

BEFORE THE ADMINISTRATOR  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF	)	
CEMEX, Inc.,	)	
Lyons Cement Plant	)	
	)	ORDER RESPONDING TO
	)	PETITIONER'S REQUEST THAT
Permit Number: 95OPBO082	)	THE ADMINISTRATOR OBJECT
	)	TO ISSUANCE OF A
	)	STATE OPERATING PERMIT
Issued by the Colorado Department of	)	
Public Health and Environment, Air	)	
Pollution Control Division	)	
	)	Petition Number: VIII-2008-01
	)	
	)	
	)	

ORDER PARTIALLY DENYING AND PARTIALLY GRANTING PETITION FOR  
OBJECTION TO PERMIT

On March 21, 2008, the United States Environmental Protection Agency (EPA) received a petition from Rocky Mountain Clean Air Action (RMCAA or 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 EPA object to the title V operating permit issued by the Colorado Department of Public Health and Environment, Air Pollution Control Division (Colorado or CDPHE) on March 1, 2008, to CEMEX, Inc. (CEMEX) to operate the Lyons Cement Plant, located 15 miles north of Boulder, Colorado near the town of Lyons, Colorado.

Petitioner has requested that the Administrator object to the CEMEX permit because Petitioner alleges that the permit does not comply with the CAA and implementing regulations at 40 CFR part 70 in that the title V operating permit: (I) fails to assure compliance with Prevention of Significant Deterioration (PSD) and Non-Attainment New Source Review (NSR) requirements triggered by modifications identified in an EPA notice of violation (NOV), and the permit fails to include a compliance schedule to bring the Lyons Cement Plant into compliance with those requirements, and (II) fails to include provisions addressing a number of other alleged modifications at the Lyons Cement Plant that Petitioner alleges have also triggered PSD and NSR requirements, and the permit fails to include a compliance schedule to bring the Plant into compliance with these other alleged requirements.

Based on a review of all the information before me, I deny in part and grant in part Petitioner's request for an objection to the CEMEX, Inc. Lyons Cement Plant title V operating permit for the reasons set forth in this Order.

## **I. STATUTORY AND REGULATORY FRAMEWORK**

Section 502(d)(1) of the Act, 42 U.S.C. § 7661a(d)(1), calls upon each state to develop and submit to EPA an operating permit program intended to meet the requirements of CAA title V. The State of Colorado originally submitted its title V program governing the issuance of operating permits in 1993 and EPA granted interim approval effective February 23, 1995. 60 Fed. Reg. 4563 (January 24, 1995); 40 CFR part 70, Appendix A. *See also* 61 Fed. Reg. 56367 (October 31, 1996) (revising interim approval). Effective October 16, 2000, EPA granted full approval to Colorado's title V operating permit program. 65 Fed. Reg. 49919 (August 16, 2000). The program is now incorporated into Colorado's regulations at 5 CCR 1001-5.

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 such other conditions as are necessary to assure compliance with applicable requirements of the CAA, including requirements of the applicable State Implementation Plan (SIP). *See* CAA §§ 502(a) and 504(a), 42 U.S.C. §§ 7661a(a) and 7661c(a). The title V operating permit program does not generally impose new substantive air quality control requirements (which are referred to as "applicable requirements"), but does require permits to contain monitoring, recordkeeping, reporting, and other conditions to assure compliance by sources with existing applicable emission control requirements. *See* 57 Fed. Reg. at 32,250, 32,251 (July 21, 1992) (EPA final action promulgating Part 70 rule). One purpose of the title V program is to enable the source, EPA, states, and the public to better understand the applicable requirements to which the source is subject and whether the source is complying with those requirements. Thus, the title V operating permits program is a vehicle for ensuring that existing air quality control requirements are appropriately applied to facility emission units and that compliance with these requirements is assured.

Under section 505(a), 42 U.S.C. § 7661d(a), of the CAA and the relevant implementing regulations (40 CFR § 70.8(a)), states are required to submit each proposed title V operating permit to EPA for review. Upon receipt of a proposed permit, EPA has 45 days to object to final issuance of the permit if it is determined not to be in compliance with applicable requirements or the requirements under title V. 40 CFR § 70.8(c). If EPA does not object to a permit on its own initiative, section 505(b)(2) of the Act provides that any person may petition the Administrator, within 60 days of expiration of EPA's 45-day review period, to object to the permit. 42 U.S.C. § 7661d(b)(2), *see also* 40 CFR § 70.8(d). In response to such a petition, the CAA requires the Administrator to issue an objection if a petitioner demonstrates that a permit is not in compliance with the requirements of the CAA. 42 U.S.C. § 7661d(b)(2). *See also* 40 CFR § 70.8(c)(1); *New York Public Interest Research Group (NYPIRG) v. Whitman*, 321 F.3d 316, 333 n.11 (2<sup>nd</sup> Cir. 2003). Under section 505(b)(2), the burden is on the petitioner to make the required

demonstration to EPA. *Sierra Club v. Johnson*, 541 F.3d 1257, 1266-1267 (11<sup>th</sup> Cir. 2008); *Citizens Against Ruining the Environment v. EPA*, 535 F.3d 670, 677-678 (7<sup>th</sup> Cir. 2008); *Sierra Club v. EPA*, 557 F.3d 401, 406 (6<sup>th</sup> Cir. 2009) (discussing the burden of proof in title V petitions); *see also NYPIRG* 321 F.3d at 333 n.11. If, in responding to a petition, EPA objects to a permit that has already been issued, EPA or the permitting authority will modify, terminate, or revoke and reissue the permit consistent with the procedures set forth in 40 CFR §§ 70.7(g)(4) and (5)(i) – (ii), and 40 CFR § 70.8(d).

As in Issue II of this petition, where a petitioner's request that the Administrator object to the issuance of a title V permit is based in whole, or in part, on a permitting authority's alleged failure to comply with the requirements of its approved PSD program<sup>1</sup> (as with other allegations of inconsistency with the Act), the burden is on the petitioner to demonstrate that the permitting decision was not in compliance with the requirements of the Act, including the requirements of the SIP.<sup>2</sup> Such requirements, as EPA has explained in describing its authority to oversee the implementation of the PSD program in states with approved programs, include the requirements that the permitting authority (1) follow the required procedures in the SIP; (2) make PSD determinations on reasonable grounds properly supported on the record; and (3) describe the determinations in enforceable terms. *See, e.g.*, 68 *Fed. Reg.* 9,892, 9,894-9,895 (March 3, 2003); 63 *Fed. Reg.* 13,795, 13,796-13,797 (March 23, 1998). EPA has approved the PSD programs into the SIPs of most states, including the State of Colorado, and as the permitting authority, Colorado has substantial discretion in issuing PSD permits. Given this, in reviewing a PSD permitting decision, EPA will not substitute its own judgment for that of the permitting authority. Rather, consistent with the decision in *Alaska Dep't of Env't Conservation v. EPA*, 540 U.S. 461 (2004), in reviewing a petition to object to a title V permit raising concerns regarding a permitting authority's PSD permitting decision, EPA generally will look to see whether the Petitioner has shown that the permitting authority did not comply with its SIP-approved regulations governing PSD permitting or whether the exercise of discretion under such regulations was unreasonable or arbitrary.<sup>3</sup> *See, e.g., In re East Kentucky Power Cooperative, Inc.* (Hugh L. Spurlock

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<sup>1</sup> As explained below in Section IV.B of this Order, Petitioner's NSR claims in Issue II were not raised with reasonable specificity during the public comment period and are therefore not reviewed in this Order.

<sup>2</sup> The appeal of federal PSD permits issued pursuant to the federal regulations at 40 CFR § 52.21 is governed by the regulations at 40 CFR § 124.19, and authority to review such permits rests exclusively with the Environmental Appeals Board (EAB). Because of the exclusive authority of the EAB in this area, the Administrator has declined to review the merits of a federal PSD permit in the context of a petition to review a title V permit. *See, e.g., In re Kawaihae Cogeneration Project*, Petition No. 0001-01-C (Order on Petition) (March 10, 1997).

<sup>3</sup> In determining the appropriate standard of review to apply to the review of federal PSD permit determinations in a petition to object to a title V permit, the standard of review applied by the EAB in reviewing the appeals of federal PSD permits provides a useful analogy. The standard of review applied by the EAB in its review of federal PSD permits is discussed in numerous EAB orders as the "clearly erroneous" standard. *See, e.g., In re Prairie State Generating Company*, 13 E.A.D. \_\_\_\_, PSD Appeal No. 05-05, slip op., (EAB, August 24, 2006); *In re Kawaihae Cogeneration*, 7 E.A.D. 107, 114 (EAB, April 28, 1997). In short, in such appeals, the EAB explained that the burden is on a petitioner to demonstrate that review is warranted. Ordinarily, a PSD permit will not be reviewed by the EAB unless the decision of the permitting authority was based on either a clearly erroneous finding of fact or conclusion of law, or involves an important matter of policy or exercise of discretion that warrants review.

Generating Station) Petition No. IV-2006-4 (Order on Petition) (August 30, 2007) (*Spurlock Final Order*); *In re Pacific Coast Building Products, Inc.* (Order on Petition) (December 10, 1999); *In re Roosevelt Regional Landfill Regional Disposal Company* (Order on Petition) (May 4, 1999).

## **II. BACKGROUND**

### **A. The Facility**

The Lyons Cement Plant is owned and operated by CEMEX near the town of Lyons, Colorado. The plant manufactures Portland cement. Production at this facility involves three processes: Raw material mining, a pulverized coal-fired kiln to convert raw materials into clinker, and a finish mill where clinker is mixed and ground with gypsum and other materials.

### **B. The Permit and the Petition**

The CEMEX title V permit at issue is a renewal permit. CDPHE issued the Lyons Cement Plant operating permit on March 1, 2008, pursuant to title V of the Act, the federal implementing regulations at 40 CFR part 70, and the Colorado State implementing regulations at Regulation No. 3, part C.

### **C. Litigation History**

On March 28, 2007, EPA issued a Notice of Violation (NOV) to CEMEX alleging violations of regulations for Prevention of Significant Deterioration, Nonattainment New Source Review, New Source Performance Standards, National Emission Standards for Hazardous Air Pollutants, Cemex's Title V Permit No. 950PB0092, and the Colorado State Implementation Plan. Subsequently on January 6, 2009, EPA filed an enforcement action in federal district court against CEMEX seeking injunctive relief and civil penalties for alleged violations of the Clean Air Act and Colorado's State Implementation Plan. *U.S. v. CEMEX*, No 1:09-CV-00019-MSK-ME (D. Co.). Then, on March 11, 2009, EPA filed an amended complaint in this same case. On March 30, 2009, CEMEX also filed numerous documents with the court, including: an Answer to the Complaint; Corporate Statement; Motion to Dismiss and Memorandum in Support of Motion to Dismiss; and Motion For Extension of Time to Designate Non-Party at Fault.

On February 26, 2007, Petitioner sent CEMEX a Notice of Intent to sue on Clean Air Act violations at the Lyons Cement Plant. On August 14, 2008, Petitioner filed a deadline suit to compel the Administrator to respond to the March 21, 2008 title V petition at issue in this Order. *Rocky Mountain Clean Air Act v. EPA*, No 1:08-CV-01422 (RWR)(D.D.C). On December 24, 2008, notice of the proposed consent decree to address this deadline suit was published. 73 Fed. Reg. 79087. The consent decree was lodged with the court on March 3, 2009. Pursuant to the terms of the consent decree, EPA has until April 20, 2009 to respond to the petition.

### **III. THRESHOLD REQUIREMENTS**

#### **A. Timeliness of Petition**

Section 505(b)(2) of the Act provides that a person may petition the Administrator of EPA, within sixty days after expiration of EPA's 45-day review period, to object to the issuance of a proposed permit. The State issued the renewed permit on March 1, 2008. EPA's 45-day review period for the CEMEX title V period expired on January 20, 2008. Thus, the sixty-day petition period ended on March 20, 2008. The subject Petition is dated March 19, 2008. EPA finds that Petitioner timely filed its petition.

### **IV. ISSUES RAISED BY PETITIONER**

#### **A. Failure to Include PSD/NSR requirements and Compliance Schedule for Modifications Alleged in an EPA NOV**

The Petitioner alleges that the Lyons Cement Plant underwent certain modifications, is subject to PSD/NSR requirements with regard to those modifications, and is in violation of these requirements. In support, Petitioner cites to the March 28, 2007 NOV issued by EPA that contains the same allegations. Specifically, in the petition, Petitioner quotes excerpts from the NOV, highlights allegations contained in the NOV, and claims that these "conclusions" in the NOV indicate that EPA has made a finding that the CEMEX Lyons Cement Plant is in violation of PSD and nonattainment NSR requirements. Petition at 6-10. Petitioner argues that, because EPA can only issue an NOV under section 113(a)(1) of the CAA if the agency finds that any person has violated or is in violation of any requirement or prohibition of an applicable implementation plan, EPA's NOV constitutes a finding that PSD/NSR are applicable requirements and that the CEMEX Lyons Cement Plant is in violation of these requirements. Citing to the NOV, the Petitioner asserts that CEMEX modified the Plant without obtaining a PSD permit and a nonattainment NSR permit authorizing the construction and operation of the modifications at issue in the NOV and including emission limits and standards that represent best available control technology (BACT) and lowest achievable emission rate (LAER) consistent with PSD/NSR. Petitioner asserts that because the title V permit fails to include a compliance plan and schedule for the allegations in the NOV, the Administrator must object to its issuance. Petition at 10.

Section 505(b)(2) of the Act provides that a petition shall be based on objections raised with reasonable specificity during the public comment period provided by the permitting agency (unless the petitioner demonstrates in the petition that it was impracticable to raise such objections within such period or unless the grounds for such objection arose after such period). EPA notes that these alleged modifications were not raised in comments to the CDPHE during the public process on the draft permit. While the underlying alleged modifications occurred before the public comment period, Petitioner's claim appears to be that an NOV constitutes findings of PSD/NSR applicability and noncompliance with these requirements and that the title V permit must therefore include the relevant PSD/NSR requirements and a compliance schedule for these requirements. EPA acknowledges that EPA's NOV was filed after the public

comment period, and evaluates and addresses Petitioner's claims relating to the NOV in this Order.

Contrary to the Petitioner's views, and as explained below and previously explained by EPA in two title V orders, the issuance of an NOV, and reference to information contained therein, alone are not sufficient to satisfy the demonstration requirement under section 505(b)(2).<sup>4</sup> See generally: *In the Matter of Georgia Power Company, Bowen Steam – Electric Generating Plant, et al*, Final Order (January 8, 2007) (*Georgia Power/Bowen Steam Final Order*), at 5-9; and *Spurlock Final Order*, at 13-18.<sup>5</sup> Under section 113(a)(1), “[w]henver, on the basis of any information available to the Administrator, the Administrator finds that any person has violated or is in violation of any requirement or prohibition of an applicable implementation plan or permit, the Administrator shall [issue an NOV].” An NOV is simply one early step in the EPA’s process of determining whether a violation has, in fact, occurred. These steps are commonly followed by additional investigation or discovery, information gathering, and exchange of views that occur in the context of an enforcement proceeding, and are considered important means of fact-finding under our system of civil litigation. An NOV is not a final agency action and is not subject to judicial review. It is well-recognized that no binding legal consequences flow from an NOV, and an NOV does not have the force or effect of law. See *PacifiCorp v. Thomas*, 883 F.2d 661 (9<sup>th</sup> Cir. 1988); *Absetec Constr. Servs. V. EPA*, 849 F.2d 765, 768-69 (2<sup>nd</sup> Cir. 1988); *Union Elec. Co. v. EPA*, 593 F.2d 299, 304-06 (8<sup>th</sup> Cir. 1979); and *West Penn Power Co. v. Train*, 522 F.2d 302, 310-11 (3<sup>rd</sup> Cir. 1975). See also *Sierra Club v. Johnson*, 541 F.3d at 1267; *Sierra Club v. EPA*, 557 F.3d at 406-409.

EPA may consider an NOV's filing or complaint's issuance as a relevant factor when determining whether the overall information presented by the petitioner - in light of all the factors that may be relevant - demonstrates the applicability of a requirement for title V purposes. Other factors that may be relevant in this determination include the quality of the information, whether the underlying facts are disputable, the types of defenses available to the source, and the nature of any disputed legal questions, all of which would need to be considered within the constraints of the title V process. If, in any particular case, these factors are relevant and the Petitioner does not present information concerning them, then EPA may find that the Petitioner has failed to present sufficient information to demonstrate that the requirement is applicable.

Another factor that EPA considers is the potential impact enforcement cases and title V decisions have on one another, as illustrated by the following example. EPA

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<sup>4</sup> The addition of EPA's complaint that includes the alleged violations in the NOV, without more, is not sufficient to demonstrate applicability and violation of a requirement as the alleged violations in the complaint are just that: alleged.

<sup>5</sup> Petitioner asserts that the Second Circuit Court of Appeals decision, *NYPIRG v. Johnson*, 427 F.3d 172 (2<sup>nd</sup> Cir. 2005)(NYPIRG) is applicable here. EPA disagrees. As recently explained by the Sixth Circuit Court of Appeals, in *NYPIRG*, a notice of violation and enforcement lawsuit were filed by the State of New York, which relied on specific state regulations that may have required a more robust determination than EPA must make before it issues an NOV or files a complaint. *Sierra Club v. EPA*, 557 F.3d 401, 410 (6<sup>th</sup> Cir. 2009).

could bring a civil judicial enforcement action for violations by a source of a substantive rule. The source and EPA would be engaged in litigation over the merits of the allegations of EPA's judicial complaint. Should EPA prevail in that enforcement proceeding, or should the source and EPA propose to settle their differences, then the court would enter judgment in the form of an order or consent decree requiring that the source achieve compliance, either pursuant to the terms of a compliance order, or, at a minimum, by a certain date. Separately, in the context of the issuance of a title V permit to the same source, the permitting authority may determine (on its own or as a result of an EPA objection) that the source is in non-compliance with the substantive rule (i.e., applicable requirement) that is the subject of the enforcement proceeding, and require in the title V permit that the source achieve compliance with the applicable requirement pursuant to a schedule of compliance. Under such circumstances the source could challenge the permit, petition EPA for relief, and appeal to the appropriate circuit court. In these circumstances, the source and EPA could find themselves in two separate fora litigating essentially the same issues -- whether the substantive rule was violated and the appropriateness of a compliance schedule -- which risks potentially different and conflicting results. *See also Georgia Power/Bowen Steam Final Order*, at 7-8; *In the Matter of Lovett Generating Station Final Order*, Petition Number: II-2001-07, dated February 19, 2003, at 18-20; and *Spurlock Final Order*, at 16-17.

Finally, while the permit does not contain the alleged PSD applicable requirements, it also does not provide any safe harbor from enforcement of PSD. Specifically, while the permit contains a section on Permit Shield, it limits the shield by indicating that the "permit shield shall not alter or affect ... the liability of an owner or operator of a source for a violation of applicable requirements prior to or at the time of permit issuance." Permit at 75. Additionally, the Permit indicates that "sources are not shielded from terms and conditions that become applicable to the source subsequent to permit issuance." Permit at 75. Thus, the permit does not disturb any ongoing or future enforcement action against CEMEX for violations of PSD requirements.

In light of the ongoing enforcement action between the United States and CEMEX, Inc., the fact that CEMEX, Inc. continues to dispute the violations cited within the March 28, 2007 NOV, and the Petitioner's sole reliance on the NOV, I find that the petition does not "demonstrate" that the title V operating permit does not comply with the Clean Air Act. Petitioner has failed to demonstrate that PSD and nonattainment NSR requirements apply to the Lyons Cement Plant, and that the permit must include a compliance plan and schedule with regard to such requirements. EPA denies the petition with respect to these two issues.

#### **B. Failure to Include PSD/NSR Requirements and Compliance Schedule for Other Alleged Modifications**

In its petition, Petitioner raises several allegations of PSD and NSR violations in addition to those alleged in the NOV. Specifically, Petitioner refers to the February 26, 2007 Notice of Intent to Sue (NOI) that the Petitioner sent CEMEX (Petition at 11; Exhibit 9 to Petition). The NOI alleged that there were six kiln modifications and three

dryer modifications that violated PSD and nonattainment NSR requirements. Petitioner asserts in the petition that because the title V permit fails to include a compliance schedule for the NOI allegations, the Administrator must object to its issuance. Petition at 11.

Section 505(b)(2) of the Act provides that a petition shall be based on objections raised with reasonably specificity during the public comment period provided by the permitting agency (unless the petitioner demonstrates in the petition that it was impracticable to raise such objections within such period or unless the grounds for such objection arose after such period). EPA reviewed the comments on the draft CEMEX title V permit submitted to Colorado during the public comment period for the CEMEX title V permit. As mentioned above, the petition refers to the nine allegations made in Petitioner's 2007 NOI as the bases for EPA to object to the title V permit for the CEMEX Lyons Cement Plant title V permit. Sierra Club's comment mentioned two PSD violations that are in the NOI. None of the comments mentioned the other seven allegations in the NOI. Although the other seven modifications identified in the NOI allegedly occurred prior to the close of the public comment period, they were not raised during the State's public comment period. The Petitioner did not explain why it was impracticable to raise these allegations to the State. Because these seven issues were not timely raised with reasonable specificity, as required by Section 505(b)(2), EPA denies review of the seven petition issues that were not raised with the State.

The two alleged PSD violations that had been raised to the State during the public comment period for the CEMEX title V permit involved 1) a modification of the kiln by cutting it in half in the 1979 to 1980 timeframe (Exhibit 9 to Petition, issue II.A.1.b., at 5; February 3, 2006 Comments on draft Title V Permit, CEMEX, Inc. #95OPBO082, at 3, (Sierra Club comments));<sup>6</sup> and 2) a conversion of the dryer from natural gas to coal between 1982 and 1985. (Sierra Club comments, Issue II.A.2.a, at 3).<sup>7</sup> In its comments to the State, Sierra Club indicated that "[i]t does not appear that the facility under went [sic] NSR, a BACT analysis, and/or PSD requirements contemporaneous with any of these modifications. Moreover, it appears that at least some of these modifications resulted in the increase of SO<sub>2</sub>, NO<sub>x</sub>, and/or CO emissions after the last modifications were completed." Sierra Club Comments at 3. The comments requested "that the State investigate this matter, apply NSR requirements, undertake a BACT analysis for NO<sub>x</sub> and SO<sub>2</sub> emissions, and include new PSD limits for NO<sub>x</sub> and SO<sub>2</sub> and/or a compliance plan for NO<sub>x</sub> and SO<sub>2</sub> emissions in the final permit for the kiln." Sierra Club Comments at 3. Finally, the Sierra Club indicated that "[i]f these requirements are not imposed in the final Title V permit, please provide a detailed explanation in your response to comments regarding your failure to include them. Please also explain why NSR, BACT, and PSD do not apply to these modifications." Sierra Club Comments at 3.

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<sup>6</sup> The Sierra Club commented that "[i]n 1979-1980, the kiln was apparently further modified by cutting it in half. In 1979 the Air Contaminant Emission Notice again indicates a design rate of 52 tons/hour of raw material in the kiln and nitrogen oxide emission estimated at 277 tpy." Sierra Club Comments at 3.

<sup>7</sup> The Sierra Club comments alleged that, "[i]n addition, the dryer was originally fueled by natural gas. A stack test from the dryer in 1982 shows SO<sub>2</sub> emissions of less than 1 tpy. Between 1982 and 1985 the dryer was converted to coal. In 1985 a stack test showed SO<sub>2</sub> emissions of 276 tpy." Sierra Club Comments at 3.

The allegations regarding the first PSD violation (regarding the kiln modification) are outlined in the RMCCA's NOI, attached to the Petition, where it alleges that:

According to information on file with the Division, the kiln at the cement plant was cut in half to reduce visible emissions. Information on file with the Division shows that this modification led to a significant increase in NO<sub>x</sub> emissions. According to a 1980 stack test done by York Research, NO<sub>x</sub> emissions after the modification were at 785 tons/year, leading to a 508 ton/year increase over 1979 emission rates. This increase in NO<sub>x</sub> emissions was significant and information on file with the Division strongly indicates a net emission increase occurred contemporaneous with the modification. Thus, a major modification of this major source occurred in 1979 or 1980; thereby triggering PSD review and permitting requirements. No PSD permit was obtained or otherwise applied for, in violation of federal PSD regulations at 40 CFR § 52.21. Thus, the Lyons Cement Plant has been in violation of the requirement to obtain a PSD permit from at least December 31, 1980 to present. NOI at 5.

The allegations concerning the dryer conversion are presented in RMCCA's NOI and it alleges that:

In 1985, the dryer was modified to burn coal, rather than natural gas. This modification led to a significant increase in SO<sub>2</sub> emissions. Based on information on file with the Division, SO<sub>2</sub> emissions increased from less than 1 ton/year in 1980 and 1982 to 276 tons/year in 1985. Information on file with the Division also shows that a net emission increase occurred contemporaneous with the modification. A major modification of this major source therefore occurred in 1985. However, no PSD permit was obtained or otherwise applied for, in violation of federal PSD regulations at 40 CFR § 52.21. Thus, the Lyons Cement Plant has been in violation of the requirement to obtain a PSD permit from at least December 31, 1985 to the present. NOI at 7-8.

In responding to the Petitioner's two allegations that were raised to the State, CDPHE stated that:

The modifications you cite were evaluated under the rules that existed at the time of each modification, and determined to not trigger, or to net out of PSD review. The emission increases were determined to meet regulatory requirements at the time of application, and are not part of the operating permit review.

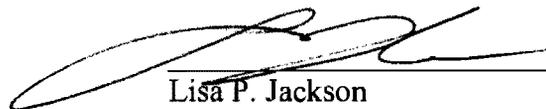
(Colorado Air Pollution Control Division Response to Comments on Draft Renewal Permit, Response to Sierra Club (December 5, 2007), at 4 (State Response to Sierra Club). The State's response does not provide any citations or summary of the rationale for its prior determination, or other basis to support its view that PSD was not violated.

As the permitting authority, CDPHE has a responsibility to respond to significant comments. *See, e.g., In the Matter of Onyx Environmental Services*, Petition V-2005-1 (February 1, 2006), cited in *In the Matter of Kerr-McGee, LLC, Frederick Gathering Station*, Petition-VIII-2007 (February 7, 2008) (*Kerr-McGee Final Order*) (“it is a general principle of administrative law that an inherent component of any meaningful notice and opportunity for comment is a response by the regulatory authority to significant comments”). Sierra Club’s comment on the two alleged modifications raised in this petition was a significant comment because it raised an issue that the title V permit for the CEMEX Lyons Cement Plant may be missing certain applicable requirements and a compliance schedule for these requirements, in violation of 40 C.F.R. part 70. CDPHE’s response, which referred to its past decisions without any citations or summary of the basis for those decisions, or any further explanation, was not an adequate response. *See Kerr-McGee Final Order*, at 4. As mentioned above, in reviewing a petition to object to a title V permit raising concerns regarding a permitting authority’s PSD permitting decision, EPA generally will look to see whether Petitioner has shown that the permitting authority did not comply with its SIP-approved PSD regulations or whether the State’s exercise of discretion under such regulations was unreasonable or arbitrary. In its response to this significant comment by Sierra Club, CDPHE failed to provide the basis (*e.g.*, citing to current or historical evidence, or the lack thereof) that supports its conclusion that PSD/NSR was not applicable at the time these two projects were undertaken by the Lyons Cement Plant. Therefore, I grant the petition on this issue and direct CDPHE to address the comment on the PSD issues for these two projects and, as necessary, make appropriate changes to the permit. In doing so, I am not concluding that the projects triggered PSD/NSR – only that the present permit record does not provide the public with a meaningful response to its comment and lacks an adequate basis for the State’s determination.

## V. CONCLUSION

For the reasons set forth above and pursuant to section 505(b)(2) of the Clean Air Act, I grant in part and deny in part Petitioner’s requests for an objection to the issuance of the CEMEX Lyons Cement Plant title V operating permit.

Dated: 4/20/09

  
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Lisa P. Jackson  
Administrator