

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

BUNGE MILLING, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	PCB No. 2023-92
ILLINOIS ENVIRONMENTAL PROTECTION	)	(Permit Appeal – Air)
AGENCY	)	
	)	
Respondent.	)	

**NOTICE OF FILING**

To: See Attached Service List (Via Electronic Filing)

PLEASE TAKE NOTICE that the undersigned filed today with the Office of the Clerk of the Illinois Pollution Control Board by electronic filing the following RESPONDENT’S RESPONSE TO PETITIONER’S REQUEST FOR STAY, copy of which is attached hereto and hereby served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION  
AGENCY

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Dated: March 13, 2023

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ILLINOIS ENVIRONMENTAL PROTECTION	)	(Permit Appeal – Air)
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**RESPONDENT’S RESPONSE TO PETITIONER’S REQUEST FOR STAY**

NOW COMES Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY (“Illinois EPA”), by and through its attorney, KWAME RAOUL, Attorney General of the State of Illinois, and for its RESPONSE to Petitioner’s Request for Stay of Contested Conditions, hereby states as follows:

**INTRODUCTION**

On February 13, 2023, Bunge Milling, Inc. (“Petitioner”) filed a Petition for Review of Federally Enforceable State Operating Permit And Request for Stay of Contested Conditions (“Petition”) seeking review of certain conditions contained in Federally Enforceable State Operating Permit 96020027 (“Permit”) issued by Illinois EPA to Bunge Milling, Inc. on January 4, 2023. In Petitioner’s Request for Stay portion of the Petition, Petitioner seeks a “stay of the contested conditions described in Section II of this Petition – i.e., Conditions 9(a), 12(c) (but only as to the challenged emission limits), 12(f), 23(a)(vii) and 23(a)(viii), 18(a)(ii), and 18(c) - during the pendency of this appeal.” (Permit Appeal at ¶ 68.) Petitioner concludes by stating that a “stay of the contested conditions will not result in any environmental harm. While the contested conditions are stayed, Bunge will continue operating in compliance with applicable emission

limits, as well as monitoring, recordkeeping and reporting requirements outlined in the uncontested provisions of the Permit.” (Permit Appeal at ¶ 75).

Illinois EPA does not object to a stay of four of the seven conditions contested by Petitioner - Conditions 9(a), 12(c), 18(a)(ii), and 18(c). In not objecting to Petitioner’s Request For Stay as to the contested provisions of Conditions 9(a), 12(c), 18(a)(ii), and 18(c), Illinois EPA reserves all arguments as to the merits of the permit appeal. *Cf. Ill. Power Generating Co. (Newton Power Station) v. IEPA*, PCB 16-60, slip. op. at 3 (Dec. 17, 2015) (quoting *Motor Oils Refining Co. v. IEPA*, PCB 89-116, slip. op. at 2 (Aug. 31, 1989) (in granting the unopposed stay, “the Board ‘makes no findings on the merits of the permit appeal ...’”).

Illinois EPA objects to Petitioner’s request that Condition 12(f) be stayed. Condition 12(f) provides that compliance with the annual emission limits in Conditions 12(a) through 12(e) of the Permit be based on a 365-day rolling total. Any stay of this averaging period would render the annual emission limits for all 135 emission units at the source unenforceable as no other averaging period is provided by Condition 12(f) of the Permit and, consequently, the stay would increase the likelihood of environmental harm. Illinois EPA additionally objects to any stay of Conditions 23(a)(vii) and 23(a)(viii) that require records be maintained that would show calculation of emissions based on “hours/day” and “daily” for the same reason – a stay of the requirement to maintain records necessary to demonstrate compliance with the annual emission limits, based on a 365-day rolling total, would increase the likelihood of environmental harm.

#### **STANDARD OF REVIEW**

Illinois law provides standards to help determine whether it is appropriate to grant a discretionary stay, including whether a certain and clearly ascertainable right needs protection, whether irreparable injury will occur without the stay, whether an adequate remedy at law exists, and whether there is a probability of success on the merits. *Bridgestone/Firestone Off Road Tire*

*Co. v. IEPA*, PCB 02-31, slip op. at 3 (Nov. 1, 2001). However, “[t]he likelihood of environmental harm should a stay be granted is of particular concern for the Board.” *Id.* (citing *Motor Oils Refining Co. v. IEPA*, PCB 89-116, slip op. at 2 (Aug. 31, 1989).

### ARGUMENT

**I. Petitioner’s request to stay Condition 12(f) should be denied because elimination of the averaging period necessary to ensure the enforceability of the annual emission limits in the Permit would create a likelihood of environmental harm.**

Conditions 12(a) through 12(e) of the Permit provide annual emission limits in tons per year for each of the 135 emission units at the source. These emission limits in conjunction with production or operational limits of the Permit have been set to restrict the potential to emit (PTE) of the facility below major source thresholds. Condition 12(f) requires that compliance with the annual emission limits in Conditions 12(a) through 12(e) be determined on a daily basis from the sum of the data for the current day plus the preceding 364 days (running 365 days total) (“365-day rolling total”). Petitioner requests that the Board stay the requirements of Condition 12(f). Petitioner claims that it would continue to operate in compliance with applicable emission limits during the pendency of the appeal, but any stay of Condition 12(f) would eliminate the means necessary to ascertain the compliance status of the emission units at the source with the corresponding annual emission limits. While the Petition requests that compliance with the annual emission limits of the Permit be based on a 12-month rolling total instead of a 365-day rolling total, the Permit does not provide this alternative averaging period. Thus, any stay of Condition 12(f) would remove the averaging period altogether from the Permit and would render the annual emission limits of the Permit unenforceable.

Emission limits restricting annual PTE must generally be enforceable as a practical matter. *See*, definition of “potential to emit” in Section 39.5(1) of the Act, 415 ILCS 5/39.5(1) (2020); *see*

also, *United States Environmental Protection Agency (USEPA) Guidance on Limiting Potential to Emit in New Source Permitting*, dated June 13, 1989, included as Attachment A. “A permit is enforceable as a practical matter (or practically enforceable) if permit conditions establish a clear legal obligation for the source [and] allow compliance to be verified.” *USEPA Guidelines: Practical Enforceability* dated September 9, 1999, included as Attachment B. Enforceability has generally been interpreted to mean that the permit contains appropriate averaging times, compliance verification procedures and recordkeeping requirements. For example, when assessing the enforceability of an emission limit to restrict PTE, the USEPA has stated that:

[T]he Clean Air Act and the implementing regulations allow for a flexible, case-by-case evaluation of appropriate methods for ensuring practical enforceability of PTE limits. The key consideration throughout these policy and guidance documents is whether the terms and conditions that limit the potential emissions are, in fact, enforceable as a practical matter.

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In order to be considered practically enforceable, an emission limit must be accompanied by terms and conditions that require a source to effectively constrain its operations as to not exceed the relevant emissions threshold. These terms and conditions must also be sufficient to enable regulators and citizens to determine whether the limit has been exceeded and, if so, to take appropriate enforcement action.

*In re Orange Recycling and Ethanol Production Facility, Pencor-Masada Oxynol, LLC* (USEPA Adm. Order, April 8, 2002), pages 5, 7, included as Attachment C.

Elsewhere, USEPA guidance such as the *New Source Review (NSR) Workshop Manual*<sup>1</sup>, plainly discusses the need for enforceable best available control technology (BACT) limits and, in particular, it provides that BACT emission limits must be practically enforceable and met on a continuous basis. A permit is enforceable that “contains appropriate averaging times, compliance verification procedures and recordkeeping requirements.” *NSR Workshop Manual* at B.56.

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<sup>1</sup> Available at <https://www.epa.gov/sites/default/files/2015-07/documents/1990wman.pdf>

If the Board grants a stay of the averaging period set forth in Condition 12(f), the Permit would no longer provide the necessary terms and conditions by which to ensure that the annual emission limits of the Permit are enforceable as a practical matter. Without information identifying the averaging time, the limit has not been appropriately defined for purposes of calculating compliance with the applicable emission limit. *USEPA Guidelines: Practical Enforceability* dated September 9, 1999, page III-57. The inability to determine compliance with the annual emission limits of the Permit would necessarily result in an increased likelihood of environmental harm. *See PQ LLC v. IEPA*, PCB 23-15 (Sep. 22, 2022) (finding that a stay of contested conditions would not result in an increased likelihood of environmental harm where Petitioner would continue to comply with its emissions limits). Petitioner seeks a stay that would eliminate the ability to assure that Petitioner complies with its annual emission limits. Therefore, Petitioner's request for a stay as to Condition 12(f) should be denied.

**II. Petitioner's request to stay Conditions 23(a)(vii) and 23(a)(viii) should be denied because elimination of these recordkeeping requirements to demonstrate compliance with the Permit's annual emission limits would create a likelihood of environmental harm.**

Conditions 23(a)(vii) and 23(a)(viii) require Petitioner to maintain records of total hours of operation of each baghouse (hours/day and hours/year) and daily and annual emissions of particulate matter (PM) and particulate matter with an aerodynamic diameter of 10 microns or less (PM<sub>10</sub>) from the source with supporting calculations (tons/month and tons/year) in order to demonstrate compliance with the conditions of the Permit. Petitioner asks the Board to stay Conditions 23(a)(vii) and 23(a)(viii) as part of Petitioner's request that references to "hours/day" or "daily" emissions be revised to "hours/month" or "monthly" emissions in order to align those provisions with Petitioner's proposed changes to Condition 12(f).

Petitioner's request to stay Conditions 23(a)(vii) and 23(a)(viii) presents the same problem as Petitioner's request to stay Condition 12(f). That is, Petitioner requests that the Board stay requirements that ensure compliance with the annual emission limits in Conditions 12(a) through 12(e) of the Permit. Eliminating the recordkeeping requirements of Conditions 23(a)(vii), and 23(a)(viii) would hinder both the Permittee's and the Illinois EPA's ability to ascertain compliance with the annual emission limits of the Permit and would thereby increase the likelihood of environmental harm. Petitioner's request for a stay as to Conditions 23(a)(vii), and 23(a)(viii) should be denied.

### CONCLUSION

Illinois EPA objects to a stay of the averaging period included within Condition 12(f) and the related recordkeeping requirements of Conditions 23(a)(vii) and 23(a)(viii) required to assess compliance with Petitioner's annual emission limits. A stay of Conditions 12(f), 23(a)(vii), and 23(a)(viii) would render the annual emission limits unenforceable as the Permit would no longer provide an averaging period and recordkeeping necessary to determine compliance with the annual emission limits for each of the 135 emission units at the source. As such, any stay would create an increased likelihood of environmental harm during the pending appeal.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL  
PROTECTION AGENCY

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
Washington, D.C. 20460

JUN 13 1989

MEMORANDUM

SUBJECT: Guidance on Limiting Potential to Emit in New Source Permitting

FROM: Terrell E. Hunt  
Associate Enforcement Counsel  
Air Enforcement Division  
Office of Enforcement and Compliance Monitoring

John S. Seitz, Director  
Stationary Source Compliance Division  
Office of Air Quality Planning and Standards

TO: Addressees

This memorandum transmits the final guidance on conditions in construction permits which can legally limit a source's potential to emit to minor or de minimis levels. We received many helpful comments on the January 24, 1989 draft of this guidance, and have incorporated the comments into the final document wherever possible. A summary of the major changes which have been made to the guidance in response to these comments is provided below.

Several commenters noted that the draft guidance used the term "federally enforceable" to mean both federally enforceable as defined in the new source regulations (40 C.F.R. Sections 52.21(b) (17), 51.165(a) (1) (xiv), 51.166(b) (17)), and enforceable as a practical matter. We have tried to distinguish the places where each term should be used, explained the relationship between the two terms, and indicated that in order to properly restrict potential to emit, limitations must be both federally enforceable as defined in the regulations and practically enforceable.

-2-

Some commenters requested that the section on averaging times for production limits be more specific as to when it is appropriate to use limitations which exceed a one month time basis. We have tried to explain why it is not possible to develop generic criteria for making this distinction, and to indicate situations where exceptions to the policy that production and operation limitations not exceed one month may be warranted.

There were some requests for a section on enforcement. We have included a new Section VI which addresses this topic. We also received many good suggestions on the example permit limitations. The section on examples has been substantially reworked to reflect your comments.

Finally, we learned through the comments that in two specific circumstances, short term emission limits are the most useful and reasonable way to restrict and verify limits on potential to emit. These circumstances are: 1) when control equipment is installed but control equipment operating parameters are difficult to measure during enforcement inspections; and 2) in surface coating operations with numerous and unpredictable use of coatings containing varying VOC content, where add-on control equipment is not employed. Therefore, we have made a narrow exception to the flat prohibition on use of emission limits to restrict potential to emit for these specific circumstances, and only when certain additional conditions have been met.

Again, we appreciate the thoughtful comments we have received on this guidance. Please insert this document into your Clean Air Act Compliance/Enforcement Policy Compendium as Item Number H.3. If you have any questions, please contact Judith Katz in the Air Enforcement Division at FTS 382-2843, or Sally Farrell in the Stationary Source Compliance Division at FTS 382-2875.

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DOJ

LIMITING POTENTIAL TO EMIT IN NEW SOURCE PERMITTING

JUNE 13, 1989

AIR ENFORCEMENT DIVISION  
OFFICE OF ENFORCEMENT AND COMPLIANCE MONITORING

STATIONARY SOURCE COMPLIANCE DIVISION  
OFFICE OF AIR QUALITY PLANNING AND STANDARDS

Limiting Potential to Emit in New Source Permitting

- I. Introduction
- II. The Louisiana-Pacific Case
- III. Types of Limitations that will Limit Potential to Emit
- IV. Time Periods for Limiting Production and Operation
- V. Sham Operational Limits
  - A. Permits with conditions that do not reflect a source's planned mode of operation are void ab initio and cannot act to shield the source from the requirement to undergo preconstruction review.
    - 1. Sham permits are not allowed by 40 CFR 52.21(r) (4)
    - 2. Sham permits are not allowed by the definition of potential to emit: 40 CFR 52.21(b) (4), 51.165(a) (1) (iii), 51.166(b) (4)
    - 3. Sham permits are not allowed by the Clean Air Act
  - B. Guidelines for determining when minor source construction permits are shams.
    - 1. Filing a PSD or nonattainment NSR application
    - 2. Applications for funding
    - 3. Reports on consumer demand and projected productions levels
    - 4. Statements of authorized representatives of the source regarding plans for operation
- VI. Enforcement Procedures
- VII. Examples
- VIII. Conclusion

Limiting Potential to Emit in New Source Permitting

I. Introduction

Whether a new source or modification is major and subject to new source review under Parts C and D of the Clean Air Act is dependent on whether that source or modification has or will have the potential to emit major or significant amounts of a regulated pollutant. Therefore, the definition of "potential to emit" under the new source regulations is extremely important in determining the applicability of new source review to a particular source. The federal regulations define "potential to emit" as:

the maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or operational limitation on the capacity of the source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of fuel combusted, stored or processed, shall be treated as part of its design if the limitation or the effect it would have on emissions is federally enforceable.

40 C.F.R Sections 52.21(b) (4), 51.165(a) (1) (iii), 51.166(b) (4).

Permit limitations are very significant in determining whether a source is subject to major new source review. This is because they are the easiest and most common way for a source to obtain restrictions on its potential to emit. A permit does not

have to be a major source permit to legally restrict potential emissions. A minor source construction permit issued pursuant to a state program approved by EPA as meeting the requirements of 40 C.F.R. Section 51.160 is federally enforceable. In fact, any permit limitation can legally restrict potential to emit if it meets two criteria: 1) it is federally enforceable as defined by 40 C.F.R. Sections 52.21(b) (17), 51.165(a) (1) (xiv), 51.166(b) (17), i.e., contained in a permit issued pursuant to an EPA-approved permitting program or a permit directly issued by EPA, or has been submitted to EPA as a revision to a State Implementation Plan and approved as such by EPA; and 2) it is enforceable as a practical matter. The second criterion is an implied requirement of the first criterion. A permit requirement may purport to be federally enforceable, but, in reality cannot be federally enforceable if it cannot be enforced as a practical matter.

Non-permit limitations can also legally restrict potential to emit. These limitations include New Source Performance Standards codified at 40 C.F.R. Part 60 and National Emission Standards for Hazardous Air Pollutants codified at 40 C.F.R. Part 61.

The appropriate means of restricting potential to emit through permit conditions has been an issue in recent enforcement cases. Through these cases and through guidance issued by EPA, the Agency has addressed three questions: what types of permit

limitations can legally limit potential to emit; whether long averaging times for production limitations are enforceable as a practical matter; and whether sources may limit potential to emit to minor source levels as a means of circumventing the preconstruction review requirements of major source review.

## II. The Louisiana-Pacific Case

In United States v. Louisiana-Pacific Corporation, 682 F. Supp. 1122 (D. Colo. Oct. 30, 1987) and 682 F. Supp. 1141 (D. Colo. March 22, 1988), Judge Alfred Arraj discussed the type of permit restrictions which can be used to limit a source's potential to emit. The Judge concluded that:

... not all federally enforceable restrictions are properly considered in the calculation of a source's potential to emit. While restrictions on hours of operation and on the amount of materials combusted or produced are properly included, blanket restrictions on actual emissions are not.

682 F. Supp. at 1133.

The Court held that Louisiana-Pacific's permit conditions which limited carbon monoxide emissions to 78 tons per year and volatile organic compounds to 101.5 tons per year should not be considered in determining "potential to emit" because these blanket emission limits did not reflect the type of permit conditions which restricted operations or production such as limits on hours of operation, fuel consumption, or final product.



The Louisiana-Pacific court was guided in its reasoning by the D.C. Circuit's holding in Alabama Power v. Costle, 636 F. 2d 323 (D.C. Circuit 1979). Before Alabama Power, EPA regulations required potential to emit to be calculated according to a source's maximum uncontrolled emissions. In Alabama Power, the D. C. Circuit remanded those regulations to EPA with instructions that the Agency include the effect of in-place control equipment in defining potential to emit. EPA went beyond the minimum dictates of the D.C. Circuit in promulgating revised regulations in 1980 to include, in addition to control equipment, any federally enforceable physical or operational limitation. The Louisiana-Pacific court found that blanket limits on emissions did not fit within the concept of proper restrictions on potential to emit as set forth by Alabama Power.

Moreover, Judge Arraj found that:

...a fundamental distinction can be drawn between the federally enforceable limitations which are expressly included in the definition of potential to emit and (emission) limitations.... Restrictions on hours of operation or on the amount of material which may be combusted or produced ... are, relatively speaking, much easier to "federally enforce." Compliance with such conditions could be easily verified through the testimony of officers, all manner of internal correspondence and accounting, purchasing and production records. In contrast, compliance with blanket restrictions on actual emissions would be virtually impossible to verify or enforce.

Id. Thus, Judge Arraj found that blanket emission limits were not enforceable as a practical matter.

Finally, the Court reasoned that allowing blanket emission limitation to restrict potential to emit would violate the intent of Congress in establishing the Prevention of Significant Deterioration (PSD) program.

### III. Types of Limitations that will Restrict Potential to Emit

As an initial matter in this discussion, a few important terms should be defined. Emission limits are restrictions over a given period of time on the amount of a pollutant which may be emitted from a source into the outside air. Production limits are restrictions on the amount of final product which can be manufactured or otherwise produced at a source. Operational limits are all other restrictions on the manner in which a source is run, including hours of operation, amount of raw material consumed, fuel combusted, or conditions which specify that the source must install and maintain add-on controls that operate at a specified emission rate or efficiency. All production and operational limits except for hours of operation are limits on a source's capacity utilization. Potential emissions are defined as the product of a source's emission rate at maximum operating capacity, capacity utilization, and hours of operation.

To appropriately limit potential to emit consistent with the opinion in Louisiana-Pacific, all permits issued pursuant to 40 C.F.R. Sections 51.160, 51.166, 52.21 and 51.165 must contain a

production or operational limitation in addition to the emission limitation in cases where the emission limitation does not reflect the maximum emissions of the source operating at full design capacity without pollution control equipment. Restrictions on production or operation that will limit potential to emit include limitations on quantities of raw materials consumed, fuel combusted, hours of operation, or conditions which specify that the source must install and maintain controls that reduce emissions to a specified emission rate or to a specified efficiency level. Production and operational limits must be stated as conditions that can be enforced independently of one another. For example, restrictions on fuel which relates to both type and amount of fuel combusted should state each as an independent condition in the permit. This is necessary for purposes of practical enforcement so that, if one of the conditions is found to be difficult to monitor for any reason, the other may still be enforced.

When permits contain production or operational limits, they should also have recordkeeping requirements that allow a permitting agency to verify a source's compliance with its limits. For example, permits with limits on hours of operation or amount of final product should require an operating log to be kept in which the hours of operation and the amount of final product produced are recorded. These logs should be available

for inspection should staff of a permitting agency wish to check a source's compliance with the terms of its permit.

When permits require add-on controls operated at a specified efficiency level, permit writers should include, so that the operating efficiency condition is enforceable as a practical matter, those operating parameters and assumptions which the permitting agency depended upon to determine that the control equipment would have a given efficiency.

An emission limitation alone would limit potential to emit only when it reflects the absolute maximum that the source could emit without controls or other operational restrictions. When a permit contains no limits on capacity utilization or hours of operation, the potential to emit calculation should assume operation at maximum design or achievable capacity (whichever is higher) and continuous operation (8760 hours per year).

The particular circumstances of some individual sources make it difficult to state operating parameters for control equipment limits in a manner that is easily enforceable as a practical matter. Therefore, there are two exceptions to the absolute prohibition on using blanket emission limits to restrict potential to emit. If the permitting agency determines that setting operating parameters for control equipment is infeasible in a particular situation, a federally enforceable permit

containing short term emission limits (e.g. lbs per hour) would be sufficient to limit potential to emit, provided that such limits reflect the operation of the control equipment, and the permit includes requirements to install, maintain, and operate a continuous emission monitoring (CEM) system and to retain CEM data, and specifies that CEM data may be used to determine compliance with the emission limit.

Likewise, for volatile organic compound (VOC) surface coating operations where no add-on control is employed but emissions are restricted through limiting VOC contents and quantities of coatings used, emission limits may be used to restrict potential to emit under the following limited circumstances. If the permitting agency determines for a particular surface coating operation that operating and production parameters (e.g. gallons of coating, quantities produced) are not readily limited due to the wide variety of coatings and products and due to the unpredictable nature of the operation, emission limits coupled with a requirement to calculate daily emissions may be used to restrict potential to emit. The source must be required to keep the records necessary for this calculation, including daily quantities and the VOC content of each coating used. Emission limits may be used in this limited circumstance to restrict potential to emit since, in this case, emission limits are more easily enforceable than operating or production limits.

#### IV. Time Periods For Limiting Production and Operation

As discussed above, a limitation specifically recognized by the regulations as reducing potential to emit is a limitation on production or operation. However, for these limitations to be enforceable as a practical matter, the time over which they extend should be as short term as possible and should generally not exceed one month. This policy was explained in a March 13, 1987 memorandum from John Seitz to Bruce Miller, Region IV. The requirement for a monthly limit prevents the enforcing agency from having to wait for long periods of time to establish a continuing violation before initiating an enforcement action.

EPA recognizes that in some rare situations, it is not reasonable to hold a source to a one month limit. In these cases, a limit spanning a longer time is appropriate if it is a rolling limit. However, the limit should not exceed an annual limit rolled on a monthly basis. EPA cannot now set out all inclusive categories of sources where a production limit longer than a month will be acceptable because every situation that may arise in the future cannot now be anticipated. However, permits where longer rolling limits are used to restrict production should be issued only to sources with substantial and unpredictable annual variation in production, such as emergency

boilers. Rolling limits could be used as well for sources which shut down or curtail operation during part of a year on a regular seasonal cycle, but the permitting authority should first explore the possibility of imposing a month-by-month limit. For example, if a pulp drier is periodically shut down from December to April, the permit could contain a zero hours of operation limit for each of those months, and then the appropriate hourly operation limit for each of the remaining months. Under no circumstances would a production or operation limit expressed on a calendar year annual basis be considered capable of legally restricting potential to emit.

#### V. Sham Operational Limits

In the past year, several sources have obtained purportedly federally enforceable permits with operating restrictions limiting their potential to emit to minor or de minimis levels for the purpose of allowing them to commence construction prior to receipt of a major source permit. In such cases where EPA can demonstrate an intent to operate the source at major source levels, EPA considers the minor source construction permit void ab initio and will take appropriate enforcement action to prevent the source from constructing or operating without a major source permit.

The following example illustrates the kind of situation addressed in this section: An existing major stationary source proposes to add a 12.5 megawatt electric utility steam generating unit, and applies for a federally enforceable minor source permit which restricts operation at the unit to 240 hours per year. Because the project is designed as a baseload facility, EPA does not believe that the source intends to operate the facility for only 240 hours a year. Further investigation would probably uncover documentation of the source's intent to operate at higher levels than those for which it is permitted.

This situation raises the question of whether a source can lawfully bypass the preconstruction or premodification review requirements of Prevention of Significant Deterioration (PSD) and nonattainment New Source Review by committing to permit conditions which restrict production to a level at which the source does not intend to operate for any extensive time. If, after constructing and commencing operation, the source obtains a relaxation of its original permit conditions prior to exceeding them, does this constitute a violation of the preconstruction review requirements? This section discusses why it is improper to construct a source with a minor source permit when there is intent to operate as a major source, and provides guidelines for identifying these "sham" permits.



A. Permits with conditions that do not reflect a source's planned mode of operation are void ab initio and cannot act to shield the source from the requirement to undergo preconstruction review.

1. Sham permits are not allowed by 40 CFR Section 52.21(r) (4) Section

52.21(r) (4) states:

At such time that a particular source or modification becomes a major stationary source or major modification solely by virtue of a relaxation in any enforceable limitation which was established after August 7, 1980 on the capacity of the source or modification otherwise to emit a pollutant, such as a restriction on hours of operation, then (PSD) shall apply to the source or modification as though construction had not yet commenced on the source or modification.

When a source that is minor because of operating restrictions in a construction permit later applies for a relaxation of that construction permit which would make the source major, Section 52.21(r) (4) prescribes the methodology for determining best available control technology (BACT). However, it does not foreclose EPA's ability, in addition to the retroactive application of BACT and other requirements of the PSD program, to pursue enforcement where the Agency believes that the initial minor source permit was a sham. EPA will limit its activity to requiring application of 40 CFR 52.21(r) (4) only for the cases where a source legitimately changes a project after finding that the operating restrictions which were taken in good faith cannot be complied with. Whether a source has acted in good faith is a factual question which is answered by available evidence in the particular case.

2. Sham permits are not allowed by the definition of potential to emit:  
40 C.F.R. Sections 52.21(b) (4), 51.165(a) (1) (iii), 51.166(b) (4).

The definition of potential to emit enables sources to obtain federally enforceable permits with operational restrictions as a means of limiting emissions to minor source levels. However, implicit in the application of these limitations is the understanding that they comport with the true design and intended operation of the project.

3. Sham permits are not allowed by the Clean Air Act

Parts C and D of the Clean Air Act exhibit Congress's clear intent that new major sources of air pollution be subject to preconstruction review. The purposes for these programs cannot be served without this essential element. Therefore, attempts to expedite construction by securing minor source status through the receipt of operational restrictions from which the source intends to free itself shortly after operation are to be treated as circumvention of the preconstruction review requirements.

B. Guidelines for determining when minor source construction permits are shams.

EPA's determination that a purportedly federally enforceable construction permit is a sham is made based on an evaluation of specific facts and evidence in each individual case. The following are criteria which should be scrutinized when making such a determination:

1. Filing a PSD or nonattainment NSR permit application

If a major source or major modification permit application is filed simultaneously with or at approximately the same time as the minor source construction permit, this is strong evidence of an intent to circumvent the requirements of preconstruction review. Even a major source application filed after the minor source application, but either before operation has commenced or after less than a year of operation should be looked at closely.

2. Applications for funding

Applications for commercial loans or, for public utilities, bond issues, should be scrutinized to see if the source has guaranteed a certain level of operation which is higher than that in its construction permit. If the project would not be funded or if it would not be economically viable if operated on an extended basis

(at least a year) at the permitted level of production, this should be considered as evidence of circumvention.

3. Reports on consumer demand and projected production levels.

Stockholder reports, reports to the Securities and Exchange Commission, utility board reports, or business permit applications should be reviewed for projected operation or production levels. If reported levels are necessary to meet projected consumer demand but are higher than permitted levels, this is additional evidence of circumvention.

4. Statements of authorized representatives of the source regarding plans for operation.

Statements by representatives of the source to EPA or to state or local permitting agencies about the source's plans for operation can be evidence to show intent to circumvent preconstruction review requirements.

Note that if a determination is made that a permit is a "sham" for one pollutant and, therefore, the source is a major source or major modification, the permit may possibly still contain valid limits on potential to emit for other pollutants.

In such cases, the entire source must still go through new source review, during which, for PSD review, all pollutants for which there is a net significant increase must be analyzed for BACT. In nonattainment new source review, new sources must have LAER determinations only for pollutants for which they are major. Major modifications, however, must have LAER determinations for all nonattainment pollutants emitted in significant amounts. If the valid limits in a partially void minor source construction permit keep certain pollutants below significance levels, then those pollutants would not have to be analyzed for BACT or LAER. However, if a source or modification is determined to be major for PSD or NSR because part of its minor permit is deemed void, it would have to undergo BACT or LAER analysis for all significant pollutants.

## VI. Enforcement Procedures

This guidance has discussed permit conditions which will legally restrict potential to emit, shielding a source from the requirement to comply with major new source permitting regulation. Failure by a permitting agency to adhere to these guidelines may result in a permit that does not legally restrict potential to emit, thereby subjecting a source to major new source review. If that source has not gone through preconstruction review, it is a significant violator of the Clean Air Act and is subject to enforcement for constructing or

modifying without a major new source permit.

The enforcement options available to EPA in these situations include administrative action under Sections 167 or 113 (a) (5) of the Act or federal judicial action under Sections 113 (b) (2), 113 (b) (5), 113(c), or 167. Which enforcement option is selected depends on the facts of the particular situation. (See July 15, 1988 guidance on EPA Procedures for Addressing Deficient New Source Permits.)

## VII. Examples

The following examples are provided to illustrate the type of permit restrictions which would and would not legally limit potential to emit to less than major source thresholds. These examples are provided for purposes of clarifying the potential to emit and averaging time guidance only. They are not intended to reflect all the permit conditions necessary for a valid permit. Specific test methods, compliance monitoring and recordkeeping and reporting requirements are necessary to make permit limitations enforceable as a practical matter. The use of examples where averaging times are the longest times allowed under EPA policies is not intended to necessarily condone the selection of the longest averaging times; averaging times should in practice be as short as possible.

1. The minor source construction permit for a boiler contains the following restrictions:  
250,000 gal fuel/month; 0.8% S fuel; 8000 hours/year.

These conditions are federally enforceable production and operation limits, but do not limit potential to emit because one of them does not meet EPA policies on enforceability as a practical matter. The averaging time for hours of operation, one of the operational limits necessary to restrict emissions to less than 250 tpy, exceeds a monthly or rolling yearly limit. If, instead of 8000 hours/year, the hourly restriction were stated as 666 hours/month, the permit would serve to keep the source a minor source, assuming the permit contains appropriate recordkeeping provisions.

2. A waferboard plant which has the physical capacity to emit over 300 tpy of carbon monoxide in the absence of using specific combustion techniques has the following permit restriction as the sole emission limitation: 249 tpy.

This does not limit potential to emit since an operational or production restriction is necessary for the source to be restricted to 249 tpy. The permit must contain a restriction on hours of operation or capacity utilization which, when multiplied by the maximum emission rate for the CO sources at the plant, results in emissions of 249 tpy. Additionally, while the

emission limit alone cannot restrict potential to emit, the emission limit is unenforceable as a practical matter since it is limited on an annual basis. The permit should contain a short term emission limit (in addition to the annual emission limit), consistent with the compliance period or parameter in the applicable test method for determining compliance.

3. A small scale rock crushing plant that cannot emit more than 240 tpy under maximum operation without controls (including plant-wide particulate emissions from transfer and storage operations) has the following permit restriction as the sole emission limitation: 240 tpy particulate matter.

Since no operational limitations are necessary for the source to emit below 250 tpy, no operational restrictions need be in the permit to limit potential to emit. However, although this is not a major source, the state agency should express the emission limit in this permit as a lb/hour measure or gr/dscf so that it will be enforceable as a practical matter.

4. A plant consisting solely of a small rock crusher has the following permit restrictions: 0.05 lb gr PM/dscf; fabric filter must be employed and maintained at 99% efficiency.

Assuming that maintaining the fabric filter at 99% efficiency will result in emissions of less than 250 tpy, this permit would limit



potential to emit if it also contained either 1) parameters that allowed the permitting agency to verify the fabric filter's operating efficiency or 2) a requirement to install and operate continuous opacity monitors (COMs) and a specification that COM data may be used to verify compliance with emission limits. Note that if this second alternative were adopted, it would not be necessary to require that the fabric filter be maintained at 99% efficiency.

To determine potential to emit, the efficiency rate of the fabric filter would be multiplied by the maximum uncontrolled emission rate, the maximum number of operating hours and maximum throughput capacity since there are no other operating or production limits. However, the efficiency rate of the fabric filter would not be enforceable as a practical matter unless there were an enforceable means to monitor ESP performance on a short term basis. The two alternatives mentioned above would satisfy this requirement.

5. A surface coating operation has the capability of utilizing 15,000 gal coating/month, with the following permit restrictions: 3.0 lb VOC/gal coating minus water; 20.5 tons VOC/month; monthly VOC emissions to be determined from records of the daily volumes of coatings used times the manufacturers specified VOC content.

This does not limit potential to emit since the source has the physical capacity to exceed 250 tpy of VOC, and the permit does not contain a production or an operational limitation. A monthly limit on gallons of coating used which when multiplied by 3.0 lb/gal equates to less than the 250 tpy threshold (13,500 gallons/month), with appropriate recordkeeping, would generally be necessary to limit potential to emit. If, however, the permitting agency determines, due to the wide variety of coatings employed and products produced, that restrictions on operation or production are not practically enforceable, then the above emission limits could restrict potential to emit if there are requirements that the source calculate emissions daily, and keep the appropriate records.

If the source was alternatively to meet the 20.5 ton/month limit by employing add-on controls, the permit would need to contain an operational limit, such as the requirement to install and operate an incinerator at 99% efficiency. A requirement to monitor incinerator efficiency (either directly or indirectly via temperature monitoring for example), and appropriate recordkeeping requirements to verify compliance with each of the permit conditions would also be necessary to make the permit conditions enforceable as a practical matter. Note, however, that in the case where add-on controls are employed, the source may be able to meet a shorter term emission limit than the ton per month figure.

#### VIII. Conclusion

We hope this guidance will help EPA Regions identify sources which have the potential to emit major amounts of an air pollutant which will subject those sources to the requirements of preconstruction new source review. Every source which is subject to these requirements but has not obtained a major new source permit should be seriously considered for enforcement action.

**Guidelines:**  
**Practical Enforceability**

September 9, 1999

DRAFT (Rev. 1)

III-53

Attachment B

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### **What is Practical Enforceability?**

A permit is enforceable as a practical matter (or practically enforceable) if permit conditions

- establish a clear legal obligation for the source
- allow compliance to be verified.

Providing the source with clear information goes beyond identifying the applicable requirement. It is also important that permit conditions be unambiguous and do not contain language which may intentionally or unintentionally prevent enforcement.

Emission limits or other applicable requirements must have associated monitoring, recordkeeping, and reporting to make it possible to verify compliance and provide for documentation of non-compliance. (More information on monitoring to verify compliance is included in the Guidelines section on Periodic Monitoring.) Further, the permit must not prevent the use of *credible evidence* by the source, public, permitting authority, or EPA.

### **What is Credible Evidence?**

Section 113(a) of the Act gives EPA the authority to bring enforcement actions “on the basis of *any information available* to the Administrator.” In an enforcement action, the court then decides whether the available information is *credible evidence* of a violation. Credible evidence includes (but is not limited to):

- The reference test method
- Other evidence that is comparable to information generated by the reference test method, such as
  - Engineering calculations
  - Indirect estimates of emissions
  - CEMS data
  - Parametric monitoring data

Data need not be required to be collected in a title V permit in order to be considered credible.

Since any credible evidence can be used to show a violation of or, conversely, demonstrate compliance with an emissions limit, it is important that permit language not exclude the use of any data that may provide credible evidence. The permit must specify the source’s obligations for monitoring in a way that does not establish an exclusive link between the test method and the emissions limit. Permit language may not

- Specify that only certain types of data may be used to determine compliance
- Specify that certain data is more credible than other types of data, or
- Include language that excuses violations under specific circumstances.

**In general, the permit should simply tell the source what it must do (e.g., monitor pressure drop in such a manner, take corrective action under these conditions, etc.) For example, “The permittee shall monitor the emissions unit weekly in accordance with method X.”**

**It is not necessary to say that a term assures compliance or that an activity is required to assure compliance.**

### **Why Review Permits for Practical Enforceability?**

The practical enforceability of a permit should be reviewed to assure the public’s and EPA’s ability to enforce the title V permit is maintained, and to clarify for the title V source its obligations under the permit. Possible consequences of not examining the permit for practical enforceability include:

- source noncompliance due to misunderstanding unclear permit conditions,
- permit conditions creating new exemptions from requirements in the underlying applicable requirements, and
- permit language that allows noncompliance, or does not promote detection and prompt correction of problems leading to noncompliance.

The first table below identifies key permit terms to examine for practical enforceability. The second table provides examples of common language pitfalls and how they can be corrected.

## What Types of Conditions Affect Practical Enforceability?

Conditions Affecting Enforceability...	Why is it important?	What to Look for...
<p><b>Emission Limits</b></p>	<p>Title V conditions must assure compliance with all applicable requirements. To assure that emission limits will be complied with, the limits must be written in a practically enforceable way. The title V permit must clearly include each limit and associated information from the underlying applicable requirement that defines the limit, such as averaging time and the associated reference method.</p>	<p>When reviewing an emission limit, make sure that</p> <ul style="list-style-type: none"> <li>• The limit is clearly written,</li> <li>• The meaning of the applicable requirement has not been altered,</li> <li>• The averaging time is included,</li> <li>• The reference diluent concentration (e.g. "As determined at 15% O<sub>2</sub>") is included,</li> <li>• The source is required to comply with the limit at all times unless exceptions are specifically allowed for by the applicable requirement,</li> <li>• The specific reference test method associated with the limit is identified, and</li> <li>• The number of test runs is specified (if not included in the reference method).</li> </ul>
<p><b>Potential to Emit Limits</b></p> <p>The title V permit may be used by a source to establish limits on potential to emit (PTE) for purposes of avoiding an otherwise applicable requirement.</p>	<p>These emission limits are important because a source has agreed to comply with a limit set at a level below major source emission thresholds in order to not be subject to requirements such as NSR, PSD, or MACT. These types of limits are one of the few types of conditions that may be established solely in the title V permit, without an underlying applicable requirement. Since the title V permit is the mechanism for creating these limits, it is also the primary mechanism for assuring they are enforceable as a practical matter.</p>	<p>In addition to the general concerns for any emission limits listed above, PTE limit must also:</p> <ul style="list-style-type: none"> <li>• Have short averaging times. Averaging times must be no longer than one day, or if set on a rolling basis, on a 12-month rolling average, calculated no less frequently than daily.</li> <li>• Otherwise meets the requirements of the June 13, 1989 Hunt/Seitz memorandum "Guidance on Limiting Potential to Emit in New Source Permitting."</li> </ul>



## What Types of Conditions Affect Practical Enforceability?

Conditions Affecting Enforceability...	Why is it important?	What to Look for...
<p><b>Director’s Discretion</b></p> <p>This term refers to a permit condition that is phrased in such a way that the decision as to whether the condition is met is left to the director of the permitting authority.</p> <p>Example: "The source shall maintain adequate records, <i>as determined by the Director</i>" or "The source may use an alternative control device <i>if the Director finds that</i> equivalent emissions reductions would be achieved." or "or other .... as approved by the Director."</p> <p>as in</p> <p>"The reference test method is EPA Method 5 or other method approved by the Director."</p>	<p>This type of provision is problematic and should not be included in the permit. EPA and citizens would have difficulty disputing a finding by the Director that the source had met the requirements of that condition. In the first example, even if the facility was <i>not</i> maintaining adequate records, the condition is drafted in such a way that the permitting authority’s determination that the records <i>are</i> adequate could preclude EPA or citizen action. Similarly, in the second example, as long as the Director found that the source’s alternative control device was achieving equivalent emissions reductions, EPA or citizens would find it difficult to take action against the source.</p> <p>Director’s discretion would allow the source to negotiate a different test method "off permit" and bypass the process required for approval of alternative test methods. Other test methods could be acceptable but must be specifically identified in the permit.</p>	<p>When reviewing a title V condition that allows Director’s discretion,</p> <ul style="list-style-type: none"> <li>• Check the underlying applicable requirement to see if it allows director’s discretion.</li> <li>• Unless the underlying applicable requirement allows director’s discretion (e.g. through SIP-approved rule), the language must be removed from the title V permit.</li> <li>• An acceptable alternative to Director’s discretion language is to include specific options up front in the permit.</li> </ul> <p>Example: "The source may use an alternative control device that achieves an overall control efficiency of 99%." or "The reference test method is EPA Method 5 or Local Method 5 as approved by the Director on 12/15/93."</p>

## What Types of Conditions Affect Practical Enforceability?

Conditions Affecting Enforceability...	Why is it important?	What to Look for...
<p><b>Start Up/Shut Down and Malfunction Language</b></p> <p>In addition to the emergency provisions of 70.6(g), permits will sometimes contain excess emissions provisions. These provisions may have been created in the permit, or may come from rules designed to give special treatment to sources that emit in excess of their limits because</p> <ul style="list-style-type: none"> <li>• the source is unable to comply with the emissions limit during startup and shutdown, or</li> <li>• process equipment or pollution control equipment breaks down.</li> </ul> <p>These rules are usually called “excess emissions rules” or “startup/shutdown rules.”</p>	<p>If properly written, excess emission provisions only apply in situations where it is technologically impossible for the source to comply, or where circumstances beyond the source’s control cause it to exceed its emissions limits. However, if EPA has not approved the provision, it is probably because the provision excuses emissions that should be under a source’s control, or allows for Director’s discretion.</p> <p>See the memo “Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions” in Appendix D for more information relating to how these provisions may apply in SIP rules.</p>	<p>When reviewing a title V permit that contains a condition that allows excess emissions,</p> <ul style="list-style-type: none"> <li>• Verify that any provisions for excess emissions are consistent with a federally promulgated standard or a standard that has been approved by EPA. If so, it is acceptable to include these in the permit.</li> <li>• If inconsistent with federal rules, <u>the excess emissions language must be removed.</u></li> </ul>
<p><b>Proper Identification of Federally Enforceable Permit Terms</b></p> <p>Any term defined as an applicable requirement in §70.2 should be identified as federally enforceable (state and local rules may have been included in the definition of applicable requirement in the state/local program).</p>	<p>Sometimes federally enforceable permit terms are misidentified as being enforceable by the State only. See also discussion of State only requirements in the Applicable Requirements section.</p>	<p>When reviewing a provision identified as State-only</p> <ul style="list-style-type: none"> <li>• Make sure that the provision does not originate in a federally-enforceable applicable requirement. See also section on NSR/PSD applicable requirements for more information.</li> </ul>

## Language That May Indicate Practical Enforceability Problems....

Problem Language	Discussion	Correction
<p>“Normally”</p> <p>as in</p> <p>“The permittee shall normally inspect the unit daily.”</p>	<p>The term “normally” is subject to interpretation. Is a permittee still “normally” inspecting on a daily basis if inspections take place only 5 days out of 7? This language may place a burden on the permitting authority to show that the source's failure to inspect daily violated the requirement to "normally" inspect the unit daily.</p>	<p>Require that specific language be substituted for a ambiguous language.</p> <p>Example: “The permittee shall inspect the unit daily.”</p> <p>If necessary to allow for missed inspections, the permit could include a data recovery provision.</p>
<p>“as soon as possible; promptly”</p> <p>as in</p> <p>“The permittee shall take corrective action as soon as possible.”</p>	<p>"As soon as possible" and "promptly" are open-ended. Without an outer limit defined in the permit, the burden may be on the permitting authority to prove that the source could or should have acted sooner.</p>	<p>Require that an outer time limit be set on any actions required to occur “as soon as possible” or “promptly.”</p> <p>Example: The permittee shall take corrective action as soon as possible but no later than within 24 hours.</p>
<p>“Significant”</p> <p>as in</p> <p>“The permittee shall take corrective action if parameters are significantly out of range.”</p>	<p>"Significant" must be defined for the permit to be enforceable. Otherwise, the burden may be on the permitting authority to show that a problem is significant.</p>	<p>Specify parameter levels or ranges which will trigger action.</p> <p>For example:</p> <p>“The permittee shall take corrective action if parameters are more than 10% out of the range defined in condition x x.”</p> <p>Or</p> <p>“The permittee shall take corrective action if pressure drop is less than 15 inches for more than one hour.”</p>

## Language That May Indicate Practical Enforceability Problems....

Problem Language	Discussion	Correction
<p>“Should” or “may”</p> <p>as in</p> <p>“ The permittee should inspect daily. The permittee may test monthly.”</p>	<p>“Should” indicates a preference, rather than a requirement, and is not appropriate for permit conditions unless the underlying applicable requirement contains provisions that are not mandatory but are recommendations only.</p> <p>“May” indicates an option, rather than a requirement, and is not appropriate for permit conditions.</p>	<p>Require that all required permit terms use “shall” or “must.”</p> <p>For example: “The permittee must inspect daily.” or “ The permittee shall test monthly.”</p>
<p>“As suggested by the manufacturer’s specifications”</p> <p>as in</p> <p>“The permittee shall maintain pressure drop as suggested by the manufacturer’s specifications.”</p>	<p>It is acceptable to use the manufacturer’s recommendations as the basis for the numbers that go into the permit if there is no better data. However, the specific numbers must be incorporated into the permit rather than a reference to a document which may not include clear requirements.</p>	<p>Require that the specific numbers (which may be based on the manufacturer’s recommendations) be included in the permit term.</p> <p>For example: “The permittee shall maintain pressure drop greater than 15 inches.”</p>
<p>“Take reasonable precautions”</p> <p>as in</p> <p>“The permittee shall take reasonable precautions to reduce fugitive emissions.”</p>	<p>“Reasonable precautions” may be too subjective to be practically enforceable. The permit must identify the minimum activities that constitute “reasonable precautions”.</p>	<p>Require the permit to include the specific measures that must be taken.</p> <p>For example, “The permittee shall conduct monthly audits of the facility to assure that the minimum reasonable precautions for preventing fugitive emissions are implemented and shall maintain records in accordance with condition xx. For the purposes of this condition, reasonable precautions shall include but are not limited to the following:</p> <ul style="list-style-type: none"> <li>a. Storing and mixing volatile materials in covered containers;</li> <li>b. Storing all solvents or solvent containing cloth or other material used for surface preparation in closed containers;...</li> </ul> <p>...[other specific conditions].”</p>

## **Language That May Indicate Practical Enforceability Problems....**

<b>Problem Language</b>	<b>Discussion</b>	<b>Correction</b>
<p>“Use best engineering practices” as in “The permittee shall use best engineering practices to operate and maintain the boiler.”</p>	<p>This is the same issue as “reasonable precautions”. To be practically enforceable, “best engineering practices” must be defined/specified in the permit.</p>	<p>Require that the engineering practices be specified in the permit.</p> <p>For example: “The permittee shall use best engineering practices to operate and maintain the boiler which shall include but not be limited to servicing the boilers at least once each calendar year to assure proper combustion is occurring and that the units are in proper operating condition.”</p>

## Conditions that Limit the Use of Credible Evidence

Since the publication of the Credible Evidence Rule on February 24, 1997 (62 FR 8314), and the Compliance Assurance Monitoring Rule on October 22, 1997 (62 FR 54899), EPA has become sensitive to language that could be construed to limit use of credible evidence. Data that is comparable to information generated by a reference method test (for example, CEMS data) could be considered credible evidence. Because any data comparable to the reference test method is credible, permit language limiting the type of data that can be used to establish compliance or a violation is unacceptable. Examples of **unacceptable language** include:

“Compliance with the emissions limit shall be determined (or demonstrated) by test method X.”

“The permittee shall be deemed in compliance with the emissions limit if the results of an emissions test done in accordance with test method X are less than Y.”

Other examples of unacceptable language are included in the following table.

It is beyond the authority of the permit writer to limit what evidence may be used to prove violations. (See 62 FR 54907-8, October 22, 1997) A permit may not be written in such a manner that it would interfere with the use of credible evidence.

When reviewing title V permit conditions that relate to determining compliance,

- Look for, and require the elimination of, any language that would bar the use of credible evidence.
- If the unacceptable language originates in an applicable requirement, flag the requirement for the permitting authority as one that must be addressed to allow for the use of credible evidence in their response to the 1994 credible evidence SIP call, which is still in effect.

## Credible Evidence “Busting” Language that must be Deleted

Does the Permit Contain...	CE “Busting” Language to Look For
<i>Language that specifies only certain types of data can be used to determine compliance?</i>	<ul style="list-style-type: none"> <li>• “The monitoring methods specified in this permit are the sole methods by which compliance with the associated limit is determined.”</li> <li>• “Monitoring and reporting requirements are requirements that the permittee uses to determine compliance...”</li> <li>• “Compliance with this provision will be demonstrated by ....(insert periodic monitoring provisions) ...”</li> </ul>

**Credible Evidence “Busting” Language that must be Deleted**

Does the Permit Contain...	CE “Busting” Language to Look For
<i>Language that specifies certain types of data are more credible than others?</i>	<ul style="list-style-type: none"> <li>• “Reference test method results supersede parametric monitoring data.”</li> <li>• “The EPA Reference Test Method results supersede CEMS data.”</li> </ul>
<i>Language that excuses violations under certain conditions?</i>	<ul style="list-style-type: none"> <li>• “The permittee is considered to be in compliance if less than 5% of any CEMS monitored emission limit averaging periods exceeds the associated emission limit.”</li> <li>• “If the permitting authority does not take action on an excess emissions demonstration by responding to the permittee in writing within 90 days of receipt, the permitting authority will be deemed to have made a determination that the excess emissions were unavoidable.”</li> <li>• “Excess emissions that are unavoidable are not violations of permit terms.”</li> <li>• “A ‘deviation from permit requirements’ shall not include any incidents whose duration is less than 24 hours from the time of discovery by the permittee.”</li> </ul>

**The Following Information Appears in Appendix D :**

- Credible Evidence Rule
- Memo on Start-up, Shut-down, Maintenance and Malfunctions
- Memo on Limiting Potential to Emit

BEFORE THE ADMINISTRATOR  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF )	
ORANGE RECYCLING AND ETHANOL )	ORDER RESPONDING TO
PRODUCTION FACILITY, PENCOR- )	PETITIONERS' REQUEST THAT
MASADA OXYNOL, LLC )	THE ADMINISTRATOR OBJECT
)	TO ISSUANCE OF A
Permit ID: 3-3309-00101/00003 )	STATE OPERATING PERMIT
Facility NYSDEC ID: 3330900101 )	
)	
Issued by the New York State )	
Department of Environmental Conservation )	Petition No.: II-2001-05
)	
)	
_____ )	

ORDER DENYING PETITIONS FOR OBJECTION TO PERMIT

The New York State Department of Environmental Conservation, Region 3 (NYSDEC) issued a modified state operating permit to Pencor-Masada Oxynol, LLC (Masada<sup>1</sup>) on October 1, 2001, incorporating changes made pursuant to the Order of the Environmental Protection Agency (EPA) Administrator, dated May 2, 2001 (May 2001 Order). *See* 66 FR 30904, June 8, 2001.<sup>2</sup> This Order was in response to petitions received regarding the initial permit issued to authorize construction and operation of the Orange Recycling and Ethanol Production Facility in Middletown, NY. The modified Masada permit was issued pursuant to title V of the Clean Air Act (CAA or the Act), 42 U.S.C. §§ 7661-7661f, CAA §§ 501-507, the federal implementing regulations, 40 CFR Part 70, and the New York State permitting regulations.

In October and November 2001, the EPA received four petitions from 14 different petitioners, requesting that EPA object to the issuance of the modified Masada permit. Specifically, we received separate petitions from Jeanette Nebus, Robert C. LaFleur, president of Spectra Environmental Group, Inc. (Spectra), and Deborah Glover. We also received a fourth petition with 11 signatories: Talkini Alves, Vidal Milland, Kristine Hannon, Bridget Coppola, Nicole Young, Kathleen House, Campbell House, Susan Cohen, Debbie Carlisle, Roberta Constantino, and Elizabeth Collard.

Under section 505(b)(1) of the Act, EPA may object to the issuance of a permit on its

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<sup>1</sup> Pencor-Masada Oxynol, LLC is the corporate owner of the Orange Recycling and Ethanol Production Facility to be built in Middletown, New York. In the interests of clarity, this Order uses the term "Masada" to encompass both the corporate owner and the Middletown facility at issue here. The phrase "the Masada permit" refers to the permit issued by NYSDEC for the Middletown facility.

<sup>2</sup> The full text of the Administrator's May 2001 Order is available at [http://www.epa.gov/region07/program\\_s/artd/air/title5/petitiondb/petitions/masada\\_decision2000.pdf](http://www.epa.gov/region07/program_s/artd/air/title5/petitiondb/petitions/masada_decision2000.pdf).



own initiative if the Administrator finds that it is “not in compliance with the applicable requirements of the [Act], including the requirements of an applicable [state] implementation plan.” *See also* 40 CFR 70.8(c). The Act and EPA’s implementing regulations provide that, if the Administrator does not object in writing, “any person” may petition the Administrator to object to the permit. CAA § 505(b)(2); 40 CFR § 70.8(d).

In the May 2001 Order, I granted petitions from Spectra Environmental Group Inc. and Ms. Jeanette Nebus to object to the NYSDEC permit on two grounds: inadequate public notice with respect to the limits on the facility’s potential to emit (PTE) - specifically permit conditions 36 and 41 - and the applicability of the record keeping requirements of the Standards of Performance for Industrial-Commercial-Institutional Steam Generating Units (NSPS) Subpart Db. The remaining petitions were denied. Pursuant to the Order, NYSDEC reopened the comment period and, ultimately, issued the revised permit on October 1, 2001. NYSDEC’s new permitting action with respect to these narrow issues, namely its consideration of the PTE limits and NSPS Db record keeping requirements, is an appropriate subject matter for petitions under section 505(b)(2) of the Act.

The new petitions with respect to this facility raise a number of claims. Some relate to the October 2001 NYSDEC permit decision and some repeat issues previously addressed in the May 2001 Order. With respect to the NYSDEC revised permit decision, the petitioners allege that (1) the permit fails to include the physical or operational limits necessary to properly limit the source’s PTE, (2) the permit limits actual emissions instead of potential emissions, (3) the annual emissions limits are set too close to major thresholds, (4) the hourly emissions limits have too long an averaging period, (5) the consequences of deviations from or exceedances of permit limits are not severe enough, and (6) the inspection and maintenance measures for data from continuous emissions monitors (CEM) should be clarified. Additionally, the petitioners raise two issues with respect to the applicable requirements of the NSPS, suggesting that the requirement to calculate the annual capacity factor needs clarification, and the criteria and implications of the use of an emerging technology should be specified. The petitioners request that EPA object to the issuance of the Masada permit pursuant to section 505(b)(2) of the Act and 40 CFR § 70.8(d) for these reasons.

The petitioners also reassert several of the claims from previous petitions, including the applicability of the major New Source Review and Prevention of Significant Deterioration programs, and the emissions of toxic air pollutants. These issues, which were addressed in great detail in the May 2001 Order, were not part of NYSDEC’s October 2001 permit decision and are thus beyond the scope of this title V petition process. Accordingly, EPA denies all such claims that do not relate to the defined scope of the NYSDEC October 2001 permitting decision.

Finally, one of the petitions raises concerns about environmental justice. While the May 2001 Order addressed issues regarding NYSDEC’s compliance with Executive Order 12898, the new petition questions EPA’s compliance with the Executive Order. This issue will be discussed below in section ILC.

In sum, EPA has performed an independent review of the petitioners’ claims. Based on

review of all the information before me, including the initial Masada permit of July 25, 2000, the modified permit of October 1, 2001, my previous Order of May 2, 2001, and the information provided by the petitioners in the petitions, I hereby deny the petitions for the reasons set forth in this Order.

**I. STATUTORY AND REGULATORY FRAMEWORK**

Major stationary sources of air pollution and other sources covered by title V are required to obtain an operating permit that includes emission limitations and such other conditions as are necessary to assure compliance with applicable requirements of the Act. See CAA §§ 502(a) and 504(a). Section 502(d)(1) of the Act calls upon each State to develop and submit to EPA an operating permit program to meet the requirements of title V. EPA granted interim approval to the title V operating permit program submitted by the State of New York effective December 9, 1996. 61 Fed. Reg. 57589 (Nov. 7, 1996); see also 61 Fed. Reg. 63928 (Dec. 2, 1996) (correction); 40 CFR Part 70, Appendix A. EPA subsequently granted full approval to New York's program effective November 30, 2001. 66 Fed. Reg. 63180 (Dec. 5, 2001).

The title V operating permit program does not generally impose new substantive air quality control requirements (which are referred to as “applicable requirements”), but does require permits to contain monitoring, record keeping, reporting, and other compliance requirements to assure compliance by sources with existing applicable requirements. 57 Fed. Reg. 32250, 32251 (July 21, 1992). One purpose of the title V program is to enable the source, EPA, States, and the public to clearly understand the regulatory requirements applicable to the source and whether the source is meeting those requirements. Thus, the title V operating permits program is a vehicle for assuring that existing air quality control requirements are appropriately applied to facility emission units in a single document and assuring compliance with these requirements.

Under section 505(a) of the Act and 40 CFR § 70.8(a), States are required to submit to EPA for review all operating permits proposed for issuance, following the close of the public comment period. EPA is authorized under section 505(b)(1) of the Act and 40 CFR § 70.8(c) to review proposed permits, and object to permits that fail to comply with applicable requirements of the Act, including the State's implementation plan (and the associated public participation requirements), or the requirements of 40 CFR Part 70.

If EPA does not object to a permit on its own initiative, section 505(b)(2) of the Act and 40 CFR § 70.8(d) provide that any person may petition the Administrator, within 60 days of the expiration of EPA's 45-day review period, to object to the permit. Petitions must, in general, be based on objections to the permit that were raised with reasonable specificity during the public comment period. When a petitioner asks EPA to object to a title V permit, a petitioner must provide enough information for EPA to discern the basis for its petition. The statute provides that a petition for review does not stay the effectiveness of the permit or its requirements if the permit was issued after the expiration of EPA's 45-day review period and prior to an EPA objection. If EPA objects to a permit in response to a petition and the permit has been issued, the permitting authority or EPA will modify, terminate, or revoke and reissue such a permit

consistent with the procedures in 40 CFR §§ 70.7(g)(4) or (5)(i) and (ii) for reopening a permit for cause.

## **II. ISSUES RAISED BY THE PETITIONERS**

The Administrator's Order of May 2, 2001, directed the NYSDEC to reopen the Masada permit to allow additional public comments on the methodology for limiting the potential emissions of the facility. Also, EPA directed NYSDEC to incorporate the portions of the NSPS Subpart Db applicable to the gasifier. The NYSDEC took the necessary steps to remedy these deficiencies. The petitioners have now requested that EPA object to Masada's modified permit based on a variety of alleged flaws in the PTE-limiting strategy and the supporting permit terms. Petitioners also have concerns with the NSPS requirements and EPA's compliance with the Executive Order 12898 on environmental justice.

### **A. Adequacy of Permit Provisions Limiting Masada's Potential To Emit (PTE)**

#### **1. Need for Physical or Operational PTE Limits**

Several of the petitioners argue that the PTE limits in Masada's permit are inadequate because they are not based on physical or operational limitations. Petitioners Nebus and Glover, quoting from EPA's June 13, 1989 *Guidance on Limiting Potential to Emit in New Source Permitting*,<sup>3</sup> (hereinafter "1989 Guidance"), argue that "short term limits are the most useful and reasonable way to restrict and thereby verify limits on potential to emit." Petitioner Nebus demands that the permit contain operational constraints, including "hours of operations, controls, amounts of materials and fuels, input and throughput, limits on what the source does and how much capacity they have." Petitioners Alves et al. also argue in favor of strictly enforced hourly limits and limitations on hours of operation and production rates. Petitioner LaFleur claims that the NYSDEC and EPA have employed unenforceable blanket emissions limitations in the permit, and that Masada is unable to correlate process feedstock and ethanol production with emissions. We are addressing these claims under a common heading, since all of these claims relate to the need for physical or operational restrictions on the facility's PTE.

The Clean Air Act does not specifically address how to calculate a facility's PTE. EPA's regulatory definition of "potential to emit"<sup>4</sup> refers generally to physical and operational

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<sup>3</sup> This memorandum was transmitted from Terrell E. Hunt, Associate Enforcement Counsel, Air Enforcement Division, Office of Enforcement and Compliance Monitoring and John S. Seitz, Director, Stationary Source Compliance Division, Office of Air Quality Planning and Standards, to EPA Regional air directors, EPA Regional Counsels, other EPA headquarters offices and the Chief of the Environmental Enforcement Section at the Department of Justice.

<sup>4</sup> EPA regulations define "potential to emit" as "the maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or operational limitation on the capacity of the source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as

(continued...)

constraints, but leaves room for interpretation about what forms of practically enforceable limitations may be appropriate in particular circumstances. Thus, in addition to the 1989 Guidance cited by the petitioners, which discusses strategies for limiting potential emissions from newly constructed facilities, EPA has issued several subsequent guidance documents on these issues.<sup>5</sup> These documents illustrate that the Clean Air Act and the implementing regulations allow for a flexible, case-by-case evaluation of appropriate methods for ensuring practical enforceability of PTE limits. The key consideration throughout these policy and guidance documents is whether the terms and conditions that limit the potential emissions are, in fact, enforceable as a practical matter.

Masada's permit relies on a 365-day "rolling cumulative total" emissions limit for nitrogen oxides (NO<sub>x</sub>) and sulfur dioxide (SO<sub>2</sub>), with emissions recorded each day and added to the total from the previous 364 days to determine an annual emissions total each day. To support this approach, the permit requires extensive data collection procedures and quality assurance measures, including stack testing and direct real-time continuous emissions measurements (CEM) to track the total daily emissions from the facility. As discussed below, EPA finds that this rolling cumulative methodology is a practically enforceable and effective means of limiting PTE in this case.

The 1989 Guidance cited by some of the petitioners specifically contemplates PTE limits based solely on an emissions limit in particular circumstances. For example, the 1989 Guidance recognizes that emissions limits, coupled with the requirement to install, maintain and operate a CEM system to determine compliance, may be appropriate where setting operating parameters for control equipment is infeasible. 1989 Guidance, at 8. Likewise, the 1989 Guidance notes that "emissions limits are more easily enforceable than operating or production limits" in volatile organic compound surface coating operations where the emissions limit is combined with a requirement to calculate daily emissions. *Id.*

Petitioners have not demonstrated that NYSDEC erred in determining that it was appropriate to employ such emissions limits, coupled with a CEMs system, in this permit.

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<sup>4</sup>(...continued)

part of its design if the limitation or the effect it would have on emissions is federally enforceable. Secondary emissions do not count in determining the potential to emit of a stationary source." 40 CFR 52.21(b)(4).

<sup>5</sup> See, e.g., Memorandum entitled "Guidance an[d] Enforceability Requirements for Limiting Potential to Emit through SIP and §112 Rules and General Permits," from Kathie A. Stein, Director, Air Enforcement Division, Office of Enforcement and Compliance Assurance, to Regional Air Directors, dated January 25, 1995; Memorandum entitled "3M Tape Manufacturing Division Plant, St. Paul, Minnesota," from John B. Rasnic, Director, Stationary Source Compliance Division, EPA's Office of Air Quality Planning and Standards, to David Kee, Director, EPA Region V Air and Radiation Division, dated July 14, 1992; Memorandum entitled "Policy Determination on Limiting Potential to Emit for Koch Refining Company Clean Fuels Project," from John Rasnic to David Kee, dated March 13, 1992; Memorandum entitled "Use of Long Term Rolling Averages to Limit Potential to Emit," from John Rasnic to David Kee, dated February 24, 1992. These memos are available on EPA's Title V Policy and Guidance Database, at <http://www.epa.gov/region07/programs/artd/air/policy/search.htm>.

Masada's operations will have significant fluctuations due the variability of the processed waste, making an operating parameter-based PTE limit less appropriate. The emissions-based PTE limit discussed below recognizes this fact, and provides Masada with operational flexibility accordingly. Moreover, Masada will be measuring its emissions on a real-time basis using CEMs, thus obviating the need to limit and monitor operating parameters as a surrogate for emissions.<sup>6</sup> Thus, the petitioners have not demonstrated that it was inappropriate for NYSDEC to use the PTE limit to restrict Masada's emissions directly, rather than its operations or production.

Although it is generally preferred that PTE limitations be as short-term as possible (e.g., not to exceed one month), EPA guidance also allows permits to be written with longer term limits if they are rolled (meaning recalculated periodically with updated data) on a frequent basis (e.g., daily or monthly). The 1989 Guidance recognizes that such longer rolling limits may be appropriate for sources with "substantial and unpredictable annual variation in production." 1989 Guidance, at 9. Similarly, the Agency explained in a 1995 guidance document that "EPA policy allows for rolling limits not to exceed 12 months or 365 days where the permitting authority finds that the limit provides an assurance that compliance can be readily determined and verified."<sup>7</sup> Annual limits rolled on a daily basis are entirely appropriate where, as here, the operations of the facility will fluctuate throughout the year and CEMs are used to ensure practical enforceability. Thus, contrary to petitioners' assertions, shorter term limits are not always essential to a practically enforceable limit.

Thus, EPA finds that the permit is consistent with the Clean Air Act, EPA's implementing regulations, and Agency policy and guidance. EPA denies the petitions with regard to this issue.

## 2. Actual emissions vs. PTE

Petitioners Nebus and Glover assert that the permit constrains the actual emissions, rather than potential emissions, of the facility. Ms. Nebus claims that "the issued Masada permit limits actual emissions, but not PTE." She then elaborates that the permit only warns the facility when it is getting close to the limit, and does not effectively limit the facility because there are no

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<sup>6</sup> This is consistent with prior EPA practice in appropriate circumstances. See e.g., Memorandum entitled "3M Tape Manufacturing Division Plant, St. Paul, Minnesota," from John Rasnic to David Kee, dated July 14, 1992 ("a federally enforceable emissions limit may be used ... to limit the potential to emit as long as a continuous emissions monitor (CEM) or an acceptable alternative is used."); and Memorandum entitled "Policy Determination on Limiting Potential to Emit for Koch Refining Company Clean Fuels Project," from John Rasnic to David Kee, dated March 13, 1992 ("Use of an emission limit to restrict potential to emit ... is acceptable provided that emissions can be and are required to be readily and periodically determined or calculated.")

<sup>7</sup> Memorandum entitled "Guidance and Enforceability Requirements for Limiting Potential to Emit through SIP and §112 Rules and General Permits," from Kathie A. Stein, Director, Air Enforcement Division, Office of Enforcement and Compliance Assurance, to Regional Air Directors, dated January 25, 1995.

operational constraints. Petitioner Glover states that, “this permit disregards PTE and is based on actual emissions.”

In order to be considered practically enforceable, an emissions limit must be accompanied by terms and conditions that require a source to effectively constrain its operations so as to not exceed the relevant emissions threshold. These terms and conditions must also be sufficient to enable regulators and citizens to determine whether the limit has been exceeded and, if so, to take appropriate enforcement action. In other words, a source may not lawfully exceed that limit. Therefore, under EPA’s regulatory framework, the source does not have the "potential to emit" above that limit. This is true whether the limit restricts emissions directly or restricts specific operating parameters, as petitioners would prefer. As discussed above in #1, EPA believes that Masada’s permit limits are practically enforceable. Therefore, they effectively limit Masada’s potential emissions and EPA denies the petitions on this basis.

3. Annual limits too close to major thresholds

Petitioners LaFleur, Nebus and Alves et al. each remark on either the unreliability of the emissions estimates, or the level at which the annual limits were set for NO<sub>x</sub> and SO<sub>2</sub>. Petitioner LaFleur states that, “Masada has not provided adequate data nor substantiation of its emissions estimates.” Petitioners Alves et al. claim that “the emissions calculations are simply not reliable or realistic.” Petitioner Nebus states that the SO<sub>2</sub> annual emissions should be limited to less than 246 tpy and NO<sub>x</sub> should be limited to less than 99.5 tpy<sup>8</sup>. EPA finds that these individual claims relate to each other, and is reading them to mean that petitioners request the annual limits to be lowered to provide a greater margin of compliance, due to the uncertainty in the facility’s emissions estimates.

This issue was addressed in great detail in the May 2001 Order, and EPA continues to disagree that there is a need for a greater margin of compliance between Masada’s PTE limits and the applicable major source thresholds. Although EPA agrees that there is some uncertainty in Masada’s estimates, it is unrealistic to expect precise emission factors prior to construction in cases where the process involves new technology and the facility is the first of its kind. The fact that there is some uncertainty regarding the estimates, however, is yet another reason to require careful monitoring of actual emissions.

I already concluded in the May 2001 Order that, based on the Agency’s review of the best information currently available, the source’s emissions estimates are sufficiently credible to serve as a reasonable basis for determining that the PTE limits can be met by the source operating as planned. May 2001 Order, at 24. I also determined that the CEM system, operated properly as required by the permit, provides reliable data to assure that Masada’s emissions stay

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<sup>8</sup> Notwithstanding the determination that the Masada facility falls within a 250 tpy source category, the Clean Air Act and NYSDEC regulations (6 NYCRR 231) establish a 100 tpy major source cutoff for NO<sub>x</sub> for attainment areas that fall within the Ozone Transport Region, as is the case here.

below the major source thresholds. In addition, stringent measures are included in the permit for conservative treatment of missing CEM data, as well as limits on how much data can be missing.

As noted in the previous Order, a strength of the rolling cumulative total approach is that it accounts for the variability in the data. It does so by limiting the source's operational constraints to the actual measured emissions, not the emissions factor, which itself often contains inherent uncertainty when applied to an individual case. May 2001 Order, at 23. Indeed, Masada bears the risk if it has underestimated emissions in that the source would be required under the permit to constrain facility operations to keep emissions below the permit limits. Therefore, there is no need for additional margins of compliance, and EPA denies the petitions on this issue.

#### 4. Averaging of hourly emissions limits

Petitioner LaFleur claims that, "although pounds-per-hour mass limits are expressed in the permit, those limits are meaningless because compliance with those short term limits is to be demonstrated on a 30-day rolling average." Many traditional PTE limits are constructed using limitations on hourly emissions rates along with restrictions on hours of operation. Since this comment could be read broadly as relating to NYSDEC's October permitting decision regarding PTE, I am exercising my discretion to consider this comment as a valid petition issue.

Petitioner LaFleur is correct that Masada's PTE limits generally do not rely on the hourly mass limits to establish the facility as a minor source. Instead, as discussed above, they rely on a 365-day rolling total emissions limit, supported with stack testing and direct, real time data from CEM. The hourly limits are not directly related to the annual emissions limits specified in conditions 36 and 41.

EPA disagrees with petitioner that the hourly limits on mass emissions of NO<sub>x</sub> and SO<sub>2</sub> (see condition 81) are meaningless. They serve two important purposes. First, they provide a maximum operating level for the facility, which is used in calculating a fallback PTE if CEM data availability falls below 75% (see permit conditions 36.2 (I)(3) and 41.2 (I)(4)). Second, Masada is required to control its SO<sub>2</sub> emissions by 97% under 6 NYCRR 212.9(b), and the hourly limit of 61.2 lb/hr represents the level to which Masada must control. Therefore, the hourly limit serves to help make the 97% control limit practically enforceable. For the purposes described here, it is reasonable for the permit to allow the collected CEM data to be compiled and averaged every 24 hours, incorporating data from the most recent 30 days. EPA denies Mr. LaFleur's petition on this issue.

#### 5. Consequences

Petitioners Nebus and Glover both claim that there should be severe consequences to Masada for exceeding any emissions limit. They each have similar statements in their respective petitions, claiming that in all instances of excess emissions, the facility must immediately submit a major source permit application. Ms. Nebus goes a step further and contends that, in the case of an exceedance, the facility should be shut down until all requirements are met.

EPA believes the permit has sufficiently strong language about some of the possible consequences of exceeding a PTE limit or any permit violation. However, the permit does not, nor should it, list comprehensively all the potential enforcement ramifications of noncompliance. The permit describes varying degrees of consequences, depending on the nature of the violation. Conditions 36.2 (I)(4) and 41.2 (I)(5) specify that if the CEM data availability drops below 95%, a record keeping violation will be cited, after the first year of operation. Conditions 36.2 (I)(3) and 41.2 (I)(4) specify that if the CEM data availability drops below 75%, then a new methodology for calculating PTE is to be used. The maximum hourly emission rate is to be multiplied by 8,760 hours (365 days x 24 hours), resulting in PTE above major source thresholds, and Masada must promptly submit the appropriate permit applications for review under major NSR and/or PSD. Conditions 36.2 (I)(1) and (III)(1) and 41.2 (I)(1) & (III)(1) specify that any exceedance of the annual limit (99.5 tpy NO<sub>x</sub> or 246 tpy SO<sub>2</sub>) shall constitute 365 days of violation. Conditions 36.2 (I)(2) and 41.2 (I)(2) specify that if the facility exceeds 100 tpy NO<sub>x</sub> or 250 tpy SO<sub>2</sub>, then the facility shall be subject to major NSR and/or PSD as though construction had not yet commenced, and Masada must promptly submit the appropriate permit applications. It is important to note that if the facility exceeds these limits, not only does it need to get a major source permit, but it may be considered to have been in violation of PSD and/or NSR from the time it was initially constructed. Finally, condition 41.2 (I)(3), relating to SO<sub>2</sub>, specifies that if Masada applies to relax any permit restrictions and thus becomes a major source, then the facility must undergo PSD review as though construction had not yet commenced.

Petitioner Nebus also claims that Masada should shut down in the case of an exceedance. EPA disagrees that the permit needs to be revised to include such a statement. The CAA provides sufficient enforcement authority for EPA to enforce this permit and all other CAA requirements. *See e.g.* § CAA 113, 303, 502(b)(5)(E). States have similar authority. EPA and the state must retain discretion to determine what remedy is appropriate in any given situation. There may be occasions where NYSDEC or EPA may see a need to shut down a facility. As expressed in Condition 1 of the Facility Level section of the permit, NYSDEC has authority under 6 NYCRR 200.5 to seal access to any air contamination source.<sup>9</sup> EPA has authority to address similar compliance problems, including seeking an immediate injunction to cease operation. The authority to enforce this permit can not be expanded by this permit and it is not appropriate to attempt to specify or limit the response that will be taken in the case of a violation.

If EPA or NYSDEC requires Masada to submit a permit application because of a permit violation, a prompt submittal is sufficient, and there is no need to require an immediate application. NYSDEC has the authority to determine if an application is delayed beyond reason,

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<sup>9</sup> The commissioner may seal an air contamination source to prevent its operation if compliance with 6 NYCRR Chapter III is not met within the time provided by an order of the commissioner issued in the case of the violation. Sealing means labeling or tagging a source to notify any person that operation of the source is prohibited, and also includes physical means of preventing the operation of an air contamination source without resulting in destruction of any equipment associated with such source, and includes, but is not limited to, bolting, chaining or wiring shut control panels, apertures or conduits associated with such source. (6 NYCRR 200.5, page 5 of permit, Item 1.1(a))



and take appropriate action. In conclusion, EPA believes the permit is sufficient, and denies the petitions on this issue.

#### 6. CEM Inspection and Maintenance

Petitioner Nebus expresses concerns that there are not enough backup measures or safeguards for times when the CEM are not operational. She also believes the permit should specify the schedule for inspecting and performing maintenance on the CEM.

EPA believes the permit is clear about what Masada should do in case of problems with the CEM. Conditions 36.2 (I)(3-4), (II)(5) and 41.2 (I)(4-5), 41.2 (II)(5) specify measures to take when CEM are not available. Calculations are to be made, substituting data according to 40 CFR §§ 75.31 or 75.33 (c)(1) (if availability above 95%) or permit-specific procedures (if availability below 95%). If CEM data availability ever falls below 75%, the facility is to use its maximum permitted hourly rate multiplied by 8,760 hours. Regarding maintenance of the systems, the terms at conditions 36.2 (II)(2-4) and 41.2 (II)(2-4) say to install, maintain and operate NO<sub>x</sub> and SO<sub>2</sub> CEM systems. Although these terms are not specific in how frequently to perform maintenance on the CEM, the permit specifies elsewhere that Masada will comply with 40 CFR Part 75 regarding the maintenance of CEM systems. Also, condition 76.2 (10) specifies that daily CEM drift tests and quarterly accuracy assessments must be performed on CEM measuring NO<sub>x</sub> from the package boiler (40 CFR 60 Appx. F, Procedure 1).

In conclusion, it should be noted that the burden is on the petitioners to demonstrate how the safeguards and related provisions in the permit are not adequate. The petitioners in this case have not met this burden to justify an objection to the permit. Finally, EPA believes that the permit is structured to provide a powerful incentive for Masada to maintain its CEM in optimum operating condition, because of the consequences associated with loss of data. EPA believes the permit is satisfactory in this regard, and denies the petitions on this issue.

### **B. New Source Performance Standards**

#### 1. Annual Capacity Factor

Petitioners Nebus and Glover request clarification of what Masada's obligations are regarding some of the terms in the permit addressing Standards of Performance for Industrial-Commercial-Institutional Steam Generating Units. The notification requirement at 40 CFR 60.49b (a) in Subpart Db, listed in permit condition 1-4, specifies four items that must be reported at the time the facility begins to operate. Specifically, sources are required to report (1) the design heat input capacity and identification of the fuels to be combusted, (2) a copy of any federally enforceable requirement that limits the annual capacity factor, (3) a calculation of the annual capacity factor at which the facility expects to operate, and (4) notification of any emerging technology that will be used for controlling emissions of sulfur dioxide. These factors are to be reported for each fuel that the facility expects to fire. In addition, permit condition 1-5 cites the record keeping requirement at 40 CFR § 60.49b(d), which requires calculation of the annual capacity factor using a rolling 12-month average. Petitioners Nebus and Glover believe

the permit should specify what fuels Masada uses, which fuel is most polluting, and how emissions are controlled.

Both the 124 mmBtu/hr natural gas-fired package boiler and the 245 mmBtu/hr fluidized bed gasifier are subject to 40 CFR 60.49b (d). Permit condition 75 incorporates this requirement for the package boiler, and is identical to permit condition 1-5 relating to the gasifier. In accordance with EPA's May 2001 Order, NYSDEC's October 2001 permitting decision reopened the permit to apply the NSPS to the gasifier, as the regulation was properly applied to the package boiler in the July 2000 permit. Therefore today's response addresses this comment as it relates to the gasifier.

EPA disagrees that the permit needs to be revised. The facility description states that the gasifier will combust only natural gas, lignin, processed biosolids and digester gas and the permit properly requires the facility to identify the fuels that are being combusted as part of the initial start-up notification. However, the issue of which fuel is most polluting and how the emissions from the firing of these fuels are controlled is not germane because the substantive emissions limitations of NSPS Db apply only to coal-fired and oil-fired steam generating units and thus do not apply to the gasifier.

Petitioner Nebus expresses a concern that the annual capacity factor is only calculated on a 12-month rolling average, instead of a daily average. She refers to the 365-day rolling total that exists elsewhere in the permit. EPA wishes to clarify that the annual capacity factor (ACF) is a ratio of how much energy a steam generating unit actually produces in a year divided by the maximum energy it could produce if it ran 8,760 hours (365 days x 24 hours) at its maximum heat input capacity. This factor is generally useful because some of the requirements in the NSPS vary depending on the ACF for a facility. In Masada's case, there are no applicable requirements that depend on the unit's calculated ACF, and Masada has no restrictions on how high its ACF can be. Therefore, EPA believes there would be no value if Masada were to calculate its ACF on a more frequent basis than required by the NSPS as stated. EPA denies the petitions on this issue.

## 2. Emerging Technologies

Petitioner Nebus expresses a concern that the permit is ambiguous as to whether Masada will use an emerging technology. Permit condition 1-4.2 (4), in applying the NSPS at Subpart Db (Industrial-Commercial-Institutional Steam Generating Units) to the gasifier, specifies that Masada must report whether it intends to use an emerging technology to control SO<sub>2</sub> emissions as part of the notification of startup. The regulations also specify that EPA must review and approve a determination of whether a technology qualifies as emerging for purposes of this rule. If the EPA determines that a technology qualifies as "emerging", then the regulation at 40 CFR 60.42b allows facilities using emerging technology to have more lenient control requirements for SO<sub>2</sub> than facilities using conventional technology.

Ms. Nebus claims the emerging technology should be named in the permit, and the public has a right to know whether the Administrator makes such a determination in a given case. EPA

agrees that in a case where the Administrator does determine that a technology qualifies as emerging, and the facility receives more lenient permit limits as a result, the public should be informed. However, as noted previously, the standards regulating emissions of SO<sub>2</sub> at 40 CFR 60.42b only apply to facilities that combust coal or oil. Because the gasifier does not combust these fuels, it is not subject to this standard.

EPA understands why there may be some confusion on the part of the petitioner regarding whether Masada will use an emerging technology. As it happens, the dry lime injection and spray dryer absorber to be used by Masada to control SO<sub>2</sub> emissions from the gasifier are conventional technologies. EPA denies the petitions on this issue.

### **C. Environmental Justice - Executive Order 12898**

EPA also received a petition arguing that EPA failed to evaluate the “environmental disparate impacts” on minority and low-income communities under Executive Order 12898.<sup>10</sup> The petition asserts that the proposed plant site is in the vicinity of a day care center, nursery, retirement home, senior citizen apartments, three public schools and three low-income housing projects. The petitioners state that EPA had extensive involvement in reviewing the NYSDEC permit, which now “carries EPA’s imprimatur.” Petitioners cite, by way of example, letters and meetings between EPA and the NYSDEC on the adequacy of the state’s proposed and draft permit, meetings and letters between Senator Richard Shelby (R-AL), Masada CEO Daryl Harms and Administrator Browner, and the Administrator’s May 2, 2001 Order.

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. I recently reaffirmed EPA’s commitment to ensuring that environmental justice is secured for all communities in a memorandum to senior Agency officials dated August 9, 2001.

Environmental justice issues can be raised and considered in a variety of actions carried out under the Clean Air Act, as for example when EPA or a delegated state issues a PSD or NSR

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<sup>10</sup> The petition was signed by the following people: Talkini Alves, Vidal Milland, Kristine Hannon, Bridget Coppola, Nicole Young, Kathleen House, Campbell House, Susan Cohen, Debbie Carlisle, Roberta Constantino, and Elizabeth Collard.

permit.<sup>11</sup> Unlike PSD or 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.

In this particular case, petitioners have not demonstrated that the Masada title V permit fails to properly identify and comply with the applicable underlying requirements of the Act, the approved state implementation plan, or the requirements of title V itself; thus, the petition to object to the permit must be denied. In addition, the record does not indicate that concerns about environmental justice and the application of the Executive Order were raised to NYSDEC during the comment period on the revised permit which ended on June 25, 2001. EPA's title V regulations provide that issues may not be raised for the first time in the context of a petition to the Administrator. 40 CFR §70.8(d). This issue is, therefore, not one which provides grounds for me to object to NYSDEC's issuance of the Masada permit.

However, as explained in the May 2001 Order, as a recipient of EPA financial assistance, the programs and activities of NYSDEC, including its issuance of the Masada 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 EPA assistance on the basis of race, color, or national origin. 42 U.S.C. § 2000d et seq.; 40 CFR 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 Masada. The complaint, however, must meet the jurisdictional criteria that are described in EPA's title VI regulations in order for EPA to accept it for investigation.<sup>12</sup>

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<sup>11</sup> Indeed, as indicated in the response to another Title V permit petition, section 173(a)(5) of the Clean Air Act requires that a permit for a "major source" subject to the NSR program may be issued only if an analysis of alternative sites concludes that "the benefits of the proposed source significantly outweigh the environmental and social costs imposed as a result of its location, construction or modification." See Borden Chemical, Inc., Title V petition No. 6-01-01 (Dec. 22, 2000), pp. 34-44, available at [http://www.epa.gov/region07/programs/artd/air/title5/petitiondb/petitions/borden\\_response1999.pdf](http://www.epa.gov/region07/programs/artd/air/title5/petitiondb/petitions/borden_response1999.pdf).

<sup>12</sup> Under Title VI, a recipient of federal financial assistance may not discriminate on the basis of race, color, or national origin. Pursuant to EPA's Title VI administrative regulations, EPA's Office of Civil Rights conducts a preliminary review of Title VI complaints for acceptance, rejection, or referral. 40 CFR § 7.120(d)(1). A complaint should meet jurisdictional requirements as described in EPA's Title VI regulations. First, it must be in writing. Second, it must describe alleged discriminatory acts that may violate EPA's Title VI regulations. Title VI does not cover discrimination on the grounds of income or economic status. Third, it must be timely filed. Under EPA's Title VI regulations, a complaint must be filed within 180 calendar days of the alleged discriminatory act. 40 CFR § 7.120(b)(2). Fourth, because EPA's Title VI regulations only apply to recipients of EPA financial assistance, it must identify an EPA recipient that allegedly committed a discriminatory act. 40 CFR § 7.15.

**III. CONCLUSION**

For the reasons set forth above and pursuant to sections 505(b) and 505(e) of the Act, 42 U.S.C. §§ 7661d(b) and (e), and 40 CFR §§ 70.7(g)(4) or (5) and 70.8(d), I deny the petitions submitted by Jeanette Nebus, Robert LaFleur, Deborah Glover, Talkini Alves, Vidal Milland, Kristine Hannon, Bridget Coppola, Nicole Young, Kathleen House, Campbell House, Susan Cohen, Debbie Carlisle, Roberta Constantino, and Elizabeth Collard.

April 8, 2002

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Dated:

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Christine Todd Whitman,  
Administrator

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on March 13, 2023, she caused to be served by electronic mail, a true and correct copy of the following instruments entitled Notice of Filing and Respondent's Response to Petitioner's Request for Stay to:

Thor W. Ketzback  
Nora J. Faris  
Bryan Cave Leighton Paisner  
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Carol Webb  
Hearing Officer  
Illinois Pollution Control Board  
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P.O. Box 19274  
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/s/Lilia M. Brown  
Lilia M. Brown  
Environmental Bureau

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this Certificate of Service are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that she verily believes the same to be true.

/s/Lilia M. Brown  
Lilia M. Brown  
Environmental Bureau