BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF	)	PETITION NO. VI-2013-10
	)	
BIG RIVER STEEL, LLC	)	
OSCEOLA, ARKANSAS	)	ORDER RESPONDING TO
	)	PETITION REQUESTING
PERMIT NO. 2305-AOP-R0	)	OBJECTION TO THE ISSUANCE OF
	)	A TITLE V OPERATING PERMIT
ISSUED BY THE ARKANSAS DEPARTMENT OF	)	
ENVIRONMENTAL QUALITY	)	
	)	

ORDER DENYING A PETITION FOR OBJECTION TO PERMIT

I. INTRODUCTION

The U.S. Environmental Protection Agency (EPA) received a petition dated October 9, 2013, (the Petition) from Nucor Steel-Arkansas and Nucor-Yamato Steel Company (collectively the Petitioner), pursuant to section 505(b)(2) of the Clean Air Act (CAA or Act), 42 U.S.C. § 7661d(b)(2). The Petition requests that the EPA object to final Permit No. 2305-AOP-R0 (the Permit) issued by the Arkansas Department of Environmental Quality (ADEQ) to Big River Steel, LLC for a steel mill (BRS or the facility) in Osceola, Mississippi County, Arkansas. The operating permit was issued pursuant to title V of the CAA, CAA §§ 501–507, 42 U.S.C. §§ 7661–7661f, and Arkansas Pollution Control & Ecology Commission (APC&EC) Regulation 26. *See also* 40 C.F.R. part 70 (title V implementing regulations). This type of operating permit is also referred to 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 further below, the EPA denies the Petition requesting that the EPA object to the Permit.

II. STATUTORY AND REGULATORY FRAMEWORK

A. Title V Permits

Section 502(d)(1) of the CAA, 42 U.S.C. § 766la(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 Arkansas submitted a title V operating permit program on October 29, 1993. The EPA granted interim approval of the Arkansas title V program in 1995, 60 Fed. Reg. 46771 (September 8, 1995). The EPA granted final approval of the Arkansas title V program in 2001, 66 Fed. Reg. 51312 (October 9, 2001). The program is currently codified in APC&EC Regulation 26.

All major stationary sources of air pollution and certain other sources are required to apply for 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. CAA §§ 502(a), 504(a), 42 U.S.C. §§ 7661a(a), 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 sources' compliance with applicable requirements. 57 Fed. Reg. 32250, 32251 (July 21, 1992); *see* CAA § 504(c), 42 U.S.C. § 7661c(c). One purpose of the title V program is to "enable the source, States, the 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. at 32251. Thus, the title V operating permit program is a vehicle for compiling the air quality control requirements as they apply to the facility'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), 42 U.S.C. § 7661d(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. 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. CAA § 505(b)(1), 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 petition the Administrator, within 60 days of the expiration of the EPA's 45-day review period, to object to the permit. CAA § 505(b)(2), 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d).

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). CAA § 505(b)(2), 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d)). 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. CAA § 505(b)(2), 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(c)(l).[1] Under section 505(b)(2) of the Act, the burden is on the petitioner to make the required demonstration to the EPA.[2]

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[1] *See also New York Public Interest Research Group, Inc. v. Whitman*, 321 F.3d 316, 333 n.11 (2d Cir. 2003) *(NYPIRG).*

[2] *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.

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," to determine whether a petition demonstrates to the Administrator that a permit is not in compliance with the requirements of the Act, and a nondiscretionary duty 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)).[3] 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.[4] Certain aspects of the petitioner's demonstration burden are discussed below; however, a more detailed discussion can be found in *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 has looked at 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 the petitioner has addressed the state or local permitting authority's decision and reasoning. The EPA expects the petitioner to address the permitting authority's final decision, and the permitting authority's final reasoning (including the state's response to comments), where these documents were available during the timeframe for filing the petition. *See MacClarence*, 596 F.3d at 1132–33.[5] Another factor the EPA has examined is whether a petitioner has provided the relevant analyses and citations to support its claims. If a petitioner does not, the EPA is left to work out the basis for 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 persuasive.").[6] Relatedly, the EPA has pointed out in numerous orders that, in particular cases,

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[3] *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)).

[4] *See also Sierra Club v. Johnson*, 541 F.3d at 1265–66; *Citizens Against Ruining the Environment*, 535 F.3d at 678.

[5] *See also, e.g., In the Matter of Noranda Alumina, LLC*, Order on Petition No. VI-2011-04 at 20–21 (December 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 the permit was deficient); *In the Matter of Kentucky Syngas, LLC*, Order on Petition No. IV-2010-9 at 41 (June 22, 2012) (*Kentucky Syngas Order*) (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); *In the Matter of Georgia Power Company*, Order on Petitions, at 9–13 (January 8, 2007) (*Georgia Power Plants Order*) (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).

[6] *See also In the Matter of Murphy Oil USA, Inc.*, Order on Petition No. VI-2011-02 at 12 (September 21, 2011) (denying a title V petition claim where petitioners did not cite any specific applicable requirement that lacked

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 (January 15, 2013) (*Luminant Sandow Order*).[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) (*Homer City Order*).[8]

The information that the EPA considers in making a determination whether to grant or deny a petition submitted under 40 C.F.R. § 70.8(d) on a proposed permit generally includes, but is not limited to, the administrative record for the proposed permit and the petition, including attachments to the petition. 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 of basis for the draft and proposed permits; the permitting authority's written responses to comments, including responses to all significant comments raised during the public participation process on the draft permit; relevant supporting materials made available to the public according to 40 C.F.R. § 70.7(h)(2); and all other 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). If a final permit and a statement of basis for the final permit are available during the agency's review of a petition on a proposed permit, those documents may also be considered as part of making a determination whether to grant or deny the petition.

C. New Source Review

The major New Source Review (NSR) program is comprised of 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 other pollutants regulated under the CAA. CAA §§ 160–169, 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. CAA §§ 171–193, 42 U.S.C. §§ 7501–7515.

At issue in this Order is the PSD program, which requires a major stationary source to obtain a PSD permit before beginning construction of a new facility or undertaking certain modifications. CAA § 165(a)(1), 42 U.S.C. § 7475(a)(1); CAA § 169(2)(C), 42 U.S.C. § 7479(2)(C). For a

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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 (April 20, 2007); *Georgia Power Plants Order* at 9–13; *In the Matter of Chevron Products Co., Richmond, Calif. Facility*, Order on Petition No. IX-2004–10 at 12, 24 (March 15, 2005).

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

source subject to the PSD permitting program, several requirements must be addressed before a permitting authority may issue a permit, including: (1) an evaluation of the impact of the proposed new or modified major stationary source on ambient air quality in the area, and (2) the application of the Best Available Control Technology (BACT) for each pollutant subject to regulation under the Act. CAA §§ 165(a)(3), (4), 42 U.S.C. §§ 7475(a)(3), (4); 40 C.F.R. § 52.21(j), (k).

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 has approved the Arkansas PSD program as part of its SIP. *See* 40 C.F.R. § 52.170(c) (listing EPA-approved PSD provisions contained in APC&EC Regulation 19, Chapter 9). The EPA-approved Arkansas PSD regulations incorporate the federal PSD regulations in 40 C.F.R. § 52.21 (a)(2) through (bb) as of November 29, 2005 with certain exceptions not relevant to the claims in the Petition. *See* APC&EC Reg. 19.904.

III. BACKGROUND

A. The Big River Steel Facility

The BRS facility is a new steel mill in Osceola, Mississippi County, Arkansas. When operational, the BRS facility will consist of two Electric Arc Furnaces to melt scrap iron and steel, each of which will produce up to 1.7 million tons of steel annually, Ladle Metallurgy Furnaces to adjust the chemistry, a Rurhstahl Heraeus Degasser and boiler for further refinement, and casters. The output steel will be further processed on a pickling line, galvanizing lines, annealing furnaces and lines, a decarburizing line, and several other processes. The facility also has emergency generators, cooling towers, raw and finished material handling, and other miscellaneous sources. Among other requirements, the BRS facility is subject to PSD review for nitrogen oxides (NO_X), carbon monoxide (CO), particulate matter (PM, PM_{10}, and $PM_{2.5}$), sulfur dioxide (SO_2), volatile organic compounds (VOC), lead, and greenhouse gases (GHG).

B. Permitting History

BRS filed an application with ADEQ for both a PSD preconstruction permit and a title V operating permit on January 30, 2013.[9] ADEQ found this first application incomplete, and BRS

[9] The facility's title V permit, issued under APC&EC Regulation 26, was processed concurrently with a PSD permit, issued under APC&EC Regulation 19. Both permits were issued in a single permit document (titled Permit No. 2305-AOP-R0), due to the structure of Arkansas's EPA-approved regulations governing the procedures for issuance of title V permits and NSR permits. As the EPA explained in approving the Arkansas title V program, "Chapter 11 of Regulation 19 . . . addresses the NSR permitting procedures for major sources which are also subject to Regulation 26—Regulations of the Arkansas Operating Permit Program. . . . Chapter 11 requires major sources which are subject to Regulation 26 to also have their permit applications processed in accordance with the procedures contained in Regulation 26, which are incorporated by reference. Thus, Chapter 11 creates the connection between the PSD and title V programs to allow Arkansas to issue one permit to its sources which are defined as major under both programs." 66 Fed. Reg. 51312, 51315 (October 9, 2001) (EPA approval of Arkansas

submitted a second permit application on March 5, 2013. Although ADEQ deemed this second application administratively complete on March 14, 2013, after discussion between ADEQ and BRS, ADEQ requested that BRS submit a third permit application. BRS submitted its third application on June 21, 2013. ADEQ issued public notice of the merged draft PSD preconstruction permit and draft title V operating permit on June 27, 2013, subject to a public comment period that ended on July 29, 2013, and a public hearing held on July 30, 2013. The EPA's 45-day review period of the proposed title V operating permit ran concurrently with the public comment period, and ended on August 11, 2013. The EPA did not object to the title V permit. ADEQ issued final Permit No. 2305-AOP-R0 along with its response to comments (RTC) document on September 18, 2013.[10]

C. Timeliness of Petition

Pursuant to the CAA, if the EPA does not object to a proposed title V 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 August 11, 2013. Thus, any petition seeking the EPA's objection to the Permit was due on or before October 10, 2013. The Petition was dated October 9, 2013, and the EPA finds that the Petitioner timely filed the Petition.[11]

IV. DETERMINATIONS ON CLAIMS RAISED BY THE PETITIONER

The Petitioner specifically enumerated twelve claims, each of which is addressed below.[12] Because 11 of the claims in the Petition concern determinations related to the PSD permit issued by ADEQ, those claims are addressed together immediately below. The remaining two claims—Claims C.4 and C.5—are addressed individually in following subsections.

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title V rules); *see also* 65 Fed. Reg. 61103, 61104 (October 16, 2000) (EPA approval of Arkansas PSD rules into the Arkansas SIP).

[10] ADEQ subsequently processed an administrative amendment on August 31, 2015, to add four insignificant activities to the Permit. As such, Permit No. 2305-AOP-R0 has technically been superseded by Permit No. 2305-AOP-R1. This administrative amendment did not alter permitted emission rates or any of the permit terms or conditions that the EPA is considering in this Order. Therefore, the EPA is responding to the Petition as it relates to the final version of Permit No. 2305-AOP-R0 that formed the basis of the Petition.

[11] After submitting the Petition, the Petitioner submitted a supplement to the Petition on April 21, 2014 (Supplemental Petition). The Supplemental Petition claims to provide additional details in support of the Petition based on information that arose in the course of a state administrative appeal process that began after the Petition was filed. The EPA is not responding to the Supplemental Petition in this Order because it was not submitted within 60 days of the end of the EPA's 45-day review period, as required by the CAA. CAA § 505(b)(2), 42 U.S.C. § 7661d(b)(2). The assertion "that it was impracticable to raise" certain information during the public comment period does not require the EPA to respond to such information included as part of a Supplemental Petition submitted after the 60-day statutory petition deadline, contrary to the assertions of the Petitioners. *See id.*; Supplemental Petition at 1–2.

[12] The Petitioner also summarized six claims in an introductory section of the Petition, the majority of which directly correspond to one of the enumerated claims. However, the fourth summary claim, concerning GHG BACT limits, is not discussed elsewhere in the Petition. We, therefore, consider that the Petition contains 13 claims – all of which are addressed below.

The Petitioner's Claims Related to PSD Determinations[13]

Petitioner's Claims: Of the Petitioner's claims related to PSD determinations made by ADEQ, the Petitioner first raises four specific claims challenging the adequacy of the PSD air quality impacts modeling conducted in order to demonstrate that the BRS facility would not cause or contribute to a violation of the $PM_{2.5}$ NAAQS. Petition at 11. In each of these modeling claims, the Petitioner contends that $PM_{2.5}$ emissions from the BRS facility should have been modeled differently. In Claim A.1, the Petitioner claims that ADEQ conducted an inadequate review of background air quality data. *Id.* at 12–16. Specifically, the Petitioner asserts that ADEQ did not adequately justify why an air quality monitor located in Dyersburg, Tennessee, was representative of the background air quality in the area of the BRS facility. *Id.* In Claim A.2, the Petitioner alleges that the $PM_{2.5}$ modeling was deficient because it excluded certain areas from the analysis. *Id.* at 16–17. Specifically, the Petitioner argues that ADEQ inappropriately excluded certain areas where $PM_{2.5}$ emissions from BRS were projected to have an insignificant impact and that ADEQ used inappropriate impact levels to assess the significance of impacts. *See id.* In Claim A.3, the Petitioner claims that the $PM_{2.5}$ modeling is deficient because ADEQ failed to include secondary formation of $PM_{2.5}$ (i.e., $PM_{2.5}$ emissions formed in the atmosphere from the facility's SO_2 and NO_x emissions), and instead only included $PM_{2.5}$ directly emitted by the facility. *Id.* at 18–19. In Claim A.4, the Petitioner asserts there are discrepancies among different modeled $PM_{2.5}$ annual impact values in or associated with the $PM_{2.5}$ modeling. *See id.* at 19–20.

Next, in Claim B, the Petitioner claims that ADEQ and BRS failed to properly carry out two types of PSD additional impacts analyses. *See id.* at 20–24. First, the Petitioner challenges the adequacy of the "analysis of the air quality impact projected for the area as a result of general commercial, residential, industrial or other growth associated with the source." *Id.* at 20–21 (citing 42 U.S.C. § 7475(a)(6) and 40 C.F.R § 52.21(o)). Second, the Petitioner challenges the adequacy of an analysis related to the effects of the proposed project's consumption of available PSD increment on industrial and economic development in the area and alternatives to the project. *See id.* at 21 (citing APC&EC Reg. 19.904(C)).

In Claim C, the Petitioner advances seven[14] loosely related claims under the following heading: "The permit and permit application does not contain source information necessary to perform the analyses required for PSD review, does not contain the information required by Part 70 for operating permits, and was not processed properly." *Id.* at 24. Many of these claims pertain to the determination of BACT for the BRS facility. In Claim C.1, the Petitioner asserts that emission factors for natural gas combustion are conflicting and argues that the $PM_{2.5}$ BACT limit for natural gas combustion units at the BRS facility are too stringent and may not be achievable by the source. *See id.* at 25–27. In Claim C.2, the Petitioner questions the basis for the $PM_{2.5}$ BACT emission limit for electric arc furnaces at the BRS facility, again alleging that the emission limits, in this case proposed and accepted by BRS, are too stringent and may not be achievable. *Id.* at 28. In Claim C.6, the Petitioner asserts that the BACT limits for the source were established based on limits proposed by BRS and the results of modeling, "without completing the full BACT technical analysis and considering the BACT factors." *Id.* at 31–32. Additionally,

[13] This section addresses Claims A.1, A.2, A.3, A.4, B, C.1, C.2, C.3, C.6, C.7, and summary claim 4 concerning GHG BACT limits.

[14] Of the seven claims contained within Claim C, two (C.4 and C.5) are addressed individually below.

in the introductory section of the Petition, the Petitioners briefly assert that ADEQ doubled the GHG BACT limit (expressed as carbon dioxide equivalent) in the Permit without adequate explanation or justification. *Id.* at 6–7 (referred to as "summary claim 4").

Other claims within Claim C are related more generally to the adequacy of the facility's permit application. In Claim C.3, the Petitioner asserts that the permit application was incomplete because it did not reflect the final design and placement of all emission units at the facility, which the Petitioner asserts affected the validity of the $PM_{2.5}$ air quality modeling. *Id.* at 29. In Claim C.7, the Petitioner claims generally that the draft permit did not comply with public notice requirements because the permit application relied in part on plans that were to be developed and because ADEQ knew that the permit application was incomplete or contradictory. *Id.* at 32–33. The Petitioner provides an example of how "missing and confused data" related to the facility's projected air quality impacts for NO_X resulted in a draft permit that misrepresented the facility's actual performance. *Id.* at 33–34.

EPA's Response: For the following reasons, the EPA denies the Petitioner's request for an objection on these claims.

Each of the Petitioner's claims summarized above involve determinations made by ADEQ that are based exclusively on requirements under the PSD provisions in part C of title I of the CAA and the ADEQ's corresponding EPA-approved SIP regulations. Notwithstanding that ADEQ issued a PSD permit within the same permit document as the facility's initial title V permit,[15] the Petitioner's claims discussed above relate exclusively to title I permitting requirements—including preconstruction modeling and monitoring requirements, additional impacts analyses, and BACT determinations—rather than title V permitting requirements.[16]

This presents the fundamental issue of whether decisions made in issuing a title I preconstruction permit, like the PSD permit issued to BRS, should be considered by the EPA in reviewing or considering a petition to object to a title V operating permit. The EPA has previously considered similar preconstruction permitting issues when they were raised in petitions for an EPA objection to a state-issued title V permit. However, the EPA has recently reviewed this past practice. *See In the Matter of PacifiCorp Energy Hunter Power Plant*, Order on Petition No. VIII-2016-4 (October 16, 2017) ("*PacifiCorp-Hunter Order*"). After a review of the structure and text of the CAA and the EPA's regulations in part 70, and in light of the circumstances presented by the petition at issue in the *PacifiCorp-Hunter Order*, the EPA concluded in the *PacifiCorp-Hunter Order* that the title V permitting process is not the appropriate forum to review preconstruction permitting decisions when a preconstruction permit has been duly issued. After considering the situation presented in the Petition regarding the BRS facility, the EPA has concluded that a title V petition to object is likewise not the appropriate forum for reviewing the merits of the

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

[16] Some of the Petitioner's claims within Claim C concerning the allegedly inadequate permit application briefly reference Arkansas's title V program rules governing the submittal of title V permit applications, including APC&EC Regulations 26.402, 26.407, and 26.501. *See* Petition at 4, 24, 25. However, none of the Petitioner's claims asserting deficiencies in the permit application involve title V requirements. Instead, these claims exclusively relate to PSD determinations made by ADEQ. The two claims involving issues related to title V requirements are discussed individually below.

preconstruction permitting requirements derived under title I of the Act in the context of a merged title I and title V program. The EPA is aware that this conclusion differs from the agency's position in prior title V petition orders involving similar circumstances. However, for the legal and policy reasons discussed below and in the *PacifiCorp-Hunter Order*, the EPA believes this position better aligns with the structure of the Act and the EPA's original understanding of the relationship between the operating and construction permitting programs under the CAA after the enactment of title V.

Section 504 of the CAA requires that title V permits "include enforceable emissions limitations and standards . . . to assure compliance with applicable requirements of this chapter, including the requirements of the applicable implementation plan." 42 U.S.C. § 7661c(a).[17] However, the term "applicable requirements" is not defined in the Act and the statute does not otherwise specify how to determine the "applicable requirements of this chapter" for a particular source. In accordance with Congressional direction, 42 U.S.C. § 7661a(b), the EPA developed regulations to implement the title V program, and those regulations include a definition of the term "applicable requirement."

> *Applicable requirement* means all of the following *as they apply* to the emission units in a part 70 source . . . :
> (1) Any standard or other requirement provided for in the applicable implementation plan approved or promulgated by EPA through rulemaking under title I of the Act that implements the relevant requirements of the Act, including any revisions to that plan promulgated in part 52 of this chapter [and]
> (2) *Any* term or condition of *any* preconstruction permits issued pursuant to regulations approved or promulgated through rulemaking under title I, including Parts C or D, of the Act
> . . .

40 C.F.R. § 70.2 (emphasis added).[18] It is clear from this language that the "applicable requirements" include the terms and conditions of preconstruction permits issued under title I of

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[17] Similar requirements appear in other parts of title V. "Schedule of compliance. The term 'schedule of compliance' means a schedule of remedial measures, including an enforceable sequence of actions or operations, leading to compliance with an applicable implementation plan, emission standard, emission limitation, or emission prohibition" 42 U.S.C. § 7661(3). "Nothing in this subsection shall be construed to alter the applicable requirements of this chapter that a permit be obtained before construction or modification." 42 U.S.C. § 7661a(a). Permitting authorities "have adequate authority to . . . issue permits and assure compliance . . . with each applicable standard, regulation, or requirement under this chapter." 42 U.S.C. § 7661a(b)(5). The regulations to implement the program shall include a "requirement that the applicant submit with the application a compliance plan describing how the source will comply with all applicable requirements under this chapter." 42 U.S.C. § 7661b(b). However, like section 504, these sections do not specify the scope of the term "applicable requirements," or how the permitting authority or the EPA is to determine what the applicable requirements are for an individual source as part of its title V permit.

[18] Arkansas' title V regulations mirror the EPA's regulations to define applicable requirement to include: "(a) Any standard or other requirement provided for in the applicable implementation plan approved or promulgated by EPA through rulemaking under title I of the Act that implements the relevant requirements of the Act, including any revisions to that plan promulgated in 40 CFR part 52; (b) Any term or condition of any preconstruction permits issued pursuant to regulations approved or promulgated through rulemaking under title I, including parts C or D, of the Act." APC&EC Reg. 26. Ch. 2.

the Act. The language in section (2) of the definition of "applicable requirement" expressly includes both PSD (part C) and NNSR (part D) permits. Therefore, if a PSD permit has been issued under an approved title I program, the second section of the definition of "applicable requirement" at 40 C.F.R. § 70.2 requires that the terms and conditions of that PSD permit are included in a source's title V permit.

The Petition addressed in this Order argues that the preconstruction permit obtained by BRS does not comply with the requirements of the applicable implementation plan. As discussed in detail below, *see infra* p. 12–14, prior to the *PacifiCorp-Hunter Order*, the EPA had construed section (1) of the definition of "applicable requirement" to include both the requirement to obtain a preconstruction permit and a requirement that such a permit comply with the applicable preconstruction permitting requirements in the plan. Specifically, the EPA has read the phrase "[a]ny standard or other requirement provided for in the applicable implementation plan" to include the requirement to obtain a preconstruction permit "that in turn complies with the applicable PSD requirements under the Act." *See, e.g., In the Matter of Shintech, Inc.*, Order on Petition, Permit Nos. 2466-VO, 2467-VO, 2468-VO at 3 n.2 (September 10, 1997). But when a source *has obtained* a preconstruction permit, for purposes of writing a title V permit, this presents an ambiguity in the definition of "applicable requirement" because section (2) includes the terms and conditions of that permit. The EPA has previously interpreted its regulations to apply both sections (1) and section (2) to title I preconstruction permitting requirements after a preconstruction permit has been obtained. But this reading can lead to a requirement that a title V permitting authority or the EPA consider or reconsider, in issuing a title V permit or permit renewal or in responding to a petition, whether a validly issued preconstruction permit complies with all of the requirements of the applicable implementation plan. While such an expansive reading of section (1) may have been applied by the EPA in past title V petition responses, this leads to an incongruous result that is inefficient and can upset settled expectations—on the part of a state, an owner/operator, and the public at large—in circumstances where a source has obtained a legally enforceable preconstruction permit in accordance with the requirements of title I.

In circumstances such as those present here where a preconstruction permit has been duly obtained, the regulations should be read to mean, consistent with the EPA's contemporaneous expressions of the purpose of title V permitting, that when a permitting authority has made a source-specific permitting decision with respect to a particular construction project under title I, those decisions "define certain applicable SIP requirements for the title V source" for purposes of title V permitting. 57 Fed. Reg. 32250, 32259 (July 21, 1992). The EPA is now interpreting the part 70 regulations to mean that the issuance of a PSD permit defines the preconstruction requirements under section (1) of the definition of "applicable requirement" for the approved construction activities for the purposes of permitting under title V of the Act.[19] These source-specific permitting actions take the general preconstruction permitting requirements of the SIP—the requirement to obtain a particular type of permit and the substantive requirements that must be included in each type of permit—and evaluate at the time of the permitting decision whether and how to apply them to a proposed construction or modification. The definition of "applicable

[19] In this context, a PSD permit only defines the applicable requirement for purposes of title V permitting. The interpretation of title V provisions reflected in this Order does not address anyone's ability to review a determination concerning the PSD permit terms and conditions under other titles of the Act.

requirement" says that the determination of "applicable requirements" is "as they apply" to the source and includes "any term or condition of any preconstruction permits issued." 40 C.F.R. § 70.2. In issuing a preconstruction permit to a source, the permitting authority provides the terms and conditions of the preconstruction permitting requirements of the SIP "as they apply" to the source at that time for purposes of inclusion into the title V permit. *Id.* In the circumstance present here, the source-specific preconstruction permit issued by ADEQ determined, for purposes of title V permitting for the BRS facility, the preconstruction requirements of the Arkansas SIP under section (1) of the definition of "applicable requirement." When ADEQ applied those requirements of the SIP to issue the PSD preconstruction permit to BRS, it derived the source-specific "applicable requirements" for purposes of section (2) of that definition.[20]

This reading of part 70 also takes into account the authority and procedures ADEQ used to issue the title V permit for BRS. The facility's title V permit, issued under APC&EC Regulation 26, was processed concurrently with a PSD permit, issued under APC&EC Regulation 19. Both permits were issued in a single permit document (titled Permit No. 2305-AOP-R0), due to the structure of Arkansas's EPA-approved regulations governing the procedures for issuance of title V permits and preconstruction permits. As the EPA explained in approving the Arkansas title V program:

> Chapter 11 of Regulation 19 . . . addresses the NSR permitting procedures for major sources which are also subject to Regulation 26—Regulations of the Arkansas Operating Permit Program. . . . Chapter 11 requires major sources which are subject to Regulation 26 to also have their permit applications processed in accordance with the procedures contained in Regulation 26, which are incorporated by reference. Thus, Chapter 11 creates the connection between the PSD and title V programs to allow Arkansas to issue one permit to its sources which are defined as major under both programs.[21]

This makes clear that while issued within one permit document, there were in fact two permits issued by ADEQ: (1) the PSD permit under Regulation 19, and (2) the title V permit, which incorporates the terms and conditions of that PSD permit as an "applicable requirement," under Regulation 26. While ADEQ processed the PSD permit and the title V permit concurrently, this is a choice made by the state as a matter of administrative efficiency. There is no requirement under the Act that a state process a preconstruction permit concurrently with a title V permit or permit modification. The EPA does not interpret this procedural streamlining—which effectively combines the public notice, comment, and permit issuance procedures for the preconstruction permit issued under Regulation 19 and the operating permit issued under Regulation 26—to establish a public petition opportunity under title V on the preconstruction permitting determinations made in issuing the PSD permit. The CAA establishes this petition opportunity on the title V permit alone and provides a different mechanism for EPA and citizen oversight of

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[20] This interpretation applies in factual circumstances like those presented in this Petition, where a permitting authority issued a source-specific title I preconstruction permit subject to public notice and comment and for which judicial review was available. The EPA is not considering at this time whether other circumstances may warrant a different approach.

[21] 66 Fed. Reg. 51312, 51315 (October 9, 2001) (EPA approval of Arkansas title V rules); *see also* 65 Fed. Reg. 61103, 61104 (October 16, 2000) (EPA approval of Arkansas PSD rules into the Arkansas SIP).

preconstruction permitting decisions under title I.[22] The EPA does not read APC&EC Regulation 19, Chapter 11 to independently establish a public petition opportunity under title V on the PSD permit issued by ADEQ where such petition opportunity would be unavailable in a circumstance where the title I and title V permitting processes were separate.

The CAA requires the EPA to object to a title V permit if the petitioner demonstrates to the Administrator that the permit is not in compliance with the requirements of the CAA. 42 U.S.C. § 7661d(b)(2). "The Administrator shall include in regulations under this subchapter provisions to implement" the title V petition process. *Id.* The EPA's title V regulations state that the "Administrator will object to the issuance of any proposed permit determined by the Administrator not to be in compliance with *applicable requirements* or requirements under this part." 40 C.F.R. § 70.8(c)(1) (emphasis added). If the EPA does not object during its 45-day review period, any person may petition the EPA to issue "such objection." 40 C.F.R. § 70.8(d). Under title V, the EPA only has authority to object to the title V permit issued under Regulation 26.

The Petitioner has not alleged that ADEQ did not incorporate the terms and conditions of a preconstruction permit "issued pursuant to regulations approved or promulgated through rulemaking under title I," *i.e.*, Regulation 19. 40 C.F.R. § 70.2 (definition of "applicable requirement"). Further, the Petitioner has not alleged in the claims discussed above that the monitoring, recordkeeping, or reporting found in the title V permit, issued under Regulation 26, are inadequate to assure compliance. Therefore, the Petitioner has not demonstrated in the claims discussed above that the title V permit is "not . . . in compliance with applicable requirements" or the requirements of part 70. 40 C.F.R. § 70.8(c)(1); *see* 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d). The EPA therefore denies the Petition with regard to these claims, for the reasons presented above and elaborated upon below.

Previous Interpretations by the EPA

This reading of the regulations comports with the EPA's statements regarding the relationship between the CAA's preconstruction and operating permit requirements at the time that the EPA initially issued the title V regulations in part 70. The EPA did not express the intention to use the title V permitting process to review the "applicable requirements" established in preconstruction permitting programs under title I of the CAA. To the contrary, the EPA stated that "[a]ny requirements established during the preconstruction review process also apply to the source for purposes of implementing title V. If the source meets the limits in its NSR permit, the title V operating permit would incorporate these limits *without further review*." Proposed Operating Permit Program, 56 Fed. Reg. 21712, 21738–39 (May 10, 1991) (emphasis added) (1991 Preamble). The EPA stated clearly that "[t]he intent of title V is not to second-guess the results of *any* State NSR program." *Id.* at 21739 (emphasis added). The EPA stated that "[d]ecisions made under the NSR and/or PSD programs (e.g., [BACT]) *define applicable SIP requirements* for the title V source and, if they are not otherwise changed, can be incorporated without further review into the operating permit for the source." *Id.* at 21721 (emphasis added).

[22] Indeed, as discussed further below, in this instance involving the BRS permit, the Petitioner invoked the state appeal process and had an opportunity for a thorough review of the propriety of the preconstruction permitting conditions for the facility through this title I process.

However, the EPA later shifted away from this understanding of part 70 (title V) permitting in circumstances where a source had already obtained a title I preconstruction permit. In title V orders and guidance documents in the late 1990s, the EPA began to interpret section (1) of the definition of "applicable requirement" to allow the EPA and states to examine the propriety of prior construction permitting decisions in the title V permitting process.

For instance, in *In the Matter of Shintech, Inc.*, Order on Petition, Permit Nos. 2466-VO, 2467-VO, 2468-VO at 3 n.2 (September 10, 1997), the EPA said:

> Where a state or local government has a SIP-approved PSD program, the merits of PSD issues can be ripe for consideration in a timely petition to object under Title V. Under 40 CFR § 70.1(b), "all sources subject to Title V must have a permit to operate that assures compliance by the source with all applicable requirements." Applicable requirements are defined in section 70.2 to include "(1) any standard or other requirement provided for in the applicable implementation plan approved or promulgated by EPA through rulemaking under Title I of the [Clean Air] Act...." The LDEQ defines "federal applicable requirement, in relevant part, to include "any standard or other requirement provided for in the Louisiana State Implementation Plan approved or promulgated by EPA through rulemaking under title I of the Clean Air Act that implements the relevant requirements of the Clean Air Act, including any revisions to that plan promulgated in 40 CFR part 52, subpart T." LAC 33:III.502. Thus, the applicable requirements of the Shintech Permits include the requirement to obtain a PSD permit *that in turn complies with the applicable PSD requirements under the Act*, EPA regulations, and the Louisiana SIP. (emphasis added)

In a 1999 letter responding to requests from permitting authorities, the Director of the Office of Air Quality Planning and Standards articulated the EPA's then-current understanding of the interaction of title I and title V. Letter from John S. Seitz, U.S. EPA, to Robert Hodanbosi, STAPPA/ALAPCO (May 20, 1999).[23] The letter stated that "applicable requirements include the requirement to obtain preconstruction permits that comply with applicable preconstruction review requirements under the Act, EPA regulations, and SIP's." *Id.* Enclosure A at 2. The letter expressed the view that section 505(b) of the Act provides a form of corrective action in addition to all the other enforcement authorities the EPA has under the Act. *Id.* While it stated that generally the agency will not object to a title V permit for determinations "made long ago[,] . . . EPA may object to [a more recent] title V permit due to an improper [preconstruction] determination." *Id.* Enclosure A at 2–3. Additionally, the letter said that the EPA could object to a title V permit where "EPA believes that an emission unit has not gone through the proper preconstruction permitting process." *Id.* Enclosure A at 3.[24] However, the letter did not provide

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[23] *Available* at *https://www.epa.gov/sites/production/files/2015-08/documents/hodan7.pdf.*

[24] The EPA has also used this reading of the agency's oversight authority under title V as part of the justification for approving state PSD programs. *See* Approval and Promulgation of Implementation Plans; Oregon, 68 Fed. Reg. 2891, 2899 (January 22, 2003); *see also* Approval and Promulgation of Implementation Plans; Idaho; Designation of Areas for Air Quality Planning Purposes; Idaho, 68 Fed. Reg. 2217, 2221 (January 16, 2003). In these approvals the

any explanation for why decisions "made long ago" were entitled to more deference than recent decisions for purposes of title V permitting.

Somewhat more recently, the EPA has implicitly or explicitly assumed that preconstruction permitting decisions were ripe for review when responding to title V petitions. For instance, while not substituting its own judgment for that of a state permitting authority, the EPA has reviewed whether a petitioner demonstrated that the permitting authority's exercise of discretion under its SIP-approved regulations was unreasonable or arbitrary. *See, e.g., In the Matter of American Electric Power – John W. Turk Plant*, Order on Petition No. VI-2008-01 (December 15, 2009); *In the Matter of Cash Creek Generation*, Order on Petition Nos. IV-2008-1 & IV-2008-2 (December 15, 2009) ("Cash Creek I"); *In the Matter of Cash Creek Generation*, Order on Petition No. IV-2010-4 (June 22, 2012) ("Cash Creek II"). In these title V orders, the EPA indicated that the agency could review whether previous preconstruction permitting decisions complied with the requirements of the SIP, which would appear to be inconsistent with the preamble of the regulations in part 70 described above.

However, at the same time, the EPA has declined in the title V petition context to review the merits of PSD permits issued by the agency or by a permitting authority that has received delegation to implement the EPA's federal PSD rules. *See In the Matter of Kawaihe Cogeneration Project*, Order on Petition, Permit No. 0001-01-C (March 10, 1997). Because these permitting decisions may be appealed to the EPA's Environmental Appeals Board, the EPA has concluded that it need not entertain claims that such permits are deficient when raised in a petition to object to a title V permit.

The EPA's Approach Moving Forward

Notwithstanding the interpretation advanced with respect to title I permitting under SIP-approved programs in these previous orders and policy statements, there are many reasons to view the EPA's original interpretation of the regulations governing title V permitting, explained in the *PacifiCorp-Hunter Order*, to be more appropriate given the policy and legal reasons explained below.

First, the interpretation expressed in this Order and the *PacifiCorp-Hunter Order*—that preconstruction permit terms and conditions should be incorporated without further review—aligns with that expressed contemporaneous with the promulgation of the title V regulations in 40 C.F.R. part 70. This provides the best indication of the intention of the agency when it issued those regulations. A contemporaneous interpretation is often given great weight in understanding the meaning of a statute. *See, e.g., Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 414 (1993) ("Of particular relevance is the agency's contemporaneous construction which 'we have allowed . . . to carry the day against doubts that might exist from a reading of the bare words of a statute'" (citing *FHA v. The Darlington, Inc.*, 358 U.S. 84, 90 (1958))). Much as an agency's

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EPA pointed to its authority under title I, sections 113 and 167, and stated that title V "has added new tools" for addressing concerns with implementation of PSD requirements by allowing for objection to title V permits under section 505(b) of the Act. However, the authority to revisit an issued preconstruction permit in the title V process does not appear to have been dispositive to the approval of these PSD programs as the EPA could still conduct oversight using its title I authorities.

contemporaneous interpretation of a statute through a regulation is given great weight, an agency's contemporaneous interpretation of its own regulations in the preamble for those regulations should carry similar weight.

More importantly, this reading—that title V permitting is not intended to second-guess the results of state preconstruction permit programs—is better aligned with the structure and purpose of title V itself. As the EPA and courts have noted on many occasions, title V was not intended to add new substantive requirements. *See, e.g., United States Sugar Corp. v. EPA*, 830 F.3d 579, 597 (D.C. Cir. 2016) ("Title V does no more than consolidate 'existing air pollution requirements into a single document, the Title V permit, to facilitate compliance monitoring' without imposing new substantive requirements." (quoting *Sierra Club v. Leavitt*, 368 F.3d 1300, 1302 (11th Cir. 2004))); *United States v. Cemex, Inc.*, 864 F.Supp.2d 1040, 1045 (D. Colo. 2012) ("'Title V permits do not generally impose any new emission limits, but are intended to incorporate into a single document all of the Clean Air Act requirements applicable to a particular facility' and to provide for monitoring and other compliance measures." (quoting *United States v. EME Homer City Generation L.P.*, 823 F.Supp.2d 274, 283 (W.D. Pa. 2011))).

Title V contains no language that says that this consolidation process[25] must involve a review of the substantive adequacy of any "applicable requirements" or a reconsideration of whether the "applicable requirements" were properly derived. This would entail much more than taking steps to "consolidate 'existing air pollution requirements.'" *United States Sugar Corp. v. EPA*, 830 F.3d at 597. As the courts have acknowledged, the purpose of the title V program is to identify which of the myriad of requirements under the CAA are applicable to an individual source. These include many requirements that are broadly applicable to entire categories of sources or sources with particular characteristics. In this case, the preconstruction requirements under the Act are different than many of these other requirements in that they were derived on a case-by-case basis in a source-specific process that produced permit terms and conditions that are expressly applicable to an individual source. But the Act does not say that "applicable requirements" with these characteristics must be checked in the title V process to determine if they were properly derived before they can be consolidated into an operating permit. Neither does the Act demand that these "applicable requirements" be re-checked each time the operating permit is renewed.

Before title V of the CAA was enacted, Congress enacted the title I preconstruction permitting requirements in the 1977 Amendments to the CAA. At that time, Congress understood that the adequacy of state preconstruction permitting decisions would be subject to review in state administrative and judicial forums.[26] Congress has also given the EPA specific oversight authority under title I to, among other authorities, approve or disapprove state permitting

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[25] While the preconstruction permit conditions applicable to BRS were not consolidated into the title V permit at a later date in this instance because the PSD and title V processes occurred concurrently, as explained above, the EPA does not view a concurrent process undertaken for administrative efficiency as expanding the scope of EPA's review in the title V context.

[26] "In order to challenge the legality of a permit which a State has actually issued ... a citizen must seek administrative remedies under the State permit consideration process, or judicial review of the permit in State court." Staff of the Subcommittee on Environmental Pollution of the Senate Committee on Environment and Public Works, 95th Congress, 1st Session, A Section-by-section Analysis of S. 252 and S. 253, Clean Air Act Amendments 36 (1977), reprinted in 5 Legislative History of the Clean Air Act Amendments of 1977 3892 (1977).

programs, 42 U.S.C. § 7410(a)(2)(C), call for revisions to those programs, *id.* § 7410(k)(5), issue injunctive orders to halt construction, *id.* § 7477, and pursue various types of enforcement actions pursuant to sections 113 and 167 of the Act, *id.* § 7413, § 7477.

There is no clear indication in the terms of the 1990 Amendments to the CAA or its legislative history that the addition of the title V provisions to the Act was intended to add another opportunity to review the merits of a construction permitting decision in addition to the title I authorities that existed already or that were added as part of the 1990 Amendments. There is no clear indication that Congress intended to alter the balance of oversight that the EPA had over state preconstruction permitting through title V review. Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). A reading of part 70 that would transform title V into an opportunity to reevaluate previous preconstruction approvals, instead of simply incorporating existing air pollution requirements into one document, would "alter the fundamental details" of the oversight authorities the EPA has under title I of the Act. For instance, instead of disapproving the preconstruction requirements in a state SIP or issuing a stop construction order to an individual source, which Congress explicitly authorized, the EPA could issue administrative orders on a case-by-case basis under title V. The text of the Act does not indicate that Congress intended to create this type of additional administrative oversight mechanism for preconstruction permitting actions in an operating permit program designed to consolidate and make existing requirements enforceable. While there is language in title V requiring that a permit "assure compliance with applicable requirements of this chapter," *e.g.*, 42 U.S.C. § 7661c(a), and similarly broad language in other parts of title V, this type of general language does not clearly or specifically say that a title V permitting authority must reevaluate preconstruction permitting decisions that have already been made under title I each time that it issues or renews a title V permit. Consistent with the EPA's contemporaneous interpretation of its part 70 regulations, this general language in the statute should be read to mean that the title V permit must include conditions to ensure compliance with the terms and conditions of the source-specific preconstruction permits that have been issued for the source. Absent language providing a clearer or direct indication that the provisions in title V of the Act require the reevaluation of preconstruction permitting decisions for a source, the EPA is determining that it should not read general and broad terms to find such a preconstruction permitting oversight tool "hidden" in the title V permitting program.

The EPA's preconstruction permitting oversight authority under title I of the Act supports reading the title V provision to supply a more limited oversight role for the EPA with regard to state implementation of preconstruction permitting programs.[27] The EPA believes that its oversight of case-specific state title I permitting decisions should be handled under title I, such as through comments on state permits or an order or action under section 113 or section 167 of the CAA. Citizen oversight may still be accomplished through either the state appeal process[28] or

[27] *See* 42 U.S.C. § 7401(a)(3) ("The Congress finds . . . air pollution control at its source is the primary responsibility of States and local governments.")

[28] Indeed, as discussed further below, in this instance involving the BRS permit, the Petitioner invoked the state appeal process and had an opportunity for a thorough review of the propriety of the preconstruction permitting conditions for the facility through this process.

through a citizen suit under section 304, depending on the type of issues involved. As described in this Order, for purposes of title V, the permitting authority should incorporate the terms and conditions of preconstruction permits into the source's title V permit, unless and until those preconstruction permits are revised, reopened, suspended, revoked, reissued, terminated, augmented, or invalidated through one of these mechanisms.[29] Similarly, broader programmatic issues should be handled under the EPA's existing title I authorities instead of through case-by-case objections under title V.

Other provisions of title V support the interpretation in this Order. For instance, title V requires state programs to have "[a]dequate, streamlined, and reasonable procedures . . . for expeditious review of permit actions . . ." 42 U.S.C. § 7661a(b)(6). Requiring the EPA to go back and review final preconstruction permitting decisions that have already been subject to the safeguards of public notice and judicial review could frustrate the goal of "expeditious review of permit action." While the preconstruction and operating permits in this case were processed concurrently, as noted above, that is not a requirement of part 70 or title V.

Similarly, Congress also provided abbreviated timeframes for the EPA to review a proposed title V permit: 45 days for the EPA's independent review, and 60 days if confronted with a petition to object. 42 U.S.C. § 7661d(b). These timeframes are inconsistent with an in-depth and searching review of the type of source-specific preconstruction permitting decisions that are made by the permitting authority under title I. Instead, these provisions suggest that the EPA's role in oversight over the issuance of title V permits should be limited. The Administrator will object to a title V permit if it does not include the "applicable requirements" or does not otherwise comply with part 70. 40 C.F.R. § 70.8(c). The EPA's oversight ensures that the permitting authority has properly included the "applicable requirements" as they apply to the source and followed the requirements of title V by including adequate monitoring, recordkeeping, and reporting to assure compliance with those requirements.[30] *See* 42 U.S.C. § 7661c(a), 7661c(c); 40 C.F.R. § 70.6(a)(3), 70.6(c)(1). In the case of preconstruction permitting requirements derived under title I of the Act, the EPA's oversight role under title V is to ensure that the terms and conditions derived under title I are properly included in the title V permit as "applicable requirements," and that the title V permit contains monitoring, recordkeeping, and reporting sufficient to assure compliance with those permit terms and conditions.

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[29] In this way, this interpretation is consistent with the EPA's statements in *In the Matter of Midwest Generation-Joliet Generating Station and Will County Generating Station*, Order on Petition No. V-2005-2 (June 14, 2007). *See supra* note 24 and accompanying text.

[30] For instance, in a case where a PSD permit is issued prior to a title V permit, the EPA would review whether the title V permit includes all the terms and conditions of the preconstruction permit and whether they appear as they appear in the preconstruction permit. If terms or conditions are left out, then the title V permit does not include all the applicable requirements, i.e., the terms and conditions of the preconstruction permit. In the instant case, because the title V permit and preconstruction permit are combined in one permit document, it is clear that the title V permit includes all the terms and conditions of the preconstruction permit (there is no separate document containing the PSD conditions). The EPA's review of the title V permit will still consider whether the permit has adequate monitoring, recordkeeping, and reporting to assure compliance with all applicable requirements, including the preconstruction permit requirements.

The EPA believes that it is inefficient and inappropriate for the EPA to review as part of the title V permitting process the preconstruction permitting decisions that are subject to public notice and comment and an opportunity for judicial review, even in "merged" or "one permit" programs. Here, in the case of the BRS Permit, the public had the opportunity to challenge the PSD conditions issued by ADEQ through the appropriate channels of state administrative and judicial review, and in fact the Petitioner took advantage of this opportunity. Following public notice of the Permit, the Petitioner submitted comments to ADEQ related to the issues raised in the title V Petition. After ADEQ issued the Permit, the Petitioner then challenged the majority of the PSD-related issues discussed above through an extensive adjudicatory process before the APC&EC's Administrative Hearing Officer, as provided by APC&EC Regulation 8.214 and Regulation 8 Chapter 6. This process involved discovery[31] and an evidentiary hearing, and culminated in a recommendation that the APC&EC affirm the Permit. *See In the Matter of: Big River Steel, LLC*, Permit No. 2305-AOP-R0, APC&EC Docket No. 13-0060P. Subsequent to the APC&EC's affirmation of the Permit, the Petitioner obtained judicial review of the Permit in the Court of Appeals of Arkansas, pursuant to APC&EC Regulation 8.217 and Regulation 8 Chapter 7. That court, too, affirmed the permit. *Nucor Steel-Arkansas v. APC&EC*, 478 S.W.3d 232 (Ark. Ct. App. December 9, 2015). Thus, the Petitioner had ample opportunity to challenge the various PSD determinations summarized above, of which it in fact took full advantage. The Petitioner's appeal of the preconstruction permitting decisions through the title I appeal process was the proper process under the CAA to obtain review of these decisions. The Petitioner is now, in essence, asking for a "second bite at the apple" through EPA oversight in the title V process. The availability of notice, opportunity to comment, and ability to seek judicial review on ADEQ's PSD determinations weigh heavily against the title V process being an additional avenue to evaluate these preconstruction permitting decisions.

Additionally, the availability of these title I avenues to address concerns with preconstruction permitting decisions illustrates how the title V permitting process and the EPA's oversight of state title V permits are ill-suited forums for considering these issues. As noted above, the EPA only has 45 days and 60 days to review a title V permit and any subsequent petition to object, respectively. Given the complex technical review required and the amount of documentation to review in order to evaluate the derivation of the substantive requirements of a preconstruction permit, this timeframe is often inadequate to fully consider the issues presented. A state adjudicatory process allows more time for development and consideration of the potential issues raised in a state's application of preconstruction permitting requirements to this particular source—another indication that these state processes and mechanisms are the appropriate forum for citizens to raise these types of preconstruction permitting issues.

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[31] Where discovery is available under state administrative and judicial review procedures, this can involve the review of a significant amount of documentation concerning preconstruction permitting decisions. While the EPA does not rely on the factual assertions made by the Petitioner in the Supplemental Petition, the present case is illustrative of this point: the Petitioner suggests in the Supplemental Petition that discovery in the administrative appeal of the BRS Permit involved over 200,000 pages of documents. In some administrative and judicial appeal processes, review of a permitting decision is based on an administrative record established at the time of the decision under review, and there is no opportunity for discovery or testimony to add to the administrative record. Such an administrative record on a preconstruction permit decision can be voluminous even without discovery or witness testimony. Under either type of review, the documentation from the preconstruction permitting may or may not be included in the title V permitting record depending on the particular situation.

The interpretation of the title V rules and statutory provisions reflected in this Order also aligns the EPA's treatment of preconstruction permits with how the EPA has consistently treated other "applicable requirements" under title V. For many other "applicable requirements," permitting agencies do not reconsider the content of those requirements in title V permits, nor does the EPA in its oversight role of title V permitting. For instance, the EPA would not allow a permitting authority to revise the substantive requirements of New Source Performance Standards established under section 111, or National Emission Standards for Hazardous Air Pollutants established under section 112.[32] These substantive requirements have already been established pursuant to a process that included public notice and comment and the opportunity for judicial review. It would therefore be inappropriate to reevaluate these standards in title V permitting. Likewise, source-specific preconstruction permitting that has been put out for notice and comment and the opportunity for judicial review has gone through a similar process at the state level. For purposes of title V permitting, it makes sense to treat decisions that go through similar processes similarly.

The EPA has also declined to second-guess the content of "applicable requirements" even when a title V permit incorporates SIP provisions that the EPA has determined are inconsistent with the CAA. The EPA has said that the proper forum to address whether a SIP provision is inconsistent with the CAA is through a "SIP Call" under CAA section 110(k). *In the Matter of Piedmont Green Power*, Order on Petition Number IV-2015-2 at 28–29 (December 13, 2016) (*Piedmont Green Power Order*); *see In the Matter of Midwest Generation, LLC, Joliet Generating Station*, Order On Petition No. V-2004-5 at 17, 20–21, 23–24 (June 24, 2005) ("[A] permitting authority cannot use a title V permit to modify a requirement from a federally approved SIP.").[33] Until the EPA approves a corrective SIP revision or issues a Federal Implementation Plan (FIP), no action within the title V permits is required. *Piedmont Green Power Order* at 29. Even if the EPA has concluded that the SIP provision is inconsistent with the Act, the title V permit should continue to incorporate the SIP provision because it is an "applicable requirement." Similarly, a decision by the EPA not to object to a title V permit that includes the terms and conditions of a title I permit does not indicate that the EPA has concluded that those terms and conditions comply with the applicable SIP or the CAA. However, until the terms and conditions of the title I permit are revised, reopened, suspended, revoked, reissued, terminated, augmented, or invalidated through some other mechanism, such as a state court appeal, the "applicable requirement" remains the terms and conditions of the issued preconstruction permit and they should be included in the source's title V permit. Consistent with 40 C.F.R. part 70, this Order treats the reviewability of preconstruction permitting conditions established by the permitting authority in a manner similar to the requirements of the SIP for purposes of title V permitting.

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[32] As noted above, the permitting authority may use the title V process to consider enhancing the monitoring, recordkeeping, or reporting required to assure compliance with these standards. *See, e.g., In the Matter of Wheelabrator Baltimore*, Order on Petition, Permit No. 24-510-01886 at 11–13 (April 14, 2010).

[33] See also; *In the Matter of Monroe Power Company*, Order on Petition IV-2001-8 at 14 (October 9, 2002); *In the Matter of Pacificorp's Jim Bridger and Naughton Electric Utility Steam Generating Plants*, Order on Petition No. VIII-00-1 at 23-24 (November 16, 2000).

For these reasons, the interpretation in this Order of title V and part 70 (and embodied in the 1991 Preamble) more closely aligns with the intent and purpose of title V than the departure from that interpretation expressed in certain previous orders and other agency statements, as discussed above. Consistent with this reading, permitting agencies and the EPA need not evaluate—in the context of title V permitting, oversight, or petition responses—the preconstruction permit terms and conditions under title I of the Act. That is especially so in a case such as this one involving the BRS permit where the title I preconstruction requirements have already been the subject of an extensive administrative appeal and a judicial review in the state system. Citizen concerns with these preconstruction permit conditions should be handled under the authorities found in title I of the Act. The permit terms and conditions derived under title I of the Act[34] should be incorporated as "applicable requirements" and the permitting authority and the EPA should limit its review under the procedures that are unique to title V permits to whether the title V permit has accurately incorporated those terms and conditions and whether the title V permit includes adequate monitoring, recordkeeping, and reporting requirements to assure compliance with the terms and conditions of the preconstruction permit. *See* 42 U.S.C. § 7661c(a); 40 C.F.R. § 70.6(a)(3), 70.6(c)(1).

For the foregoing reasons, the EPA denies the Petitioner's request for an objection on these claims.

Claim C.4: The Petitioner's Claim that "The Permit does not contain enforceable permit conditions that lead to compliance."

Petitioner's Claim: In Claim C.4, the Petitioner challenges permit conditions related to two dust control plans, which the Petitioner contends "[t]he Permit prominently relies upon." Petition at 29 (citing Permit Specific Conditions 95, 100, and 108). The Petitioner asserts that it previously commented that "the permit should specify when the dust control plan must be prepared and should list the minimum required Plan elements or criteria." *Id.* at 30. The Petitioner claims that ADEQ's response was inadequate, asserting that "the permit does not list any minimum plan elements or criteria." *Id.*

The Petitioner alleges that the permit contains a requirement to record water and materials throughput data, but argues that "the mere keeping of data does not demonstrate that the emissions are well controlled," which the Petitioner asserts would require "that the water be applied at a certain rate or when needed." *Id.* The Petitioner asserts that there is no explanation of how this monitoring and recordkeeping requirement will maintain proper controls. *Id.*

The Petitioner argues that the EPA previously "held that a title V permitting agency must include in the public record for review any element required to determine compliance with the conditions of the permit." *Id.* at 30 (citing *In the Matter of Alliant Energy, WPL Edgewater Generating Station*, Order on Petition No. V-2009-02 (August 1, 2010) (*Alliant Edgewater Order*)). Further, the Petitioner asserts that "the permitting authority must explain how the proposed monitoring

[34] This Petition only regards an issued major source PSD permit. However, the EPA has previously applied a similar interpretation and reasoning in denying a petition when the source had been issued a minor NSR permit. *See PacifiCorp-Hunter Order* at 8–20.

will lead to compliance" (citing *Alliant Edgewater Order*) and claims that "ADEQ has failed to do this." *Id.*

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

The Petitioner asserts that it previously commented to ADEQ that "the permit should list the minimum required plan elements for these dust control plans," and that "the permit does not list any minimum plan elements or criteria." Petition at 29–30. However, the Petitioner has not cited any legal authority for this claim.[35] The Petitioner implies that the Permit's lack of minimum required plan elements results in the Permit not assuring compliance with applicable requirements, as the Petitioner claims that "the permitting authority must explain how the proposed monitoring will lead to compliance." Petition at 30.[36] However, the Petitioner has failed to demonstrate that the dust control plans are required to determine compliance with any permit conditions or any applicable requirement. The Petitioner asserts that the Permit "prominently relies upon" the dust control plans, citing without further explanation Specific Conditions 95, 100, and 108, Petition at 29, but the Petition lacks any discussion of the relationship between the dust control plans and the cited permit conditions or any applicable requirement to which such plans might relate. As the EPA has repeatedly stated, general assertions are insufficient to demonstrate that a permit is not in compliance or does not assure compliance with applicable requirements.[37] The EPA expects a petitioner to clearly explain, with citation and analysis, why a particular permit term does not comply with, or assure compliance with, a specific applicable requirement.[38] Moreover, the Petitioner has not addressed—and therefore has not demonstrated—why any particular potential elements of a dust control plan, either alone or in conjunction with other control technology required by the permit, are necessary to assure compliance with any permit terms.[39] Accordingly, the Petitioner has not demonstrated that the relevant Permit requirements, viewed together, are inadequate to assure compliance with any applicable requirement.

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[35] The EPA notes that the Petitioner simply claimed that the permit should list minimum required plan elements or criteria. The Petitioner did not claim in the Petition—and accordingly, did not demonstrate—that either of the fugitive dust control plans were required by any particular applicable requirement. Nor did the Petitioner claim or demonstrate that the plans themselves were required to be included in the Permit, nor demonstrate that they were required to be available for public review as part of the permit application. *See In the Matter of Louisiana Pacific Corporation*, Order on Petition No. V-2006-3 at 15–16 (November 5, 2007) ("The Fugitive Dust Control Plan is not an applicable SIP requirement; therefore it was not necessary for WDNR to make it available as part of the permit record during the public comment period."); *Kentucky Syngas Order* at 12 ("In this case, the Petitioners did not demonstrate that the flare monitoring plan required by KSG's permit is relied upon to impose an applicable requirement or as a compliance assurance measure.").

[36] The Petitioner also asserts that the EPA in the *Alliant Edgewater Order* held that "a title V permitting agency must include in the public record for review any element required to determine compliance with the conditions of the permit." The Petitioner did not further develop a claim based on this reference to the *Alliant Edgewater Order*, and, as discussed below, the Petitioner has not demonstrated that specifying the minimum required elements of the dust control plans is necessary to determine compliance with the conditions of the permit.

[37] *See supra* note 7 and accompanying text.

[38] *See supra* note 6 and accompanying text.

[39] For example, although the Petitioner alleges that water must be applied "at a certain rate or when needed" in order to adequately control emissions, the Petitioner provides no justification for this assertion, nor does the Petitioner explain why this is necessarily true for any of the particular emission points listed in Specific Condition 95.

Regarding the Petitioner's brief claim that "[t]he permit simply lists a requirement to record throughput data (for water and materials), but the mere keeping of data does not demonstrate that the emissions are well controlled," Petition at 30, the Petitioner appears to challenge the sufficiency of certain permit conditions related to compliance assurance.[40] As an initial matter, the EPA need not consider the Petitioner's apparent challenge to these compliance assurance conditions because these claims were not raised with reasonable specificity during the public comment period,[41] and the Petitioner has not demonstrated that it was impractical to do so. 42 U.S.C. § 7661d(b)(2). Even if considered, the Petitioner's characterization of the permit is incomplete and therefore incorrect. While Specific Condition 97 and Plantwide Condition 5 include throughput recordkeeping conditions, Specific Condition 96 additionally establishes legally enforceable throughput limits on the materials received by various emission sources. The Petition fails to mention the limits contained in Specific Condition 96, which are clearly a key element of how BRS will be required to restrict emissions from these units in order to comply with relevant permit conditions. As the EPA has previously indicated, the failure to acknowledge a key permit condition relevant to the issues raised in the petition supports the EPA's determination that a petitioner has failed to demonstrate a flaw in the permit. *See, e.g., Homer City Order* at 48. Moreover, the Petitioner has provided no information explaining how these compliance assurance conditions are related to the dust control plans at issue in the Petition.

To the extent that the dust control plans are a part of the set of controls and limits that ADEQ determined constitute BACT for the source under the title I PSD program requirements, the EPA will not, in this Order, evaluate the sufficiency of such a BACT determination, for the reasons described in the EPA's response to the claims related to PSD determinations above.[42]

Overall, the Petitioner has not demonstrated, with respect to the dust control plans required by the Permit, that the Permit omits any applicable requirement or that the Permit fails to assure compliance with any applicable requirement.

For the foregoing reasons, the EPA denies the Petitioner's request for an objection on this claim.

Claim C.5: The Petitioner's Claim that "The Permit does not contain adequate monitoring, recordkeeping and reporting requirements to comply with the requirements of 40 C.F.R. 70.6(a)(3)(i)(B) because it does not provide for a test method."

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[40] Although the Petitioner does not expressly cite Specific Condition 96, Specific Condition 97, or Plantwide Condition 5, the Petitioner's claim may be referring to these conditions. *See* Permit at 111, Specific Condition 95 ("Compliance with this condition will be show[n] by compliance with Specific Conditions 96 and 97 and Plantwide Condition 5.").

[41] The public comments on this point simply stated: "Miscellaneous Operations, SC 95 and Roadway Sources SC 103. These conditions refer to the Control Technology as a 'Dust Control Plan.' However, there is no Condition requiring development and/or submittal of this Plan (SC 103 refers to the dust control plan for roadways, but not raw material handling operations). In order to be enforceable, the permit should specify when the dust control plan must be prepared and should list the minimum required Plan elements or criteria." Petition Attachment 1, Nucor Comment No. 40.

[42] *See supra* pp. 8–20.

Petitioner's Claim: In Claim C.5, the Petitioner claims that Specific Condition 93, which concerns the testing of total dissolved solids (TDS) in the cooling towers, is inadequate because the Permit does not specify the TDS test method. Petition at 30.

The Petitioner asserts that, in response to a comment, ADEQ updated Specific Condition 93 "to state that [TDS] testing can be conducted by a method approved by [ADEQ] prior to testing." *Id.* at 30–31. The Petitioner further asserts that "it is clear that the method of determining TDS is critical to determining whether the BRS will be in long term compliance" and that "it is impossible to determine from the record how compliance is to be determined" because ADEQ's response postpones resolution of this issue to beyond the title V permitting process. *Id.* at 31. The Petitioner argues that ADEQ can neither "defer critical decisions" to beyond the permitting period, nor refuse to provide public notice and an opportunity to comment on "critical monitoring provisions." *Id.* at 31 (citing *Alliant Edgewater Order*). The Petitioner argues further that "permitting authorities do not have the discretion to issue a permit without specifying the monitoring methodology needed to assure compliance with applicable requirements in the title V permit." *Id.* at 31 (quoting *In the Matter of United States Steel Corporation – Granite City Works*, Order on Petition No. V-2011-2 (December 3, 2012), which in turn quoted *In the Matter of Wheelabrator Baltimore*, Order on Petition, Permit No. 24-510-01886 at 10 (April 14, 2010)). The Petitioner claims that this problem is compounded because the permit does not specify the units in which TDS is to be determined. *Id.* at 31.

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

The Permit, in Specific Condition 93, requires BRS to "test the TDS of each of the cooling towers initially and every 6 months thereafter. This testing shall be conducted in accordance with Plantwide Condition 3 with a method approved by the Department before the first test is performed." Permit at 108. The Petitioner notes that Specific Condition 93 does not specify a particular TDS test method, and claims that the Permit must do so. However, as discussed below, the Petitioner has not demonstrated that a TDS test method must be specified in the Permit in order to assure compliance with any applicable requirement.

The Petitioner asserts that "it is clear that the method of determining TDS is critical to determining whether the BRS [facility] will be in long term compliance." Petition at 31. As an initial matter, the Petitioner does not identify any permit terms or applicable requirements for which specifying the TDS test method in the Permit is "critical"; the Petition lacks any discussion concerning how the selection of a TDS test method is related to any particular requirement. Although not described in the Petition, the EPA notes that the TDS testing required by Specific Condition 93 is expressly identified as the compliance demonstration methodology for Specific Conditions 91 and 92, and, by extension, for Specific Condition 90—all of which are associated with PM emissions from the cooling towers.[43] Specific Condition 93, as noted above,

[43] Specific Condition 90 contains PM, PM_{10}, and $PM_{2.5}$ emission limits, in units of pounds per hour and tons per year, for the facility's 12 cooling towers. This condition states that "[t]he permittee shall demonstrate compliance with this condition by compliance with Specific Conditions 92 and 91." Permit at 106. Specific Condition 91 contains a BACT Analysis Summary and imposes a BACT limit, i.e., a 0.0005 percent drift loss limit for each of the

requires that "[t]he permittee test the TDS of each of the cooling towers initially and every 6 months thereafter." Permit at 108. Thus, contrary to the Petitioner's assertion that "it is impossible to determine from the record how compliance is to be determined," Petition at 31, the Permit clearly states the method by which compliance with relevant permit conditions will be determined—by testing TDS concentrations initially and every six months.

Contrary to the Petitioner's unsupported assertion that "it is clear that the method of determining TDS is critical," Petition at 31, it is unclear from the abbreviated information on this claim in the Petition *why* specifying a TDS test method is "an essential part of the monitoring requirements." *Wheelabrator Order* at 11. The Petitioner has not claimed that any particular TDS test method would be more or less reliable or accurate than another available method, or even whether multiple TDS test methods exist, nor how any potential differences between such test methods would materially affect a demonstration of compliance.

Overall, the Permit specifies the method by which BRS will demonstrate compliance with relevant permit conditions—by testing TDS concentrations every six months. The Petitioner has not demonstrated that additional information concerning the exact protocol or method by which the TDS testing will be conducted must be included in the permit. The Petitioner's general allegations—unsupported by any technical explanation or justification or consideration of the specific relationship between TDS testing and the relevant requirements with which it assures compliance—fail to demonstrate that the method of determining TDS is "an essential part of the monitoring requirements that must be in the title V permit to assure compliance" with relevant permit terms. *Wheelabrator Order* at 11. Because the Petitioner has not demonstrated why the specific TDS test method is "essential" to assuring compliance with any applicable requirement, the Petitioner has not demonstrated that the permit does not "specify[] the monitoring methodology *needed to assure compliance* with applicable requirements in the title V permit," as the EPA directed in the *U.S. Steel Order* (emphasis added),[44] or that the public was deprived of the "opportunity to comment on critical monitoring provisions." Petition at 31.

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12 cooling towers, based on the installation of drift eliminators as an emission control device and the implementation of low TDS solids in the cooling water as a pollution prevention measure, as well as a 5 percent opacity limitation. This condition states further that "[c]ompliance with this condition will be show[n] by compliance with Specific Conditions 92 and 93." *Id.* at 107. Specific Condition 92, which imposes numerical TDS limits on various cooling towers, in turn states that "[t]he permittee shall demonstrate compliance with this condition by compliance with Specific Condition 93." *Id.*

[44]The EPA notes that the title V petition orders that the Petitioner briefly quotes (the *U.S. Steel Order* and the *Wheelabrator Order*) involved monitoring provisions that were "needed to assure compliance," *U.S. Steel Order* at 10, or "an essential part of the monitoring requirements," *Wheelabrator Order* at 11. The Petitioner has the burden of providing sufficient legal and factual analysis to demonstrate that the EPA should object to a title V permit. The Petitioner has failed to provide that analysis and has therefore not made such a demonstration. Aside from quoting from a single sentence in those orders, the Petitioner has not provided any analysis explaining why the facts in those cases are sufficiently similar to those alleged in the Petition such that an objection to the monitoring conditions in the Permit is warranted. The EPA notes that claims in both the *U.S. Steel* and *Wheelabrator Orders* involved different types of monitoring provisions than the one at issue in the BRS Petition; each involved claims regarding essential pieces of the overall monitoring methodology. The U.S. Steel permit did not specify any emission factors or equations necessary to determine emissions. *See U.S. Steel Order* at 11–12. The Wheelabrator permit did not specify which parameters would be monitored in order to convert continuous emission monitoring systems data into mass emissions data. *See Wheelabrator Order* at 11. By failing to provide any analysis, the Petitioner has not demonstrated that the TDS test method is a similar critical piece of the overall monitoring methodology. Notably,

Regarding the Petitioner's brief statement in passing that the permit does not specify the units in which TDS is to be determined, this assertion, even if considered a claim, was not raised with reasonable specificity during the public comment period. Moreover, the EPA notes that the permit application clearly indicates that the units are in milligrams per liter or parts per million (equivalent units in this application), as is standard for quantifying TDS.[45] The Petitioner has not demonstrated that the absence of this information on the face of the Permit resulted in a flaw in the permit.

For the foregoing reasons, the EPA denies the Petitioner's request for an objection on this claim.

V. CONCLUSION

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

Dated: OCT 31 2017

E. Scott Pruitt,
Administrator.

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neither the *U.S. Steel Order* nor the *Wheelabrator Order* implicated the question of whether a test method or sampling protocol (for TDS or any other parameter or limit) must be specified in a permit. In contrast, in the *Kentucky Syngas Order*, the EPA denied a similar claim related to a sulfur content test protocol that was not contained in the permit, noting:

> The 'plan' referenced here appears to be essentially a performance test protocol. This point is explained by KDAQ as follows, "[t]he development of a sampling plan for the AGR vent prior to initial startup is no different than developing and submitting a performance test protocol prior to conducting the test. Permit conditions which allow developing and submitting a performance test protocol prior to conducting the test are common and contained in many permits approved by the EPA."

Kentucky Syngas Order at 13.

[45] *See* Petition Attachment 5, Final Air Permit Application, Vol. 2 at 163–66 (June 21, 2013).