BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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Petition No. VIII-2024-6

In the Matter of

HighPoint Operating Corporation, Anschutz Equus Farms 4-62-28

Permit No. 20OPWE423

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 received a petition dated April 1, 2024 (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. 20OPWE423 (the permit) issued by the Colorado Department of Public Health and Environment (CDPHE) to the HighPoint Operating Corporation (HighPoint) in Weld County, Colorado. The operating permit was issued pursuant to title V of the CAA, 42 U.S.C. §§ 7661–7661f, and 5 Code of Colorado Regulations 1001-5, Part C. *See also* 40 Code of Federal Regulations 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 and objects to the issuance of the permit. Specifically, the EPA grants Claims 1 and 2 and denies Claim 3.

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 and objects to the issuance of a permit, 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 HighPoint Facility

The Anschutz Equus Farms Facility, owned by the HighPoint Operating Corporation, is located in Weld County, Colorado. This area is classified as being in severe non-attainment for the eight-hour ozone standard. The facility is an oil and natural gas production facility that separates mixed-phase well production fluids and stores natural gas condensate, crude oil, and produced water. Waste gas from storage tanks and loadout units is routed to enclosed combustion devices (ECDs). The facility is a major source under title V for volatile organic compounds (VOC) and nitrogen oxides (NO_x).

B. Permitting History

On December 16, 2020, HighPoint applied for an initial title V permit for the Anschutz Equus Farms Facility. CDPHE published notice of a draft permit on July 17, 2023, subject to a public comment period that ran until August 16, 2023. On December 18, 2023, CDPHE submitted the proposed permit, along with its responses to public comments and technical review document, to the EPA for its 45-day review. The EPA's 45-day review period ended on February 1, 2024, during which time the EPA did not object to the proposed permit. CDPHE issued the final title V permit for the Anschutz Equus Farms Facility on February 8, 2024.

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 February 1, 2024. Thus, any petition seeking the EPA's objection to the proposed permit was due on or before April 1, 2024. The petition was received April 1, 2024, and, therefore, the EPA finds that the petitioner timely filed the petition .

D. Environmental Justice

The EPA used EJScreen[10] to review key demographic and environmental indicators within a five-kilometer radius of the Anschutz Equus Farms Facility. This review showed a total population of approximately 20 residents within a five-kilometer radius of the facility, of which approximately 22 percent are people of color and 36 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.

EJ Index	Percentile in State
Particulate Matter 2.5	68
Ozone	24
Diesel Particulate Matter	39
Air Toxics Cancer Risk	56
Air Toxics Respiratory Hazard	71
Toxic Releases to Air	28
Traffic Proximity	12
Lead Paint	66
Superfund Proximity	45
RMP Facility Proximity	69
Hazardous Waste Proximity	35
Underground Storage Tanks	35
Wastewater Discharge	82

IV. EPA DETERMINATIONS ON PETITION CLAIMS

A. Claim 1: The Petitioner Claims That "The Title V Permit Unjustifiably Assumes a Control Efficiency of 95% for Control Devices, Without Proper Testing, Monitoring, Recordkeeping, and Reporting to Ensure Compliance and Enforceability."

[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*.

Petition Claim: The petitioner claims that the permit does not assure compliance with requirements for enclosed combustion devices serving five units (AIRS ID 008—four 400-barrel fixed roof atmospheric produced water storage vessels, AIRS ID 009—four 400-barrel fixed roof atmospheric compression condensate storage vessels, AIRS ID 010—thirteen 400-barrel fixed room atmospheric production condensate storage vessels, AIRS ID 006—hydrocarbon loadout from compression condensate Tanks, and AIRS ID 007—hydrocarbon loadout from production condensate tanks) to achieve 95 percent control efficiency of VOC emissions. *Id.* at 6–7; *see id.* at 6–25. Specifically, the petitioner claims that the permit lacks "testing or monitoring as well as recordkeeping and reporting of the control efficiency." *Id.* at 8 (citing 42 U.S.C. § 7661c(c); 40 C.F.R. § 70.6(a)(1), (c)(1); 57 Fed. Reg. 32,250, 32,251; *In the Matter of Bonanza Creek Energy Operating Company, LLC,* Order on Petition No. VIII-2023-11 (January 30, 2024) (*Bonanza Creek Order*); *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*); Colorado Regulation No. 3, Part C, Section V.C.5.b).

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 title V permit. Petition at 6 (citing 42 U.S.C. § 7661c(a)–(c); 40 C.F.R. § 70.6(a)(1), (a)(3), (c)(1)).

The petitioner claims that ECDs at similar facilities have been found previously via testing to have control efficiencies less than 95%, citing several examples. *Id.* at 19–20 (citing Petition Ex. 8 *Stack Tests for Enclosed Combustion Devices* (January 2022)). The petitioner alleges that "[t]hese facilities were relying on monitoring parameters similar or identical to the faulty parameters the Division has included in the title V permit, yet it was only performance testing that eventually revealed flare control efficiency below 95%." *Id.* at 21. The petitioner claims that the EPA and the Wyoming Department of Environmental Quality found that "ECDs were observed to be operating over a wide range of combustion efficiencies ranging from below 20% to above 99%. . . . Optimization testing revealed that depending on the operational setup, ECD combustion efficiency can be affected by as little as 2% to more than 80%." *Id.* at 21 (quoting Petition Ex. 14 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.* (citing Petition Ex. 15 *Email from Christopher LaPlante to Jennifer Mattox et al.* (June 8, 2020).

The petitioner argues: "In fact, the very nature of these control devices, with their lack of control over key parameters like temperature and residence time, and the variable composition of the gas being combusted, means that assumptions about control efficiency are invalid." *Id.* (citing Petition Ex. 16 Ranajit Sahu *Technical Comments on the Proposed CDPHE Permit No. 20AD0062* at 2–5).

The petitioner provides an example of a different title V permit issued by CDPHE where semi-annual performance testing of an ECD for a similar unit is required. *Id.* at 21–22 (citing Petition Ex. 17 *Air Pollution Control Division Colorado Operating Permit, D90 Energy, LLC—Bighorn 0780 S17 CTB Facility, Permit No. 17OPJA401* (Jan. 1, 2020) at Section II, Condition 2.8.). The petitioner claims that CDPHE's own regulations require "at least annual testing of enclosed combustion devices whenever a permittee requests a control efficiency greater than 95%." *Id.* at 22 (citing Petition Exhibit 19, AQCC Regulation No. 7 at 46–51). The petitioner claims that the Statement of Basis for these regulations asserts that "testing is necessary to ensure that enclosed combustion devices are operating effectively, even when subject to the 95% control efficiency requirement." *Id.* (citing Petition Ex. 19 at 291).

The petitioner criticizes what it characterizes as CDPHE's policy of only requiring performance testing for units with required control efficiency of greater than 95 percent, arguing that this threshold is arbitrary and unsupported by the evidence of variable control efficiency in the record. *Id.* at 22.

The petitioner addresses numerous permit conditions for each unit,all in section II of the permit and substantively nearly identical for each unit, 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 the petitioner's opinion, assure compliance. *See id.* at 8–19.[11] Repeatedly, throughout this portion of the petition, the petitioner claims that the permit conditions do "not require actual testing or monitoring of emissions to assure a 95% control efficiency." *Id.* at 12; *see id.* at 8–19. The petitioner claims that the requirements for a pilot light to be present at all times and to monitor the pilot light only guarantee that combustion is occurring and that control efficiency is above zero, but not that it is 95 percent. *Id.* at 9. Similarly, the petitioner dismisses the requirements for visible emissions checks—the petitioner argues that smoke and opacity could be unrelated to VOC control efficiency and that there is no evidence that no smoke and no/low opacity guarantees 95 percent control efficiency. *Id.*

The petitioner also rebuts several of CDPHE's defenses of the monitoring scheme presented in its RTC. *See id.* at 22–25. The petitioner dismisses CDPHE's statement that the control efficiency derives from manufacturer guarantees. *Id.* at 22 (citing RTC at 2–3). The petitioner argues that such guarantees "do not constitute sufficient periodic monitoring" and do not represent the operation of ECDs in "uncontrolled" environments where they are susceptible to weather and other conditions. *Id.* at 23 (citing *Cash Creek Order* at 17–18).

The petitioner claims that CDPHE's response outlining the actions required for the presumption of 95 percent control efficiency,*i.e.*, the monitoring requirements previously addressed, is insufficient because "there is no indication that compliance with the various qualitative parameters, including presence of a pilot light, the presence of an auto-ignitor, and visible emissions monitoring, assures compliance with the quantitative control efficiency requirement." *Id.* at 23.

The petitioner addresses CDPHE's assertion that its testing showed ECDs, on average, achieved control efficiencies of 95 percent or higher. *Id.* (citing RTC at 4). The petitioner argues that compliance with the permit's conditions cannot rely on averages across multiple sources, but must be assured through testing, monitoring, and reporting requirements specific to each source. *Id.*

In response to CDPHE's assertion that Regulation No. 7, Part B, Section II.B.2.h requires ongoing performance testing of the ECDs and that the tests "are designed to demonstrate that these devices are actually capable of achieving a 95% control efficiency on an ongoing basis," the petitioner notes that these requirements are labeled "State Only" in the permit and therefore cannot assure compliance with federally enforceable applicable requirements. *Id.* at 24 (quoting RTC at 10; citing *Bonanza Creek Order* at 14).

EPA Response: For the following reasons, the EPA grants this petition claim and objects to the issuance of the permit.

[11] The Petitioner cites requirements under condition 2 for AIRS ID 008, condition 3 for AIRS ID 009, condition 4 for AIRS ID 010, and condition 5 for AIRS ID 006 and 007.

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 include, generally, "good engineering and maintenance practices, manufacturer specifications, adequately designing and sizing of air pollution control equipment, the requirement to use an enclosed combustion device, visual observations, pilot light presence, monitoring for visible emissions[.]" RTC at 10. Critically, the ECDs are also subject to state-only enforceable performance testing requirements. The foundation of the petitioner's claim is that without *federally enforceable* performance testing requirements, the rest of the monitoring cannot assure continuous compliance with the 95 percent control efficiency requirements applicable to the ECDs.

The EPA addressed very similar claims in two previous orders—the *Bonanza Creek Order* and the *DCP Platteville Order*.[12] In those cases, substantively very similar monitoring requirements for ECDs subject to 95 percent VOC control requirements were at issue, and the EPA found that the permit records were inadequate to determine whether the permits included the necessary monitoring requirements to assure compliance with the 95 percent control efficiency requirements. *See Bonanza Creek Order* at 13–15; *DCP Platteville Order* at 11–13. CDPHE's previous explanations in its RTCs failed to explain how the permit conditions assured compliance, but merely asserted that they did.

Here, as in the other cases, the petitioner persuasively argues that the federally enforceable monitoring requirements in the permit merely ensure that the ECDs are not malfunctioning, and that combustion is actually occurring. *See* Petition at 9. It is unclear to the EPA, however, how these monitoring requirements assure that the ECDs continually achieve the specific 95 percent control efficiency required in the permit in the absence of federally enforceable performance testing. *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.

In the *Bonanza Creek* and *DCP Platteville* orders, the EPA noted that CDPHE seemed to imply that the state-only enforceable performance testing requirements were necessary to assure compliance with the 95 percent control efficiency requirements. The EPA also stated that these conditions would have to be federally enforceable if CDPHE intended to rely upon them to resolve the EPA's objections. *Bonanza Creek Order* at 15; *DCP Platteville Order* at 13.

Here, CDPHE, in its RTC, provides more explanation of the monitoring conditions and more clearly indicates that the state-only enforceable performance testing requirements are necessary to assure compliance:

[12] *In the Matter of DCP Operating Company LP, Platteville Natural Gas Processing Plant*, Order on Petition No. VIII-2023-14 (April 2, 2024) (*DCP Platteville Order*).

> The periodic performance testing requirements of Section II.B.2.h. are designed to demonstrate that these devices are actually capable of achieving a 95% control efficiency on an ongoing basis. As the commenter indicates, good engineering and maintenance practices, manufacturer specifications, adequately designing and sizing of air pollution control equipment, the requirement to use an enclosed combustion device, visual observations, pilot light presence, monitoring for visible emissions and flow meter installation requirements, when considered individually, may not provide complete assurance that a 95% control efficiency is met. However, this facility's enclosed combustion devices are subject to not one of these requirements, but rather to all of these requirements together, and when conducted in aggregate, the Division believes that these monitoring requirements provide reasonable assurance that the enclosed combustion devices are being operated as designed.

RTC at 10.

As the petitioner notes, however, and as the EPA previously stated, state-only enforceable permit terms cannot be relied upon to satisfy the title V requirement to assure compliance with 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; Petition at 24. Because CDPHE relies on the performance testing requirements to assure compliance with the 95 percent control efficiency requirements, and because they are state-only enforceable, the permit, therefore, fails to "set forth" the necessary monitoring requirements to assure compliance with the requirements for the ECDs to achieve 95 percent control efficiency. 42 U.S.C. § 7661c(c); *see* 40 C.F.R. §§ 70.6(c)(1).

Direction to CDPHE: CDPHE must amend the permit to ensure that it assures compliance with all federally enforceable permit conditions. CDPHE may be able to accomplish this in a number of ways, but if it does not make the performance testing requirements federally enforceable, CDPHE must amend the permit record to explain why these are not necessary to assure compliance with the 95 percent control efficiency requirements.

B. Claim 2: The Petitioner Claims That "The Title V Permit Fails to Require Monitoring and Testing, as well as Associated Recordkeeping and Reporting to Assure Compliance with Applicable NO_x and CO Limits for the Condensate Tanks."

Petition Claim: The petitioner claims that the permit lacks sufficient testing and monitoring to assure compliance with NO_x and carbon monoxide (CO) limits applicable to ECDs controlling emissions from condensate storage tanks (AIRS ID 009 and AIRS ID 010). *See* Petition at 26–29 (citing Section II, Conditions 3 and 4; Permit at 23–26). Specifically, the petitioner argues that the permit relies unjustifiably on AP-42 emission factors to demonstrate compliance without requirements to periodically update those factors or verify their representativeness through testing. *Id.* at 29.

The petitioner describes title V requirements related to monitoring, stating:

> A Title V permit must "set forth [] monitoring [] requirements to assure compliance with

> the permit terms and conditions." To this end, a Title V permit must include "periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit." In addition, the permitting record must contain a sufficient "statement that sets forth the legal and factual basis for the draft permit conditions."

Id. at 29 (quoting 42 U.S.C. § 7661c(b); 40 C.F.R. § 70.6(a)(3)(i)(A); 40 C.F.R. § 70.7(a)(5); citing 40 C.F.R. § 70.6(c)(1); *In the Matter of Valero Refining-Texas, L.P., Valero Houston Refinery*, Order on Petition No. VI-2021-8 at 62 (June 30, 2022)).

The petitioner notes: "Section II, Conditions 3 and 4 require compliance with NO_x and CO emission limits applicable to the enclosed combustion devices controlling emissions from the condensate storage tanks." *Id.* at 26. The petitioner claims that the permit lacks monitoring or testing to assure compliance with these limits. *Id.*

Instead, the petitioner claims, the permit relies on emissions equations using AP-42 emission factors to demonstrate compliance. *Id.* The petitioner claims that the EPA recommends against using AP-42 emission factors to establish source-specific limits. *Id.* at 27 (citing *In the Matter of Tesoro Refining and Marketing Co.*, Order on Petition No. IX-2005-6, at 32–33 (Mar. 15, 2005)). The petitioner claims that the permit record fails to explain why AP-42 factors are appropriate to assure compliance with limits in this case. *Id.*

The petitioner claims that the permit lacks any other monitoring related to the NO_x and CO limits, and notes particularly the lack of monitoring for heat input, even though, the petitioner argues, such information would be necessary to calculate emissions via the emission factors. *Id.* The petitioner references earlier arguments under Claim 1 of the petition to argue that the variability of ECD operations necessitates ongoing testing and monitoring. *Id.* at 28.

The petitioner states that CDPHE's response on this issue in its RTC did not resolve the problem since CDPHE simply asserts a lack of alternatives to AP-42 emission factors. *Id.* at 28 (citing RTC at 12). The petitioners provide examples of NO_x and CO testing requirements in other permits issued by CDPHE to similar sources and note that EPA test methods 10 and 7E set forth procedures for determining CO and NO_x emissions from stationary sources. *Id.* at 27–28 (citing Petition Ex. 20; Ex. 9; 40 C.F.R. § 60, Appendix A-4).

The petitioner states:

> [W]hile AP-42 may have been the best source of source-specific information when establishing initial emission factors to calculate potential emission rates for the Equus Farms facility, it is not the best source of source-specific information for which to assure sufficient periodic monitoring that ensures compliance with applicable NO_x and CO limits now that the facility is operating.

Id. at 28.

EPA Response: For the following reasons, the EPA grants this petition claim and objects to the issuance of the permit.

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 permit limits CO emissions from AIRS ID 090 (four condensate storage vessels) to 1.8 tons per year, and CO and NO_x emissions from AIRS ID 010 (thirteen condensate storage vessels) to 5.1 and 1.1 tons per year, respectively. Permit at 19, 21; Section II Conditions 3, 4. To demonstrate compliance with these limits, the permit requires emission calculations using AP-42 emission factors. *Id*; Construction Permit 18WE0231 at 8; Construction Permit 18WE0232 at 8).

The petitioner has raised concerns with the variability of ECD operations and the representativeness of AP-42 emission factors. *See* Petition at 28. The petitioner also questions the utility of such emission factors in the absence of heat-input monitoring. *Id.* at 27. CDPHE's RTC leaves those issues largely unaddressed, and attempts to justify the permit's use of AP-42 emission factors based on the unavailability of alternative sources of emission information, even while acknowledging that "AP-42 might have certain deficiencies." RTC at 12.

The petitioner demonstrates that CDPHE's justification for using AP-42 emission factors based on the unavailability of alternative sources of information is incorrect. The petitioner provides test methods and an example of their use at a similar facility to measure NO_x and CO emissions, demonstrating that reasonable alternatives to AP-42 emission factors exist. *See* Petition at 27–28.

The permit record is, therefore, inadequate for the EPA to determine whether the permit "sets forth" sufficient monitoring to assure compliance with the NO_x and CO limits applicable to the condensate storage tanks (AIRS ID 009 and AIRS ID 010). 42 U.S.C. § 7661c(c); *see* 40 C.F.R. §§ 70.6(c)(1), 70.8(c)(3)(ii).

Direction to CDPHE: CDPHE must either amend the permit record to explain why testing is not feasible or necessary to assure compliance with the NO_x and CO limits in this case, or amend the permit to ensure that it includes sufficient monitoring and testing to assure compliance. Any such explanation should also address the petitioner's concern about monitoring heat input.

C. Claim 3: The Petitioner Claims That "The Title V Permit Fails to Assure Compliance with the Colorado SIP's Requirement That a Permitted Facility Will Not Cause or Contribute to a Violation of the NAAQS."

Petition Claim: The petitioner claims that the permit does not assure compliance with all applicable requirements of Colorado's SIP because CDPHE issued several preconstruction permits for the HighPoint facility without determining whether they would interfere with the attainment or maintenance of the NAAQS. *See* Petition at 29–35.

The petitioner first argues that "[e]nsuring compliance with the NAAQS" is an applicable requirement under title V because the definition of applicable requirement in 40 C.F.R. § 70.2 includes all SIP requirements. *Id.* at 29–30 (citing 5 C.C.R. § 1001-5, Part A, I.B.9). The petitioner claims that the Tenth Circuit Court of Appeals "has accepted this plain language reading of the Title V regulations" and held that preconstruction permitting requirements are title V requirements that must be considered in a title V petition. *Id.* at 30 (quoting *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 preconstruction permitting programs and lists EPA requirements for minor source permitting programs, arguing that such programs must prevent construction or modification if it will interfere with attainment of a NAAQS. *Id.* at 31 (quoting 40 C.F.R. § 51.160(a)–(b)). The petitioner quotes corresponding regulations in Colorado's SIP, claiming 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 31–32 (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 reports concerning CDPHE's minor source permitting program concluded that CDPHE habitually failed to conduct the preconstruction modelling necessary to assure compliance with the NAAQS when issuing minor source permits and therefore improperly permitted minor sources. *See id.* at 32–33 (citing Petition Ex. 4 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*); *EPA Region 8 Review of EPA's Office of Inspector General Hotline Complaint No. 2021-0188* (July 2022) (*EPA Report*)). The petitioner claims that 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." *Id.* at 33. The petitioner argues that because CDPHE's policies that resulted in the failure to conduct preconstruction NAAQS determinations were operating at the time the HighPoint facility's preconstruction permits were issued, the requirements of those permits were incorporated into the title V permit illegally, and the "EPA must object because the Title V 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 33.

The petitioner lists eight construction permits (18WE0232, 18WE0230, 18WE0231, 18WE0229, 18WE0228, 18WE0233, 18WE0234, and 18WE0236) it claims CDPHE issued improperly. *Id.* The petitioner claims that the Technical Review Document does not reference "any analysis to demonstrate that the applicable requirements prohibiting permitting of NAAQS violations are met with the current permit conditions" *Id.* at 34. The petitioner argues, therefore, that the title V permit "does not contain any enforceable emission limits to assure that these sources will not cause or contribute to NAAQS violations." *Id.*

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 because it is not authorizing a modification of the Equus Farms facility through the Title V Permit." *Id.* The petitioner faults CDPHE for relying on the preamble to Part 70 because it "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 CDPHE failed "to assure that issuance of the underlying construction permits protected the NAAQS" and that "[t]he Title V Permit cannot now incorporate construction permits that

were approved with no demonstration that the NAAQS would be protected." *Id.* The petitioner argues that the "EPA must determine if the eight construction permits being incorporated into the Title V Permit comply with all of the SIP requirements for construction permits, including the requirement that the construction permits do not permit NAAQS violations." *Id.*

The petitioner highlights long-term limits on NO_x emissions applicable to the facility's three 1,680 horsepower engines that the petitioner claims do not assure protection of the short-term (hourly) 2010 NO_x NAAQS. *Id.* (citing Permit Section II, Condition 1).

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

The EPA previously addressed a similar claim in the *DCP Platteville Order*. That claim was denied for similar reasons discussed here. *See DCP Platteville Order* at 13–19. Ultimately, the petitioner has failed to demonstrate that CDPHE did not conduct the NAAQS determinations for the construction permits that the petitioner claims were required.

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 33. 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.[13] 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 14.

However, the EPA has also previously explained:

> [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.

[13] *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*).

Suncor Plant 2 Order at 54.[14]

Here, the petitioner claims that CDPHE failed to meet its obligation to determine whether each construction permit that is being incorporated into the permit would cause an exceedance of the NAAQS. *See* Petition at 33. 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 31–32. In its RTC, CDPHE asserts it is not required to conduct "a separate and cumulative NAAQS demonstration of the entire stationary source at the time of title V permit issuance, especially where there are no minor or significant modifications forming part of this title V permitting action." RTC at 13.

The petitioner argues that the NAAQS assessments required by Colorado's SIP (at the time of the construction permits' issuance) are reviewable in this title V petition because of the Tenth Circuit's *Sierra Club* decision. *See* Petition at 30 (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 types of SIP requirements that the Tenth Circuit evaluated in *Sierra Club* are distinguishable from those at issue here.[15] 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 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 13. Rather, the Troutman Report concluded that "CDPHE had two conflicting

[14] 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).

[15] 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.").

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 33; s*ee* 40 C.F.R. 70.12(a)(2)(iii).[16] 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 record 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. 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

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

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.

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 and object to the issuance of the permit as described in this Order.

Dated: July 31, 2024

Michael S. Regan
Administrator