

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN THE MATTER OF:)	PETITION FOR OBJECTION
)	
Proposed Clean Air Act Title V)	
Operating Permit Issued to Orion)	Permit # 0054
Power Midwest, L.P.)	

Citizens for Pennsylvania’s Future (“PennFuture”) and the Group Against Smog and Pollution (“GASP”) (collectively, “Petitioners”) file this Petition pursuant to section 505(b)(2) of the Clean Air Act, 42 U.S.C. § 7661d(b)(2), and 40 C.F.R.§ 70.8(d), and respectfully request that the Administrator of the United States Environmental Protection Agency object to an operating permit issued to Orion Power Midwest, L.P. pursuant to Title V of the Clean Air Act, for an electric generating unit (the Cheswick Power Station) located in Springdale, Allegheny County, Pennsylvania (permit # 0054) (the “TVOP”) for the following reasons:

PETITIONERS

Citizens for Pennsylvania’s Future (“PennFuture”) is a state-wide public interest organization with offices located in Pittsburgh, Harrisburg, Philadelphia, and Wilkes-Barre, that works for the protection of Pennsylvania’s environment and the development of Pennsylvania’s economy, through advocacy, education, and litigation to enforce environmental laws. PennFuture’s members include residents of southwestern Pennsylvania, including residents of municipalities in the vicinity of the Cheswick Power Station.

The Group Against Smog and Pollution, Inc. (“GASP”) is a membership-based non-profit environmental organization working for a healthy, sustainable environment. Founded in 1969, GASP serves as watchdog, advocate and educator on environmental

issues with a focus on air quality in western Pennsylvania. GASP membership includes hundreds of residents living in southwestern Pennsylvania, including residents of Cheswick Borough, adjacent to the Cheswick Power Station.

Petitioners' ability to carry out their mission of improving the implementation and enforcement of the Clean Air Act and other environmental laws will be adversely impacted if the Administrator does not object to the TVOP.

BACKGROUND

THE TITLE V PERMITTING PROCESS

Title V of the Clean Air Act ("Title V")¹ establishes an operating permit program for certain sources of air pollution, including "major sources."² Title V requires each state to administer an operating permit program for "major sources," subject to the United States Environmental Protection Agency's ("EPA") approval and oversight of the program.³

EPA granted final approval to the Allegheny County Health Department's ("ACHD") Title V permitting program on or about November 1, 2001, and the program became effective on December 17, 2001.⁴ ACHD's Title V permitting program is codified at Sections 2103.01 - 2103.25 of Article XXI of ACHD's Rules and Regulations ("Article XXI"), and has been incorporated into Pennsylvania's State Implementation

¹ Title V is codified at 42 U.S.C. §§ 7661-7661f. Title V's implementing regulations are codified, in pertinent part, at 40 C.F.R. Part 70.

² A "major source" includes a source that has the potential to emit more than 100 tons per year of certain criteria pollutants. 42 U.S.C. § 7661(2). The Cheswick Power Plant is a "major source" within the meaning of Title V.

³ See 42 U.S.C. § 7661a(d)(1).

⁴ See *Clean Air Act Full Approval of Partial Operating Permit Program; Allegheny County; Pennsylvania*, 66 Fed. Reg. 55112 (Nov. 1, 2001).

Plan (“SIP”).⁵ ACHD’s regulations for installation permits are codified at Sections 2102.01 – 2102.06 of Article XXI and also have been incorporated into Pennsylvania’s SIP.⁶

Under the Clean Air Act, EPA’s obligation is clear: “If any [Title V] Permit contains provisions that are determined by the Administrator as not in compliance with the applicable requirements of this chapter ... the Administrator **shall** ... object to its issuance.”⁷ EPA “does not have discretion whether to object to draft permits once noncompliance has been demonstrated.”⁸

RELEVANT FACTUAL BACKGROUND

The Cheswick Power Plant (the “Plant”) is an electric generating facility located in Springdale, Allegheny County, Pennsylvania. The Plant is currently operated by GenOn Power Midwest, L.P. (“GenOn”).⁹ ACHD has primary regulatory oversight responsibility for the Plant.

ACHD provided public notice of a draft Title V Operating Permit for the Plant on or about October 12, 2010. Petitioners submitted joint comments to the draft TVOP on November 15, 2010; those comments included all issues raised by this Petition.

On December 30, 2010, ACHD issued the TVOP.

⁵ See 40 C.F.R. § 52.2020(c)(2); *Approval and Promulgation of Air Quality Implementation Plans; Pennsylvania; Federally Enforceable State Operating Permit Program for Allegheny County*, 69 Fed. Reg. 52831 (Aug. 30, 2004); *Clean Air Act Full Approval of Partial Operating Permit Program; Allegheny County; Pennsylvania*, 67 Fed. Reg. 68935 (Nov. 14, 2002).

⁶ See 40 C.F.R. § 52.2020(c)(2); 67 Fed. Reg. 68935.

⁷ 42 U.S.C. § 7661d(b)(1) (emphasis added).

⁸ *New York Pub. Interest Research Group v. Whitman*, 321 F.3d 316, 334 (2d Cir. 2003).

⁹ Petitioners believe that GenOn is the successor-in-interest to Orion Power Midwest, L.P. (“Orion”).

SPECIFIC OBJECTIONS

I. THE TVOP DOES NOT INCORPORATE APPLICABLE RESTRICTIONS AND LIMITATIONS IN THE INSTALLATION PERMIT #0054-I004a

On April 2, 2007, ACHD issued Installation Permit #0054-I004 to Orion, which authorized the construction of a flue gas desulfurization system (“FGD System”) at the Plant. On April 20, 2010, ACHD issued an amended permit (Installation Permit #0054-I004a (the “Installation Permit”)) to Orion.

The Installation Permit incorporated the following provisions:

1. General Condition III.12:

This Installation Permit shall expire in 18 months if construction has not commenced within such period or shall expire one (1) year after such construction has been suspended, if construction is not resumed within such period. In any event, this Installation Permit shall expire upon completion of construction, except that this Installation Permit shall authorize temporary operation to facilitate shakedown of sources and air cleaning devices, to permit operations pending issuance of a related subsequent Operating Permit, or to permit the evaluation of the air contamination aspects of the source. Such temporary operation period shall be valid for a limited time, not to exceed 180 days, but may be extended for additional limited periods, each not to exceed 120 days, except that no temporary operation shall be authorized or extended which may circumvent the requirements of this Permit.

2. Restriction V.A.1.f:

“The permittee shall operate and maintain the [FGD System] such that a minimum of three spray levels are operating and maintained at all times while the main boiler is comubusting coal or synfuel.”

3. Restriction V.A.1.g:

“Emissions from Stack-001a shall not exceed the limitations in Table V-A-1:”

TABLE V-A-1: Stack 001a Emissions

POLLUTANT	lb/hr	Annual Emissions Limit tons/year
PARTICULATE MATTER	224.3	982
PM-10	180.0	788
PM-2.5	180.0	788
SULFUR DIOXIDE	10,080 9669 7700	33726
HYDROGEN CHLORIDE	78.0	341.6
HYDROGEN FLUORIDE	9.75	42.7
SULFURIC ACID MIST	357.0	1563.7
LEAD	0.207	0.313

By June 2010, the construction of the FGD System had progressed to the point that the Plant’s operator could begin an “initial shakedown operation.”¹⁰ In October 2010, “unexpectedly high levels of corrosion” were discovered on the walls of the FGD System during an inspection.¹¹ By letter dated December 7, 2010, GenOn requested permission from ACHD to operate the Plant without the FGD System while it made repairs and modifications to the FGD System over the next several months,¹² and received permission from ACHD to operate the Plant temporarily without the FGD System by letter dated December 9, 2010.¹³ ACHD did not publish notice or seek public comment regarding GenOn’s request to operate the Plant temporarily while the FGD System was not in service.

¹⁰ Exhibit A - Letter from Keith A. Schmidt (Director, Environmental Policy, GenOn) to James E. Thompson (Air Quality Program Manager, ACHD), at 2 (Dec. 7, 2010).

¹¹ *Id.*

¹² *See id.*

¹³ Exhibit B - Letter from Sandra Etzel (Chief Engineer, ACHD Air Quality Program) to Keith A. Schmidt (Dec. 9, 2010).

Notably, in its December 7, 2010 letter, GenOn repeatedly characterized its ongoing work on the FGD System as “construction improvements,” and stated that it “has no plans to seek approval for routine boiler operations without the FGD System in service.”¹⁴

The TVOP does not incorporate any of the Installation Permit’s terms and conditions, including most notably the emissions limitations in Table V-A-1 and the requirement that the Plant operate the FGD System whenever it burns coal or synfuel in the Plant’s main boiler. ACHD responded as follows to Petitioners’ assertion that the TVOP must include the terms and conditions of the Installation Permit:

The Department disagrees. While it may be ideal to issue the Title V permit after [the Installation Permit] has been verified, we have received requests such as letters dated 4/5/2010 and 4/14/2010 from PennFuture to immediately issue the outstanding Title V permits. Regardless, an operating permit is granting permission to operate and the Department will not grant permission to operate equipment until the permittee has demonstrated that the equipment meets the requirements in the Installation Permit. There are no changes to the permit due to this comment.¹⁵

A. The Installation Permit’s Requirement That The Plant Operate The FGD When Burning Coal Or Synfuel In Its Main Boiler Is An “Applicable Requirement”

A central purpose of Title V is to ensure that for every major source, there is an operating permit that incorporates, in one document, “all applicable requirements” for the source’s compliance with the Clean Air Act (the “CAA”).¹⁶ Article XXI defines “applicable requirement” to mean:

... unless otherwise expressly excluded, **all** of the following applicable to a source
....

- a. All provisions of this Article;

¹⁴ *Id.*, at 2.

¹⁵ ACHD, *Summary of Public Comments and Department Responses on the Proposed Issuance of Orion Power Midwest, L.P. – Cheswick Power Station Title V Operating Permit No. 0054* (Dec. 30, 2010), at 15.

¹⁶ See 40 C.F.R. § 70.6(a)(1).

- b. All provisions of the Clean Air Act and [Pennsylvania's] Air Pollution Control Act;
- c. All provisions of all regulations approved or promulgated by EPA through rulemaking under the Clean Air Act; and
- d. **All terms and conditions of any permit**, license, or order issued pursuant to this Article, the Clean Air Act, the Air Pollution Control Act, or any regulations approved or promulgated by EPA through rulemaking under the Clean Air Act.¹⁷

The Installation Permit was issued pursuant to Article XXI. For several reasons, the Installation Permit's terms and conditions were in effect when ACHD issued the Title V Operating Permit on December 30, 2010 and remain in effect. First, GenOn's construction work on the FGD System and shakedown of the system are, by Genon's own admission, ongoing.¹⁸ Thus, the Installation Permit has not expired pursuant to its section III.12 and continues in effect.¹⁹

Second, the Installation Permit does not authorize any exceptions from its own restrictions and limitations, even for unanticipated conditions or operational emergencies – “no temporary operation shall be authorized or extended which may circumvent the [Installation Permit's] requirements,”²⁰ including, without limitation, its requirement that the Plant operate the FGD System whenever it burns coal or syfuel in its main boiler.

Third, ACHD has not revised the Installation Permit to eliminate its emissions limitations and requirement that GenOn operate the FGD System when it burns coal or synfuel in the Plant's main boiler. An installation permit for a major source that impacts

¹⁷ Art. XXI, § 2102.20 (emphasis added).

¹⁸ See Exhibit A - Dec. 7, 2010 Letter from Keith A. Schmidt to James E. Thompson, *supra* note 10, at 2-3.

¹⁹ See Exhibit C – Cheswick Installation Permit, Flue Gas Desulfurization System § III.12 (stating that the permit “shall expire upon completion of construction,” and authorizes temporary operation of the FGD System after completion of construction “to facilitate shakedown of sources and air cleaning devices”).

²⁰ *Id.*

a nonattainment area²¹ may be modified only if the requirements contained in Article XXI, Sections 2102.04, 2102.05, and 2102.06 are satisfied, including, without limitation, an interstate notification requirement²² and a public notice and hearing requirement.²³ ACHD has made no attempt to satisfy that public notice and hearing requirement in connection with GenOn's recent operation of the Plant without the FGD System, and thus the Installation Permit's terms and conditions continue to apply.

Finally, ACHD's comment-response document does not dispute that the terms and conditions of the Installation Permit are "applicable requirements."²⁴ ACHD's statement that it "will not grant permission to operate equipment until the permittee has demonstrated that the equipment meets the requirements in the Installation Permit" is belied by the Installation Permit's requirement that the FGD System be operated whenever the Plant burns coal or synfuel in its main boiler – ACHD has not only granted GenOn permission to operate the FGD System, it **requires** GenOn to operate that system.²⁵ Even GenOn has acknowledged that the Installation Permit's terms and conditions are applicable requirements – in its December 7, 2010 letter to ACHD, GenOn stated that it "has no plans to seek approval for routine boiler operations without the FGD system in service,"²⁶ implicitly confirming that it is ordinarily required to operate the

²¹ Allegheny County is a nonattainment area for fine particulate matter ("PM2.5"). See <http://www.epa.gov/pmdesignations/2006standards/final/region3.htm>. The Plant is a major source of PM2.5. Exhibit C – Cheswick Installation Permit *supra* note 19, § II (Facility Description).

²² See Art. XXI, § 2102.05.b.

²³ See Art. XXI, § 2102.05.c.

²⁴ Exhibit D - ACHD, *Summary of Public Comments and Department Responses on the Proposed Issuance of Orion Power Midwest, L.P. – Cheswick Power Station Title V Operating Permit No. 0054* (Dec. 30, 2010), at 15.

²⁵ See Exhibit C – Cheswick Installation Permit *supra* note 19, § V.A.1.f ("The permittee shall operate and maintain the [FGD System] such that a minimum of three spray levels are operating and maintained at all times while the main boiler is comubusting coal or synfuel").

²⁶ Exhibit A - Dec. 7, 2010 Letter from Keith A. Schmidt to James E. Thompson, *supra* note 10, at 3.

FGD System, and thus that the operation of the FGD System is an “applicable requirement.”

Accordingly, the Installation Permit’s terms and conditions, including its emissions limitations and its requirement that GenOn operate the FGD System whenever it burns coal or synfuel in the Plant’s main boiler are “applicable requirements” that must be incorporated into the TVOP now.

B. The Administrator Must Object To The TVOP Because It Fails To Include Applicable Requirements Imposed By The Installation Permit, Including Operating Restrictions And Limitations On Emissions

Allegheny County’s Title V permitting rules require that all Title V operating permits that ACHD issues include conditions that “provide for and require compliance with **all applicable requirements.**”²⁷ As explained above, the Installation Permit’s requirement that the FGD System be operated whenever the Plant burns coal or synfuel in its main boiler and the emissions limitations that the Installation Permit imposes on the Plant are “applicable requirements,” and were “applicable requirements” when ACHD issued the TVOP on December 30, 2010. Accordingly, the Administrator must object to the issuance of the TVOP because it does not include those “applicable requirements.”²⁸

²⁷ See Art. XXI, § 2103.12.a.2.C (emphasis added); accord 40 C.F.R. § 70.6(a)(1).

²⁸ *In re: Wisconsin Pub. Serv. Corp.’s J.P. Pulliam Power Plant*, Petition No. V-2009-01, 2010 EPA CAA Title V LEXIS 2, *4 (Slip op. June 28, 2010) (rejecting regulatory agency’s contention that emissions limitations in a preconstruction permit could be omitted from a Title V operating permit because the project described in the preconstruction permit had not been completed when the Title V operating permit was issued, and objecting to the permit because it did not incorporate the emissions limitations); see *In re: Dynegy Northeast Generation*, Petition No. II-2001-06, 2003 EPA CAA Title V LEXIS 2, *20 (Slip op. Feb. 14, 2003) (stating that emissions limitations in a pre-existing construction permit must be included in a Title V operating permit unless the construction permit is modified according to proper procedures).

II. THE TVOP FAILS TO INCLUDE LIMITS ON MERCURY AND OTHER HAZARDOUS AIR POLLUTANTS IN VIOLATION OF FEDERAL AND ALLEGHENY COUNTY LAW.

Under Section 112(b)(1) of the Clean Air Act, mercury compounds are hazardous air pollutants (“HAPs”).²⁹ On December 20, 2000, EPA issued a finding that regulation of HAPs from coal- and oil-fired electric utility steam generating units was necessary and appropriate, and added these units to the list of source categories under Section 112(c) of the Act.³⁰ In accordance with Section 112(c)(5) of the Act, the deadline for EPA promulgation of a rule to regulate HAPs from these units was December 20, 2002.³¹

Under ACHD regulations:

In the event that the Administrator [of EPA] fails to promulgate a standard for a category or subcategory of major sources of hazardous air pollutants by the date established pursuant to the Clean Air Act, by no later than 18 months after such date, any person who operates, or allows to be operated, any major source in such category or subcategory shall apply for the issuance or amendment of an operating permit reflecting appropriate applicable operating permit emission limitations and thereafter comply with the applicable operating permit emission limitations.³²

Regarding mercury compounds, EPA failed to promulgate a standard for HAPs for coal- and oil-fired electric utility steam generating units by June 20, 2004, the date 18 months from the December 20, 2002 deadline noted above.³³ Therefore, ACHD’s HAP Rule

²⁹ 42 U.S.C. § 7412(b)(1).

³⁰ *Regulatory Finding on the Emissions of Hazardous Air Pollutants from Electric Utility Steam Generating Units*, 65 Fed. Reg. 79825 (Dec. 20, 2000).

³¹ 42 U.S.C. § 7412(c)(5) (“In the case of source categories and subcategories listed after publication of the initial list required under paragraph (1) or (3), emission standards under subsection (d) of this section for the category or subcategory shall be promulgated within 10 years after November 15, 1990, or within 2 years after the date on which such category or subcategory is listed, whichever is later”). With the listing of the electric utility steam generating unit category on December 20, 2000, the deadline for promulgation of the emission standard was December 20, 2002.

³² Art. XXI § 2104.08.h.1. (emphasis added) (the “ACHD HAP Rule”).

³³ In 2005, instead of promulgating a standard under Section 112 of the Clean Air Act, EPA removed electric utility steam generating units from the Section 112(c) list, then issued regulations under Section 111 of the Clean Air Act. *Revision of December 2000 Regulatory Finding*, 70 Fed. Reg. 15994 (Mar. 29, 2005); *Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam*

required major sources of HAPs in Allegheny County to “apply for the issuance or amendment of an operating permit reflecting appropriate applicable operating permit emission limitations and thereafter comply” with these limits.

Under the ACHD rule for issuance of operating permits, Article XXI § 2103.12 (the “ACHD Operating Permit Rule”), all provisions of Article XXI, including the ACHD HAP Rule, are “applicable requirements.”³⁴ Further, the ACHD Operating Permit Rule specifies that ACHD shall not issue any operating permit unless the permit application demonstrates, among other things, that the permit conditions provide for and require compliance with all applicable requirements, including:

...existing and new source MACT [maximum achievable control technology] standards...and where no applicable MACT emission limitations have been established by EPA after the federal deadline set for such establishment, such determinations of MACT as shall be made on a case-by-case basis by the Department.

Article XXI § 2103.12.a.2.c. Therefore, under the ACHD Operating Permit Rule, ACHD may not issue an operating permit unless it includes applicable MACT standards, determined on a case-by-case basis if there is no federal standard. The ACHD Operating Permit Rule, which incorporates the ACHD MACT standard, is incorporated into Pennsylvania’s SIP.³⁵ Therefore, the ACHD Operating Permit Rule and the ACHD HAP Rule are applicable requirements under both federal rules³⁶ and ACHD rules.

Generating Units, 70 Fed. Reg. 28606 (May 18, 2005). On appeal, the United States Court of Appeals for the D.C. Circuit invalidated EPA’s delisting action and the Section 111 regulations. *New Jersey v. Environmental Prot. Agency*, 517 F.3d 574 (D.C. Cir. 2008). ACHD has acknowledged the D.C. Circuit action and described the Clean Air Mercury Rule as a “non-applicable requirement.” Exhibit D - ACHD, *Summary of Public Comments and Department Responses on the Proposed Issuance of Cheswick TVOP*, supra note 24, at 9.

³⁴ Art. XXI, § 2101.20 (definition of “applicable requirement” includes all provisions of Article XXI); Art. XXI, § 2103.12 (issuance of operating permits).

³⁵ 40 C.F.R. § 52.2020(c)(2).

³⁶ 40 C.F.R. § 70.2 (definition of “applicable requirement” includes “[a]ny standard or other requirement provided for in the applicable implementation plan approved or promulgated by EPA...”).

The Plant is a major source of HAPs³⁷ and is in the category of coal-fired electric generating units.³⁸ Since EPA has never issued relevant regulations under Section 112 of the Clean Air Act and there is no federal rule regulating HAPs from electric generating units, there is no federal standard for HAPs from the Plant.³⁹ Therefore, ACHD rules require the Plant to have applied for issuance or amendment of its operating permit to reflect case-by-case MACT by 18 months after the Clean Air Act deadline of December 20, 2002.⁴⁰ Under these rules, the TVOP must reflect “appropriate applicable operating permit emissions limitations” and the plant must thereafter comply with these limits.⁴¹

The TVOP reflects no case-by-case MACT determination and does not include any HAP operating permit emissions limitations. The failure to conduct this determination and to include these limits means that an applicable requirement is not included in the TVOP in violation of federal and Allegheny County law. Accordingly, the Administrator must object to the TVOP.

III. THE TVOP FAILS TO INCLUDE THE CHESWICK ASH DISPOSAL SITE

For purposes of Title V permitting, EPA defines a stationary source as “any building, structure, facility, or installation which emits or may emit a regulated NSR

³⁷ Exhibit E - ACHD, *Permit Review of Application, Orion Power Midwest, L.P. – Cheswick Power Station Title V Operating Permit No. 0054* (Dec. 30, 2010) at 1; ; Exhibit F - ACHD, *Orion Power Midwest, L.P. – Cheswick Power Station Title V Operating Permit No. 0054* (Dec. 29, 2010), at 4.. According to its Toxics Release Inventory report, in 2009 the Cheswick plant emitted various HAPs, including mercury compounds, arsenic compounds, chromium compounds, hydrochloric acid, hydrogen fluoride, manganese compounds, and nickel compounds.

Of the 232.39 pounds of mercury emitted at Cheswick in 2009, 137.76 pounds were point source air emissions. Exhibit G –TRI Report Cheswick Plant, *available at*: www.epa.gov/tri.

³⁸ *See, e.g.*, Energy Information Administration, *Existing Electric Generating Units in the United States 2008*, *available at* <http://www.eia.doe.gov/cneaf/electricity/page/capacity/capacity.html> .

³⁹ Exhibit E - *Permit Review of Application, Cheswick Power Station Title V Operating Permit*, *supra* note 37 at 9 (contending that the Clean Air Mercury Rule is a non-applicable requirement).

⁴⁰ Art. XXI, § 2104.08.h.1.

⁴¹ *Id.*

pollutant.”⁴² Article XXI uses this same language in its definition of source.⁴³ While federal Title V rules do not define “building, structure, facility, or installation,” the definition of “stationary source” is to be interpreted consistent with the definition in the PSD program.⁴⁴

Federal PSD rules define “building, structure, facility, or installation” as: all of the pollutant-emitting activities which: 1) belong to the same industrial grouping; 2) are located on one or more contiguous or adjacent properties; and 3) are under the control of the same person (or persons under common control).⁴⁵ As discussed in the following sections, the Ash Disposal Site and the Plant satisfy each of these factors, meaning the TVOP must be revised to incorporate pollutant emitting activities at the Ash Disposal Site.

A. The Ash Disposal Site and Power Plant are Under Common Control

As EPA noted in a recent inspection of the Plant “[t]he bottom ash and fly ash from the boiler ultimately go to a landfill which is owned by RRI Energy [now GenOn] and located about 5 miles away from their Springdale location.”⁴⁶ Article XXI states that the term

common control . . . includes all equipment, operations, activities, and the like *either fully or partially owned*, operated, managed, supervised, overseen, directed, or otherwise controlled in any way by a source permit applicant or any partner, joint entrepreneur, employer, employee, wholly or partially owned subsidiary or related legal entity, parent company or

⁴² 40 C.F.R. § 52.21(b)(5); 40 C.F.R. § 70.2.

⁴³ Art. XXI, § 2101.20 (defining “source”).

⁴⁴ Memo from Assistant Administrator Gina McCarthy to Regional Administrators, “Withdrawal of Source Determination for Oil and Gas Industries” (Sept. 22, 2009), *available at*: <http://www.epa.gov/region7/air/nsr/nsrmemos/oilgaswithdrawal.pdf>.

⁴⁵ 40 C.F.R. § 52.21(b)(6).

⁴⁶ Exhibit H - James Hagedorn, EPA, Inspection Report of RRI Energy Plant in Springdale, PA (May 25, 2010), at 5.

related legal entity, any wholly or partially owned subsidiary or partner or joint entrepreneur of any parent company, or any other legal entity in a similar relationship to the applicant as those set forth above.⁴⁷

Neither the Title V regulations nor Article XXI defines the term “control.”

Instead, EPA relies on the Security and Exchange Commission’s definition of that term.⁴⁸

That definition states:

Control is the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person (or organization or association) whether through the ownership of voting shares, contract, or otherwise.⁴⁹

Other EPA air regulations include a similar definition, for instance 40 C.F.R. § 66.3 (concerning collection of Clean Air Act § 120 noncompliance penalties) states that, “[c]ontrol (including the terms controlling, controlled by, and under common control with) means the power to direct or cause the direction of the management and policies of a person or organization, whether by the ownership of stock, voting rights, by contract, or otherwise.”⁵⁰ Clearly, ownership of both the Plant and Ash Disposal Site satisfies the “common control” element of the source determination inquiry.

B. The Ash Disposal Site is a Support Facility for the Plant and Thus Must be Aggregated with the Plant Even Though the Ash Disposal Site and Plant Have Dissimilar Standard Industrial Classification Codes.

Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same “Major Group” (i.e., have the same first two digit

⁴⁷ Art. XXI, § 2101.20, definition of common control.

⁴⁸ *Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Emission Offset Interpretative Rule*, 45 Fed. Reg. 59874, 59878 (Sept. 11, 1980).

⁴⁹ 17 C.F.R. § 240.12b-2.

⁵⁰ 40 C.F.R. § 66.3(f).

standard industrial classification code).⁵¹ While a landfill and electric generating unit do not fall under the same standard industrial classification, the Ash Disposal Site and the Plant are still considered part of the same industrial grouping for the purposes of making a major source determination, because the Ash Disposal Site's primary activity is the disposal of coal combustion waste generated at the Plant. In the preamble to EPA's definition of source for the PSD program, the agency writes

Each source is to be classified according to its primary activity, which is determined by its principal product or group of products produced or distributed, or services rendered. Thus, one source classification encompasses both primary and support facilities, even when the latter includes units with a different two-digit SIC code.⁵²

Applying this language in the Anheuser-Busch case, EPA writes:

each source is to be classified according to its primary activity that is determined by its principal product or group of products. Thus, one source classification encompasses both primary and support facilities, even when it includes units with a different two-digit SIC code. Without an acceptable means of waste water disposal the brewery cannot produce beer. Land application at the landfarm is the waste water disposal means chosen by Anheuser-Busch for the brewery. . . EPA believes that the landfarm is a support facility to the brewery since landfarm operations assist in the primary activity of the brewery. Even if the landfarm, has a separate two-digit SIC code from the brewery, the landfarm is still a support facility for the brewery and considered part of the brewery. In other words, support activities are aggregated with their associated primary activity regardless of dissimilar SIC codes.⁵³

Similarly, in the present case without an acceptable means of fly ash, bottom ash, and gypsum disposal, the Plant could not operate. Disposal at the Ash Disposal Site is the means of disposal chosen by the Plant's operator. Thus the Ash Disposal Site is a

⁵¹ 40 C.F.R. § 52.21(b)(6).

⁵² *Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans*, 45 Fed. Reg. 52676, 52695 (Aug. 7, 1980).

⁵³ EPA Office of Air Quality Planning and Standards, *Analysis of the Applicability of Prevention of Significant Deterioration (PSD) to the Anheuser-Busch, Inc. Brewery* (Aug. 27, 1996), available at <http://www.epa.gov/region07/air/nsr/nsrmemos/abnt.pdf>.

support facility for the Plant because the Ash Disposal Site's operations assist in the primary activity of the Plant, and must be permitted as part of the Plant.

C. The Ash Disposal Site and the Plant are Contiguous and Adjacent

Source aggregation decisions concerning whether facilities are “contiguous or adjacent,” generally focus on proximity, dependency or interdependence, and the existence of a physical connection between facilities. These considerations represent how EPA determines if source aggregation is necessary to ensure the equipment and activities being permitting conform to the common sense notion of a plant. If one of the criteria, such as proximity, is somewhat weak, particularly strong facts in another category, such as dependency or the existence of a physical connection, can weigh in favor of the facilities being considered contiguous or adjacent.⁵⁴

In an attempt to justify its failure to aggregate the disposal site with the Plant, ACHD stated aggregation was not appropriate “due to the distance between the two sites and the fact that there is no pipeline between them. All but one of the [EPA source] determinations we reviewed have had some physical connection such as a pipeline between the distant sites.”⁵⁵

A recent EPA source determination notes that:

EPA has never established “a specific distance between pollutant emitting activities” for determining whether two noncontiguous facilities are “adjacent,” but EPA has historically interpreted the term to include concepts other than the physical distance between two facilities. In fact, EPA has repeatedly included an evaluation of the nature of the relationship between the facilities and the degree of interdependence between them in determining

⁵⁴ Letter from Richard R. Long, Director Air and Radiation Program EPA Region 8 to Dennis Myers, Construction Permit Unit Leader, Colorado Department of Public Health and Environment, Air Pollution Control Division (Apr. 20, 1999) (“we believe that the distance alone does not preclude these two being considered adjacent for PSD permitting purposes.”), *available at*: <http://www.epa.gov/region7/air/nsr/nsrmemos/amersoda.pdf>.

⁵⁵ Exhibit D - ACHD, *Summary of Public Comments and Department Responses on the Proposed Issuance of Cheswick TVOP*, *supra* note 24, at 19.

whether multiple non-contiguous emissions points should be considered a single source.⁵⁶

In the past EPA has deemed sources as far as “35-40 miles apart” to be contiguous and adjacent.⁵⁷ In this case the Plant and the Ash Disposal Site are roughly five miles apart by road⁵⁸ and 3.4 miles apart by straight line. The Plant cannot operate without the Ash Disposal Site because all fly ash, bottom ash, and gypsum generated at the Plant is disposed of at the Ash Disposal Site.⁵⁹ Multiple EPA source determinations indicate sites with similar operational relationships and separated by comparable distances are “adjacent and contiguous.” For instance:

- An Anheuser-Busch brewery in Fort Collins, CO was contiguous and adjacent with a landfarm 6 miles away where all brewery process water was sent for disposal.⁶⁰
- Steel mills 3.7 miles apart and separated by a lake, landfills, an interstate, and a river were considered contiguous and adjacent between hot metal produced at one mill was sent to the other for additional processing via *commercial* rail lines.⁶¹
- Aluminum plants separated by 3.4 miles were deemed contiguous and adjacent based on “considerable trucking of material between the two plants and sharing of personnel.”⁶²

In addition to their distances and operational relationships being similar to those between the Plant and the Ash Disposal Site, strong physical connections between the

⁵⁶ Letter from Cheryl L. Newton, Director, EPA Region 5 to Scott Huber, Summit Petroleum Corp., (Oct. 18, 2010) p.6, *available at*: <http://www.epa.gov/region7/air/title5/t5memos/singler5.pdf>

⁵⁷ EPA Region 8, *American Soda Single Source Determination* (Apr. 20, 1999) *available at*: <http://www.epa.gov/region7/air/nsr/nsrmemos/amersoda.pdf>.

⁵⁸ Exhibit H Inspection Report of RRI Energy Plant in Springdale, PA, *supra* note 46 at 5.

⁵⁹ *Id.*

⁶⁰ EPA Office of Air Quality Planning and Standards, *Analysis of the Applicability of Prevention of Significant Deterioration (PSD) to the Anheuser-Busch, Inc. Brewery* (Aug. 27, 1996), *available at* <http://www.epa.gov/region07/air/nsr/nsrmemos/abnt.pdf>

⁶¹ EPA Region 5, Air and Radiation Division letter to Illinois Environmental Protection Agency (March 13, 1980), *available at* <http://www.epa.gov/region07/air/nsr/nsrmemos/acme.pdf>.

⁶² EPA Region 2, *Alcoa Massena Modernization Project Request for a Single Source Determination* (Mar. 9, 2009) at 3, *available at*: <http://www.epa.gov/region7/air/nsr/nsrmemos/alcoany.pdf>.

pollutant emitting activities were not necessary in order to satisfy the adjacent and contiguous requirement for any of the three source determinations cited above.

For Anheuser-Busch source determination, EPA found the dependency of the sites sufficient grounds to satisfy the contiguous and adjacent requirement prior to considering the presence of a dedicated pipeline. The existence of the pipeline merely “strengthens the conclusion that the brewery operation is dependent on landfarm operations.”⁶³ For the latter two source determinations listed above, the contiguous and adjacent factor was satisfied despite the fact that the physical connections — a commercial rail line and public roads, respectively — were weak or nonexistent.

D. The Ash Disposal Site Must be Incorporated into the TVOP

The Plant and the Ash Disposal Site are under common control and are deemed to have the same SIC code because the Ash Disposal Site serves as a support facility for the Plant. ACHD contends that the sites should not be considered a single source because of the distance between the two facilities and insufficient physical connection. However, as detailed above, distance alone is not determinative, and EPA has deemed pollutant emitting activities separated by comparable distances and with comparable operational relationships to be a single source, including in cases where no private, dedicated physical connection existed between the pollutant emitting activity sites. Thus, the Ash Disposal Site must be considered to be part of the Plant, and the Ash Disposal Site must be included in the TVOP and subject to all applicable Title V requirements.

⁶³ EPA Office of Air Quality Planning and Standards, *Analysis of the Applicability of Prevention of Significant Deterioration (PSD) to the Anheuser-Busch, Inc. Brewery* (Aug. 27, 1996) at 4, available at <http://www.epa.gov/region07/air/nsr/nsrmemos/abnt.pdf>

IV. THE TVOP DOES NOT INCORPORATE COMPLIANCE ASSURANCE MONITORING REQUIREMENTS

Major sources must satisfy Compliance Assurance Monitoring (“CAM”) requirements described in 40 C.F.R. Part 64. Subject to some exemptions, the CAM program requires major sources to develop monitoring plans to ensure proper operations of pollution control devices used to meet emission limits or standards for a regulated air pollutant. CAM requirements are applicable for at least two control devices on the main boiler: the FGD System and the electrostatic precipitator (“ESP”). ACHD has failed to incorporate CAM requirements for either of these sources into the TVOP.

Section I, above, described ACHD’s failure to include the Installation Permit’s requirements, including CAM requirements, in the TVOP. Regarding CAM requirements for the ESP, ACHD states:

While the source will continue to use an ESP with a COM, and continuously monitor and record opacity and ESP operating parameters to comply with the applicable particulate emission limit, the requirements of 40 CFR Part 64 shall not apply to the Main Boiler No.1 until the renewal of this Part 70 major source operating permit.⁶⁴

ACHD’s comment response document echoes this assertion, stating that particulate matter monitoring requirements were adequate and that “CAM applies [only] upon renewal of the TVOP.”⁶⁵

Petitioners believe ACHD has based their assertion that CAM does not apply on 40 CFR § 64.5(a), which reads in relevant part:

⁶⁴ Exhibit D - ACHD, *Summary of Public Comments and Department Responses on the Proposed Issuance of Cheswick TVOP*, supra note 24, at 4.

⁶⁵ *Id.*, at 17.

(1) On or after April 20, 1998, the owner or operator shall submit information as part of an application for an initial part 70 or 71 permit if, by that date, the application either:

(i) Has not been filed; or

(ii) Has not yet been determined to be complete by the permitting authority.

(2) On or after April 20, 1998, the owner or operator shall submit information as part of an application for a significant permit revision under part 70 or 71 of this chapter, but only with respect to those pollutant-specific emissions units for which the proposed permit revision is applicable.

The Plant's operator submitted an application for a Title V permit on October 31, 1995. Assuming the application was deemed complete by April 20, 1998,⁶⁶ the plant would have been exempt from CAM requirements under § 64.5(a)(1) at the time CAM regulations were first promulgated. However, the Plant is no longer exempt from CAM.

Section 64.5(a)(2) requires sources that apply for a "significant permit revision" after April 20, 1998, to include a CAM plan to be incorporated into the resulting Title V permit. The EPA guidance document "2nd Set of Frequently Asked Questions and Responses Concerning Implementation of the CAM Rule" confirms this reading:

Question 18. A source owner has submitted a permit application before April 20, 1998 and has received a completeness determination but no title V permit. If, before a permit is issued, a source owner makes a change that involves a large PSEU [pollutant specific emission unit] (a unit whose post control emissions exceed the major source threshold) and that would be considered significant under part 70 if a permit had been issued, would the large PSEU be subject to the CAM rule?

Response 18. Yes, the large PSEU would become subject to the CAM rule if the change could potentially affect the unit's compliance status and if the change is owner-initiated. Not all changes that would require a significant permit revision trigger CAM rule applicability. The types of changes that could trigger CAM rule applicability include source owner- or operator initiated physical changes such as increasing production rate,

⁶⁶ Petitioners do not know if ACHD formally determined that the Title V permit application for the Plant was complete.

changing to a new fuel or raw material, adding a new process line or control device, increasing the load on the control device by routing additional process exhaust to it, changing the control device, installing new monitoring systems, or changing process or weight rates.⁶⁷

Several post-April 20, 1998 changes at the Plant trigger CAM applicability under § 64.5(a)(2), including:

- Approval to combust up to 35% Powder River Basin coal – Nov. 11, 2009.⁶⁸
- Installation Permit Application for Flue Gas Desulfurization Unit - May 1, 2006.⁶⁹
- TVOP Application Update for Installation of Low NO_x Burner Upgrade at Boiler 1 and SO₂ and NH₃ Injection systems to improve ESP particulate collection efficiency – Oct. 16, 2000.⁷⁰
- Installation Permit Application for SCR Unit in Cheswick – Oct. 23, 2000.⁷¹

Additionally, Petitioners believe EPA established the April 20, 1998 deadline based on the assumption that permitting authorities would take final action on TVOP applications within 18 months of a completeness determination in accordance with 40 C.F.R. 70.7(a)(2). Therefore, CAM-exempt operating permits would be issued by the year 2000, and that CAM requirements would apply, at the latest, upon permit renewal in 2005.

The CAM rule preamble discussion of § 64.5 states the April 20, 1998 deadline was designed to “assure that significant permit revisions affecting particular emissions

⁶⁷ EPA, *2nd Set of Frequently Asked Questions and Responses Concerning Implementation of the CAM Rule* (Apr. 30, 2004), available at: <http://www.epa.gov/ttn/emc/cam/camfaq2.pdf>.

⁶⁸ Exhibit I – ACHD, Approval to combust up to 35% Powder River Basin coal (Nov. 11, 2009).

⁶⁹ Exhibit C – Cheswick Installation Permit *supra* note 19.

⁷⁰ Exhibit J - TVOP Application Update for Installation of Low NO_x Burner Upgrade at Boiler 1 and SO₂ and NH₃ Injection systems to improve ESP particulate collection efficiency (Oct. 16, 2000).

⁷¹ Exhibit K - Installation Permit Application for SCR Unit in Cheswick (Oct. 23, 2000).

units are not considered in a piecemeal fashion and *that part 64 is implemented as quickly as reasonably practicable.*”⁷² EPA did not create the April 20, 1998 deadline in § 64.5(a) with the intention it would be cited to allow a source to evade CAM requirements in a permit issued in 2010, and delay satisfying CAM until permit renewal in 2015, over 18 years after CAM regulations were promulgated.

Because the Plant’s operators have submitted significant permit application revisions since April 20, 1998, Part 64 requirements must be satisfied in the TVOP, not, as ACHD asserts, upon the renewal of the TVOP. Further, even if the Plant’s operators had not submitted these significant revisions, citing the § 64.5 deadline to avoid CAM requirements in a Title V permit issued in 2010 is inconsistent with EPA’s purpose in creating the CAM submittal deadline. The TVOP must be revised to incorporate CAM requirements for the FGD System and existing monitoring for the ESP must be reviewed and revised as necessary to satisfy Part 64.

V. ASH HANDLING, PROCESSING, AND STORAGE CONDITIONS MUST INCLUDE TESTING REQUIREMENTS AND OTHER CONDITIONS IN ORDER TO ENSURE COMPLIANCE

Under the Clean Air Act, each Title V permit “shall set forth inspection, entry, monitoring, compliance certification, and reporting requirements to assure compliance with the permit terms and conditions.”⁷³ Similarly, ACHD requires that operating permits include “compliance certification, testing, monitoring, reporting, and recordkeeping requirements sufficient to assure compliance with the terms and conditions

⁷² *Compliance Assurance Monitoring*, 62 Fed. Reg. 54900, 54927 (Oct. 22, 1997) (emphasis added).

⁷³ 42 U.S.C. § 7661c(c). EPA regulations regarding state operating permit programs appear at 40 C.F.R. Part 70.

of the permit.”⁷⁴ ACHD’s rules are incorporated into Pennsylvania’s SIP and therefore also constitute “applicable requirements” under federal law.⁷⁵

The TVOP establishes an emission limitation of 0.02 grains/dscf from either of the two fly ash silo baghouse vents.⁷⁶ ACHD expects emission levels of 8.06 tons per year (“tpy”) of particulate matter less than 2.5 microns in diameter (“PM 2.5”) from ash handling and storage. Within the ash handling and storage operations, emissions of 5.86 tpy particulate matter/particulate matter less than 10 microns in diameter will be emitted from the baghouse vents.⁷⁷ However, there are no testing requirements in the TVOP to verify compliance with the emission limitation.⁷⁸ Although ACHD has reserved the right to require emissions testing to assure compliance with permit conditions, there are no mandatory testing requirements applicable to the above grain-loading emission limitation.⁷⁹

ACHD contends that it will rely on “good engineering practices in operating and maintaining the source in lieu of testing for sources that operate intermittently (only during loading of the silo) and have low emissions.”⁸⁰ However, “good engineering practices” are not defined, and ACHD’s rules do not recognize an exemption from testing and monitoring for intermittent sources or sources with emissions below a certain

⁷⁴ Art. XXI, § 2103.12.h.1.

⁷⁵ 40 C.F.R. § 52.2020(c)(2); 40 C.F.R. § 70.2 (“applicable requirements” definition).

⁷⁶ TVOP, § V.E.1.b.

⁷⁷ Exhibit E - *Permit Review of Application, Cheswick Power Station Title V Operating Permit*, supra note 37 at 2; (Potential Emission Summary), Appendix B (Emission Calculations, Bottom Ash and Fly Ash Handling Operations). Emissions of the three fractions of particulate matter (PM) from ash handling and storage operations are almost identical, with potential emissions of 8.12 tons per year of PM, 8.06 tons per year of particulate matter less than 10 microns in diameter (PM10), and 8.06 tons per year of particulate matter less than 2.5 microns in diameter (PM2.5).

⁷⁸ Exhibit F - ACHD, *Cheswick Power Station Title V Operating Permit*, supra note 37 § V.E.1.

⁷⁹ *Id.*, § V.E.2.

⁸⁰ Exhibit D - ACHD, *Summary of Public Comments and Department Responses on the Proposed Issuance of Cheswick TVOP*, supra note 24, at 21.

