**BEFORE THE ADMINISTRATOR**
**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

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Petition No. VIII-2023-14

In the Matter of

DCP Operating Company LP, Platteville Natural Gas Processing Plant

Permit No. 02OPWE252

Issued by the Colorado Department of Public Health and Environment

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# ORDER GRANTING IN PART AND DENYING IN PART A PETITION FOR OBJECTION TO A TITLE V OPERATING PERMIT

## I. INTRODUCTION

The U.S. Environmental Protection Agency (EPA) received a petition dated September 19, 2023 (the Petition) from the Center for Biological Diversity (the Petitioner), pursuant to section 505(b)(2) of the Clean Air Act (CAA or Act), 42 United States Code (U.S.C.) § 7661d(b)(2). The Petition requests that the EPA Administrator object to operating permit No. 02OPWE252 (the Permit) issued by the Colorado Department of Public Health and Environment (CDPHE) to the Platteville Natural Gas Processing Plant (Platteville Facility) in Weld County, Colorado. The Permit was issued pursuant to title V of the CAA, 42 U.S.C. §§ 7661–7661f, and 5 Code of Colorado Regulations (CCR) 1001-5, Part C. *See also* 40 Code of Federal Regulations (C.F.R.) part 70 (title V implementing regulations). This type of operating permit is also known as a title V permit or part 70 permit.

Based on a review of the Petition and other relevant materials, including the Permit, the permit record, and relevant statutory and regulatory authorities, and as explained in Section IV of this Order, the EPA grants in part and denies in part the Petition requesting that the EPA Administrator object to the Permit. Specifically, the EPA grants Claim I in part and denies the rest of the claims.

## II. STATUTORY AND REGULATORY FRAMEWORK

### A. Title V Permits

Section 502(d)(1) of the CAA, 42 U.S.C. § 7661a(d)(1), requires each state to develop and submit to the EPA an operating permit program to meet the requirements of title V of the CAA and the EPA's implementing regulations at 40 C.F.R. part 70. The state of Colorado submitted a title V program governing the issuance of operating permits on November 5, 1993. The EPA granted interim approval to the title V operating permit program in January 1995 and full approval in August 2000. *See* 60 Fed. Reg. 4563 (January 24, 1995) (interim approval); 61 Fed. Reg. 56368 (October 31, 1996) (revising

interim approval); 65 Fed. Reg. 49919 (August 16, 2000) (full approval). This program is codified in 5 CCR 1001-5, Part C.

All major stationary sources of air pollution and certain other sources are required to apply for and operate in accordance with title V operating permits that include emission limitations and other conditions as necessary to assure compliance with applicable requirements of the CAA, including the requirements of the applicable implementation plan. 42 U.S.C. §§ 7661a(a), 7661b, 7661c(a). The title V operating permit program generally does not impose new substantive air quality control requirements, but does require permits to contain adequate monitoring, recordkeeping, reporting, and other requirements to assure compliance with applicable requirements. 40 C.F.R. § 70.1(b); 42 U.S.C. § 7661c(c). One purpose of the title V program is to "enable the source, States, EPA, and the public to understand better the requirements to which the source is subject, and whether the source is meeting those requirements." 57 Fed. Reg. 32250, 32251 (July 21, 1992). Thus, the title V operating permit program is a vehicle for compiling the air quality control requirements as they apply to the source's emission units and for providing adequate monitoring, recordkeeping, and reporting to assure compliance with such requirements.

### B. Review of Issues in a Petition

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

Each petition must identify the proposed permit on which the petition is based and identify the petition claims. 40 C.F.R. § 70.12(a). Any issue raised in the petition as grounds for an objection must be based on a claim that the permit, permit record, or permit process is not in compliance with applicable requirements or requirements under part 70. 40 C.F.R. § 70.12(a)(2). Any arguments or claims the petitioner wishes the EPA to consider in support of each issue raised must generally be contained within the body of the petition.[1] *Id.*

The petition shall be based only on objections to the permit that were raised with reasonable specificity during the public comment period provided by the permitting authority (unless the petitioner demonstrates in the petition to the Administrator that it was impracticable to raise such objections within such period or unless the grounds for such objection arose after such period). 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d); *see also* 40 C.F.R. § 70.12(a)(2)(v).

[1] If reference is made to an attached document, the body of the petition must provide a specific citation to the referenced information, along with a description of how that information supports the claim. In determining whether to object, the Administrator will not consider arguments, assertions, claims, or other information incorporated into the petition by reference. *Id*.

In response to such a petition, the Act requires the Administrator to issue an objection if a petitioner demonstrates that a permit is not in compliance with the requirements of the Act. 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(c)(1).[2] Under section 505(b)(2) of the Act, the burden is on the petitioner to make the required demonstration to the EPA.[3] The petitioner's demonstration burden is a critical component of CAA § 505(b)(2). As courts have recognized, CAA § 505(b)(2) contains both a "discretionary component," under which the Administrator determines whether a petition demonstrates that a permit is not in compliance with the requirements of the Act, and a nondiscretionary duty on the Administrator's part to object where such a demonstration is made. *Sierra Club v. Johnson*, 541 F.3d at 1265–66 ("[I]t is undeniable [that CAA § 505(b)(2)] also contains a discretionary component: it requires the Administrator to make a judgment of whether a petition demonstrates a permit does not comply with clean air requirements."); *NYPIRG*, 321 F.3d at 333. Courts have also made clear that the Administrator is only obligated to grant a petition to object under CAA § 505(b)(2) if the Administrator determines that the petitioner has demonstrated that the permit is not in compliance with requirements of the Act. *Citizens Against Ruining the Environment*, 535 F.3d at 677 (stating that § 505(b)(2) "clearly obligates the Administrator to (1) determine whether the petition demonstrates noncompliance and (2) object *if* such a demonstration is made" (emphasis added)).[4] When courts have reviewed the EPA's interpretation of the ambiguous term "demonstrates" and its determination as to whether the demonstration has been made, they have applied a deferential standard of review. *See, e.g.*, *MacClarence*, 596 F.3d at 1130–31.[5] Certain aspects of the petitioner's demonstration burden are discussed in the following paragraph. A more detailed discussion can be found in the preamble to the EPA's proposed petitions rule. *See* 81 Fed. Reg. 57822, 57829–31 (Aug. 24, 2016); *see also In the Matter of Consolidated Environmental Management, Inc., Nucor Steel Louisiana*, Order on Petition Nos. VI-2011-06 and VI-2012-07 at 4–7 (June 19, 2013) (*Nucor II Order*).

The EPA considers a number of criteria in determining whether a petitioner has demonstrated noncompliance with the Act. *See generally Nucor II Order* at 7. For example, one such criterion is whether a petitioner has provided the relevant analyses and citations to support its claims. For each claim, the petitioner must identify (1) the specific grounds for an objection, citing to a specific permit term or condition where applicable; (2) the applicable requirement as defined in 40 C.F.R. § 70.2, or requirement under part 70, that is not met; and (3) an explanation of how the term or condition in the permit, or relevant portion of the permit record or permit process, is not adequate to comply with the corresponding applicable requirement or requirement under part 70. 40 C.F.R. § 70.12(a)(2)(i)–(iii). If a petitioner does not identify these elements, the EPA is left to work out the basis for the petitioner's objection, contrary to Congress's express allocation of the burden of demonstration to the petitioner in CAA § 505(b)(2). *See MacClarence*, 596 F.3d at 1131 ("[T]he Administrator's requirement that [a title V petitioner] support his allegations with legal reasoning, evidence, and references is reasonable and

[2] *See also New York Public Interest Research Group, Inc. v. Whitman*, 321 F.3d 316, 333 n.11 (2d Cir. 2003) (*NYPIRG*).
[3] *WildEarth Guardians v. EPA*, 728 F.3d 1075, 1081–82 (10th Cir. 2013); *MacClarence v. EPA*, 596 F.3d 1123, 1130–33 (9th Cir. 2010); *Sierra Club v. EPA*, 557 F.3d 401, 405–07 (6th Cir. 2009); *Sierra Club v. Johnson*, 541 F.3d 1257, 1266–67 (11th Cir. 2008); *Citizens Against Ruining the Environment v. EPA*, 535 F.3d 670, 677–78 (7th Cir. 2008); *cf. NYPIRG*, 321 F.3d at 333 n.11.
[4] *See also Sierra Club v. Johnson*, 541 F.3d at 1265 ("Congress's use of the word 'shall' . . . plainly mandates an objection *whenever* a petitioner demonstrates noncompliance." (emphasis added)).
[5] See also Sierra Club v. Johnson, 541 F.3d at 1265–66; Citizens Against Ruining the Environment, 535 F.3d at 678.

persuasive.").[6] Relatedly, the EPA has pointed out in numerous previous orders that general assertions or allegations did not meet the demonstration standard. *See, e.g.*, *In the Matter of Luminant Generation Co., Sandow 5 Generating Plant*, Order on Petition Number VI-2011-05 at 9 (Jan. 15, 2013).[7] Also, the failure to address a key element of a particular issue presents further grounds for the EPA to determine that a petitioner has not demonstrated a flaw in the permit. *See, e.g.*, *In the Matter of EME Homer City Generation LP and First Energy Generation Corp.*, Order on Petition Nos. III-2012-06, III-2012-07, and III-2013-02 at 48 (July 30, 2014).[8]

Another factor the EPA examines is whether the petitioner has addressed the state or local permitting authority's decision and reasoning contained in the permit record. 81 Fed. Reg. at 57832; *see Voigt v. EPA*, 46 F.4th 895, 901–02 (8th Cir. 2022); *MacClarence*, 596 F.3d at 1132–33.[9] This includes a requirement that petitioners address the permitting authority's final decision and final reasoning (including the state's response to comments) where these documents were available during the timeframe for filing the petition. 40 C.F.R. § 70.12(a)(2)(vi). Specifically, the petition must identify where the permitting authority responded to the public comment and explain how the permitting authority's response is inadequate to address (or does not address) the issue raised in the public comment. *Id*.

The information that the EPA considers in determining whether to grant or deny a petition submitted under 40 C.F.R. § 70.8(d) generally includes, but is not limited to, the administrative record for the proposed permit and the petition, including attachments to the petition. 40 C.F.R. § 70.13. The administrative record for a particular proposed permit includes the draft and proposed permits; any permit applications that relate to the draft or proposed permits; the statement required by § 70.7(a)(5) (sometimes referred to as the "statement of basis"); any comments the permitting authority received during the public participation process on the draft permit; the permitting authority's written responses to comments, including responses to all significant comments raised during the public participation process on the draft permit; and all materials available to the permitting authority that are relevant to the permitting decision and that the permitting authority made available to the public according to § 70.7(h)(2). *Id.* If a final permit and a statement of basis for the final permit are available

[6] *See also In the Matter of Murphy Oil USA, Inc.*, Order on Petition No. VI-2011-02 at 12 (Sept. 21, 2011) (denying a title V petition claim where petitioners did not cite any specific applicable requirement that lacked required monitoring); *In the Matter of Portland Generating Station*, Order on Petition at 7 (June 20, 2007) (*Portland Generating Station Order*).

[7] *See also Portland Generating Station Order* at 7 ("[C]onclusory statements alone are insufficient to establish the applicability of [an applicable requirement]."); *In the Matter of BP Exploration (Alaska) Inc., Gathering Center #1*, Order on Petition Number VII-2004-02 at 8 (Apr. 20, 2007); *In the Matter of Georgia Power Company*, Order on Petitions at 9–13 (Jan. 8, 2007) (*Georgia Power Plants Order*); *In the Matter of Chevron Products Co., Richmond, Calif. Facility*, Order on Petition No. IX-2004–10 at 12, 24 (Mar. 15, 2005).

[8] *See also In the Matter of Hu Honua Bioenergy*, Order on Petition No. IX-2011-1 at 19–20 (Feb. 7, 2014); *Georgia Power Plants Order* at 10.

[9] *See also, e.g.*, *Finger Lakes Zero Waste Coalition v. EPA*, 734 Fed. App'x *11, *15 (2d Cir. 2018) (summary order); *In the Matter of Noranda Alumina, LLC*, Order on Petition No. VI-2011-04 at 20–21 (Dec. 14, 2012) (denying a title V petition issue where petitioners did not respond to the state's explanation in response to comments or explain why the state erred or why the permit was deficient); *In the Matter of Kentucky Syngas, LLC*, Order on Petition No. IV-2010-9 at 41 (June 22, 2012) (denying a title V petition issue where petitioners did not acknowledge or reply to the state's response to comments or provide a particularized rationale for why the state erred or the permit was deficient); *Georgia Power Plants Order* at 9–13 (denying a title V petition issue where petitioners did not address a potential defense that the state had pointed out in the response to comments).

during the agency's review of a petition on a proposed permit, those documents may also be considered when determining whether to grant or deny the petition. *Id*.

If the EPA grants a title V petition, a permitting authority may address the EPA's objection by, among other things, providing the EPA with a revised permit. 42 U.S.C. § 7661d(b)(3), (c); 40 C.F.R. § 70.8(d); *see id*. § 70.7(g)(4); 70.8(c)(4); *see generally* 81 Fed. Reg. at 57842 (describing post-petition procedures); *Nucor II Order* at 14–15 (same). In some cases, the permitting authority's response to an EPA objection may not involve a revision to the permit terms and conditions themselves, but may instead involve revisions to the permit record. For example, when the EPA has issued a title V objection on the ground that the permit record does not adequately support the permitting decision, it may be acceptable for the permitting authority to respond only by providing an additional rationale to support its permitting decision.

When the permitting authority revises a permit or permit record in order to resolve an EPA objection, it must go through the appropriate procedures for that revision. If a final permit has been issued prior to the EPA's objection, the permitting authority should determine whether its response to the EPA's objection requires a minor modification or a significant modification to the title V permit, as described in 40 C.F.R. § 70.7(e)(2) and (4) or the corresponding regulations in the state's EPA-approved title V program. If the permitting authority determines that the revision is a significant modification, then the permitting authority must provide for notice and opportunity for public comment for the significant modification consistent with 40 C.F.R. § 70.7(h) or the state's corresponding regulations.

In any case, whether the permitting authority submits revised permit terms, a revised permit record, or other revisions to the permit, and regardless of the procedures used to make such revision, the permitting authority's response is generally treated as a new proposed permit for purposes of CAA § 505(b) and 40 C.F.R. § 70.8(c) and (d). *See Nucor II Order* at 14. As such, it would be subject to the EPA's 45-day review per CAA § 505(b)(1) and 40 C.F.R. § 70.8(c), and an opportunity for the public to petition under CAA § 505(b)(2) and 40 C.F.R. § 70.8(d) if the EPA does not object during its 45-day review period.

When a permitting authority responds to an EPA objection, it may choose to do so by modifying the permit terms or conditions or the permit record with respect to the specific deficiencies that the EPA identified; permitting authorities need not address elements of the permit or the permit record that are unrelated to the EPA's objection. As described in various title V petition orders, the scope of the EPA's review (and accordingly, the appropriate scope of a petition) on such a response would be limited to the specific permit terms or conditions or elements of the permit record modified in that permit action. *See In the Matter of Hu Honua Bioenergy, LLC*, Order on Petition No. VI-2014-10 at 38–40 (Sept. 14, 2016); *In the Matter of WPSC, Weston*, Order on Petition No. V-2006-4 at 5–6, 10 (Dec. 19, 2007).

### C. New Source Review

The major New Source Review (NSR) program encompasses two core types of preconstruction permit requirements for major stationary sources. Part C of title I of the CAA establishes the Prevention of Significant Deterioration (PSD) program, which applies to new major stationary sources and major modifications of existing major stationary sources for pollutants for which an area is designated as

attainment or unclassifiable for the national ambient air quality standards (NAAQS) and for other pollutants regulated under the CAA. 42 U.S.C. §§ 7470–7479. Part D of title I of the Act establishes the major nonattainment NSR (NNSR) program, which applies to new major stationary sources and major modifications of existing major stationary sources for those NAAQS pollutants for which an area is designated as nonattainment. 42 U.S.C. §§ 7501–7515. The EPA has two largely identical sets of regulations implementing the PSD program. One set, found at 40 C.F.R. § 51.166, contains the requirements that state PSD programs must meet to be approved as part of a state implementation plan (SIP). The other set of regulations, found at 40 C.F.R. § 52.21, contains the EPA's federal PSD program, which applies in areas without a SIP-approved PSD program. The EPA's regulations specifying requirements for state NNSR programs are contained in 40 C.F.R. § 51.165.

While parts C and D of title I of the Act address the major NSR program for major sources, section 110(a)(2)(C) addresses the permitting program for new and modified minor sources and for minor modifications to major sources. The EPA commonly refers to the latter program as the "minor NSR" program. States must also develop minor NSR programs to, along with the major source programs, attain and maintain the NAAQS. The federal requirements for state minor NSR programs are outlined in 40 C.F.R. §§ 51.160 through 51.164. These federal requirements for minor NSR programs are less prescriptive than those for major sources, and, as a result, there is a larger variation of requirements in EPA-approved state minor NSR programs than in major source programs.

The EPA has approved Colorado's PSD, NNSR, and minor NSR programs as part of its SIP. *See* 40 C.F.R. § 52.320(c) (identifying EPA-approved regulations in the Colorado SIP). Colorado's major and minor NSR provisions, as incorporated into Colorado's EPA-approved SIP, are contained in portions of 5 CCR 1001-5, Parts B and D.

## III. BACKGROUND

### A. The Platteville Facility

The Platteville Facility, owned by the DCP Operating Company, is located in Platteville, Weld County, Colorado. This area is classified as being in severe non-attainment for the eight-hour ozone standard. The facility is a natural gas processing plant that extracts field-produced natural gas, recompresses processed gas, and transmits it to the sales pipeline. The facility is a major source under title V for volatile organic compounds (VOC), nitrogen oxides, and carbon monoxide.

The EPA used EJScreen[10] to review key demographic and environmental indicators within a five-kilometer radius of the Platteville Facility. This review showed a total population of approximately 3,206 residents within a five-kilometer radius of the facility, of which approximately 42 percent are people of color and 24 percent are low income. In addition, the EPA reviewed the EJScreen Environmental Justice Indices, which combine certain demographic indicators with 13 environmental indicators. The following table identifies the Environmental Justice Indices for the five-kilometer radius surrounding the facility and their associated percentiles when compared to the rest of the State of Colorado.

[10] EJScreen is an environmental justice mapping and screening tool that provides the EPA with a nationally consistent dataset and approach for combining environmental and demographic indicators. *See https://www.epa.gov/ejscreen/what-ejscreen*.

| EJ Index | Percentile in State |
|---|---|
| Particulate Matter 2.5 | 85 |
| Ozone | 58 |
| Diesel Particulate Matter | 56 |
| Air Toxics Cancer Risk | 85 |
| Air Toxics Respiratory Hazard | 88 |
| Toxic Releases to Air | 53 |
| Traffic Proximity | 51 |
| Lead Paint | 74 |
| Superfund Proximity | 56 |
| RMP Facility Proximity | 77 |
| Hazardous Waste Proximity | 42 |
| Underground Storage Tanks | 59 |
| Wastewater Discharge | 87 |

### B. Permitting History

The DCP Operating Company first obtained a title V permit for the Platteville Facility in 2007, which was subsequently renewed. On April 26, 2017, the DCP Operating Company applied for a title V permit renewal. Colorado published notice of a draft permit on April 3, 2023, subject to a public comment period that ran until May 3, 2023. On June 6, 2023, Colorado submitted the proposed permit, along with its responses to public comments (RTC) and technical review document (TRD), to the EPA for its 45-day review. The EPA's 45-day review period ended on July 21, 2023, during which time the EPA did not object to the proposed permit. Colorado issued the final title V renewal permit (the Permit) for the Platteville Facility on August 1, 2023.

### C. Timeliness of Petition

Pursuant to the CAA, if the EPA does not object to a proposed permit during its 45-day review period, any person may petition the Administrator within 60 days after the expiration of the 45-day review period to object. 42 U.S.C § 7661d(b)(2). The EPA's 45-day review period expired on July 21, 2023. Thus, any petition seeking the EPA's objection to the Permit was due on or before September 19, 2023. The Petition was received September 19, 2023, and, therefore, the EPA finds that the Petitioner timely filed the Petition.

## IV. DETERMINATIONS ON CLAIMS RAISED BY THE PETITIONER

**Claim I: The Petitioner Claims That "The Permit Unjustifiably Assumes a Control Efficiency of 95 Percent for Control Devices, without Proper Testing, Monitoring, and Reporting to Assure Compliance with Section II, Conditions 3.1.1.2 and 5.1.1.2, and Despite Evidence to the Contrary."**

***Petition Claim:*** The Petitioner claims that the Permit does not assure compliance with requirements for enclosed combustion devices (ECDs) to achieve 95 percent control efficiency of VOC emissions from the ethylene glycol dehydration unit (AIRS ID 009) and the facility flare (AIRS ID 024). Petition at 11–12

(citing permit conditions 3.1.1.2 and 5.1.1.2 in section II of the Permit); *see id.* at 11–31. Specifically, the Petitioner claims that the permit lacks "enforceable testing or monitoring as well as recordkeeping and reporting of the control efficiency." *Id.* at 12 13 (citing 42 U.S.C. § 7661c(c); 40 C.F.R. § 70.6(a)(1), (c)(1); 57 Fed. Reg. at 32251; Colorado Regulation No. 3, Part C, Section V.C.5.b; *In the Matter of Cash Creek Generation, LLC*, Order on Petition No. IV-2010-4 at 16–19 (June 22, 2012) (*Cash Creek II Order*)).

The Petitioner first lays out general title V permit requirements related to testing, monitoring, recordkeeping, and reporting for assuring compliance with the terms of a permit. *See* Petition at 11 (citing 42 U.S.C. § 7661c(c); 40 C.F.R. § 70.6(a)(1), (c)(1)). The Petitioner states that title V permits must contain "sufficiently reliable" procedures for determining compliance and "periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit." *Id.* (quoting 42 U.S.C. § 7661c(b); 40 C.F.R. § 70.6(a)(3)(i)(B); citing 40 C.F.R. § 70.6(a)(3), (c)(1)).

The Petitioner claims that ECDs at similar facilities have been found via testing to have VOC control efficiencies less than 95 percent. *Id.* at 13 (citing Petition Ex. 5, *Stack Tests for Enclosed Combustion Devices* (January 2022)). The Petitioner claims that the EPA and the Wyoming Department of Environmental Quality found the following during a study to better understand ECD operation and develop a new method of measuring ECD combustion efficiency:

> ECDs were observed to be operating over a wide range of combustion efficiencies ranging from below 20 percent to above 99 percent. . . . Optimization testing revealed that depending on the operational setup, ECD combustion efficiency can be affected by as little as 2 percent to more than 80 percent.

*Id.* at 14 (quoting Petition Ex. 6, Michael Stovern et al., *Measuring Enclosed Combustion Device Emissions Using Portable Analyzers* at 9 (May 14, 2020)). The Petitioner alleges that CDPHE was aware of this evidence of the variable control efficiency of ECDs when writing the Permit. *Id.* at 14 (citing Petition Ex. 7, *Email from Christopher LaPlante to Jennifer Mattox et al.* (June 8, 2020)).

The Petitioner claims that such "key parameters" as temperature, residence time, turbulence, and the composition of combusted gas ultimately determine control efficiency, and that ECDs do not regulate these parameters. *Id.* at 14, 20, 26, 29 (citing Petition Ex. 8, Ranajit Sahu *Technical Comments on the Proposed CDPHE Permit No. 20AD0062* at 2–5). The Petitioner also claims that the permit does not account for other variables that affect control efficiency such as weather, altitude, equipment condition and installation, and the composition of the fuel stream. *Id.* at 28-29 (citing Petition Ex. 9, *Parameters for Properly Designed and Operated Flares, Report for Flare Review Panel* (Apr. 2012)). The Petitioner claims that "[n]o quantitative assumptions can rationally be made about the impacts these many variables in total have on the mass emissions from a flare." *Id.* at 29.

The Petitioner argues that only site-specific, periodic testing can "provide the data needed to ensure compliance." *Id.*; *see id.* at 20, 27. The Petitioner insists this testing must be performed pursuant to a specific methodology and should be required at least semi-annually. *Id.* at 27 (citing Petition Ex. 10, *Technical Review Document for Operating Permit 170PJA401: SandRidge Exploration and Production — Bighorn Pad*, at 10 (Jan. 1, 2020)). The Petitioner also claims that the Permit must include requirements for continuous emissions monitoring systems (CEMS), or, in the alternative, parametric monitoring. *Id.*

at 28. The Petitioner argues this parametric monitoring should "set maximum and minimum requirements for both flow, temperature, residence time, and turbulence, with the acceptable parameters being based on the most recent stack tests." *Id.*

The Petitioner addresses numerous permit conditions (all in section II of the Permit) that it claims are meant to assure compliance with the requirement for 95 percent control efficiency, dismissing each and explaining why it does not, in its opinion, assure compliance. *See id.* at 15–27.

The Petitioner claims that the requirement[11] for a pilot light to be present at all times only guarantees that combustion is occurring and that control efficiency is above zero, but not that it is 95 percent. *Id.* at 16. The Petitioner applies the same logic to permit condition 5.7.1—a requirement to verify flare operation quarterly with an infrared camera. *Id.*

The Petitioner describes the requirement[12] for monitoring for the presence of smoke as "in theory, qualitative monitoring for VOC control efficiency." *Id.* at 16–17. However, the Petitioner argues that smoke and opacity could also be unrelated to VOC control efficiency and that there is no evidence that no smoke and no or low opacity guarantees 95 percent control efficiency. *Id.* (citing *Cash Creek II Order* at 18; Petition Ex. 8 at 2).

The Petitioner claims that the requirements in the Permit that derive from Colorado Regulation 7 (permit conditions 8.1.1 and 8.1.2) cannot assure compliance because these "can change at any time if the Colorado Air Quality Control Commission changes Regulation 7, without public notice and comments, EPA 45-day review, or an opportunity for the public to object to the change." *Id.* at 18.

The Petitioner then dismisses the requirements[13] for the ECD to be operated and maintained consistent with manufacturer specifications and good engineering and maintenance practices. *See id.* at 18–21. The Petitioner claims that these terms are too vague to assure compliance and that the manufacturer specifications are not in the permit record. *Id.* at 18. Moreover, the Petitioner argues that maintenance can only maintain an initial control efficiency, which the Petitioner claims is unknown because the Permit lacks requirements for initial performance testing. *Id.* at 19. The Petitioner states that there is no evidence that other ECDs, that were found to have control efficiency under 95 percent, were not following these general operating and maintenance conditions. *Id.* at 19.

The Petitioner also criticizes the requirements[14] for the ECD to be "adequately designed and sized to achieve the control efficiency rates," arguing that CDPHE cannot rely on the design of an ECD to achieve a certain control efficiency. *Id.* at 20-21 (citing *Cash Creek II Order* at 17). The Petitioner also claims that these conditions lack recordkeeping and reporting requirements that would enable the public to determine whether the ECD were, in fact, adequately designed, sized, and maintained. *Id.*

[11] The Petitioner cites permit condition 3.9.3 and Appendix G(II)(b) for the dehydration unit and permit condition 5.7.2 for the facility flare.
[12] The Petitioner cites permit condition 3.9.4 for the dehydration unit and 5.7.4 for the facility flare.
[13] The Petitioner cites permit conditions 8.1.1 and 8.1.2.
[14] The Petitioner cites permit conditions 8.1.1 and 8.1.2.

The Petitioner then addresses several state-only enforceable requirements,[15] first claiming that these cannot assure compliance with the federally enforceable requirement for 95 percent VOC control because they are state-only enforceable. *See id.* at 21–27 (quoting *In the Matter of Chevron Products Company*, Order on Petition No. IX-2004-08 at 31–33 (Mar. 15, 2005); citing *In the Matter of Conoco Phillips Co.*, Order on Petition No. IX-2004-09 at 22 (Mar. 15, 2005)). The Petitioners then allege deficiencies with the content of each state-only enforceable requirement. *See id.*

The Petitioner claims that the state-only enforceable requirement of permit condition 8.4.4 for the ECD to be enclosed could "possibly reduce cross-winds" but "does not guarantee a minimum residence time, which is what is needed to assure a certain control efficiency." *Id.* at 23 (citing Petition Ex. 8 at n.6). The Petitioner also claims that the requirement for no visible emissions during normal operations contained in the same permit condition is unrelated to control efficiency. *Id.* The Petitioner claims that the visual observations meant to determine whether the ECD is operating properly can only determine the presence of combustion and not control efficiency. *Id.* at 23–24.

The Petitioner next addresses the requirements related to flow meters contained in condition 8.4.6.2(g). *See id.* at 24–25. The Petitioner criticizes several aspects of the way flow is monitored. *See id.* Moreover, the Petitioner argues that monitoring flow, in and of itself, does not assure compliance with control efficiency in the absence of limits on flow. *Id.* at 25.

The Petitioner states that permit condition 8.4.8 "appears to require performance testing" of the ECD and facility flare. *Id.* However, the Petitioner criticizes the testing protocol—which it claims is not in the permit record, the way failed tests are utilized, various exemptions from testing, and the testing schedule. *See id.* at 25–27.

The Petitioner also rebuts several of CDPHE's explanations of its monitoring scheme presented in the RTC. *See id.* at 27–30.

The Petitioner criticizes what it characterizes as CDPHE's threshold of greater than 95 percent control efficiency for requiring performance testing. *Id.* at 27–28 (citing RTC at 4). The Petitioner argues that this threshold is arbitrary and does not accord with the evidence of variable control efficiency in the record. *Id.*

The Petitioner claims that CDPHE's response in the RTC outlining the actions required for the presumption of 95 percent control efficiency (*i.e.*, the monitoring requirements previously addressed) is insufficient because these same control requirements applied in cases where ECDs were found to have control efficiencies less than 95 percent. *Id.* at 28. The Petitioner claims that CDPHE offers no evidence to connect the monitoring requirements in the Permit to 95 percent control efficiency and that CDPHE ignores the examples of ECDs "complying with these requirements and test[ing] below 95 percent VOC control efficiency." *Id.* at 30.

The Petitioner addresses CDPHE's assertion in the RTC that its testing showed that ECDs, on average, achieved control efficiencies of 95 percent or higher. *Id.* (citing RTC at 4). The Petitioner claims that CDPHE "concedes that not each ECD achieved 95 percent." *Id.* The Petitioner argues that compliance

[15] The Petitioner cites permit condition 3.11.2.1 for the dehydration unit and 5.8 for the facility flare, both of which incorporate requirements from permit condition 8.4.

with this specific Permit's conditions cannot rely on averages across multiple sources, but must be assured through testing, monitoring, and reporting requirements specific to this source. *Id.* (citing 42 U.S.C. § 7661c(c); 40 C.F.R. § 70.6(a)(1), (3)(i)(B), (c)(1)).

***EPA Response:*** For the following reasons, the EPA grants in part and denies in part the Petitioner's request for an objection on this claim.

The EPA grants the Petitioner's request for an objection on this claim with regard to the ECD controlling VOC emissions from the triethylene glycol dehydration unit (AIRS ID 009). The permit record is inadequate for the EPA to determine whether the Permit "sets forth" the necessary monitoring requirements to assure compliance with the requirement for the ECD to achieve 95 percent control efficiency. 42 U.S.C. § 7661c(c); *see* 40 C.F.R. §§ 70.6(c)(1), 70.8(c)(3)(ii); *see also In the Matter of Bonanza Creek Energy Operating Company, LLC, Antelope CPF 13-21 Production Facility et al.,* Order on Petition No. VIII-2023-11 (January 30, 2024).

All title V permits must "set forth . . . monitoring . . . requirements to assure compliance with the permit terms and conditions." 42 U.S.C. § 7661c(c); *see* 40 C.F.R. § 70.6(c)(1). Determining whether monitoring is adequate in any particular circumstance requires a context-specific evaluation. *In the Matter of CITGO Refining and Chemicals Company, L.P.*, Order on Petition No. VI-2007-01 at 7 (May 28, 2009). The rationale for the selected monitoring requirements must be clear and documented in the permit record. 40 C.F.R. § 70.7(a)(5).

Here, the monitoring requirements that establish the presumption of 95 percent VOC control efficiency by the ECD include, generally, "daily pilot light and auto-igniter inspections, daily visible emission observations, operating with no visible emissions, performing visual observations to confirm the control device is operating properly, installing and operating an auto-igniter." RTC at 3.[16] CDPHE describes these requirements as "ongoing parametric monitoring requirements for the control device [that] are used to determine if the control device is meeting the requirement to achieve 95 percent control efficiency." *Id.* at 4.

The Petitioner provides a detailed, condition-by-condition refutation of these monitoring requirements, explaining for each permit condition how, in its opinion, the monitoring is unrelated to achieving a specific control efficiency. *See* Petition at 15–27. The Petitioner persuasively argues that these monitoring requirements may ensure the ECD is not malfunctioning, and that combustion is actually occurring. *See id.* Therefore, they may also ensure that the ECD maintains a certain, initial control efficiency. It is unclear to the EPA, however, how the monitoring requirements assure that the ECD continually achieves the specific 95 percent control efficiency required in the Permit. *See, e.g., Cash Creek II Order* at 17–18 (granting a petition where the permitting authority relied on an initial, manufacturer-stated, combustion efficiency and did not explain how the permit terms assured continual compliance with the combustion efficiency).

The Petitioner also correctly points out that state-only enforceable permit terms (*e.g.*, the requirements related to flow meters and performance testing) are outside the scope of the EPA's review. *See* Petition at 21. Moreover, state-only enforceable permit terms cannot be relied upon to

[16] *See* permit conditions 3.9, 3.11.1.1, and 3.11.2.1.

satisfy the title V requirement to assure compliance with all permit terms. *See* 42 U.S.C. § 7661c(a), (c); 40 C.F.R. § 70.6(b)(1), (2); *see also In the Matter of Cargill, Inc., Blair Facility* Order on Petition No. VII-2022-9 at 14 (February 16, 2023) (explaining that monitoring requirements "designed to assure compliance with a federally enforceable CAA requirement" must be federally enforceable).[17]

CDPHE's responses in the RTC concerning the monitoring requirements for the ECD provide no further substantial information. CDPHE does not explain *how* the permit conditions assure compliance, but merely asserts that they do. CDPHE also does not address the specific variables that the Petitioner alleges determine VOC control efficiency—residence time, temperature, and turbulence—and whether the monitoring may be related to these parameters, or why it does not need to be, if CDPHE believes it does not. *See, e.g., In the Matter of Inter Power Ahlcon Partners LP, Colver Power Plant,* Order on Petition No. III-2020-13 at 7–11 (June 7, 2022) (granting a petition where the permitting authority did not establish appropriate ranges for parametric monitoring).

Instead, CDPHE references its policy that it may require "additional testing or monitoring" for control devices presuming VOC control efficiency over 95 percent. RTC at 4. CDPHE does not explain why 95 percent control efficiency is the threshold for additional performance testing. The closest CDPHE comes to justifying this threshold is its commentary on the testing data referenced by the Petitioners, stating:

> [T]his dataset includes results from 52 stack tests and 47 of the 52 tests resulted in greater than 95 percent control efficiency. In fact, the average control efficiency from all of the stack tests is 98.18 percent. This data supports the appropriate value of 95 percent control efficiency for enclosed flares.

*Id*. In some respects, this dataset could be seen to support CDPHE's conclusions about control efficiency. However, this dataset, as well as the EPA's report with Wyoming DEQ, also indicates that ECDs are capable of *not* achieving 95 percent control efficiency. The EPA's report suggests failures to achieve 95 percent control efficiency can often be attributed to "operational setup" and therefore emphasizes the importance of "site-specific 'spot checking' of ECDs." Michael Stovern et al., *Measuring Enclosed Combustion Device Emissions Using Portable Analyzers* at 9 (May 14, 2020). CDPHE provides no information regarding what might cause ECDs to fail to achieve 95 percent control efficiency, and whether the monitoring requirements in the Permit would prevent such factors.

With regard to the facility flare (AIRS ID 024), the EPA denies the Petitioner's request for an objection on this claim. The Petitioner has provided insufficient analysis to demonstrate that the Permit does not assure compliance with the requirement for the flare to achieve 95 percent control efficiency. *See* 40 C.F.R. 70.12(a)(2)(iii).[18] The vast majority of the Petitioner's arguments concerning control efficiency are specifically tailored to ECDs, and the Petitioner does not explain whether or why their arguments are equally applicable to open flares. For example, the evidence the Petitioner cites of tested devices

[17] Since state-only enforceable permit conditions are not subject to the requirements of 40 C.F.R. §§ 70.6, 70.7, or 70.8, the EPA need not address the Petitioner's critiques of any state-only enforceable requirements at this time. *See, e.g.*, *In the Matter of Harquahala Generating Station Project*, Order on Petition, at 5 (July 2, 2003) ("State-only terms are not subject to the requirements of Title V and hence are not [] evaluated by EPA unless those terms are drafted in a way that might impair the effectiveness of the permit or hinder a permitting authority's ability to implement or enforce the permit.").
[18] *See supra* notes 6–8 and accompanying text.

with control efficiencies less than 95 percent pertains only to ECDs and does not include flares. *See* Petition Exs. 5–7. The Petitioner neglects to similarly demonstrate that flares can fail to achieve 95 percent control efficiency, or to explain why the evidence it cites is applicable to flares. Additionally, in its response to the Petitioner's comments on this issue, CDPHE specifically notes that the flare is subject to the "requirements of 40 CFR Part 60 Subpart A §60.18 in accordance with Colorado Construction Permit 01WE0430 and Colorado Regulation No. 3, Part B, Section III.E . . ." including "operating with no visible emissions, operating with a pilot light present at all times, achieving a minimum waste gas heat content, operating below the maximum tip velocity, operating in conformance with flare design and operating at all times when emissions are routed to it." RTC at 3. The Petitioner does not address the part of CDPHE's response in the RTC relating to waste gas heat content or tip velocity, or the permit conditions that CDPHE references. *See* 40 CFR 70.12(a)(2)(vi).[19] The Petitioner fails to consider whether or how these requirements may be related to the parameters the Petitioner claims affect control efficiency, and, therefore, fails to demonstrate that the monitoring requirements for the facility flare are inadequate.[20]

***Direction to CDPHE:*** CDPHE must revise the permit record to more fully explain how the monitoring provisions in the Permit assure compliance with the requirement to achieve 95 percent VOC control efficiency applicable to the triethylene glycol unit. If, upon further review, CDPHE determines that additional monitoring is necessary to assure compliance, CDPHE must revise the Permit as necessary and justify the selected additional requirements in the permit record. CDPHE may accomplish this in a number of different ways. The EPA notes, however, that CDPHE seems to imply that the state-only enforceable requirements related to performance testing and flow metering are necessary to assure compliance with 95 percent control efficiency. *See* RTC at 3. If CDPHE intends to rely on these permit conditions to resolve the EPA's objection, they would have to be federally enforceable. Additionally, should CDPHE rely on these permit conditions to resolve the EPA's objection, CDPHE should address the Petitioner's concerns related to them, especially concerns about testing protocols, testing frequency, flow monitoring exemptions, and whether the Permit needs to specify a limited range for flow. *See* Petition at 24–27.

**Claim II: The Petitioner Claims That "The Permit Does Not Ensure That the 11 Federally Enforceable Construction Permits Contain Adequate Provisions to Ensure That They Do Not Permit Violations of the National Ambient Air Quality Standards."**

***Petition Claim:*** The Petitioner claims that the Permit does not assure compliance with all requirements of Colorado's SIP because CDPHE issued several construction permits for the Platteville facility without determining whether they would interfere with the attainment or maintenance of the NAAQS. *See* Petition at 31–41.

The Petitioner first argues that compliance with the NAAQS is an applicable requirement for title V because the definition of applicable requirement in the EPA's regulations includes all SIP requirements. *Id.* at 31 (citing 40 C.F.R. 70.2; 5 C.C.R. § 1001-5, Part A, I.B.9). The Petitioner claims that the United

[19] *See supra* note 9 and accompanying text.

[20] The EPA's determination that the Petitioner has not demonstrated a flaw in the Permit in regard to the facility flare should not be interpreted as a judgment regarding the adequacy of the permit terms at issue here (*i.e.*, whether the current permit terms or the requirements in 40 C.F.R § 60.18 are sufficient to assure that the facility flare in fact achieves 95 percent control efficiency).

States Court of Appeals for the Tenth Circuit "has accepted this plain language reading of the title V regulations" and held that construction permitting requirements are title V applicable requirements. *Id.* at 32 (citing *Sierra Club v. EPA*, 964 F.3d 882, 890–91 (10th Cir. 2020)).

The Petitioner claims that compliance with the NAAQS is "at the core of" CAA construction permitting programs and lists EPA requirements for minor source permitting programs, arguing that such programs "must enable the permitting agency to reject any permit application if it will interfere with attainment." *Id.* at 33–34 (citing 40 C.F.R. § 51.160(a)–(b)). The Petitioner quotes corresponding regulations in Colorado's SIP, arguing that they require that CDPHE shall only issue permits if "[t]he proposed source or activity will not cause an exceedance of any National Ambient Air Quality Standards." *Id.* at 34–35 (quoting 5 CCR § 1001-5, Part B, III.D.1; citing 5 CCR § 1001-5, Part B, III.F.1).

The Petitioner claims that two investigative reports concerning CDPHE's minor source permitting program concluded that CDPHE failed to conduct the modelling necessary to assure compliance with the NAAQS and therefore improperly permitted minor sources. *See id.* at 35–37 (citing Petition Ex. 2, Troutman Pepper Hamilton Sanders LLP, *Public Report of Independent Investigation of Alleged Non-Enforcement of National Ambient Air Quality Standards by the Colorado Department of Public Health and Environment* (September 22, 2021) (Troutman Report); Petition Ex. 3, *EPA Region 8 Review of EPA's Office of Inspector General Hotline Complaint No. 2021-0188* (July 2022) (EPA Report)). The Petitioner claims:

> The majority of the construction permits whose conditions are incorporated into this Title V permit were issued based upon the faulty assumptions in the Division's PS Memo 10-01, which not only resulted in the Division foregoing modeling to assess NAAQS compliance for minor sources that could result in NAAQS violations, but also failed to provide for another method of assessing NAAQS compliance.

*Id.* at 37. The Petitioner argues that because such policies were operating at the time CDPHE issued the Platteville facility's construction permits, the requirements of those permits were incorporated into Platteville's title V permit contrary to law, and the "EPA must object because the Permit does not assure compliance with the applicable requirement of assuring compliance with the NAAQS for the source covered by the construction permits." *Id.* at 37.

The Petitioner lists eleven construction permits[21] it claims CDPHE issued improperly by failing to assess whether the permits would cause an exceedance of the NAAQS. *Id.* at 38. The Petitioner acknowledges that the TRD states that the source will not cause any exceedance of the NAAQS but claims CDPHE provided no evidence in support of this statement. *Id.* at 39. The Petitioner claims that "[a]side from the modification to Construction Permit No. 01WE0430 and the engine limits, the TRD does not reference any analysis because CDPHE and the permittee did not conduct any." *Id.* at 38. The Petitioner claims that CDPHE's decision to not conduct modeling for that modification is unsupported. *Id.* at 40. The Petitioner alleges that the Permit "does not contain any enforceable emission limits to assure that these sources will not cause or contribute to NAAQS violations." *Id.* at 38.

[21] The Petitioner cites permit nos. 01WE0422, 01WE0423, 01WE0424, 01WE0425, 01WE0426, 01WE0427, 01WE0428, 01WE0429, 01WE0430, 01WE0432, and 07WE0993.

The Petitioner then characterizes CDPHE's RTC as asserting that "it does not need to ensure that the applicable requirement of ensuring protection of the NAAQS for the entire facility, just for modifications that are approved in the specific Title V permitting action at issue, including the modification of Construction Permit No. 01WE0430." *Id.* at 39 (citing RTC at 9). The Petitioner criticizes this argument, faulting CDPHE for relying on the preamble to the EPA's part 70 regulations because that preamble "was published nearly 20 years before the Tenth Circuit rejected EPA's exclusion of NAAQS compliance from the category of applicable requirements." *Id.* The Petitioner claims that "without an adequate analysis to demonstrate that the applicable requirements prohibiting permitting of NAAQS violations are met with the current permit conditions, EPA must object to the Permit." *Id.* at 40.

The Petitioner claims that "the six engines, the dehydration unit, and the other emission units do not have short-term $NO_x$ emission limits," pointing out that emission limits for these units are expressed in tons per year. *Id.* at 40–41 (citing Permit at 16, 21, 17, 18–19, 20, 50, 60, 76, and 82). The Petitioner claims that NAAQS modeling must be based on the highest short-term $NO_x$ emission rates and describes other considerations for modeling, implying that the requirements in the Permit do not reflect these sorts of considerations. *Id.* at 41.

***EPA Response:*** For the following reasons, the EPA denies the Petitioner's request for an objection on this claim.

As an initial matter, to the extent the Petitioner claims that the EPA "must object because the Permit does not assure compliance with the applicable requirement of assuring compliance with the NAAQS," the Petitioner is incorrect. Petition at 37. As CDPHE noted in its RTC, and as the EPA has previously stated:

> [T]he NAAQS are not themselves title V "applicable requirements" with which a source must directly comply, and the promulgation of a NAAQS does not, in and of itself, automatically result in actionable measures applicable to a source.[22] Instead, the relevant "applicable requirements" are the specific measures contained in each state's EPA-approved SIP to achieve the NAAQS, as they apply to emission units at a part 70 source. *See* 40 C.F.R. § 70.2 (definition of "applicable requirement").

*In the Matter of Suncor Energy (U.S.A.), Inc., Commerce City Refinery, Plant 2 (East)*, Order on Petition Nos. VIII-2022-13 & VIII-2022-14 at 54 (July 31, 2023) (*Suncor Plant 2 Order*); *see* RTC at 9–10.

However, the EPA has also previously explained:

[22] *See* 40 C.F.R. § 70.2 (definition of "applicable requirement"); 57 Fed. Reg. at 32276 (July 21, 1992) ("Under the Act, NAAQS implementation is a requirement imposed on States in the SIP; it is not imposed directly on a source. In its final rule, EPA clarifies that the NAAQS and the increment and visibility requirements under part C of title I of the Act are applicable requirements for temporary sources only."); 56 Fed. Reg. at 21732–33 (May 10, 1991) ("The EPA does not interpret compliance with the NAAQS to be an 'applicable requirement' of the Act."); *see also, e.g.*, *In the Matter of Lucid Energy Delaware, LLC, Frac Cat Compressor Station and Big Lizard Compressor Station*, Order on Petition Nos. VI-2022-5 & VI-2022-11 at 13 (*Lucid Order*).

> [T]here may be situations in which specific SIP regulations (or, as is the case here, EPA-approved state part 70 regulations) give rise to an obligation to consider a source or project's impact on the NAAQS through a title V permit proceeding. Whether this is necessary, and whether such an evaluation is required prior to a modification or during operation, depends on the specific EPA-approved state regulations at issue.

*Suncor Plant 2 Order* at 54.[23] Here, the Petitioner claims that CDPHE failed to meet its obligation to determine whether each construction permit that has been, or is being, incorporated into the Permit would cause an exceedance of the NAAQS. *See* Petition at 38. The Petitioner cites Colorado's minor NSR regulations in its SIP that require CDPHE to "grant the [construction] permit if it finds that: The proposed source or activity will not cause an exceedance of any National Ambient Air Quality Standards." Regulation 3, Part B, Section III.D.1; *see* Petition at 34–5. In its RTC, CDPHE asserts it "is not required to conduct a cumulative NAAQS analysis of the entire title V source as part of this renewal action." RTC at 8.

However, CDPHE acknowledges its obligation to conduct a NAAQS assessment through this title V proceeding, but only for certain "combined construction/operating permitting" actions, *i.e.*, two significant permit modifications processed as part of this title V renewal. *Id.* at 8–9 (citing Regulation No. 3, Part C, Sections I.A.7.j and III.C.12.d); *see* TRD at 1. The regulations CDPHE cites as requiring a NAAQS assessment for the modifications are part of Colorado's part 70 regulations.[24]

CDPHE asserts that it did conduct a NAAQS assessment for these two permit modifications:

> A Facility and Project Information Submittal Form for Modeling Requirements Determination Form (APCD-114) was provided by the applicant in accordance with the Interim Colorado Modeling Guideline for Air Quality Permits in place at the time (the version last revised May 2022) and the Permitting Section Addendum to the Modeling Guideline (last revised 9/21/2022). This form was reviewed by the permit modeling unit and a determination was made that modeling was not required for this NAAQS assessment. This determination was included in full in the information to support provided during the public notice period and was discussed in the associated technical review document. As such, the Division made a NAAQS determination for this specific project.

RTC at 8–9. The TRD contains further details about these NAAQS determinations, explaining that:

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[23] See *In the Matter of Alabama Power Company, Barry Generating Plant*, Order on Petition No. IV-2021-5 at 11 (June 14, 2022). Similarly, certain SIP requirements might also be interpreted to require permitting authorities to establish limits necessary to protect the NAAQS through the title V process. *See In the Matter of Duke Energy, LLC Asheville Steam Electric Plant*, Order on Petition No. IV-2016-06 at 11–12 (June 30, 2017); *In the Matter of Duke Energy, LLC Roxboro Steam Electric Plant*, Order on Petition No. IV-2016-07 at 10–11 (June 30, 2017); *In the Matter of Public Service of New Hampshire, Schiller Station*, Order on Petition No. VI-2014-04 (July 28, 2015).

[24] The assessment is, therefore, reviewable in a petition challenging the title V permit. *See Suncor Plant 2 Order* at 54 ("Given that CDPHE's EPA-approved part 70 regulations explicitly require CDPHE's consideration of NAAQS impacts resulting from a modification through certain types of title V permit proceedings, EPA agrees that such issues may be reviewable in a petition challenging those title V permits.").

> As part of the prior permitting action for this source, the Division made a determination this source will not cause an exceedance of any National Ambient Air Quality Standards ("NAAQS") as required by Colorado Air Quality Control Commission Regulation 3, Part B. The Division is not reconsidering that prior determination. . . . The proposed engine modifications demonstrate only emission decreases for all pollutants with NAAQS/CAAQS as an administrative reduction in emissions (Reg 7, Part E, Section I.D.5). There is no rational basis to conclude that a decrease in emissions from an existing source might cause or contribute to an exceedance of the NAAQS given the Division's previous determination that the existing permitted emissions were compliant with the NAAQS. The proposed project also includes a modification to dehydration unit D-001/S-009 (AIRS ID 125-0595-009) that would result in a 0.18 lb/hr (0.8 tpy) decrease in CO emissions and a 0.02 lb/hr (0.1 tpy) increase in $NO_x$ emissions which is below the corresponding $NO_x$ threshold in Table 1 of the Colorado Modeling Guideline for Air Quality Permits (October 2021). The threshold amounts in Table 1 are considered *de minimis* emissions, which have a low probability of causing or contributing to an exceedance of any NAAQS. . . . Thus PMU has concluded that it is unlikely the proposed source or activity which is the basis for this permit modification will cause an exceedance of any NAAQS. Therefore, modeling is not required, or justified, to conduct the NAAQS analysis.

TRD at 31–32.

Accordingly, to the extent the Petitioner requests that the EPA object to the Permit based on the NAAQS determination for the modifications CDPHE is processing as part of this title V renewal, the EPA denies the Petitioner's request for objection. The Petitioner fails to address CDPHE's reasoning in the RTC concerning the emissions associated with these significant modifications. *See* 40 C.F.R. 70.12(a)(2)(vi).[25] The Petitioner does not engage with the details of the modifications or CDPHE's explanation of its decision not to conduct modeling. The Petitioner asserts, without any support, that modeling is the only acceptable method for conducting NAAQS assessments and is required in every circumstance. *See* Petition at 36. The Petitioner is incorrect that modeling is always required. As the EPA has previously explained:

> [T]he regulations do not require air quality modeling in every case. It may be possible for a permitting authority to use means other than modeling to justify a conclusion that a permit will not interfere with attainment of the NAAQS. This option is within the scope of the state's discretion as the permitting authority under its SIP-approved Minor NSR program.

EPA Report at 13.

With regard to the eleven underlying construction permits as a whole, the Petitioner argues that the NAAQS assessments required by Colorado's SIP are reviewable in its title V petition because of the Tenth Circuit's *Sierra Club* decision. *See* Petition at 32 (citing *Sierra Club v. EPA*, 964 F.3d 882 (10th Cir. 2020)). The EPA does not necessarily concede that the Tenth Circuit's *Sierra Club* decision means that such SIP-based NSR NAAQS assessments are "applicable requirements" for title V purposes, as the

[25] *See supra* note 9 and accompanying text.

types of SIP requirements that the Tenth Circuit evaluated in *Sierra Club* are distinguishable from those at issue here.[26] However, even assuming for the sake of argument that such SIP-based NSR NAAQS assessments are "applicable requirements," the Petitioner has not demonstrated that CDPHE failed to satisfy these SIP requirements either when it previously issued the underlying construction permits or when it issued the current title V Permit.

The Petitioner relies almost exclusively on two investigative reports to support its claim that CDPHE did not conduct NAAQS assessments for the eleven construction permits. The reports contain no information about the specific construction permits in question, and, as CDPHE explains in its RTC, they also do not conclude that CDPHE failed to conduct NAAQS assessments in every minor NSR permitting action more generally. *See* RTC at 8. Rather, the Troutman Report concluded that "CDPHE had two conflicting policies on minor source modeling, one [PS memo 10-01] based on an unsupported extension of EPA's permitting threshold for existing major sources, and one [Modeling Guideline] that was well-supported by technical analyses," which caused confusion within CDPHE. Troutman Report at 2. The EPA Report found similar programmatic issues with CDPHE's "implementation of the CAA minor source permitting program," resulting, in some circumstances, in permit records lacking "analysis supporting the conclusion that the approved permit actions would not cause a NAAQS violation." EPA Report at 3.

The Petitioner vaguely alleges that CDPHE relied on PS memo 10-01 for "the majority of the construction permits" at issue, but provides no evidence or citation in support of this allegation. Petition at 37; s*ee* 40 C.F.R. 70.12(a)(2)(iii).[27] The Petitioner seems to rely on alleged overlapping time periods in which the construction permits were issued and PS memo 10-01 was in effect. However, the Petitioner does not actually provide any of the dates that the construction permits were issued to demonstrate this alleged overlap. Indeed, the Petitioner does not reference any document from any of the permit records associated with the construction permits. The Petitioner merely claims that the NAAQS analyses are absent from the title V permit record. But the Petitioner does not cite any authority that would require a title V permit to include such NAAQS assessment documentation from past NSR permitting actions. *See* 40 C.F.R. 70.12(a)(2)(ii).

The Petitioner's arguments about the time periods for the emission limits established in the construction permits also do not demonstrate that CDPHE failed to conduct NAAQS assessments.

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[26] The Tenth Circuit's decision concluded that the SIP requirements pertaining to major NSR are "applicable requirements" under the EPA's definition of that term. Notably, the requirement to obtain a major NSR permit, and the substantive requirements that would be imposed through such a permit, generally apply directly to the source. The Tenth Circuit's decision did not address the extent to which SIP requirements *that do not expressly impose an obligation on an emissions source* would qualify as "applicable requirements" under the EPA's part 70 definition. Here, Regulation 3, Part B, Section III.D.1 (the relevant SIP requirement, which relates to a NAAQS assessment requirement for minor NSR permits) imposes an obligation on CDPHE, but does not appear to "apply to emissions units in a part 70 source," which is an essential component of the definition of an "applicable requirement." *See* 40 C.F.R. § 70.2. *See also Lucid Order* at 13–14 ("[T]his SIP provision appears to impose an obligation on the permitting authority to deny an application for a construction permit that would cause or contribute to an exceedance of the NAAQS, but does not impose an obligation to include additional terms in a title V permit that prevents exceedances of the NAAQS. Moreover, because [the SIP provision] does not appear to impose any requirement that applies to the source itself or to any particular emission unit at the source (but instead imposes an obligation on the state regarding permit issuance/revisions), it is unclear whether this provision is an "applicable requirement" with which the title V permits must assure compliance, or that can or should be implemented through title V.").

[27] *See supra* notes 6–8 and accompanying text.

Presumably, the Petitioner is suggesting that CDPHE could not have satisfied the SIP requirements related to assessing short-term NAAQS while at the same time approving longer-term emission limits. However, this reasoning is flawed. The Petitioner has not demonstrated that emission limits expressed in tons per year are inherently incapable of protecting shorter-term NAAQS. Nor has the Petitioner demonstrated that any specific emission limit is incompatible with a conclusion that the underlying project would not cause an exceedance of the NAAQS.

Therefore, the EPA denies the Petitioner's request for an objection on this claim.

The EPA notes that the Petitioner's concerns raised in this claim seem more relevant to broader programmatic issues with how CDPHE has historically issued minor NSR permits than with whether the present title V permit satisfies all applicable requirements. The EPA emphasizes that a title V petition is not the appropriate forum to address the types of general programmatic concerns with a permitting authority's implementation of its EPA-approved SIP regulations governing NSR permitting that the Troutman and EPA Reports describe. *See e.g., In the Matter of Plains Marketing LP, Mobile Terminal at Magazine Point, et al.,* Order on Petition Nos. IV-2023-1 & IV-2023-3 at 24 (September 18, 2023) (denying a claim where the petitioner alleged a programmatic deficiency with the permitting authority's implementation of its NSR permitting program). Indeed, CDPHE has already made substantive changes to its minor source permitting program as a result of investigations that resulted in the reports referenced in the Petition. *See e.g., CDPHE Response to EPA Review of PEER Complaint* (October 21, 2022), available at *https://www.epa.gov/caa-permitting/epa-report-public-employees-environmental-responsibility-hotline-complaint-no-2021*. Among other steps, CDPHE has retired the PS Memo 10-01 that the reports found problematic. *Id.* at 2. CDPHE also convened a "Minor Source Permit Modeling Subject Matter Expert Panel" that recommended changes to CDPHE's modeling processes to "ensure Colorado has a cohesive and justified approach to modeling and permitting of minor sources that meet EPA NAAQS and Colorado air quality targets." *Id.* at 2–3. CDPHE also solicited public comments on this panel's recommendations and CDPHE's modeling guidelines. *Id.* CDPHE's current policy for demonstrating compliance with the NAAQS in minor source permitting can be found on its website. *Id.* at 5.

**Claim III: The Petitioner Claims That "The Permit Denies the Public Access to Monitoring, Testing, and Recordkeeping Information Needed to Assure Compliance with the Applicable Requirements."**

***Petition Claim:*** The Petitioner claims that many of the Permit's conditions[28] require the source to maintain compliance records and deliver them to CDPHE only upon request, thus preventing public access to those records. *See* Petition at 41–44.

The Petitioner argues that this recordkeeping practice "bars the public from obtaining this information" unless CDPHE requests it, contravening a primary purpose of title V, namely "to 'enable the source, States, EPA, and the public to understand better the requirements to which the source is subject, and whether the source is meeting those requirements.'" *Id.* at 42 (quoting 57 Fed. Reg. at 32251; citing 42 U.S.C. § 7661c(c); 40 C.F.R. § 70.6(c)(1)).

[28] The Petitioner cites permit conditions 1.1.1; 1.2.1; 1.3; 1.4; 1.5; 1.10.1.5(i); 2.3; 2.4; 2.5; 2.7.7; 3.1.3; 3.2.3; 3.3.1.1; 3.3.1.2; 3.3.2; 3.4; 3.5.1; 3.5.2; 3.6; 3.7; 3.9; 3.11.1.5; 4.2; 5.3.1; 5.4; 5.7; 7.1.2; and 7.1.3 (all in Section II of the Permit). Petition at 42.

The Petitioner claims that the EPA recently—in May of 2023—disapproved "these types of reporting rules" in Colorado's 2008 ozone NAAQS SIP submittal based on the same logic the Petitioner applies to the permit conditions. *Id.* The Petitioner quotes the EPA's disapproval action:

> Specifically, these rules do not include sufficient reporting requirements to ensure that citizens will be able to enforce the SIP requirements, as is necessary under the CAA and EPA regulations. That is, the regulations in Table 2 require facilities to maintain records necessary to establish compliance with these rules for a certain period of time and to make them available to the state on request. But if there is no requirement for these records to be submitted to the state absent a request, then unless the state requests the compliance records and then makes them publicly available, no parties other than the state or the EPA under its CAA section 114 authority will have practical access to the basic information necessary to determine compliance by the regulated entities under these rules. This undermines citizens' ability to participate in the enforcement of the SIP as allowed by CAA section 304. As EPA has repeatedly stated, to be enforceable, a CAA SIP rule must be legally and practically enforceable. We find that a requirement to provide records to the state only on request, without any required periodic reporting to the state, is inconsistent with CAA and regulatory requirements for enforceability. Therefore, due to the lack of adequate reporting requirements (or some equivalent means of ensuring enforceability), the EPA is simultaneously finalizing a limited approval and disapproval of these rules, as authorized under sections 110(k)(3) and (4) and 301(a).

*Id.* (quoting 88 Fed. Reg. 29827, 29828 (May 9, 2023); citing Petition Ex. 20, *Response to Comments for the Federal Register Notice on Air Plan Approval; Colorado; Serious Attainment Plan Elements and Related Revisions for the 2008 8-Hour Ozone Standard for the Denver Metro/North Front Range Nonattainment Area* at 46–50 (Apr. 25, 2023)).[29]

The Petitioner claims that the public cannot determine whether the source is in compliance with "many of the requirements of its permit" without access to the records in the permit conditions under question. *Id.* at 43. The Petitioner urges CDPHE to assist public enforcement "by ensuring that the public has access to all of the records sources are required to generate pursuant to Title V permits." *Id.* at 44.

***EPA Response:*** For the following reasons, the EPA denies the Petitioner's request for an objection on this claim.

The Petitioner has not demonstrated that the Permit fails to require the source to submit records consistent with the relevant statutory and regulatory authorities governing title V permits. The Petitioner suggests that 28 permit conditions require the permittee to submit certain compliance records to CDPHE *only* upon request, and that this "upon request" reporting scheme is insufficient. But the Petitioner has not demonstrated that these permit terms actually restrict reporting in this manner.

[29] On August 31, 2023 the EPA granted a Petition for Reconsideration submitted by Colorado on July 10, 2023 requesting that the EPA reconsider the issuance of the limited disapproval portions of the May 9, 2023 action that the Petitioner quotes. Letter from EPA Regional Administrator KC Becker to Colorado Attorney General Phil Weiser (Aug. 31, 2023), available at *https://www.regulations.gov/document/EPA-R08-OAR-2023-0483-0009*; *see* 88 Fed. Reg. 68532, 68533.

The Petitioner provides virtually no information regarding the list of 28 permit conditions that it claims are deficient, nor does the Petitioner evaluate the relationship between these permit terms and other requirements. *See* 40 C.F.R. 70.12(a)(2)(iii).[30]

Notably, in its RTC, CDPHE specifically references the general semi-annual reporting requirement in permit condition 22 in section IV of the Permit and states that "the permittee is required to keep all monitoring data and support information, including all calibration and maintenance records for continuous monitoring, and copies of all reports required by the permit. Reports are required to contain the results of the monitoring required in the permit." RTC at 11. CDPHE also states that "[f]acilities with Title V permits are required to report any permit or monitoring deviations semi-annually and certify annually whether or not they are in compliance with their permit." *Id.* (citing Regulation No. 3, Part C, Section V.C.7.a). CDPHE also cites an EPA guidance document to support CDPHE's statement that "the permittee is not required to submit raw data on monitoring/testing as a part of its monitoring report." *Id*. (citing *Questions and Answers on the Requirements of Operating Permits Program Regulations* (July 7, 1993)).

To demonstrate a basis for the EPA's objection, a petition must "identify where the permitting authority responded to the public comment . . . and explain how the permitting authority's response to the comment is inadequate to address the issue raised in the public comment." 40 C.F.R. § 70.12(a)(2)(vi).[31] The Petitioner fails to mention any part of CDPHE's response or the permit conditions that CDPHE cites to support its approach to recordkeeping and reporting in the Permit.

Critically, the Petitioner fails to acknowledge the general semi-annual reporting requirement in permit condition 22 in section IV, which requires submittal of "all reports of any required monitoring at least every six (6) months" in accordance with the requirements of CAA § 504(a) and 40 C.F.R. § 70.6(a)(3)(iii)(A). Permit at 136; *see* RTC at 11. The recordkeeping requirements cited by the Petitioner, do not, on their face, exclude those records from the reports of required monitoring. *See In the Matter of Georgia-Pacific Consumer Operations LLC, Crossett Paper Operations* Order on Petition Nos. VI-2018-3 & VI-2019-12 at 11 (February 22, 2023). Nor does CDPHE's response indicate that any specific records are intended to be excluded from the semi-annual monitoring reports. *See* RTC at 11. Therefore, a fact-specific, case-by-case inquiry would be required to determine both whether the Permit intends to exclude certain records from the monitoring reports, and whether that exclusion prevents the Permit from assuring compliance with any underlying requirements. The Petitioner fails to demonstrate either point in relation to any particular permit condition and thus presents no basis for the EPA's objection.

[30] *See supra* notes 6–8 and accompanying text; *see also In the Matter of Terra Energy Partners, Rocky Moutain LLC, Parachute Water Management Facility*, Order on Petition Nos. VIII-2022-16 & VIII-2022-17 at 14–16 (June 14, 2023) (*Terra Parachute Order*).

[31] *See supra* note 9 and accompanying text; *see also Terra Parachute Order* at 14–16.

**Claim IV: The Petitioner Claims That "EPA Must Object to the Permit because It Incorporates by Reference Colorado Regulatory Provisions That Do Not Exist."**

***Petition Claim:*** The Petitioner claims that many of the Permit's terms[32] improperly incorporate applicable requirements by reference to an outdated version of the Colorado Air Quality Control Commission Regulation 7. *See* Petition at 44–45.

The Petitioner claims that a reorganization of Regulation 7 (5 C.C.R. § 1001-9) became effective in June 2023, following the public comment period for the Permit but before its final issuance. *Id.* at 44. The Petitioner claims this reorganization eliminated Part D from the regulation, but the Permit nevertheless continues to cite Part D and may contain other errors. *Id.* The Petitioner also expresses concern over apparent further changes to Regulation 7 that were scheduled to become effective in September 2023. *Id.* n11.

The Petitioner states that a primary purpose of title V is to "enable the source, States, EPA, and the public to understand better the requirements to which the source is subject, and whether the source is meeting those requirements." *Id.* at 45 (quoting 57 Fed. Reg. at 32251; citing 42 U.S.C. § 7661c(c); 40 C.F.R. § 70.6(c)(1)). The Petitioner claims that the EPA, the public, and perhaps CDPHE "will not be able to identify the applicable requirements and associated monitoring, reporting, or recordkeeping requirements that are incorporated by reference where the incorporation relies on invalid, outdated citations to Colorado's regulations." *Id.*

***EPA Response:*** For the following reasons, the EPA denies the Petitioner's request for an objection on this claim.

The permit conditions cited by the Petitioner do not appear to incorporate any requirements solely by reference to Regulation No. 7, Part D, as the Petitioner implies. Rather, each permit condition seems to contain the full text of each requirement.[33] The Petitioner's concern that applicable requirements will not be identifiable "where the incorporation relies on invalid, outdated citations," appears, therefore, to be speculative. Petition at 45. The Petitioner does not claim, much less demonstrate, that any applicable requirements are missing from the Permit, or that any requirements in the Permit are incorrect or there by mistake. Therefore, the Petitioner has not presented any grounds for the EPA's objection. *See* 40 C.F.R. 70.12(a)(2)(ii)–(iii).[34]

[32] The Petitioner cites permit condition 1.4 in section I; permit conditions 3.11.1.2, 3.11.1.3(a)–(b), 3.11.1.4, 3.11.1.5, 3.11.1.6, 3.11.1.7, 3.11.2, 4.4, 5.8, 8.1, 8.2, 8.3, and 8.4 in section II.

[33] *See e.g.*, permit conditions 3.11.1.7.a–c, which reference "Part D, Section I.H" but also detail specific reporting requirements contained therein. Permit at 72–73.

[34] *See supra* note 6 and accompanying text. The EPA notes that all title V permits must "specify and reference the origin of and authority for each term or condition." 40 C.F.R. 70.6(a)(1)(i). Although the Petitioner did not claim that the Permit does not satisfy this requirement (and thus has not demonstrated grounds for the EPA's objection), the EPA encourages CDPHE to update the citations in the Permit while resolving the EPA's objection under Claim I of the Petition.

## V. CONCLUSION

For the reasons set forth in this Order and pursuant to CAA § 505(b)(2) and 40 C.F.R. § 70.8(d), I hereby grant in part and deny in part the Petition as described in this Order.

Dated: April 2, 2024

Michael S. Regan
Administrator