BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:	)
Harvest Four Corners, LLC	)
Permit No. R6FOP-NM-040R2	)

PETITION FOR REVIEW
ORAL ARGUMENT REQUESTED

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INTRODUCTION

On February 4, 2022, Harvest Four Corners LLC ("Harvest" or "Petitioner") submitted a timely application for renewal of its Part 71 Federal Operating Permit for the Los Mestenios Compressor Station Facility ("Los Mestenios" or "Facility") that included complete application forms and over 100 pages of substantiating information. This submission contained all elements required under Part 71 for a completeness determination. After six months of iterative dialogue between Harvest and U.S. Environmental Protection Agency ("EPA") Region 6 regarding the renewal application, EPA denied Harvest's renewal application and renewal permit, declaring that it "will not reissue the renewal" of the Facility's Permit based on allegedly insufficient information necessary to process the application. EPA further asserted that "if Harvest wishes to proceed with obtaining a Part 71 permit, a new initial application will need to be submitted for the Facility." This final permit decision came after the expiration of Harvest's existing permit and terminates its right to operate Los Mestenios.

Pursuant to 40 C.F.R. § 71.11(l)(1) and 40 C.F.R. § 124.19(a)(4)(i)(A), Harvest petitions the Environmental Appeals Board ("EAB" or "Board") for review of EPA's final permit decision, which is clearly erroneous and an abuse of discretion.

In addition, without this review, EPA's new permitting approach raises troubling precedent that would require existing facilities to shut down during the pendency of a Title V permit renewal application where, as here, applicants supplied robust initial applications and worked diligently to provide EPA with requested supplemental information. Thus, the EAB has separate grounds to review the final permit decision as raising an important and adverse programmatic implementation issue or exercise of discretion by EPA. 40 C.F.R. § 124.19(a)(4)(i)(B).

Harvest respectfully requests that the Board order EPA to rescind its final permit decision and deem the application timely and complete so that the facility may operate during the time needed for EPA to process and issue a renewal permit.

FACTUAL AND STATUTORY BACKGROUND

I. Facility Background

Los Mestenios is an existing natural gas compressor station located within the boundaries of the Jicarilla Apache Reservation in Rio Arriba County, New Mexico, approximately 24 miles northwest of Gavilan. Attachment J – Decl. of Oakley Hayes ¶ 4. Los Mestenios accepts produced natural gas gathered from various wellheads from the gas field surrounding the Facility and compresses this gas for delivery to natural gas processing facilities. *Id.* ¶ 5. Los Mestenios consists of a single 1200 HP natural gas-fired Solar Saturn combustion turbine used to drive a natural gas compressor, one 400-barrel condensate tank, a 400-barrel overflow condensate tank, and an emergency generator engine. *Id.* ¶ 6. The Facility was first issued a Title V permit by EPA in 2003. ¶ 7. EPA issued the most recent Title V permit (Number R6FOP-NM-04-R2) for the Los Mestenios facility to Williams Four Corners, LLC on August 8, 2017, with an expiration date of August 8, 2022. *Id.* Harvest acquired the Facility from Williams Four Corners LLC in 2018. *Id.* On February 4, 2022, Harvest submitted its Title V renewal application, which is the subject of this appeal.[1] Attachment A - Harvest's February 4, 2022 Application.

[1] Prior to submitting the renewal application, Harvest identified updates to the facility, such as the removal of an engine, that resulted in a substantially lower potential to emit than originally permitted. Attachment J – Decl. of Oakley Hayes ¶ 8. Based upon the reduction in the potential to emit, Harvest submitted a registration as a true minor source under the New Source Review Federal Implementation Plan on January 21, 2022. *Id.* ¶ 9. Based on EPA feedback that the Agency considered Los Mestenios to still be a Title V facility, Harvest submitted the renewal application on February 4, 2022. *Id.* ¶ 10.

II. Applicable Statutes and Regulations

A. Title V of the Clean Air Act

Because the Facility has a potential to emit above the major source threshold, Title V of the Clean Air Act ("CAA") applies. CAA § 502(a), 42 U.S.C. § 7661a(a). Title V requires major stationary sources of air pollution to obtain operating permits and establishes procedures for federal authorization of state-run programs. CAA § 501 *et seq*., 42 U.S.C. § 7661 *et seq*. Title V does not generally impose substantive obligations, but rather consolidates all applicable requirements into a single document with monitoring, recordkeeping, and reporting requirements to ensure compliance. *See In re Veolia ES Tech. Sols., L.L.C.*, 18 E.A.D. 194, 196 (EAB 2020); *see also In re Peabody W. Coal Co.,* 12 E.A.D. 22, 27 (EAB 2005). Sources subject to Title V must obtain and operate consistent with its operating permit. CAA § 502(a), 42 U.S.C. § 7661a(a); 40 C.F.R. § 71.1(b).

B. Part 71 Federal Operating Permit Program

The federal Part 71 Title V operating permit program applies to all Title V facilities located in States or Indian Country without an approved Title V program. 40 C.F.R. Part 71. Because the Facility is a major source located within the boundaries of the Jicarilla Apache Reservation and the tribe does not have an approved Title V program, the Facility is subject to Part 71 and EPA is the permitting authority. 40 C.F.R. §§ 71.3(a), 71.4(b).

C. Application Shield for Renewal of a Part 71 Permit

As long as a facility submits a "timely and complete" renewal application, EPA regulations provide the facility with an application shield that extends the expiration date of the existing permit while the renewal application is being processed. 40 C.F.R. § 71.7(b), (c)(3); *see also* 5 U.S.C. § 558(c) ("When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.").

A "timely" application for purposes of permit renewal "is one that is submitted at least 6 months but not more than 18 months prior to expiration of the part 70 or 71 permit." 40 C.F.R. § 71.5(a)(1)(iii). To be deemed "complete" under the Part 71 regulations, the application must provide the information set forth at 40 C.F.R. § 71.5(c). 40 C.F.R. § 71.5(a)(2). Part 71 applications necessarily are guided by EPA's application forms.[2] EPA has explained that the rules are intended for applicants to "prepare simplified permit applications and for permitting authorities to find them complete" and "implement both of the white papers for part 71 program purposes." 61 Fed. Reg. 34,202, 34,215 (July 1, 1996).

In fact, "[t]he current rule allows permitting authorities to implement a two-step process for application completeness, first determining an application to be *administratively complete*, then requiring application updates as needed to support draft permit preparation."[3] An "administratively complete" initial application is one that nominally contains "information sufficient to allow the permitting authority to begin processing the application." *Id.* at 4. But this is just the initiation of the application process. The Part 71 regulations contemplate that "while processing an application that has been determined or deemed to be complete," EPA may request additional information that "is necessary to evaluate or take final action on the application" and may "set a reasonable deadline for a response." 40 C.F.R. § 71.5(a)(2). Recognizing that this process may extend beyond expiration of the existing operating permit, the statute and regulations provide facilities with an application shield that is intended to allow sources to continue to operate under the terms of the existing permit

[2] The regulations provide for a "standard application form" which shall include "the elements specified" in subsection (1) through (11) of subparagraph (c). 40 C.F.R. § 71.5(c). EPA's Part 71 Application Forms and Instructions are available at: https://www.epa.gov/title-v-operating-permits/epa-issued-operating-permits. The current Instruction Manual for Part 71 Forms (EPA Form 5900-78) is OMB No. 2060-0336 and expires November 30, 2022.

[3] *See* U.S. EPA, White Paper for Streamlined Development of Part 70 Permit Applications, at 19-20 (July 10, 1995) [hereinafter Title V White Paper] (emphasis added).

while engaging with EPA in an iterative process to ensure that EPA has the information that it needs to issue a defensible permit. 40 C.F.R. § 71.7(b), (c)(3); *see also* 5 U.S.C. § 558(c).

D. Procedural Requirements for Part 71 Renewal Applications

Section 71.11 sets out the procedures for developing the administrative record, public participation, and administrative review for "all permit proceedings," with certain exceptions not applicable here. 40 C.F.R. § 71.11; *see also id.* § 71.7(c)(1)(i) ("Permits being renewed are subject to the same procedural requirements ... that apply to initial permit issuance."). First, EPA "shall promptly provide notice to the applicant of whether the application is complete." 40 C.F.R. § 71.11(a)(1); *see also id.* § 71.7(a)(4) ("Unless the permitting authority requests additional information or otherwise notifies the applicant of incompleteness within 60 days of receipt of an application, the application shall be deemed complete."). Once the application is complete, EPA must "decide whether to prepare a draft permit or to deny the application." *Id.* § 71.11(a)(2). If EPA "initially decides to deny the permit application," the Agency is obligated to "issue a notice of intent to deny." *Id.* § 71.11(a)(3) ("A notice of intent to deny the permit application is a type of draft permit and follows the same procedures as any draft permit prepared under this section.").

In the case of notices of intent to deny or terminate, EPA must follow a procedural process that results in the development of an administrative record. For example, EPA must prepare a statement of basis, briefly describing the reasons supporting the initial decision. 40 C.F.R. § 71.11(b). Notices of intent to deny shall be publicly noticed and made available for at least 30 days of public comment. 40 C.F.R. § 71.11(a)(3), (5); *id.* § 71.11(d)(1)(i)(a), (d)(i). The rules also provides for the opportunity for a public hearing. *Id.* § 71.11(e), (f). The rules impose an obligation on "[a]ll persons, *including applicants*, who believe any condition of a draft permit is inappropriate or that the *permitting authority's initial decision to deny an application, terminate a permit*, or prepare a draft permit is

inappropriate, must raise all reasonably ascertainable issues and submit all reasonably ascertainable arguments supporting their position by the close of the public comment period (including any public hearing)." 40 C.F.R. § 71.11(g) (emphasis added).

Once these procedural requirements are met, EPA issues a final permit decision. 40 C.F.R. § 71.11(i)(1) ("For the purposes of this section, a final permit decision means a final decision to issue, deny, revise, revoke and reissue, renew, or terminate a permit."). A final permit decision becomes effective 30 days after the service of notice of the decision, unless review is requested "in which case the specific terms and conditions of the permit which are the subject of the request for review shall be stayed..." 40 C.F.R. § 71.11(i)(2)(ii).

Section 71.11(l)(1) specifies that "[p]ermit decisions may be appealed under the permit appeal procedures of 40 CFR 124.19." 40 C.F.R. § 71.11(l)(1). An appeal under Section 71.11(l)(1) is "a prerequisite to seeking judicial review of the final agency action" under Clean Air Act section 307(b). 40 C.F.R. § 71.11(l)(2).

III. Factual Background

A. Harvest Submitted a Timely and Complete Renewal Application on February 4, 2022

On February 4, 2022, Harvest submitted its renewal application, more than six months in advance of the August 8, 2022 permit expiration.[4] Attachment A - Harvest's February 4, 2022 Application. The 150-page permit application included all the initial information required by the Part 71 forms and regulations and was appropriately certified. *See id.*; Attachment J – Decl. of Oakley Hayes ¶ 11. The only substantive changes from the 2017 Title V permit reflected in

[4] Importantly, this renewal application was delayed because EPA rejected Harvest's attempt to register as a minor source on grounds the Facility's potential to emit no longer exceeds Title V thresholds. As a result, Harvest moved ahead with submitting its application for renewal of its existing Part 71 permit. Decl. of Oakley Hayes ¶ 10.

Harvest's renewal application were (1) a request to replace the existing compressor engine with an engine that had a smaller potential to emit of NOx; (2) addition of an emergency generator engine; and (3) changes to the inputs for, and modeling of, the condensate tank emissions. Attachment J – Decl. of Oakley Hayes ¶ 11. Harvest has since rescinded the request to replace the compressor engine and has requested to remove the compressor engine from the permit. *Id.* Only the combustion turbine and the emergency engine have applicable requirements that would be reflected in a Title V permit. *Id.* ¶ 12.

B. EPA Issued Initial Incompleteness Determination and Supplemental Information Request on April 5, 2022

On April 5, 2022, EPA deemed the application incomplete and requested "supplemental information." Attachment C-1 - EPA's April 5, 2022 Incompleteness Determination Letter. This was the first time that Harvest had received any communication from EPA regarding its renewal application. Decl. of Oakley Hayes ¶ 13. Neither EPA's determination nor its requests for supplemental information cited which elements of Section 71.5(c) were missing from Harvest's application or identified which elements were necessary to begin processing the application. Attachment C-1. Furthermore, the supplemental information EPA sought was not required to be submitted under EPA's Part 71 application forms. EPA requested the following supplemental information:

> Harvest will need to provide the following supplemental information for us to proceed with processing the title V permit application: complete up-to-date process and operational flow diagram, text description of current operations that delineate any and all changes in equipment or operations since the last permit issued, and most importantly any operating and emissions data collected in accordance with the current title V permit that can be used to substantiate changes in the PTE calculations for the permit renewal For example, we need to understand the basis for the reduction in flash emissions from the condensate storage tank due to a change in the condensate composition or well of origin, and finally, all modeling inputs, including changes from prior modeling conducted which was the basis of the original permit. Please delineate specific improvements in using

> the VMGSym and how any changes from prior modeling efforts result in emissions estimates today.

Id. No deadline was set for submission of the supplemental materials. *Id.*

C. Harvest Responded to EPA's Supplemental Information Request on April 14, 2022 and EPA Failed to Promptly Determine Whether the Application Was Complete

On April 14, 2022, nine days after receipt of the incompleteness determination and request for supplemental information, Harvest provided all requested information to EPA. Attachment C-2 - Harvest's April 14, 2022 Application Submittal. On May 19, 2022, after receiving no communication from EPA regarding its April 14, 2022 submittal, Harvest sent an email to EPA asking if they had any additional questions after review of the supplemental information. Attachment F - April and May 2022 Correspondence between Harvest and EPA. On May 27, 2022, Ms. Erica LeDoux of EPA sent Harvest an email "apologizing for [her] late response" and indicating that "[a]t this time, EPA has no questions." *Id.* Ms. LeDoux also noted that she "ha[d] been working on several permit actions that were in the queue prior to Harvest Four Corners submittals" but would be scheduling a meeting after she "had the opportunity to complete my review of your supplemental information that was submitted." *Id.*

More than a month later, on July 1, 2022, Ms. LeDoux sent Harvest an invitation for a Microsoft Teams Meeting scheduled on July 27, 2022 in order to "get our initial meeting on the calendar." Attachment G - EPA's July 1, 2022 Meeting Invitation. In her invitation, she "apologize[d] for the delay" in scheduling, citing again her work on "other permit actions" while also noting that the "office is short staffed with a heavy workload." *Id.* On July 27, 2022, Harvest and EPA met for the first time to discuss the permit application. Attachment J – Decl. of Oakley Hayes ¶ 19. During this meeting, Harvest and EPA discussed facility process flow, facility equipment, and information related to condensate composition and condensate emissions. *Id.*

On August 5, 2022, EPA requested that Harvest respond to "a checklist of clarification questions we discussed during our call on July 27" with a due date of August 17, 2022, which was after the permit expiration date of August 8, 2022. Attachment H - EPA's August 5, 2022 Correspondence with Attachment. Harvest responded to the request on August 17, 2022. Attachment C-3 - Harvest's August 17, 2022 Application Submittal; Attachment C-4 - August 2022 Correspondence between Harvest and EPA. On August 18, 2022, EPA requested "documentation" demonstrating that an engine was taken out of service as well as an updated process flow diagram showing the engine "removed from the drawing" instead of shaded-in and marked out of service, as Harvest had shown the engine on the previously submitted process flow diagram. Attachment C-4 - August 2022 Correspondence between Harvest and EPA. No due date was set for submittal of this information. *Id.* On August 31, 2022, Harvest uploaded all additional requested data to EPA's FTP site. *Id.*; Attachment J – Decl. of Oakley Hayes ¶ 22.

D. EPA Issued a Final Permit Decision on September 8, 2022 Reaffirming its Initial Incompleteness Determination

On September 8, 2022, Region 6 issued a letter to Harvest informing it that EPA will "not re-issue the renewal of the Facility's Part 71 Permit R6FOP-NM-04-R2 because Harvest failed to submit a timely and complete renewal application consistent with 40 CFR § 71.7(b)1 and § 71.7(c)(1)(ii)." Attachment B - EPA's September 8, 2022 Decision Letter. As a basis for the decision, EPA cited the April 5, 2022 incompleteness determination as well as allegedly insufficient responses to EPA's supplemental information requests. *Id.* Specifically, EPA asserted that:

> An incompleteness determination letter was emailed to Harvest on April 5, 2022. Pursuant of 71.5(c), this incompleteness letter requested Harvest to provide pertinent information to allow EPA to proceed with processing the Facility's Part 71 renewal application. Harvest was given deadlines to provide the responses to the EPA's questions. Harvest provided answers to some questions adequately, however a significant number of the responses were not sufficiently responsive. EPA communicated this to Harvest and the deadline was extended. To this date, these questions remain insufficiently answered.

Id. Enclosed with the letter were some, but not all, of the earlier documents from the administrative record, Attachments C-1 through C-4, as well as a new and previously unshared document entitled "Questions Remaining," Attachment C-5. Attachment C - Enclosure from EPA's September 8, 2022 Decision Letter. Finally, EPA instructed Harvest that "[g]iven the expiration of the Facility's Part 71 Permit No. R6FOP-NM-04-R2 on August 8, 2022, if Harvest wishes to proceed with obtaining a Part 71 permit, a new initial application will need to be submitted for the Facility." Attachment B - EPA's September 8, 2022 Decision Letter.

E. Harvest Immediately Objected to EPA's Final Permit Decision

Following receipt of the letter, counsel for Harvest quickly requested a meeting with EPA. Attachment I - Post-Decision Correspondence. On September 13, 2022, representatives for Harvest met with EPA to discuss the decision and requested reconsideration. *Id.* That same day, counsel for Harvest submitted a letter to EPA detailing Harvest's written response and requesting a prompt response. Attachment D - Harvest's September 13, 2022 Response Letter. On September 29, 2022, EPA responded to Harvest's September 13, 2022 letter, stating that "[t]he position EPA communicated in our letter of September 8, 2022, remains the same, that Harvest failed to submit a timely and complete renewal application consistent with 40 CFR §§ 71.7(b) and 71.7(c)(1)(ii)." Attachment E - EPA's September 29, 2022 Reply Letter. Harvest now seeks review of EPA's September 8, 2022 final permit decision.

* * *

THRESHOLD PROCEDURAL REQUIREMENTS

In considering a petition filed under 40 C.F.R. § 124.19(a), the Board first evaluates whether the petitioner has met threshold procedural requirements such as timeliness, standing, issue preservation and specificity. *See* 40 C.F.R. § 124.19; *In re Indeck-Elwood, LLC*, 13 E.A.D. 126, 143 (EAB 2006). Petitioner satisfies the threshold requirements for filing a petition for review under 40 C.F.R. part 124.

I. EPA's Final Permit Decision is Reviewable by the EAB

EPA's September 8, 2022 letter was a "final permit decision" and is subject to appeal to the Board pursuant to 40 C.F.R. § 71.11(l)(1) and 40 C.F.R. § 124.19(a). For purposes of appeal, "a final permit decision means a final decision to issue, deny, revise, revoke and reissue, renew, or terminate a permit." 40 C.F.R. § 71.11(i)(1). EPA's September 8, 2022 letter was the culmination of Region 6's decision to deny Harvest's renewal application and renewal permit based on a finding that the application was incomplete. The Part 71 regulations grant the Board authority to review petitions challenging federal Title V operating permit decisions issued by EPA. 40 C.F.R. § 71.11(l)(1); *see also* EAB Practice Manual at 59 (Aug. 2013).

Prior to appeal, Harvest requested reconsideration of the September 8, 2022 decision in its meeting with EPA on September 13, 2022 as well as in its written response filed that same day. Harvest's written response identified the issues that are generally the subject of this appeal. Attachment D - Harvest's September 13, 2022 Response Letter. On September 29, 2022, EPA responded to Harvest's September 13, 2022 letter, stating that "[t]he position EPA communicated in our letter of September 8, 2022, remains the same." Attachment E - EPA's September 29, 2022 Reply Letter. Given EPA's refusal to reconsider its decision, Harvest now seeks appeal of EPA's final permit decision on September 8, 2022.

II. Harvest's Petition for Review is Timely

Harvest timely appeals EPA's final permit decision under 40 C.F.R. § 71.11(i)(2)(ii) and 40 C.F.R. § 124.19(a)(3), which provides a 30-day window to file a petition for review. Harvest received EPA's final permit decision on September 8, 2022 via electronic mail. Attachment B - EPA's September 8, 2022 Decision Letter. Thirty days from September 8, 2022, would be Saturday, October 8, 2022. Because Saturday, October 8, 2022, falls on a weekend, and Monday, October 10, 2022 is a legal public holiday (Columbus Day), the deadline for Harvest's filing of the petition for review is no later than Tuesday, October 11, 2022. *See* 40 C.F.R. § 71.11(m)(3) ("If the final day of any time period falls on a weekend or legal holiday, the time period shall be extended to the next working day."); 5 U.S.C. § 6103)(a) (legal public holidays).

III. EPA's Procedural Failures Do Not Undermine Standing or Preclude EAB Review of EPA's Final Permit Decision

EPA's failure to follow the procedural rules applicable to a Part 71 permit does not preclude Harvest's standing under 40 C.F.R. § 124.19(a)(2) to file a petition for review of the final permit decision.[5] *See In the Matter of Russell City Energy Ctr.*, 14 E.A.D. 159, 177 (EAB 2008) ("Indeed, it would be incongruous for the Board to categorically deny standing, and possibility of redress, to a petitioner who presents facts purporting to show that EPA (or one of its delegates) has violated [the public notice and comment regulation] and thereby prejudiced the petitioner's participation rights."). EPA's failure to follow its own procedural rules prejudiced Harvest and the issues and arguments normally raised during public comment were not "reasonably ascertainable." Even absent the normal procedures associated with permit reviews, Harvest's September 13, 2022 reconsideration

[5] While the EAB is not an Article III court, Harvest, as the applicant and party aggrieved by EPA's final permit decision, nevertheless clearly has Article III standing in this matter. The company was injured by EPA's unlawful denial of its renewal application and renewal permit (e.g., the facility now does not have a valid Part 71 operating permit and, thus, has shut down operations pending resolution of this matter), Harvest's injury is traceable to EPA's unlawful denial, and Harvest's injury is redressable by EAB through a remand of EPA's permit decision. *Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 556, 560-1 (1992).

request identified Harvest's objections to EPA's denial of the company's renewal permit. Attachment D - Harvest's September 13, 2022 Response Letter. Harvest's claims are thus memorialized in the record of this proceeding and appropriately preserved for review by the Board.

By relying on its initial incompleteness determination as the basis for denying Harvest's permit application, EPA failed to provide any of the Part 71 required opportunities for public participation that are generally the foundation for establishing standing under Section 124.19(a)(2). First, EPA failed to issue a notice of intent to deny the application or statement of basis. *See* 40 C.F.R. § 71.11(a)(3),(b) (d)(1)(i)(a). Second, EPA failed to make the notice of intent to deny available for public comment. *See* 40 C.F.R. § 71.11(a)(3), (5); 71.11(d)(2)(i). Finally, EPA failed to hold a public hearing. *See* 40 C.F.R. § 71.11(d)(2)(ii). Had EPA followed the procedural steps required by Section 71.11, Harvest would have provided comment and participated in a public hearing. Instead, EPA simply notified Harvest that it would not "re-issue the renewal."

If EAB does not grant review under these circumstances, Harvest's alternative is to challenge EPA's denial of the application and permit in federal circuit court as a final agency action pursuant to CAA § 307(b). EPA would be better served if EAB asserts jurisdiction in the first instance, given the EAB's clear role as the final arbiter in EPA permitting decisions. Here, EAB's role is particularly important because EPA did not establish a formal administrative record for the denial. An EAB decision in Harvest's favor presumably would require EPA on remand to rectify this problem. Alternatively, an EAB decision in EPA's favor would facilitate subsequent judicial review by establishing an administrative record that currently does not exist.

Furthermore, EPA's failure to provide any of the required opportunities for public participation prejudiced Harvest's ability to ensure that each issue being raised in the petition was raised during the public comment period (including any public hearing). *See In the Matter of Russell City Energy Ctr.*, 14 E.A.D. 159, 177 (EAB 2008). Both Part 71 and the Board's procedural rules

require that a petitioner raise those issues being appealed as part of the public comment process. 40 C.F.R. § 124.19(a)(ii). *See also id.* § 71.11(g) (imposing obligation on "[a]ll persons, *including applicants*, who believe any condition of a draft permit is inappropriate or that the *permitting authority's initial decision to deny an application, terminate a permit*, or prepare a draft permit is inappropriate, must raise all reasonably ascertainable issues and submit all reasonably ascertainable arguments supporting their position by the close of the public comment period (including any public hearing).").

Here, the issues were not "reasonably ascertainable," and the arguments were not "reasonably available" because EPA failed to follow the required procedures. Prior to appeal, Harvest requested reconsideration of the decision in its meeting with EPA on September 13, 2022 as well as in its written response filed that same day. Attachment D - Harvest's September 13, 2022 Response Letter. Harvest's written response identified the issues that are generally the subject of this appeal. *Id.* EPA's failure to follow the procedural rules applicable to a Part 71 permit should not preclude appeal of a final permit decision particularly where, as here, EPA's failure to follow its own procedural rules is a key element of the appeal.

* * *

ARGUMENT

EPA's final permit decision denying Harvest's renewal permit application and renewal permit for the Los Mestenios Facility was based entirely on an erroneous and inadequately justified incompleteness determination that violates the streamlined and iterative permit application process prescribed by EPA's rules and guidance. The final permit decision also is procedurally infirm. EPA's refusal to deem the application complete and extend the application shield where a permittee submitted a robust initial application and engaged in good faith with the Agency after the initial submittal raises an important program implementation issue that is appropriate for Board review.

For these reasons, Harvest requests that the EAB determine that EPA based its final permit decision upon findings of fact or conclusions of law that are clearly erroneous as well as an abuse of discretion. Separately, the final permit decision raises an important policy consideration that the Board should, in its discretion, review and reverse. *See* 40 C.F.R. § 124.19(a)(4)(i). Harvest respectfully requests that the Board determine that Harvest's initial application was complete or remand that determination to EPA. In either event, EAB should direct that Harvest may qualify for the application shield that should have been granted or deemed to be in place as of the time that Harvest submitted its initial permit application.

I. EPA's Final Permit Decision Lacks Reasoned Judgment and is Clearly Erroneous.

EPA's September 8, 2022 final permit decision was grounded on two determinations. First, EPA cites back to its April 5, 2022 letter asserting the Harvest's initial renewal application was incomplete and requesting supplemental information. Second, EPA alleges that Harvest had not adequately responded to EPA's supplemental information requests. The final permit decision must be reversed because both underlying determinations were clearly erroneous.

The legal bar for an administratively complete application is intentionally permissive, given the significant adverse consequences of an incompleteness determination. *See* 61 Fed. Reg. 34,202, 34,215. Harvest's renewal application met this bar and Harvest worked in good faith to provide EPA with additional substantiating information. EPA's approach to Harvest's renewal application has placed Harvest in the exact predicament that the Title V rules and guidance were intended to prevent, culminating in EPA's sudden and unsupported decision on September 8, 2022 to deny the renewal application and renewal permit. As a result, Harvest has been forced to suspend operations until such time as EPA issues a new initial Title V permit application or the Board reverses its decision making. EPA's actions not only affect Harvest, but also impact upstream producers and royalty owners, including the Jicarilla Apache Nation, which it serves.

A. Harvest's Initial Permit Application was Timely and Complete

On February 4, 2022, Harvest submitted its timely and complete renewal application for the Los Mestenios Facility.[6] Attachment A - Harvest's February 4, 2022 Application. The application included all required forms and over 100 pages of substantiating information that addressed each of the necessary elements for a completeness determination. *See id.*; Attachment J – Decl. of Oakley Hayes ¶ 11. Based upon the minimal updates needed to the 2017 Title V permit and the small number of units with applicable requirements that would be reflected in the Title V permit, the renewal application was straightforward and met the requirements to be considered complete. *See* Attachment J – Decl. of Oakley Hayes ¶¶ 11-12.

The Part 71 regulations follow the Part 70 regulations and white papers and are intended to "provide[] the flexibility needed by industry and mandated by title V…" 61 Fed. Reg. 34,205, 34,215. As a result, "[t]he current rule allows permitting authorities to implement a two-step process

[6] EPA does not contest that Harvest's application was timely under 40 C.F.R. § 71.5(a)(1)(iii).

for application completeness, first determining an application to be administratively complete, then requiring application updates as needed to support draft permit preparation."[7]

In order to be deemed administratively complete under the Part 71 regulations, the application must address each element at 40 C.F.R. § 71.5(c). 40 C.F.R. § 71.5(a)(2). EPA's Title V White Paper clarifies the standard for the completeness determination and emphasizes the iterative application process even after such a determination:

> In any event, permitting authorities must award the application shield if the source submits a timely application which meets the criteria for completeness in § 70.5(c). Under this approach, if the source has supplied at least initial information in all the areas required by the permit application form and has certified it appropriately, the permitting authority generally has flexibility to judge the application to be complete enough to begin processing. Accordingly, there should normally be no need for an applicant to submit an application many days in advance in order to build in extra time for an iterative process before the relevant submittal deadline.[8]

The information supplied in the initial permit application is simply intended to start the process—i.e., "enough [for EPA] to begin processing" the application. As EPA acknowledges, "[t]he great majority of the detailed background information relied upon by the source to prepare the application need not be included in the application for it to be found complete."[9] In order to "help applicants understand the flexibility available for submitting simplified permit applications that can be found complete," EPA assured commenters in the preamble to the final Part 71 regulations that "[s]ince the white papers will be implemented for part 71 purposes, this flexibility also exists in the part 71 permit program." 61 Fed. Reg. at 34,215.

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[7] *See* Title V White Paper, *supra* note 3, at 19-20.

[8] Title V White Paper, *supra* note 3, at 20 (emphasis added).

[9] *Id.*

Here, Harvest's 150-page renewal application met all the requirements to be deemed complete: The application included all the initial information required by EPA's own Part 71 forms, the application included information for all the required elements of 40 C.F.R. § 71.5(c), and the application was appropriately certified. *See* Attachment A - Harvest's February 4, 2022 Application. EPA's rigid and mechanistic review of Harvest's renewal application violates the flexible and iterative process EPA's Part 71 regulations require.

B. EPA's Initial Incompleteness Determination is Clearly Erroneous and an Abuse of Discretion

EPA's April 5, 2022 letter to Harvest declared the company's initial permit application to be incomplete without explanation. Simply asserting that EPA needs more information to process the application is not enough. Where the effect of EPA's decision is the loss of the application shield, EPA cannot simply state its preference for more information without providing any reference to which elements of section 71.5(c) were missing or explaining why the information was not sufficient for EPA to begin processing the application. "[T]he Region must articulate with reasonable clarity the reasons for [its] conclusions and the significance of the crucial facts in reaching those conclusions." *See In re: Ash Grove Cement Company*, 7 E.A.D. 387, 397 (EAB 1997) (remanded when basis for permit decision was "not clear" and "therefore d[id] not appear to reflect considered judgment."); *see also In re Austin Powder Co.*, 6 E.A.D. 713, 720 (EAB 1997). EPA's failure to substantiate its conclusion that the application was incomplete is clearly erroneous and an abuse of discretion. *See In re City of Keene*, 18 E.A.D. 720, 724 (EAB 2022) (explaining that the clearly erroneous standard requires that EPA exercise "considered judgement" and "articulate with reasonable clarity the reasons supporting its conclusion …").

EPA's April 5, 2022 letter also requested "supplemental information." Attachment C-1 - EPA's April 5, 2022 Incompleteness Determination Letter. Specifically, EPA requested: (1) a

"complete up-to-date process and operational flow diagram;" (2) "text description of current operations that delineate any and all changes in equipment or operations since the last permit issued;" (3) "any operating and emissions data collected in accordance with the current title V permit that can be used to substantiate changes in the PTE calculations for the permit renewal;" and (4) "all modeling inputs, including changes from prior modeling conducted which was the basis of the original permit." *Id.* No deadline was provided for submission of the additional materials. *Id.*

EPA did not assert that the requested supplemental information formed the basis of its incompleteness determination or provide any explanation of why EPA might have believed that such information should have been included in Harvest's initial application. So, the request for supplemental information does not cure EPA's failure to identify and explain the inadequacies in the initial application that formed the basis of its incompleteness determination.

In any event, the supplemental information requested in the April 5, 2022 letter could not reasonably have formed the basis of an incompleteness determination because the "supplemental information" requested was either (1) not specifically required by EPA's application forms or the regulations; or (2) was already provided by Harvest in the original application. In particular, EPA's first request—a "process and operational flow diagram"—is not a required element of a complete application under 40 C.F.R. § 71.5(c) nor is it required by EPA's application forms. Second, EPA's request for a "text description of current operations that delineate any and all changes in equipment or operations since the last permit issued" was included on page 7 of the initial permit application.

EPA's third and fourth requests related to the Facility's potential to emit. Attachment C-1 - EPA's April 5, 2022 Incompleteness Determination Letter. EPA's requests for additional emissions information and changes in the modeling are within EPA's discretion as part of permit development—but they go well beyond the detail contemplated for an initial completeness

determination under 40 C.F.R. § 71.5(c)(3)(i). *See In re Ash Grove Cement Co.,* 7 E.A.D. 387, 397 (EAB 1997) ("[A]cts of discretion must be adequately explained and justified." (*citing Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983))). Section 71.5(c)(3)(i) simply requires an application to "describe all emissions of regulated air pollutants emitted from any emissions unit" and include "additional information related to the emissions of air pollutants sufficient to verify which requirements are applicable to the source and other information necessary to collect any permit fees owed." EPA guidance makes clear that "[e]missions information for these purposes does not always need to be detailed or precise [and] . . . [i]nformation for applicability purposes need only be detailed enough to resolve any open questions about which requirements apply."[10]

Section 3 of Harvest's renewal application (Emission Calculations and Document) addressed these details and provided documentation showing a reduction in total volatile organic compound ("VOC") emissions. To the extent that EPA requested substantiating information associated with these calculations, such as the modeling inputs, these requests reflected "additional information" that it has determined "is necessary to evaluate or take final action on that application" but do not address initial completeness of the application. *See* 40 C.F.R. § 71.5(a)(2).

In any event, the key issue related to Harvest's potential to emit is whether the Facility's potential to emit has been reduced to the point that a Part 71 permit is no longer needed. It would be irrational and wholly unwarranted for EPA to deny Harvest's permit application and renewal permit (and force shutdown of the facility in the meantime) out of concern that the Facility may be a minor source that does not need a Part 71 permit. This is particularly true given that Harvest

[10] Title V White Paper, *supra* note 3, at 3.

submitted a protective Part 71 renewal application rather than trying to force EPA to make a minor source determination prior to expiration of Harvest's existing Part 71 permit.

Rather than adhere to the directive in EPA regulations and guidance to "provide flexibility for sources to prepare simplified permit applications and for permitting authorities to find them complete," 61 Fed. Reg. at 34,215, EPA applied a novel standard that required Harvest to submit all substantiating information necessary for permit development in order to receive a completeness determination. This approach reflects a lack of considered judgment and an abuse of discretion. *See In re City of Keene*, 18 E.A.D. 720, 724 (EAB 2022) (explaining that the clearly erroneous standard requires that the administrative record show that EPA exercised "considered judgement" and "articulate[d] with reasonable clarity the reasons supporting its conclusion and the significance of crucial facts it relied on when reaching its conclusion."); *In re: Desert Rock Energy Company, LLC*, 14 E.A.D. 484, 539 (EAB 2009) (holding that EPA abused its discretion by failing to "provide a rational explanation" for its CAA permitting decision and to "adequately explain" why EPA treated similar facilities differently in previously issued permits).

Finally, the April 5 incompleteness determination also constituted an abuse of discretion because EPA made it plain through its actions and communications that it was busy working on other permits at the time Harvest's renewal application was submitted and that it would be weeks before the Agency could focus in earnest on the application. For example, it took well over a month for EPA to respond to Harvest's February 4 application. *See* Attachment J – Decl. of Oakley Hayes ¶ 13. Similarly, after Harvest promptly submitted the supplemental information requested in EPA's April 5 response, Harvest heard nothing from EPA for well over a month. *Id.* ¶¶ 16-18. At that point, the company proactively contacted EPA on May 19 to ask if the Agency had any additional

questions after review of the supplemental information. *See* Attachment F - April and May 2022 Correspondence between Harvest and EPA.

Over a week later, on May 27, 2022, Ms. Erica LeDoux of EPA sent Harvest an email "apologizing for [her] late response" and indicating that "[a]t this time, EPA has no questions." *Id.* Ms. LeDoux also noted that she "ha[d] been working on several permit actions that were in the queue prior to Harvest Four Corners submittals" but would be scheduling a meeting after she "had the opportunity to complete my review of your supplemental information that was submitted." *Id.* More than a month later, on July 1, 2022, Ms. LeDoux sent Harvest an invitation for July 27, 2022 in order to "get our initial meeting on the *calendar*." Attachment G - EPA's July 1, 2022 Meeting Invitation. In her invitation, she "apologize[d] for the delay" in scheduling, citing again her work on "other permit actions" while also noting that the "office is short staffed with a heavy workload." *Id.* It was not until July 27, 2022 that Harvest and EPA met for the first time to discuss the permit application. Attachment J – Decl. of Oakley Hayes ¶ 19.

These facts show that EPA admittedly was in no position to promptly begin processing Harvest's application. Yet, the Agency nevertheless asserted on April 5 that the application was incomplete and, by extension, not sufficient to begin processing. EPA's decision to find the application was not sufficient to begin processing rings hollow because any perceived gaps in the application did not delay EPA's review and easily were cured well before EPA was ready to focus in earnest on the application. Under these circumstances, the April 5 incompleteness determination constituted an abuse of discretion.

In sum, Harvest's initial application was administratively complete because it: (1) addressed all required elements of the rules and application forms; and (2) contained "all the information needed to begin processing the application." *See* 61 Fed. Reg. at 34,207. EPA failed to explain or

justify its rationale for declaring the initial application to be incomplete – relying instead on a conclusory finding that was unmoored to the facts or the applicable regulations. Furthermore, EPA needlessly found the application was insufficient to begin processing in a situation where it would be weeks before EPA was ready to begin processing the application. For these reasons, EPA's incompleteness determination was clearly erroneous and constituted an abuse of discretion. *See In re City of Keene*, 18 E.A.D. at 724.

C. EPA's Failure to Promptly Provide Notice to Harvest of Whether the Application was Complete in Response to Harvest's April 14, 2022 Submittal Resulted in a Determination of Completeness by Operation of Law

On April 14, 2022, less than two weeks after receipt of EPA's April 5, 2022 letter, Harvest responded to EPA and provided all requested supplemental information. Attachment C-2 - Harvest's April 14, 2022 Application Submittal. Harvest reasonably understood that submitting the supplemental information would cure whatever perceived inadequacies EPA had identified in Harvest's initial application, thus rendering the initial application complete and qualifying Harvest for the application shield.

Upon receipt of the submittal, EPA was under an obligation to "promptly provide notice to the applicant of whether the application is complete." 40 C.F.R. § 71.7(a)(4); *see also* § 71.5(a)(2). "Unless the permitting authority requests additional information or otherwise notifies the applicant of incompleteness within 60 days of receipt of an application, the application shall be deemed complete." 40 C.F.R. § 71.7(a)(4); *see also* § 71.5(a)(2). EPA's failure to "promptly provide notice" to Harvest of whether the initial application, as supplemented by the additional information requested by EPA, was complete "within "60 days of receipt" of Harvest's April 14, 2022 submittal caused Harvest's application to be deemed complete by operation of law. 40 C.F.R. § 71.5(a)(2), 71.7(a)(4). EPA's September 8, 2022 denial of Harvest's renewal application and permit is thus clearly

erroneous because it asserts that Harvest's application is incomplete when, by regulation, it was deemed complete on June 13, 2022.

Notably, nothing in the Part 71 rules suggest that the 60-day deadline for making a completeness determination would not also apply to supplemental information submitted at EPA's request and that appears to be needed to cure a perceived inadequacy in the initial permit application. In fact, multiple sections in Part 71 imply the obligation to "promptly provide notice to the applicant of whether an application is complete" is continual. *See* 40 C.F.R. § 71.7(a)(4); *see also* 40 C.F.R. §§ 71.5(a)(2), 71.11(a)(1). To hold otherwise would not only defeat the purpose of the deadline and duty to provide notice but penalize applicants committed to working in good faith with EPA to correct any deficiencies that encounter unreasonable agency delay and decision-making.

In any event, Harvest's initial permit application, supplemented by the company's response to EPA's supplemental information request, was affirmatively determined to be complete by the Region's tribal permit coordinator. On May 19, 2022, after receiving no communication from EPA for more than a month after responding to EPA's supplemental information request, Harvest sent an email to EPA asking if they had any additional questions after review of the supplemental information. Attachment F - April and May 2022 Correspondence between Harvest and EPA. On May 27, 2022, Ms. Erica LeDoux of EPA sent Harvest an email "apologizing for [her] late response" and indicating that "[a]t this time, EPA has no questions." *Id.* Ms. LeDoux also noted that she "ha[d] been working on several permit actions that were in the queue prior to Harvest Four Corners submittals" but would be scheduling a meeting after she "had the opportunity to complete my review of your supplemental information that was submitted." *Id.* Ms. LeDoux thus acknowledged that adequacy of Harvest's permit application ("EPA has no questions") and, at the same time, confirmed that EPA could have begun processing the application, but chose not to do so given

other priorities. Again, EPA's September 8, 2022 denial of Harvest's renewal application and permit are clearly erroneous in light of the May 27, 2022 communication.

D. EPA's Determination That Harvest Failed to Submit Sufficient Supplemental Information Also Constituted Clear Error

As explained above, EPA's second basis for denying Harvest's renewal application and renewal permit was the assertion that Harvest's supplemental filings were "not sufficiently responsive" and EPA's questions "remain insufficiently answered." Attachment B - EPA's September 8, 2022 Decision Letter. This determination is clearly erroneous on the facts *and* as a matter of law.

First, EPA's claim that Harvest failed to adequately respond to the Agency's supplemental information requests is plainly erroneous on the facts. To begin, as explained above, Harvest cured any alleged defects in its initial application on April 14, 2022, when it responded to all of the identified information deficiencies in EPA's April 5, 2022 incompleteness determination. Beyond the April 5 request, EPA made just two additional requests for supplemental information. On August 5, 2022, EPA submitted to Harvest "a checklist of clarification questions we discussed during our call on July 27" with a due date of August 17, 2022, which was after the permit expiration date of August 8, 2022. Attachment H - EPA's August 5, 2022 Correspondence with Attachment. Harvest responded to the request on August 17, 2022. Attachment C-3 - Harvest's August 17, 2022 Application Submittal; Attachment C-4 - August 2022 Correspondence between Harvest and EPA.

Then, on August 18, 2022, EPA requested "documentation" demonstrating that an engine was taken out of service as well as an updated process flow diagram showing the engine "removed from the drawing" instead of shaded-in and marked out of service (as Harvest had depicted on the previously submitted process flow diagram). Attachment C-4 - August 2022 Correspondence

between Harvest and EPA. No due date was set for submittal of this information. *Id.* On August 31, 2022, Harvest uploaded all additional requested data to EPA's FTP site. *Id.*

As the record shows, Harvest quickly and completely responded to all of EPA's supplemental information requests. Moreover, it is equally clear on the record that EPA never informed Harvest that "a significant number of the responses were not sufficiently responsive" nor did EPA ever extend any "deadline" because the record reflects that Harvest had never missed a deadline set by EPA. While EPA included an enclosure with its September 8, 2022 letter entitled "Questions Remaining" that it claimed were "those questions where Harvest responses were not sufficient," these questions neither were provided to Harvest in advance of the letter nor was any deadline ever provided to respond to them. Attachment C-5, EPA's September 8, 2022 Questions Remaining. In fact, these questions were new requests for additional information that followed up on Harvest's timely responses to earlier questions.

Second, EPA's claim that Harvest failed to adequately respond to the Agency's supplemental information requests also is plainly erroneous on the law. EPA's sole stated justification is that Harvest's supplemental filings were "not sufficiently responsive" and EPA's questions "remain insufficiently answered." Attachment B - EPA's September 8, 2022 Decision Letter. EPA's rationale is vague, void of any citation to relevant legal authority, and is not supported by any factual assertions or analysis. As such, EPA failed to exercise "considered judgment." *See In re: Ash Grove Cement Company*, 7 E.A.D. 387, 397 (where permit decision was "not clear" and "therefore d[id] not appear to reflect considered judgment.").

For these reasons, EAB should reverse EPA's final permit determination.

II. The Extreme Outcome Caused by EPA's Final Permit Decision Reflects An "Exercise of Discretion" Appropriate for EAB Review and Raises "Important Policy Considerations" that Must be Resolved by the EAB.

Confronted with the effects of the EPA's September 8, 2022 decision—that Los Mestenios's Part 71 permit expired without the protections of the application shield—Harvest was forced to shutter operations while it seeks this appeal and works through the Title V permitting process. *See* 40 C.F.R. § 71.7(c)(1)(ii) ("Permit expiration terminates the source's right to operate unless a timely and complete renewal application has been submitted consistent with paragraph (b) of this section and § 71.5(a)(1)(iii)"); *see also* 40 C.F.R. § 71.1(b). This extreme outcome—which has implications not only for Harvest, but for producers and royalty owners including the Jicarilla Apache Nation—was wholly unjustified and a disproportionate response to the Agency's perceived need for more information. EPA's final permit decision is "[a]n exercise of discretion" that the EAB should review and raises "important policy considerations" that must be resolved by the EAB. *See* 40 C.F.R. § 124.19(a)(4)(i)(B).

EPA's decision is particularly unreasonable given that this is a renewal application, where EPA comes to the current application process with extensive prior information about and knowledge of the facility. Los Mestenios has existed for decades. The Facility was originally issued a Title V permit by EPA in 2003 and has obtained several renewals before Harvest applied for the current renewal. Attachment J – Decl. of Oakley Hayes ¶ 7. EPA should be intimately familiar with the Facility and should be well aware that this is a small and uncomplicated natural gas compressor station that consists of a single small combustion turbine/compressor, two liquid condensate tanks, an emergency generator, and assorted insignificant supporting equipment. *Id.* ¶ 6. Only two pieces of equipment have applicable requirements and there is no argument about these requirements, which are the heart of the Title V permit. *Id.* ¶ 12. The facility is located on the remote Jicarilla Apache reservation. *Id.* ¶ 4. There is no evidence in the permit record of any adverse impact on

health or the environment, no record of complaints or concern by local residents or the tribal government, and no allegations of noncompliance with applicable requirements.

The only area of significant uncertainty in this proceeding, and the focus of the majority of the supplemental requests for information, relates to the company's prior request to register the facility as a true minor source, such that a Title V permit would no longer be needed. *See id.* ¶¶ 9-10. Harvests' request was primarily based on data showing a reduction in emissions from the condensate tanks due to a lowered system pressure and a 2021 condensate analysis. *Id.* ¶¶ 8-9.

Thus, ironically, the key question on renewal of the facility's Title V permit is whether potential emissions are now low enough to justify a change to minor source status. But ongoing discussions and disagreements regarding the complexities of sampling and modeling the Facility's potential to emit is not a basis for withholding a completeness determination. By design, the Title V permit application process is meant to be iterative. Harvest's initial application was timely, addressed all minimum elements required by the rules, and provided sufficient information to allow EPA to begin processing the application. Harvest provided timely and complete responses to each of the Agency's requests for additional information. Indeed, it was EPA—and not Harvest—that went for weeks and even months without a substantive response and waited until the end of July to schedule a meeting on the supplemental materials provided by Harvest in mid-April. *See* Attachment F - April and May 2022 Correspondence between Harvest and EPA; Attachment J – Decl. of Oakley Hayes ¶¶ 16-19.

Given these facts, shutting the facility down was a wholly unreasonable and disproportionate response to any perceived need on EPA's part for supplemental information. Continued operation would not create or sustain any significant adverse impact on health or the environment. Nor would continued operation sanction ongoing noncompliance. In this context, there is no rational basis for

taking the extreme approach of refusing to make a completeness determination, extend the application shield, and continue processing the renewal application.

EAB should reject the EPA's rigid and uncompromising approach, which was unwarranted under these particular circumstances and, more broadly, sets dangerous precedent for future similar decisions that runs contrary to Title V regulations and guidance. EAB should act to sharply constrain the Agency from exercising its power to shut down existing facilities through the Title V permit application process.

III. The Part 71 Regulations Do Not Authorize the Agency to Deny a Permit Based on an Incompleteness Determination

EPA's September 8, 2022 letter purports to deny Harvest's renewal application and, thus, deny Harvest a renewal permit. Attachment B - EPA's September 8, 2022 Decision Letter. But notably absent from EPA's letter is any explanation of where EPA finds authority under the rules or law to take this action. *Id.* EPA does not cite authority for its action because such authority is not provided in the Part 71 rules or the underlying statute. EPA is not authorized under the law to deny an application based on an incompleteness finding. As a result, EPA's denial must be reversed.

The only provisions in Part 71 authorizing EPA to deny a permit application are Section 71.11(a)(2) and (3). *See* 40 C.F.R. § 71.11(a)(2), (3). Under these provisions, EPA may deny an application only by following the same procedural requirements that it must follow in issuing a permit (i.e., public notice, opportunity for comment, creation of administrative record). *See* 40 C.F.R. § 71.11(a)(3) ("If the permitting authority initially decides to deny the permit application, it shall issue a notice of intent to deny. A notice of intent to deny the permit application is a type of draft permit and follows the same procedures as any draft permit prepared under this section"). Importantly, under these provisions, EPA may deny a permit only <u>after</u> it determines an application to be complete. 40 C.F.R. § 71.11(a)(2) ("Once an application for an initial permit, permit revision,

or permit renewal is complete, the permitting authority shall decide whether to prepare a draft permit or to deny the application.").

With regard to an incomplete application, the Part 71 regulations only authorize EPA to "request[] additional information or otherwise notif[y] the applicant of incompleteness." *See* 40 C.F.R. § 71.7(a)(4). But the only consequence specified in the rules for failure to submit sufficient information or to submit information by the deadline is loss of the application shield. *See* 40 C.F.R. § 71.7(c)(1)(ii). Nowhere do the rules further state that EPA may deny an application and a permit due to the failure of an applicant to be complete. In contrast to the Part 71 program, the procedural rules in Section 124.3 applicable to other EPA programs makes clear an applicant's failure or refusal to correct deficiencies may be a basis for denial. *See* 40 C.F.R. § 124.3(d) ("If an applicant fails or refuses to correct deficiencies in the application, the permit may be denied."). Thus, EPA's denial of Harvest's application and denial of its renewal permit were not authorized by the Part 71 rules and must be reversed.

IV. EPA Denial of Harvest' Application and Renewal Permit Were Procedurally Inadequate

As explained above, Section 71.11(a)(2) and (3) establish the procedural rules that EPA must follow to deny a permit application. While the rules anticipate that a denial action will occur only after an application is determined to be complete, *see* 40 C.F.R. § 71.11(a)(1), (2), the procedural rules specified in 71.11(a)(3) are not limited on their face only to the denial of a complete application. Instead, 71.11(a)(3) plainly applies when EPA "initially decides to deny the permit application." 40 C.F.R. § 71.11(a)(3). While Harvest disputes that the application was incomplete and that an incompleteness determination is even a basis for denial under the Part 71 regulations, should the EAB determine that Part 71 allows EPA to deny an incomplete permit application, EAB must find that EPA must issue such a denial under the procedures specified in Part 71.11(a)(2) and (3). Under

these rules, EPA failed to provide any of the required opportunities for public participation prior to issuing its final decision. This was clear error that must be reversed by the EAB.

Because "the permitting procedures outlined in the Agency's regulations serve an important function related to the efficiency and integrity of the overall administrative scheme" the Board "do[es] not view procedural arguments or errors as inherently insignificant." *In the Matter of ConocoPhillips Co.*, 13 E.A.D. 768, 776-777 (EAB 2008). "Accordingly, because of the importance of ensuring that Agency decision makers adhere fully to the public participation requirements of these regulations, a remand is in order." *In re Chevron Mich., LLC*, 15 E.A.D. 799, 808 (EAB 2013) ("Whether or not this remand results in any change to the Region's ultimate permit decision, remand is necessary to ensure that the permit issuer has complied or will fully comply with the requirement to give adequate and timely consideration to public comments at the time of issuing a final permit decision."). For this reason, the Board has "[o]n a number of occasions, … reviewed and remanded permit decisions based on procedural irregularities that occurred during the permitting process." *Id.* at 803 (citing examples); *see In the Matter of Russell City Energy Ctr.*, 14 E.A.D. 159, 178 (EAB 2008) (Remanding because permitting authority "clearly erred" by issuing final decision without providing adequate notice and opportunity to comment.).

Section 71.11 sets out the procedures for developing the administrative record, public participation, and administrative review for "all permit proceeding," with some exceptions for "permit revisions qualifying as minor permit modifications or administrative amendments." 40 C.F.R. § 71.11; *see also* 71.7(c)(1)(i)("Permits being renewed are subject to the same procedural requirements ... that apply to initial permit issuance."). "If the permitting authority initially decides to deny the permit application, it shall issue a notice of intent to deny." 40 C.F.R. § 71.11(a)(3). The rule further provides that "[a] notice of intent to deny the permit application is a type of draft permit and follows the same procedures as any draft permit prepared under this section"). *Id.* In the case

of notices of intent to deny or terminate, EPA must also prepare a statement of basis, briefly describing the reasons supporting the initial decision. 40 C.F.R. § 71.11(b).

Here, EPA failed to provide any of the required opportunities for public participation prior to issuance of the agency's final permit decision. *See* 40 C.F.R. § 71.11(a)(3). First, EPA failed to issue a notice of intent to deny or statement of basis. *See* 40 C.F.R. § 71.11(a)(3), (b), (d)(1)(i)(a) ("The permitting authority shall give public notice that the following actions have occurred: (A) A permit application has been initially denied under paragraph (a) of this section."). Second, EPA failed to make the notice of intent to deny available for public comment. 40 C.F.R. § 71.11(a)(3), (5), .11(d)(2)(i). Finally, EPA failed to hold a public hearing. 40 C.F.R. § 71.11(d)(2)(ii). EPA was required to follow these procedural steps prior to the issuance of a final permit decision. *See* 40 C.F.R. § 71.11(i)(1). EPA's failure was clear error that must be reversed by the EAB.

* * *

CONCLUSION

Harvest respectfully requests that the Board find that EPA's decision to deny Harvest's Part 71 renewal application and permit was based upon findings of fact and/or conclusions of law that are clearly erroneous as well as an abuse of discretion, and reflect important policy consideration that the Board should, in its discretion, review. *See* 40 C.F.R. § 124.19. Harvest respectfully requests that the Board order EPA to rescind its permit decision and remand the Part 71 permit renewal application for further processing according to the applicable rules and guidance. Additionally, Harvest respectfully requests that the Board order EPA to determine or deem the application to be timely and complete, such that the facility may operate during the pendency of the permit proceeding.

* * *

STATEMENT REQUESTING ORAL ARGUMENT

Harvest requests that the EAB schedule oral argument in this case. The posture of this case is unique – involving denial of a Part 71 renewal permit application and renewal permit. Such a dispositive determination at the earliest stages of the permit renewal process is highly unusual and presents the EAB with unique substantive and procedural issues. Moreover, this decision had the profound effect of causing the facility to shut down pending resolution of this dispute or issuance of a new permit. Oral argument would assist in the full development of the issues and contribute to a fully-informed decision.

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Date: October 11, 2022

STATEMENT OF COMPLIANCE WITH WORD LIMITATION

The Petition for Review is 10,299 words in length and complies with the word limitation of 14,000 words in 40 C.F.R. § 124.19(d)(3).

s/ Emily Schilling

LIST OF ATTACHMENTS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copies of Harvest Four Corners LLC's Petition for Review of Permit No. R6FOP-NM-040R2 were served by electronic filing, commercial delivery service, and electronic mail to the following persons, the 11th day of October, 2022:

Emilio Cortes
U.S. Environmental Protection Agency
Clerk of the Board, Environmental Appeals Board
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Via EAB eFiling System

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s/ Aaron B. Tucker

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