

BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF)
PACIFIC COAST BUILDING)
PRODUCTS, INC.,) ORDER RESPONDING TO PETITIONER'S
APEX, NEVADA) REQUEST THAT THE ADMINISTRATOR
) OBJECT TO ISSUANCE OF A STATE
Permit No. A00011) OPERATING PERMIT
Issued by the Clark County)
Health District, Nevada)
_____)

ORDER DENYING PETITION FOR OBJECTION TO PERMIT

On June 6, 1999, the Environmental Protection Agency ("EPA") received a petition from Robert W. Hall ("Petitioner") requesting that EPA object to the issuance to Pacific Coast Building Products, Inc. ("PABCO") of state operating permit number A00011 for the operation of a wallboard plant located near Apex, Nevada ("Part 70 permit" or "PABCO permit"). The PABCO permit was issued by the Clark County Health District in the State of Nevada ("CCHD") on May 13, 1999 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 at 40 CFR Part 70, and Clark County District Board of Health, Air Pollution Control Regulations, Section 19.

The petition alleges that the PABCO permit failed to: (1) cite and issue the Part 70 permit according to the approved and applicable State Implementation Plan (SIP); (2) require implementation of Best Available Control Technology (BACT) and Lowest Achievable Emission Rate technology (LAER); (3) require PABCO to conduct post-construction ambient monitoring as required by the SIP and a previously issued permit; (4) comply with the compliance schedule requirements of Section 10 of the SIP; and (5) be issued pursuant to an EPA-approved Part 70 program. Petitioner has requested that EPA object to the issuance of the Part 70 permit pursuant to section 505(b)(2) of the Act, 42 U.S.C. § 7661d(b)(2), and Section 19.6.3 of the Clark County District Board of Health Air Pollution Control Regulations for these reasons.

Based on a review of all the information before me, including the PABCO permit, the permit application and the Technical Support Document, additional information provided by the permitting authority in response to inquiries, and the information provided by Petitioner in the petition, I deny Petitioner's request for the reasons set forth in section III.

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) & 504(a). Section 502(d)(1) of the Act calls upon each State or locality to develop and submit to EPA an operating permit program intended to meet the requirements of Title V. CCHD submitted for EPA approval under Title V a program governing the issuance of operating permits contained in Section 19 of its Air Pollution Control Regulations. On August 14, 1995, EPA granted interim approval to the CCHD's Title V program. 60 Fed. Reg. 36,070 (Aug. 14, 1995). This interim approval was effective on August 14, 1995 and had an expiration date of August 13, 1997. EPA extended this interim approval twice, most recently until June 1, 2000. See 61 Fed. Reg. 56,368 (Oct. 31, 1996); 62 Fed. Reg. 45,372 (Aug. 29, 1997) (codified at 40 CFR Part 70, Appendix A).

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, recordkeeping, reporting, and other requirements to assure compliance by sources with existing applicable requirements. 57 Fed. Reg. 32250, 32251 (July 21, 1992) (final rule promulgating Part 70 regulations). One purpose of the Title V program is to enable the source, EPA, States and local permitting authorities, and the public to better understand the applicable requirements to which the source is subject and whether the source is meeting those requirements. Thus, the Title V operating permits program is a vehicle for ensuring that existing air quality control requirements are appropriately applied to facility emission units in a single document and that compliance with these requirements is assured.

Under section 505(b) of the CAA and 40 CFR § 70.8, permitting authorities are required to submit operating permits proposed pursuant to title V to EPA for review. EPA will object to permits determined by the Agency not to be in compliance with applicable requirements or the requirements of 40 CFR Part 70. If EPA does not object to a Title V 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. To justify exercise of an objection by EPA to a title V permit pursuant to section 505(b)(2), a petitioner must

demonstrate that the permit is not in compliance with the requirements of the Act, including the requirements of Part 70.

Petitions must, in general, be based on objections to the permit that were raised with reasonable specificity during the public comment period. 40 CFR § 70.8(d). 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 before receipt of the objection. Id. If EPA objects to a permit in response to a petition and the permit has been issued, EPA or the permitting authority 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

As referenced above, Petitioner's Title V petition alleges that CCHD failed to comply with the requirements of the State Implementation Plan ("SIP") and the approved Part 70 program in issuing the Part 70 permit. Specifically, the petition alleges the following as grounds for objection to the Part 70 permit:

- the Part 70 permit was not issued according to the approved and applicable SIP;
- the Part 70 permit does not require implementation of BACT/LAER;
- the Part 70 permit does not require PABCO to conduct post-construction ambient monitoring required by the SIP and a previously-issued permit;
- the Part 70 permit does not require PABCO to comply with the compliance schedule requirements of Section 10 of the SIP; and
- the Part 70 permit was not issued pursuant to an EPA-approved Part 70 program.

III. DISCUSSION

The issues listed as grounds for objection to the Part 70 permit are each addressed separately in this section, in the order listed above.

A. Failure to Cite and Issue the Part 70 Permit According to the Approved and Applicable SIP

In his petition, Petitioner alleges that the Part 70 permit is deficient because it failed "to cite and issue the Part 70 Operating Permit according to the approved and applicable State Implementation Plan" and asserts that "[n]either EPA nor the APCD may legally substitute local rules for SIP requirements." Petition at 2. An examination of Exhibit A to the Petition, which is referenced as explaining this allegation, leads EPA to believe that Petitioner is asserting that the Part 70 permit is defective because either (1) it incorporates requirements from an Authority to Construct permit ("ATC") that was issued pursuant to, and contains requirements from, Section 12 of the Clark County Air Pollution Control Regulations, which is not part of the EPA-approved SIP, rather than Section 15 of those regulations, which is part of the SIP; or (2) it incorporates local, non SIP-approved requirements in place of SIP-approved requirements. See Petition at 11-19. EPA addresses both of these arguments below.

1. Incorporation of Requirements from Authority to Construct Permit Issued Pursuant to Non SIP-Approved Rule

Petitioner appears to allege that because the Part 70 permit incorporates requirements from an ATC that was issued pursuant to, and contains requirements from, a non-SIP approved rule (section 12), rather than a SIP-approved rule (section 15), the Part 70 permit is defective. However, after an examination of the ATC and the SIP, EPA has determined that the ATC meets all SIP requirements. First, the authority to issue the ATC came from a SIP-approved rule (section 15). Second, although the ATC cites the locally-approved section 12 requirements, these requirements are as stringent as, or more stringent than, the SIP-approved section 15 requirements; thus, the section 15 requirements are satisfied by the section 12 ATC terms and conditions. Finally, although Petitioner claims that the ATC was issued in violation of certain requirements of section 15, Petition at 19, Petitioner provides no evidence of such violations and, after an independent inquiry, EPA has determined that the facility's current ATC was issued in full compliance with the requirements of section 15 referenced by Petitioner.

2. Incorporation of Local, Non SIP-Approved Requirements in Place of SIP-Approved Requirements

Under 40 CFR §§ 70.2 and 70.6 as well as the approved Part 70 permit program implemented by CCHD, all provisions of the

Clark County portion of the Nevada SIP are applicable requirements with which the Part 70 permit must assure compliance. However, Petitioner is incorrect when he alleges that requirements adopted locally by CCHD are included in the Part 70 permit in place of SIP requirements. Rather, the SIP requirements are streamlined into, and subsumed under, the more stringent CCHD requirements according to a process provided for in an EPA guidance document entitled "White Paper Number 2 for Improved Implementation of The Part 70 Operating Permits Program" (March 5, 1996) ("White Paper 2").¹

White Paper 2 sets forth the Agency's view that multiple applicable requirements may be streamlined into a single new permit term (or set of terms) that will assure compliance with all of the requirements. The legal basis for such streamlining relies on section 504(a) of the Act and 40 CFR § 70.6(a), which require that title V permits contain emission limits and standards and other terms as needed to assure compliance with applicable requirements, including the requirements of the applicable implementation plan. See 42 U.S.C. § 7661c(a); 40 CFR § 70.6(a). This section does not require repetition of all terms and conditions of an applicable requirement when another applicable requirement or Part 70 permit condition (i.e., a streamlined requirement) could be fashioned to otherwise assure compliance with that applicable requirement.

White Paper 2 specifically allows the use of a previously "state-only" (or non SIP-approved) requirement as a streamlined requirement that would subsume federally enforceable requirements when the "state-only" requirement is at least as stringent as any applicable federal requirement it would subsume. See White Paper 2 at 11. The streamlined requirement that was originally "state-only" then becomes a federally enforceable condition in the Part 70 permit. Id.

The Technical Support Document ("TSD") for the PABCO Part 70 Permit, which serves as the statement of basis for the CCHD Part 70 permit, see 40 CFR § 70.7(a)(5), contains a thorough review of all requirements to which PABCO is subject. This listing includes requirements which are enforceable by CCHD only, as well as those that are federally enforceable. In cases where a locally adopted rule that has not been incorporated into the SIP differs from a similar, SIP-approved rule, the TSD contains a streamlining analysis to determine the most stringent requirements. Where the local, non-SIP requirement is more

¹ White Paper 2 is available at EPA's website at <http://www.epa.gov/ttncaaa1/t5wp.html>.

stringent than the SIP requirement, the SIP requirement has been streamlined into, and subsumed under, the local rule, which then becomes federally enforceable in the Part 70 operating permit.

EPA has reviewed the TSD and the Part 70 permit and has determined that CCHD's streamlining analysis was performed correctly and is consistent with the guidance of White Paper 2. In all cases where overlapping requirements were found, CCHD incorporated the most stringent of these into the Part 70 permit. In some cases, a locally adopted requirement that has not yet been approved into the SIP was more stringent than the SIP requirement. Thus, the Part 70 permit streamlined the SIP requirement into the locally adopted requirement and only listed the locally adopted requirement in the applicable requirements section. The locally adopted requirement then became federally enforceable because it streamlined federally enforceable requirements.

For the reasons stated above, Petitioner's first claim does not demonstrate that the PABCO Part 70 permit fails to comply with the requirements of the Act or Part 70.

B. Failure to Require Implementation of BACT

Petitioner next alleges that the Part 70 permit fails to assure compliance with the requirements of the federal and State preconstruction review programs because it does not require Best Available Control Technology (BACT) as required by the SIP and federal law. Petition at 2; Exhibit A to Petition at 19-25.

Under title I of the Act, preconstruction review for new major sources and major modifications to existing major sources must include an analysis to determine the appropriate control technology. In areas which are classified as either "attainment" or "unclassifiable" with respect to the National Ambient Air Quality Standards ("NAAQS"), each major source or major modification must apply Best Available Control Technology ("BACT") for each pollutant subject to review. PABCO is a major source of coarse particulate matter (PM_{10}) in an area of Clark County designated as in attainment with the PM_{10} NAAQS. Therefore, the preconstruction permit issued to PABCO must incorporate controls which were determined to be BACT for control of PM_{10} emissions. CCHD issued the most recent preconstruction permit for this facility on November 17, 1997. Petitioner argues that the BACT controls in that permit are defective because (1) the permit only requires 1.5% moisture content of processed material using water spray, and (2) the permit does not require the application of moisture "seven days a week, twenty-four hours a day where material is subject to prevailing winds." Exhibit A

to Petition at 19.

The merits of federal preconstruction review permits can be ripe for consideration in a timely petition to object under title V. See Order *In re Shintech Inc.*, at 3 n.2 (Sept. 10, 1997). Under 40 CFR § 70.1(b), "all sources subject to Title V must have a permit to operate that assures compliance by the source with all applicable requirements." Applicable requirements are defined in 40 CFR § 70.2 to include: "(1) any standard or other requirement provided for in the applicable implementation plan approved or promulgated by EPA through rulemaking under Title I of the [Clean Air] Act...." Such applicable requirements include the requirement to obtain preconstruction permits that comply with preconstruction review requirements under the Act, EPA regulations, and State Implementation Plans ("SIPs"). See generally CAA §§ 110(a)(2)(C), 160-69, & 173; 40 CFR §§ 51.160-66 & 52.21. Thus, the applicable requirements of the PABCO Permit include the requirement to obtain a preconstruction permit that complies with requirements under the Act, EPA regulations, and the Nevada SIP.

Petitioner expresses two concerns about the appropriateness and the enforceability of the controls determined to be BACT for PABCO's emissions of PM₁₀. First, Petitioner claims that the requirement to achieve 1.5% moisture content of processed material using water spray bars does not constitute BACT since a higher control efficiency could be achieved by requiring a higher moisture content. Exhibit A to Petition at 19. Petitioner also argues that the preconstruction permit - and therefore the Part 70 permit - failed to require BACT since these do not require that PABCO must apply moisture, "seven days a week, twenty-four hours a day where material is subject to prevailing winds." Id.

In determining BACT under a preconstruction review program, as in implementing other aspects of SIP preconstruction review programs, a permitting authority exercises considerable discretion. Thus, EPA lacks authority to take corrective action merely because the Agency disagrees with a permitting authority's lawful exercise of discretion in making BACT-related determinations. The permitting authority's discretion is bounded, however, by the fundamental requirements of administrative law that agency decisions not be arbitrary or capricious, be beyond statutory authority, or fail to comply with applicable procedures. Consequently, preconstruction permits issued by CCHD must conform to the applicable requirements of the Clean Air Act and the SIP, and failure to do so may result in corrective action by EPA. Such corrective action may take the form of an objection to an operating permit in response to a

public petition.

Having evaluated the conditions reflected in the preconstruction permit issued to PABCO and accompanying materials, EPA concludes that Petitioner has failed to demonstrate that the permit does not assure compliance with relevant applicable requirements, including the requirement to obtain a preconstruction permit that complies with applicable preconstruction review requirements under the Act, EPA regulations, and the Clark County portion of the Nevada SIP. To the contrary, EPA concludes that the PABCO preconstruction permit, and the BACT determination, reflect a reasoned determination that is well within CCHD's discretion to reach, and that is consistent with determinations for similar sources in this area. Reasons for this conclusion follow.

EPA has accepted 1.5% moisture content of processed material as BACT, in part due to the high cost and limited availability of water in the areas of Clark County where mining typically occurs.² The preconstruction permit requires that PABCO maintain this moisture level for all processed material. Biweekly testing to ensure compliance with this moisture level is also required. As written, the preconstruction permit issued to PABCO assures compliance with the moisture content determined to be BACT for this facility.

In addition to the use of spray bars to achieve a minimum moisture level in processed material, the preconstruction permit requires several other types of controls that limit emissions of PM₁₀. For example, emissions from all encloseable equipment are required to be vented to a baghouse, including emissions from the dryer, impeller mills, and storage bins. Also, all drop points from conveyor lines are required to be covered. Finally, paved and unpaved haul roads must be controlled using a combination of sweeping and application of water and chemical dust suppressant. Thus, the controls required by the preconstruction permit issued to PABCO do constitute BACT for emissions of PM₁₀ from this facility.

For the reasons stated above, EPA does not believe the permitting authority has been arbitrary or otherwise unlawful in establishing the control requirements in PABCO's PSD permit that are reflected in its operating permit. Thus, Petitioner's second claim does not demonstrate that the PABCO permit fails to comply

² The Clean Air Act and EPA regulations specifically allow the consideration of cost in making case-by-case BACT determinations. See CAA § 169(3); 40 CFR § 52.21(b)(12).

with the requirements of the Act or Part 70.

C. Failure to Require PABCO to Conduct Post-Construction Ambient Monitoring as Required by the SIP and a Previously-Issued Permit.

Petitioner next alleges that the SIP and a permit previously issued to PABCO require post-construction ambient air monitoring. Petitioner therefore alleges that because the Part 70 permit does not require such monitoring, the Part 70 permit is deficient. Petition at 2; Exhibit A to Petition at 25.

On September 3, 1981, EPA approved a rule entitled, "Section 15, Source Registration" into the Clark County portion of the Nevada SIP. At the time of approval, this rule satisfied the federal requirements for review of new major sources and major modifications to existing major sources; the rule remains a part of the EPA-approved SIP. In section 15.13.12(2), this rule requires the following with respect to post-construction monitoring:

"The owner or operator of a major stationary source or major modification shall, after construction of the stationary source or modification, conduct such ambient monitoring as the Control Officer determines is necessary to determine the effect emissions from the stationary source or modification may have, or are having, on air quality in an area."

On June 18, 1993, CCHD drafted a preconstruction permit which required PABCO to perform ambient air monitoring of PM_{10} after a modification which resulted in increases of PM_{10} emissions. Although it was signed by CCHD staff, this permit was not formally issued. An updated permit was issued to PABCO on November 11, 1993 which did not contain the requirement for post-construction ambient air monitoring. Subsequent preconstruction permits issued to PABCO have also not required such monitoring. As a result, the Part 70 permit does not contain the requirement to perform ambient air monitoring.

Petitioner incorrectly alleges that section 15.13.12(2) requires ambient monitoring in all cases. Petition at 2, 25-26. At the time of preconstruction permitting, Section 15 of the applicable SIP allowed the Control Officer substantial discretion concerning post-construction monitoring, including the discretion to require no ambient air monitoring at all for a particular source. Thus, under the approved SIP, CCHD had full authority to require no ambient air monitoring as long as that determination was made in a manner that was not arbitrary, capricious or otherwise unlawful. Petitioner has provided no evidence or

argument that CCHD's exercise of discretion was arbitrary, capricious, or otherwise not in accordance with law in determining that no monitoring was necessary for PABCO's preconstruction permit. After an independent inquiry, EPA believes that CCHD was well within its discretion in determining that monitoring was unnecessary. Therefore, Petitioner's third claim seeking objection to the Part 70 permit is hereby denied.

D. Failure to Comply with the Compliance Schedule Requirements of Section 10 of the SIP.

Petitioner next alleges that the Part 70 permit is defective because it was not issued in compliance with "the Compliance Schedule requirements of § 10 of the SIP." Petition at 2.

On July 24, 1979, EPA approved a rule entitled, "Section 10, Compliance Schedules" into the Clark County portion of the Nevada SIP. This rule is still a part of the SIP, and has not been amended since its initial approval. Section 10.1 of this rule requires the following:

"Any existing source not in compliance with emission limitations hereinafter adopted, or which is not operating under a compliance schedule approved by the Hearing Board, shall submit a compliance schedule to the Control Officer for review no later than 90 days after adoption of such emission limitations."

Petitioner's specific grievance is somewhat unclear to EPA. Petitioner has not provided any supporting evidence or arguments concerning noncompliance with Section 10 in the Petition. Notably, Petitioner has not even alleged that PABCO is not in compliance with applicable emission limitations. In fact, Petitioner's entire argument on this point is contained in his one sentence allegation. Petition at 2.

After an independent review of the requirements of section 10, EPA has not identified any violation of this provision. The Part 70 permit does contain a compliance schedule which requires PABCO to submit an application for a modified preconstruction permit within 3 months from the date of Part 70 permit issuance. Page 85 of the TSD explains that submittal of an application has been required in order to correct inconsistencies in the emissions limits contained in the current preconstruction permit. Despite this, there is no evidence submitted to EPA by PABCO, CCHD, or Petitioner to suggest that PABCO is out of compliance with any of its permitted emission limits. Thus, EPA finds that Petitioner has failed to provide evidence that an EPA objection

is warranted.

E. Failure to Maintain an EPA-Approved Part 70 program.

Petitioner's fifth argument asserts that the Part 70 permit is invalid because it was not issued pursuant to an EPA-approved Part 70 program. Quite simply, Petitioner is incorrect.

As noted by Petitioner, EPA initially granted interim approval to CCHD for its Part 70 permit program on July 15, 1995. See 60 Fed. Reg. 36070 (July 15, 1995). This interim approval specified an expiration date of August 13, 1997, if the issues preventing full approval by EPA were not resolved by that time. On July 1, 1996, EPA amended 40 CFR Part 70 to allow an extension of all interim approvals granted to State Part 70 programs until June 13, 1998. See 61 Fed. Reg. 56368 (July 1, 1996). Then, on August 29, 1997, EPA granted another extension of all interim-approved Part 70 programs until October 1, 1998. See 62 Fed. Reg. 45732 (Aug. 29, 1997). Finally, on July 27, 1998, EPA granted the most recent extension of all Part 70 program interim approvals until June 1, 2000. See 63 FR 40054 (July 27, 1998).

Petitioner argues that the Part 70 permit is invalid, asserting that the interim approval for CCHD's Part 70 program expired on October 1, 1998. Petition at 2-3, 6-8. Specifically, Petitioner states that he has been unable to find an additional extension of EPA's interim approval of CCHD's Part 70 program. Petition at 8. However, as referenced above, on July 27, 1998, EPA extended the interim approval of CCHD's program until June 1, 2000. This extension was published in the Federal Register. See 63 Fed. Reg. 40054. Thus, CCHD has an interim-approved Part 70 permit program and Petitioner's argument that the Part 70 permit was not issued pursuant to an EPA-approved Part 70 program is incorrect. Therefore, EPA finds that Petitioner has not provided grounds for an objection to the Part 70 permit.

CONCLUSION

For the reasons set forth above, I deny the petition from Robert W. Hall requesting the Administrator to object to the issuance of the Part 70 permit issued to PABCO pursuant to CAA section 505(b)(2).

Date

Carol M. Browner
Administrator