option for addressing this objection would be to clarify the title V permit terms and conditions as described above.⁹

⁷ In the next section, the EPA directs the TCEQ to revise Pirkey's title V permit to clarify the applicability of 30 T.A.C. §§ 111.111(a)(1)(B) and 111.153(b). Because the TCEQ must again revise this title V permit, we do not see a need to address Petitioners' specific allegation that a title V minor revision was not the appropriate process for the previous permit revision. In revising the title V permit to respond to this Order, the TCEQ must follow the appropriate process described in its approved title V program.

⁸ However, we acknowledge that there may be certain planned MSS events during which the opacity limit at 30 T.A.C. § 111.111(a)(1)(B) may be exceeded, to the extent that such planned MSS events are specified at 30 T.A.C. § 111.111(a)(1)(E). *See* footnotes 3 and 4.

⁹ The EPA notes that the opacity requirements of 40 C.F.R. § 60.42(a) are separate applicable requirements from those of 30 T.A.C. § 111.111(a)(1)(B).

Another option to respond to this objection may be to revise the title V permit to incorporate the 2014 NSR Permit in lieu of the 2012 NSR Permit and also revise the 2014 NSR Permit to provide the necessary clarity and, thus, avoid potentially conflicting terms and conditions in the title V permit.¹⁰ To the extent the TCEQ elects to revise the 2014 NSR Permit and that permit continues to include alternative BACT limits for startup and shutdown periods, the TCEQ should ensure that its permitting record explains how those limits reflect BACT for the operating conditions to which they apply. We note that Condition 18.D. of the 2014 NSR Permit applies to planned maintenance, as well as startup and shutdown periods. While the EPA has recognized the permissibility of properly justified alternative BACT limits for periods of startup and shutdown, we have also stated that such limits are not justifiable for periods of scheduled maintenance or for malfunctions. Letter from Richard R. Long, Region 8 Air and Radiation Program, to Rick Sprott, Utah Dept. of Environmental Quality (June 13, 2005). As the EPA explained in its 2010 Texas SIP Approval, “maintenance activities can and should be scheduled during process shutdown.” *Id.* at 68992. Thus, to the extent the 2014 NSR Permit continues to include alternative BACT limits for periods of MSS, the TCEQ should address why it believes such alternative limits are needed for planned maintenance. In revising the title V permit to respond to this order, the TCEQ should follow the appropriate process described in its approved title V program. In responding to this order, the TCEQ should review the requirements of 40 § C.F.R. 70.8(d) and 30 T.A.C. § 122.360(h)(2).

B. Petitioners’ Claim 2. The Proposed Permit Must Clarify that Credible Evidence May be Used by Citizens to Enforce the Terms and Conditions of the Permit.

Petitioners’ Claim. The Petitioners claim that the 2014 Proposed Title V Permit must be revised to ensure that any credible evidence may be used to demonstrate noncompliance with applicable requirements in the permit. Petition at 10. For support, the Petitioners cite to the preamble for the Compliance Assurance Monitoring (CAM) rule and explain that “[w]hile the Proposed Permit does not contain language limiting the use of credible evidence, a recent Texas federal court ruling suggests that the mere absence of limiting language is not sufficient to protect the use of credible evidence” *Id.* The Petitioners cite to a decision from the U.S. District Court for the Western District of Texas¹¹ and quote a statement from that decision that “a concerned citizen is limited to the compliance requirements, as defined in the title V permit, when pursuing a civil lawsuit for CAA violations.” Petition at 10-11. The Petitioners claim that, “[t]o address this decision and to ensure that EPA’s Credible Evidence and CAM rules are properly implemented in Texas,” the Administrator should require the TCEQ to revise the 2014 Proposed Title V Permit to include a condition that states, “[n]othing in this permit shall be interpreted to preclude the use of any credible evidence to demonstrate non-compliance with any term of this permit.” *Id.* at 11.

EPA’s Response. For the reasons described below, the EPA denies the Petition on this claim.

¹⁰ The EPA observes that the 2012 NSR Permit appears to include certain terms and conditions related to the previously referenced PM and opacity SIP provisions. The basis for the inclusion of these provisions in the 2012 NSR Permit is unclear and such inclusion is likely unnecessary.

¹¹ Petition at 11, n.41 (citing *Sierra Club v Energy Future Holdings Corp.*, No. W-12-CV-108 (W.D. Tex. February 10, 2014).

Consistent with the CAA, the EPA, states, and citizens can use any credible evidence to prove compliance and non-compliance with the CAA, including compliance and non-compliance with title V permits. *See* Credible Evidence Revisions, 62 *Fed. Reg.* 8314, 8318 (February 24, 1997). The CAA authorizes the EPA, states, and citizens to bring enforcement actions against a source for violation of any requirement or prohibition of an applicable implementation plan or permit, including a title V permit. 42 U.S.C. §§ 7413(a), 7604(a)(1), 7604(f)(4). Section 113(e) of the CAA specifically authorizes the use of "any credible evidence" in federal enforcement and citizen suits. 42 U.S.C. § 7413(e). Consistent with the CAA, the EPA interprets the 2014 Title V Permit to allow the EPA, states, and citizens to use any credible evidence to determine compliance with and/or enforce an applicable requirement of the permit. Because the authority to use credible evidence is found in the CAA, the absence of language regarding the use of credible evidence in a title V permit does not preclude its use in demonstrating compliance. *See, e.g., In the Matter of Motiva Enterprises* Order on Petition Number: II-2002-05 (September 24, 2004). However, a title V permit may not preclude any entity, including the EPA, citizens or the state, from using any credible evidence to enforce emissions standards, limitations, conditions, or any other provision of a title V permit. *See, e.g., Compliance Assurance Monitoring*, 62 *Fed. Reg.* 54900, 54907-08 (October 22, 1997). The EPA has previously denied petition claims regarding credible evidence where the petitioner did not demonstrate that the permit contains provisions that expressly exclude the use of credible evidence. *See, e.g. In the Matter of Louisiana Pacific Corporation, Tomahawk, Wisconsin*, Order on Petition No. V-2006-3 (November 5, 2007) at 11-12.

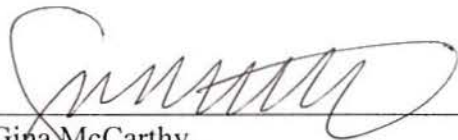
In this case, as the Petitioners state, "the proposed permit does not contain language limiting the use of credible evidence." Petition at 10. Further, the Texas title V permitting program contains provisions specifically authorizing the use of credible evidence. *See* 30 T.A.C. § 122.132 (d)(e)(4)(B) (requiring a compliance plan to include "... for all emission units addressed in the application, an indication of the compliance status with respect to all applicable requirements, based on any compliance method specified in the applicable requirements and any other credible evidence or information); *see also*, 30 T.A.C. § 122.10 (defining "deviation" as "any indication of noncompliance with a term or condition of the permit as found using compliance method data from monitoring, recordkeeping, reporting, or testing required by the permit and any other credible evidence or information). Neither of these provisions, nor the 2014 Title V Permit, contain any language limiting the use of credible evidence by the EPA, states or citizens.

For these reasons, the EPA denies the Petition with respect to Claim 2.

V. CONCLUSION

For the reasons set forth above and pursuant to CAA § 505(b)(2), 42 U.S.C. 7661d(b)(2), 30 T.A.C. § 122.360, and 40 C.F.R. § 70.8(d), I hereby grant in part and deny in part the Petition as to the claims describe herein.

Dated: 2/3/16



Gina McCarthy,
Administrator.