BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of the Modified Title V Operating Permit *Issued by the* South Dakota Department of Environment and Natural Resources *to* Pacer Corporation to operate the White Bear Mica Plant near Custer, South Dakota	)	Permit No. 28.1107-21

PETITION FOR OBJECTION TO ISSUANCE OF OPERATING PERMIT FOR PACER MICA PROCESSING PLANT

Pursuant to Section 505(b)(2) of the Clean Air Act ("CAA"), 40 CFR § 70.8(d), and the applicable federal and state regulations, Biodiversity Conservation Alliance, Rocky Mountain Clean Air Action, Defenders of the Black Hills, Native Ecosystems Council, Prairie Hills Audubon Society of Western South Dakota, Center for Native Ecosystems, Nancy Hilding, Brian Brademeyer, Jeremy Nichols (hereafter "Petitioners") hereby petition the Administrator of the U.S. Environmental Protection Agency ("EPA") to object to the modified Title V operating permit (hereafter "modified Title V permit") issued by the South Dakota Department of Environment and Natural Resources ("DENR") for Pacer Corporation (hereafter "Pacer") to operate the White Bear Mica Plant near Custer, South Dakota (hereafter "mica plant"), Permit Number 28.1107-21. The modified Title V permit modifies a Title V permit issued to Pacer by DENR on March 1, 2005 by authorizing the construction and operation of a new baghouse that

emits particulate matter into the atmosphere.[1] Petitioners request the EPA object to the issuance of Permit Number 28.1107-21 for the White Bear Mica Plant and/or find reopening for cause for the reasons set forth within this petition.

[1] The proposed modified title V Permit, the proposed modified Title V permit statement of basis, and the original Title V permit as Exhibits 1, 2, and 3, respectively.

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INTRODUCTION

Pacer operates the White Bear Mica Plant, which has the potential to emit into the air of Custer County massive amounts of particulate matter pollution. Of particular concern is that the mica plant has the potential to emit over 500,000 pounds per year of particulates, including particulate matter less than 10 microns in size ("PM_{10}"), or 1/7 the width of a human hair, and total suspended particulates ("TSP"). Particulate matter less than 10 microns in size is small enough to get into human lungs closely linked to respiratory ailments and the incidence of asthma.[2]

Pollution from Pacer's mica mill also affects the Black Hills region of western South Dakota, including the scenic vistas of Wind Cave National Park and Badlands National Park, both of which are protected as Class I areas under the CAA. 42 USC § 7472(a)(4). The Black Hills region of western South Dakota consists of over a million acres of public lands, including the Black Hills National Forest, and is vital to the health and sustainability of many communities. A forested island within the sea of the Great Plains, the Black Hills also support a unique, isolated ecosystem that hosts a diversity of plants and animals found nowhere else in the world. The Black Hills are also sacred to countless indigenous peoples who have lived around the Black Hills region for millennia, relying upon the health and sustainability of the surrounding land, air, and water for survival and cultural well-being. Air pollution from the plant threatens to degrade the irreplaceable scenic, natural, and cultural values of the region.

The DENR submitted the proposed modified Title V permit for Pacer's mica plant to the EPA for review on or around February 28, 2006. The EPA's 45 day review period thus ended on April 14, 2006. During the EPA's review period, the agency did not object to the issuance of the

[2] See, www.epa.gov/airtrends/pm.html.

Title V permit. This petition is thus timely filed within 60 days following the conclusion of EPA's review period and failure to raise objections.

This petition is based on the objections to the Title V permit raised with reasonable specificity during the public comment period. To the extent the EPA may somehow believe this petition is not based on comments raised with reasonable specificity during the public comment period, Petitioners request the Administrator also consider this a petition to reopen the Title V permit for Pacer's mica plant in accordance with 40 CFR § 70.7(f).[3] A permit reopening and revision is mandated in this case because of one or both of the following reasons:

1. Material mistakes or inaccurate statements were made in establishing the terms and conditions in the permit. See, 40 CFR § 70.7(f)(1)(iii). As will be discussed in more detail, the Title V permit for the plant suffers from material mistakes that render several terms and conditions meaningless, ambiguous, unenforceable as a practical matter, in violation of applicable requirements, etc.; and

2. The permit fails to assure compliance with the applicable requirements. See, 40 CFR § 70.7(f)(1)(iv). As will be discussed in more detail, the Title V permit for the plant fails to assure compliance with several applicable requirements.

PETITIONERS

Biodiversity Conservation Alliance is a Laramie, Wyoming based nonprofit organization dedicated to protecting and restoring ecological health and sustainability in the Black Hills

[3] To the extent the Administrator may not believe citizens can petition for reopening for cause under 40 CFR § 70.7(f), Petitioners also hereby petitions to reopen for cause in accordance with 40 CFR § 70.7(f) pursuant to 5 USC § 555(b).

region of western South Dakota. Members and supporters of Biodiversity Conservation Alliance depend upon clean air in the Black Hills region to ensure unimpaired visibility, healthy plant and animal communities, successful wildlife viewing, and enjoyable recreational experiences.

Rocky Mountain Clean Air Action is a newly founded, Denver, Colorado based citizens group dedicated to protecting clean air in Colorado and the surrounding Rocky Mountain region for the health and sustainability of local communities.

Defenders of the Black Hills is a nonprofit organization, without racial or tribal boundaries, whose mission is to ensure that the provisions of the Fort Laramie Treaties of 1851 and 1868 are upheld by the federal government of the United States. Defenders' actions seek to restore and protect the environment of the Black Hills to the best of their ability.

Native Ecosystems Council is a Rapid City, South Dakota based, unincorporated, non-profit, science-based conservation organization dedicated to protecting and restoring the health of the Black Hills ecosystem. Members and supporters of Native Ecosystems Council use and enjoy the Black Hills for wildlife viewing, recreation, and scientific study.

Prairie Hills Audubon Society of Western South Dakota is a South Dakota-based, nonprofit organization with almost 200 members in the Black Hills region. Members of Prairie Hills Audubon Society use and enjoy the Black Hills for, among other things, bird-watching, and depend upon clean air for the health of their own communities, as well as those of the wildlife, fish, and plants of the Black Hills.

Center for Native Ecosystems is a Denver, Colorado based non-profit, science-based conservation organization dedicated to protecting and recovering native and naturally functioning ecosystems in the Greater Southern Rockies and Great Plains. Using the best available science, the Center for Native Ecosystems participates in policy and administrative

processes, legal actions, and public outreach and education programs to protect and restore imperiled native plants and animals and the air, land, and water they depend upon.

Nancy Hilding is a Blackhawk, South Dakota resident who depends upon clean air for her health and happiness. Ms. Hilding suffers from asthma, which is exacerbated by air pollution, and is most happy when she can breathe clean, clear air. Ms. Hilding is also the President of Prairie Hills Audubon Society of Western South Dakota and in this capacity works to protect and restore the health and sustainability of the Black Hills ecosystem. In her capacity as President of Prairie Hills Audubon Society of Western South Dakota, Ms. Hilding takes great pleasure in educating others about the natural values of the Black Hills and depends upon clean air to carry out the educational goals of the organization.

Brian Brademeyer is a Rapid City, South Dakota resident who depends upon clean air for his health and happiness. Mr. Brademeyer enjoys hiking in the Black Hills and working on his home, located in Palmer Gulch in the Black Hills near Mt. Rushmore. Several years ago, Mr. Brademeyer underwent open heart surgery. Mr. Brademeyer now depends upon clean air to ensure pure oxygen, free of poisonous compounds, reaches his heart to help this sensitive organ regain its strength and stamina. Mr. Brademeyer also has a home in the Black Hills and enjoys viewing the peaks within the Black Elk Wilderness and Norbeck Wildlife Preserve. Clean air is essential to ensuring unimpaired views of these peaks.

Jeremy Nichols is a resident of Denver, Colorado, an avid bicycle rider, outdoor enthusiast, and regular visitor to the Black Hills of South Dakota who is deeply concerned about air quality in the Black Hills region and its effects on the health and welfare of people, plants, and animals. Mr. Nichols is also the founder of Rocky Mountain Clean Air Action and in this

capacity works carry out the mission of the group to ensure protection of clean air for communities throughout the Rocky Mountains, including the Black Hills.

On January 9, 2006, Petitioners submitted comments to the DENR by certified mail in regards to the proposal to renew the Title V permit for the mica mill.[4]

GROUNDS FOR OBJECTION

I. The State of South Dakota Failed to Respond to Significant Comments

The EPA has noted that "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." See, *In the Matter of Onyx Environmental Services*, Petition V-2005-1 (February 1, 2006) at 7. Unfortunately, despite this general principle, the DENR failed to respond to significant comments presented by the Petitioners in their February 13, 2006 Response to Comments, claiming that certain permit provisions were not modified and therefore not subject to public comment. In particular, the Division entirely failed to respond to Petitioners' concerns raised in their January 9, 2006 comment letter regarding the adequacy of modified Title V permit Conditions 5.10, 6.2, 6.5, 6.6, and 8.1, despite the fact that they covered the proposed changes in operation.[5] As will be explained in more detail, the failure to respond to significant comments was illegal and may have resulted in one or more deficiencies in the modified Title V permit for the mica plant and the EPA must object to its issuance.

A. The DENR Violated its SIP in Failing to Respond to Significant Comments

According to South Dakota Administrative Rules ("ARSD") at 74:36:05:39, which have been adopted into the South Dakota State Implementing Plan ("SIP"), the required public review of a modified Title V permit, "covers only the proposed changes rather than the unchanged

[4] These comments are attached as Exhibit 4.
[5] The DENR's February 13, 2006 Response to Comments are attached as Exhibit 5.

activities of the permittee." As is clear, although this provision allows the DENR to limit the scope of public review for a draft modified Title V permit, it does not permit the DENR to limit the scope of review to only selected modified Conditions within a permit. Rather, the plain language of the SIP requires that public review of a modified Title V permit cover only proposed changes in the activities of a permittee. Thus, the required public review of the modified Title V permit for Pacer's mica plant was limited to the proposed changes in activities, which according to the Statement of Basis, involved the installation and operation of "a new Flex-Kleen pulse jet baghouse to control particulate emissions from three conveyor belts (CB103, CB100A, and CB100B)." **Ex. 2 at 1.** According to the DENR, this baghouse "is a new source of emissions to the ambient air." Id.

Unfortunately, DENR limited public review to only selected modified Conditions within the modified Title V permit, despite the fact that several unmodified Conditions from the original Title V permit related to the installation and operation of the proposed baghouse. For example, Petitioners commented on the ability of Condition 8.1 to ensure sufficient periodic monitoring of opacity from the operation of the new baghouse, stating:

> Section 8.1 fails to require sufficient periodic monitoring of visible emissions and opacity from the White Bear Mica Plant. To begin with, the modified Title V permit requires that visible emissions be monitored only two minutes once a month. On its face, this monitoring is insufficient to ensure opacity does not exceed 7% at all times as required by section 6.1 of the March 1, 2005 Title V permit. Monitoring once a month and then only two minutes is wholly insufficient. At best, the monitoring requirements at Section 8.1 provide data representative of the source's compliance with Section 6.1 only 24 minutes a year. The modified Title V permit must require at least hourly opacity monitoring.
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> Furthermore, monitoring only visible emissions fails to provide data that is reliable and representative of the source's compliance with the opacity limits set forth in the permit. Simply observing whether visible emissions are present fails to provide data to determine whether opacity is at or below 7%. Although the permit states that if visible emissions are present, additional monitoring, including Method 9 observations, is to be undertaken,

> this allows the polluter to exceed opacity limits. Indeed, the polluter could exceed the opacity limit during the visible observation and there would be no way to determine compliance with Section 6.1 of the modified Title V permit. We request that the modified Title V permit require only Method 9 observations in relation to opacity monitoring to ensure the polluter obtains reliable data representative of the source's compliance with Section 6.1.

Ex. 4 at 8. Although these comments directly relate to the sufficiency of the opacity monitoring in relation to the operation of the new baghouse, DENR failed to respond to this significant comment, stating:

> Biodiversity's comments on permit condition 8.1 will not be addressed. Comments on the proposed modification to the existing permit are limited to the modification itself. Permit condition 8.1 was not modified, has already been through a public comment period during the issuance of the existing Title V air quality permit, was approved by EPA, and may not be revised under this permit modification process.

Ex. 5 at 4. Contrary to the DENR's implication, Condition 8.1 covers the proposed changes in that it sets forth opacity monitoring requirements related to the operation of the new baghouse. Thus, the failure to respond to significant comments over the sufficiency of the opacity monitoring in relation to the operation of the new baghouse, or the proposed change, violates the South Dakota SIP.

The DENR similarly failed to respond to Petitioners' significant comments regarding the adequacy of Conditions 5.10, 6.2, 6.5, and 6.6. For instance, in relation to Condition 5.10, Petitioners commented that:

> Section 5.10 requires that permit violations, such as violations related to the operation of the proposed baghouses, be reported in writing to the Secretary within five days of discovering the violation. Unfortunately, this Section provides an unreasonably broad exemption that, as a practical matter, renders this Section unenforceable and is contrary to federal regulations.
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> Indeed, the permit states that, "The Secretary may waive the written report on a case-by-case basis if the oral report has been received within the reporting period and dependent

> upon the severity of the permit violation." March 1, 2005 Title V Permit at 9. The Secretary, however, has no authority at all to waive written reporting of permit violations. Regulations at 40 CFR § 70.6(a)(3)(iii)(B) clearly require prompt reporting of permit deviations and provide for no special waiver, whether approved by the state or the EPA. The Section must be rewritten to eliminate this statement.
>
> Section 5.10 also fails to require prompt reporting of permit violations, as required by 40 CFR § 70.6(a)(3)(iii)(B). Of concern is that the Section allows the Secretary to extend the submittal deadline for a written report of permit violations up to 30 days. This is not prompt reporting. At the least, the permit needs to explain the conditions under which the Secretary may extend the submittal deadline for a written report of permit violations. As it stands, Section 5.7 arbitrarily gives the Secretary authority to extend the reporting of violations, no matter how serious, detrimental to public health and safety, and/or damaging to the environment, to 30 days. This Section must be rewritten to either 1) eliminate the statement that the Secretary can extend submittal deadlines for written reports of permit violations up to 30 days or 2) reasonably and rationally explain the circumstances under which the Secretary may extent submittal deadlines for written reports of permit violations.

Ex. 4 at 5-6. In this comment, Petitioners clearly questioned whether 5.10 was legally sufficient in relation to the operation of the new baghouse, or the changed activity, and prompt reporting of permit deviations related to the operation of the new baghouse. The DENR responded that:

> Biodiversity's comments on permit condition 5.10 will not be addressed. Comments on the proposed modification to the existing permit are limited to the modification itself. Permit condition 5.10 was not modified, has already been through a public comment period during the issuance of the existing Title V air quality permit, was approved by EPA, and may not be revised under this permit modifications process.

Ex. 5 at 3. Again, this response is not allowed by the South Dakota SIP.

In this case, DENR seems to be seriously misinterpreting its SIP. The SIP clearly states that public review of modified Title V permits, such as Pacer's, is limited to the proposed changes in the activity of a permittee. See, ARSD 74:36:05:39. In this case, DENR inappropriately limited public review only to selected modified Conditions in the modified Title V permit, despite the fact that several unmodified Conditions, such as Condition 5.10 and Condition 8.1, cover the proposed changes in the activities of the permittee, in this case the

operation of the baghouse. **Nowhere in ARSD 74:36:05:39 or elsewhere in the South Dakota SIP is the DENR allowed to limit public review of a modified Title V permit to only the specific Conditions that are modified.**

The DENR's logic in fact turns the South Dakota SIP, as well as EPA's Title V regulations, on their head. **Clearly changes in the activities of a permittee that require the modification of a Title V permit must be reviewed in the context of the ability of the changes to meet all applicable requirements, including regulations at 40 CFR § 70. In effect however, DENR has limited review of the proposed changes, as incorporated into the modified Title V permit, to the extent that it has prevented Petitioners from undertaking such a review.** The result is that Petitioners have been denied the opportunity to comment on the ability of the proposed changes, or the installation and operation of the new baghouse, to meet all applicable requirements.

The DENR's failure to respond to significant comments relating to the operation of the new baghouse is even more egregious given that Petitioners made clear that their comments related only to the changes in activities, or the installation and operation of the baghouse, and the ability of the modified Title V permit to ensure compliance with applicable requirements in relation to the operation of the baghouse. Petitioners stated in their January 9, 2006 comments:

> For the purposes of these comments, we often reference the March 1, 2005 Title V permit issued to Pacer Corp. for the White Bear Mica Plant. However, all comments are in relation to the proposed modifications and the ability of the modified Title V permit to ensure compliance with all applicable requirements related to the operation of the new equipment.

Ex. 4 at 2 (emphasis added). In this case, Petitioners clearly attempted to respect and adhere to the South Dakota SIP in preparing and submitting their comments, only to have DENR summarily fail to respond to significant comments related to the modification.

The Administrator must therefore object to the modified Title V permit due to the fact that the DENR failed to adhere to ARSD 74:36:05:39 within the South Dakota SIP in its response to public comments and failed to respond to significant comments regarding the ability of the operation of the proposed baghouse to meet all applicable requirements.

B. The Failure to Respond to Significant Comments, in Violation of the South Dakota SIP, Likely Resulted in one or More Deficiencies in the Modified Title V Permit

The EPA has ruled that the failure of a permitting agency to respond to significant comments that may result in one or more deficiencies in a Title V permit is grounds for objection. See, *In the Matter of Onyx Environmental Services*, Petition V-2005-1 (February 1, 2006) at 7. The failure of the DENR to respond to the significant concerns of the Petitioners did, in fact, result in one or more deficiencies in the modified Title V permit. Petitioners raised specific and significant concerns over the ability of the modified Title V permit to ensure compliance with the applicable requirements in relation to the operation of the new baghouse. The modified Title V permit continues to suffer from the deficiencies described in Petitioners' comments. As will be explained in more detail in this petition, the failure of the DENR to respond to these significant comments clearly resulted in one or deficiencies in the modified Title V permit. The Administrator must therefore object to the issuance of the modified Title V permit for Pacer's mica mill.

II. Adjacent and Interrelated Pollutant Emitting Activities and/or Sources Were not Included in the modified Title V Permit or Considered for Purposes of Determining Prevention of Significant Deterioration Applicability

In issuing the modified Title V permit, the DENR failed to consider emissions from an adjacent emissions unit that should be considered part of the White Bear Mica Plant for Prevention of Significant Deterioration ("PSD") and Title V permitting purposes. The result is that the DENR's conclusion that the mica plant is not a major source of PSD purposes is unsupported and the modified Title V permit fails to meet applicable requirements at 40 CFR § 70.

Regulations 40 CFR § 52.21(b)(5) defines a stationary source as, "any building, structure, facility, or installation which emits or may emit a regulated NSR pollutant." See also, definition of "stationary source" under 40 CFR § 70.2. Regulations at 40 CFR § 52.21(b)(6) further define "building, structure, facility, or installation" as "all of the pollutant emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control)[.]" The regulations further state, "Pollutant emitting activities are considered part of the same industrial grouping if they belong to the same 'Major Group' (i.e., which have the same first two digit code) as described in the Standard Industrial Classification Manual[.]" Similarly, Title V regulations at 40 CFR § 70 explicitly require all adjacent pollutant emitting activities and sources under common control and belonging to a single major industrial grouping be considered as one source for Title V permitting purposes. Under Title V regulations, a major source is considered "any stationary source or (or any group of stationary sources that are located on one or more contiguous or adjacent properties, and are under common control of the same person (or persons under common control) belonging to a single major industrial grouping[.]" 40 CFR § 70.2, definition of "Major source."

A. Pacer's Brite-X Mica Mine is an Adjacent, Interrelated Source and the Operation of a Rock Crusher at the Mine is an Adjacent, Interrelated Pollutant Emitting Activity

In the case of the mica plant, the DENR failed to include pollutant emitting activities from the Brite-X Mica Mine, an adjacent and interconnected source that supplies the plant with its mica for processing, in its assessment of PSD applicability and for Title V permitting purposes. According to an Environmental Assessment prepared by the U.S. Forest Service, the Brite-X Mica Mine is located on National Forest System lands in the Black Hills approximately 10 miles north of the mica plant.[6] Also according to the U.S. Forest Service, a rock crushing plant is in operation at the Brite-X Mica Mine. The Forest Service states in its Environmental Assessment:

> The Brite-X mine has been operating since 1978. Existing mine disturbance encompasses approximately 10 acres, and includes an open pit, rock crushing plant, equipment storage/parking area, mine access road, and sediment control structures.

Ex. 6 at 2 (emphasis added). The existence of a crusher is verified by the DENR, which stated in an April 14, 2006 e-mail that, "In February 2006, Pacer hired a new contractor to crush the required material. This contractor's portable crusher is a 1998 TESAB ROTO Crusher, with a maximum operating rate of 300 tons per hour."[7] Also according to DENR, the crusher is a source of PM_{10} emissions. See, **Ex. 7.**

The Brite-X Mica Mine is an adjacent source that must be included in the modified Title V permit for the mica plant and emissions from the rock crusher must be aggregated with emissions from the mica plant in order to accurately determine PSD applicability. Indeed, both the Brite-X Mica Mine and the White Bear Mica Plant are under common control by Pacer Corporation and clearly both facilities have a functional inter-relationship. While the rock

[6] The U.S. Forest Service's environmental assessment is attached as Exhibit 6.
[7] This e-mail is attached as Exhibit 7.

crusher may be operated by a contractor, Pacer still controls the operations of the crusher and the crusher operates at the Brite-X Mica Mine site. Thus, the crusher and the mica plant are under common control by Pacer. Additionally, the mica mine clearly provides mica to the mica plant, thus the plant depends upon the operations of the Brite-X Mine for its functions. Similarly, the mine depends upon the mica plant for its operations. Without the existence of the White Bear Mica Plant, the Brite-X Mica Mine would cease to operate. Furthermore, both the White Bear Mica Plant and the Brite-X Mica Mine are also part of the same industrial grouping. According to the Standard Industrial Classification Manual, both facilities fall under Major Group 14, or "Mining and Quarrying of Nonmetallic Minerals, Except Fuels."[8]

The two sources are also considered adjacent for PSD and Title V purposes. Although the EPA has noted that the distance associated with "adjacent" "must be considered on a case-by-case basis,"[9] the agency has noted that two emissions units that are interdependent operations under common control can be considered adjacent when they are upwards of 20 miles apart. EPA noted in relation to two interdependent facilities in Utah 21.5 miles apart that, "the lengthy distance between the facilities 'is not an overriding factor that would prevent them from being considered a single source.'" **Ex. 8 at 2.** The fact that the Brite-X Mica Mine and the mica plant are only 10 miles apart strongly indicates the two facilities, and their pollutant emitting activities, are adjacent for PSD and Title V purposes.

Unfortunately, the DENR entirely failed to include the Brite-X Mica Mine as an adjacent source in the White Bear Mica Plant Title V permit and failed to aggregate emissions from the rock crusher at the Brite-X Mica Mine when determining PSD applicability. Indeed, the modified Title V permit only covers operations at the White Bear Mica Plant, entirely omitting

[8] See, http://www.osha.gov/pls/imis/sic_manual.display?id=404&tab=description.
[9] See, 1998 Letter from EPA Region 8 to Utah Division of Air Quality, attached as Exhibit 8.

operations at the Brite-X Mica Mine. Furthermore, the Statement of Basis for the modified Title V permit entirely omits any discussion of pollutant emitting activities at the Brite-X Mica Mine. See, **Ex. 2**. Accordingly, the Administrator must object to the issuance of the modified Title V permit.

B. DENR's Response to Comments Over this Issue Misses the Point

In response to Petitioners' concerns, DENR gave three reasons for not including operations of the Brite-X Mica Mine in the modified Title V permit and for not considering emissions from the rock crusher for determining PSD applicability, each of which are flawed.

First, DENR asserted that, "The particulate matter emissions from the mica mine are generated from fugitive sources." **Ex. 5 at 1**. This is untrue, however. The DENR itself stated in an April 14, 2006 e-mail that a rock crusher operates at the mine site and releases PM_{10}. See, **Ex. 7**.

Second, DENR asserted:

> Pacer Corporation is not one of the 28 named Prevention of Significant Deterioration source categories as defined in 40 CFR § 52.21(b)(1)(i)(c)(iii). Therefore, fugitive particulate matter emissions from the mica mine are not included in determining if the source is major under the Prevention of Significant Deterioration program.

Ex. 5 at 2. Again, DENR misses the point. While Pacer's mica mine and mica plant may not be one of the 28 named PSD source categories, it is not exempt from PSD. Particulate emissions from the rock crusher at the mica mine must be analyzed in determining PSD applicability if this pollutant emitting activity is determined to be an adjacent, interrelated pollutant emitting activity that falls under the same major industrial grouping as the mica plant.

Third, DENR asserted:

> The net emissions benefit from shutting down the mica plant in Custer was not determined and used as an emission offset because Pacer Corporation agreed to accept federally enforceable permit conditions that would maintain its actual particulate emissions at the White Bear Mica plant below the major source threshold under the Prevention of Significant Deterioration program.

Ex. 5 at 2. Again, DENR misses the point. If the rock crusher in operation at the Brite-X mica mine is an adjacent, interrelated pollutant emitting activity with the same major industrial grouping as the mica plant, its emissions must be aggregated with those of the mica plant to determine PSD applicability and, if necessary, establish appropriate federally enforceable permit conditions to keep actual emissions below major source thresholds under PSD. The DENR seems to be arguing that since the mica plant may have accepted federally enforceable permit conditions that limit particulate emissions below major source thresholds, emissions from the rock crusher at the mica mine simply don't matter. This is contrary to the plain language of PSD regulations at 40 CFR § 52.21. Furthermore, it ignores the fact that adjacent and interrelated sources under common control with the same major industrial grouping must be considered one major source under Title V regulations at 40 CFR § 70.

If anything, the Administrator must object on the basis that the DENR's rationale for ignoring emissions from the Brite-X mica mine and the rock crusher in operation at the mine when preparing the modified Title V permit and determining PSD applicability is unsupported and contrary to law.

III. The Permit Fails to Require Sufficient Periodic Monitoring and/or Monitoring that Ensures Compliance with Particulate Limits at Condition 6.1

The modified Title V permit fails to require sufficient periodic monitoring and/or monitoring that ensures compliance with the applicable particulate limits at Condition 6.1 in relation to the operation of the new baghouse, or Unit #6.

A. Part 70 Monitoring Requirements Apply in Relation to Particulate Matter Monitoring

The particulate limit for the new baghouse in the modified Title V permit is set forth in at Condition 6.1. The Condition limits TSP emissions from the new baghouse to 0.022 grains per dry standard cubic foot, which is required by New Source Performance Standards ("NSPS") for nonmetallic mineral processing facilities at 40 CFR § 60.672(a)(1). However, while the NSPS limit TSP emissions to 0.022 grains per dry standard cubic foot, the NSPS do not set forth any specific requirements related to TSP monitoring. The only monitoring requirements explicitly set forth under the NSPS for nonmetallic mineral processing facilities is set froth at 40 CFR § 60.674 and only applies to facilities that use a wet scrubber to control emissions. Pacer's mica plant does not use a wet scrubber to control emissions. Thus, given that the applicable requirements, in this case the NSPS for nonmetallic processing facilities, fail to require periodic monitoring of TSP emissions, 40 CFR Part 70 monitoring requirements apply to the operation of the new baghouse. Regulations at 40 CFR § 70.6(a)(3)(i)(B) require "periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit[.]. Additionally, regulations at 40 CFR § 70.6(c)(1) also require monitoring that assures compliance with the terms and conditions of any Title V permit.

Unfortunately, in issuing the modified Title V permit, DENR failed to ensure sufficient periodic monitoring and/or monitoring that ensures compliance with TSP limits in accordance with 40 CFR § 70.6(a)(3)(i)(B) and 40 CFR § 70.6(c)(1) in relation to the operation of the new baghouse, or Unit #6. Indeed, in response to Petitioners' comment regarding the adequacy of TSP monitoring, DENR asserts that only the NSPS requirements for nonmetallic mineral processing facilities apply to TSP monitoring in the modified Title V permit. See, **Ex. 5 at 2.** Yet, as already explained, the NSPS fail to require periodic monitoring of TSP emissions from

facilities like the mica plant, and therefore 40 CFR Part 70 monitoring requirements apply. The Administrator must object to the issuance of the modified Title V permit due to its failure to require monitoring under 40 CFR Part 70 of the Title V regulations.

B. The Modified Title V Permit Fails to Require Sufficient Periodic Monitoring and/or Monitoring that Ensures Compliance in Relation to Particulate Limits

The DENR's failure to comply with 40 CFR Part 70 monitoring requirements is entirely evident given the failure of the modified Title V permit to ensure sufficient periodic monitoring and/or monitoring that ensures compliance with TSP limits set forth at Condition 6.1.

To begin with, the modified Title V permit does not even set forth any specific TSP monitoring requirement. Section 8.0 of the modified Title V permit, which deals with "Monitoring," contains no TSP monitoring requirements whatsoever. Section 8.0 of the modified Title V permit only requires monitoring of opacity and pressure drops across each baghouse, but does not require TSP monitoring. Thus, the modified Title V permit fails to require sufficient periodic monitoring that ensures compliance with NSPS TSP limits established for the new baghouse and set forth in the modified Title V permit at Condition 6.1.

To the extent that the modified Title V permit relies on performance testing to ensure compliance with TSP limits at Condition 6.1, performance testing does not constitute sufficient periodic monitoring and/or monitoring that ensures compliance with TSP limits.

While Section 7.9 in the modified Title V permit requires "initial particulate emission testing," this Section only requires testing once during the permit term. As a practical matter, Section 7.9 only requires monitoring of particulate emissions once every five years. **One-time performance testing fails to constitute sufficient periodic monitoring of TSP emissions in accordance with 40 CFR § 70.6(a)(3)(i)(B) and fails to ensure compliance with TSP limits in accordance with 40 CFR § 70.6(c)(1).** Indeed, in Appalachian Power Co. v. Environmental

Protection Agency, the Court of Appeals for the D.C. Circuit specifically held that a one-time performance test failed to constitute sufficient periodic monitoring, stating:

> State permitting authorities therefore may not, on the basis of EPA's Guidance or 40 CFR § 70.6(a)(3)(i)(B), require in permits that the regulated source conduct more frequent monitoring of its emissions than that provided in the applicable State or Federal standard, unless that standard requires no periodic testing, specifies no frequency, or requires only a one-time test.

Appalachian Power Co. v. Environmental Protection Agency, 208 F.3d 1015 (D.C. Cir. 2000) (emphasis added). Thus, on its face and in accordance with the applicable requirements, one-time performance testing does not constitute sufficient periodic monitoring of TSP emissions from the new baghouse.

As a practical matter, monitoring once every five years fails to provide data from the relevant time period. In this case, NSPS limits for TSP apply on a continual basis. Logically, to ensure compliance with TSP limits on a continual basis, the modified Title V permit must require continuous TSP monitoring. Unfortunately, the modified Title V permit fails to require continuous monitoring of TSP emissions and therefore fails to ensure sufficient periodic monitoring that ensures compliance with TSP limits at Condition 6.1 in accordance with 40 CFR § 70.6(a)(3)(i)(B) and 40 CFR § 70.6(c)(1).

Also as a practical matter, monitoring once every five years fails to provide data that is representative of the source's overall compliance status. Section 7.9 in the modified Title V permit provides data that is only representative of the source's particulate limit compliance status once every five years. As a practical matter, Section 7.9 would only provide data on the source's compliance status every four years and 364 days, leaving the Pacer free to violate particulate

limits the rest of the time. In this case, the monitoring clearly fails to ensure compliance with the NSPS TSP limit at Condition 6.1.

The DENR claims in its response to comments that, "The existing permit requires periodic monitoring of opacity and pressure drop reading to track Unit #6's compliance status" (see, **Ex. 5 at 2**), seeming to imply that opacity and pressure drop monitoring will demonstrate compliance with TSP limits. This is not supported by the modified Title V permit, the Statement of Basis, or any other piece of information. To begin with, nothing in the Title V permit states that compliance with opacity limits and/or any specific pressure drop reading indicates and/or can be used as a surrogate for compliance with TSP limits at Condition 6.1 in this case.[10] Nothing in the Statement of Basis or any other supporting permit documentation indicates that compliance with the 7% opacity limit or any specific pressure drop reading will, in fact, limit TSP emissions below the allowable limits set forth at Condition 6.1. The DENR cannot simply claim, without any supporting information, such as basic correlation data, that compliance with the 7% opacity limit or any pressure drop reading, automatically indicates compliance with the TSP limits set forth at Condition 6.1.

This also calls into question the DENR's assertion that the modified Title V permit complies with 40 CFR § 64.3 with regards to compliance assurance monitoring ("CAM") for TSP emissions. According to DENR, "compliance assurance monitoring for the particulate emission limit will be based on the federal opacity monitoring requirements in 40 CFR, Part 63, Subpart LLL for portland cement plants." **Ex. 2 at 6.** It is unclear, first off, how and/or why the DENR is relying upon the opacity monitoring requirements at 40 CFR, Part 63, Subpart LLL to satisfy CAM requirements in the first place. Second, the DENR provides no explanation in the

[10] In fact, it is unclear at what pressure drop reading or readings the baghouses must operate. The Title V permit sets no limits on pressure drop. This further casts doubt on the DENR's claim that pressure drop monitoring will ensure compliance with TSP limits.

Statement of Basis as to how compliance with the opacity monitoring requirements at 40 CFR, Part 63, Subpart LLL will ensure compliance with TSP limits, rendering reliance on the opacity monitoring requirements of Subpart LLL unfounded in violation of 40 CFR § 64.2(b)(1). Indeed, 40 CFR § 64.2(b)(1) explicitly requires that monitoring data be representative of the emissions being monitored.[11] In this case, there is no explanation and/or information demonstrating that opacity monitoring under Subpart LLL provides data representative of TSP emissions. Furthermore, nothing in the modified Title V permit ensures compliance with several provisions of CAM, including:

- The requirement to verify procedures to confirm operational status of the monitoring prior to the date by which the owner or operator must conduct monitoring (40 CFR § 64.2(b)(2));
- The requirement to ensure that quality assurance and control practices are adequate to ensure the continuing validity of data (40 CFR § 64.2(b)(3)); and
- The requirement to ensure specifications for data collection and handling ((40 CFR § 64.2(b)(4)).

In fact, nothing in the modified Title V permit references and/or incorporates any of the CAM requirements set forth at 40 CFR § 64.2. Thus, not only has the DENR has fail to meet CAM requirements at 40 CFR § 64.2 with regards to ensuring compliance with TSP emission limits for the new baghouse, but DENR also failed to require sufficient periodic monitoring and/or monitoring that ensures compliance with TSP limits.

[11] It is also important to point out that opacity requirements at Subpart LLL are actually less stringent than under the NSPS, ranging from 10-20%, rather than the 7% required by the NSPS for nonmetallic mineral processing facilities. This further calls into question the reliance upon 40 CFR, Part 63, Subpart LLL to monitor visibility from the mica plant.

The DENR also claims in its response to comments that, "The permit modification adds Unit #6 to the preventative maintenance schedule for each baghouse" (see, **Ex. 5 at 2**), also seeming to imply that a maintenance schedule will ensures compliance with TSP limits. This is problematic in several ways. To begin with, the actual maintenance requirements are vague and undefined within the modified Title V permit. Condition 5.7 only states that, "At a minimum, the maintenance schedule shall meet the manufacturer's recommended schedule for maintenance." While manufacturer's recommendations may be utilized, in this case it is unclear what these recommendations may be, from what source they are derived, and whether they are subject to revision and/or modification. It is also unclear what the manufacturers actually recommend with regards to maintenance and whether this is adequate to ensure compliance with the TSP limits for Unit #6 at Condition 6.1. As a practical matter, it is impossible to ensure the maintenance schedule will be properly implemented and followed, and that the requirements of Condition 5.7 will even be met. Finally, nothing in the modified Title V permit actually explains how the baghouse, or Unit #6, is to be operated and maintained. Nothing in the modified Title V permit requires Pacer to meet any standards related to the operation and maintenance of the baghouse, not even the manufacturer's recommendations. As a practical matter, the DENR cannot assert the effectiveness of the baghouse in controlling TSP emissions unless the modified Title V permit requires that this device be operated and maintained in a manner that ensures proper, consistent, and continuous control of emissions.

The Administrator must therefore object to the issuance of the modified Title V permit due to its failure to require sufficient periodic monitoring of TSP emissions and/or monitoring that ensures compliance with TSP limits at Condition 6.1 for the new baghouse in accordance with 40 CFR § 70.6(a)(3)(i)(B) and 40 CFR § 70.6(c)(1).

IV. The Permit Fails to Require Sufficient Periodic Opacity Monitoring and/or Monitoring that Ensures Compliance with the 7% Opacity Limit and Visibility Limits

The modified Title V permit fails to require sufficient periodic monitoring of opacity from the new baghouse and/or fails to require monitoring that ensures compliance with the applicable requirements, in violation of 40 CFR § 70.6(a)(3)(i)(B) and 40 CFR § 70.6(c)(1).[12]

A. The Permit Fails to Require Continuous Opacity Monitoring

To begin, the modified Title V permit fails to require sufficient periodic monitoring of opacity and/or fails to require monitoring that ensures compliance with the applicable requirements, in violation of 40 CFR § 70.6(a)(3)(i)(B) and 40 CFR § 70.6(c)(1) because the permit fails to require continuous opacity monitoring at Condition 8.1.

According to the modified Title V permit and the NSPS, the 7% opacity limit set forth at Condition 6.1 applies at all times. It is important to note that, while the NSPS limits opacity to 7%, the NSPS do not set forth any specific requirements related to opacity monitoring. The only monitoring requirements explicitly set forth under the NSPS for nonmetallic mineral processing facilities is set froth at 40 CFR § 60.674 and only applies to facilities that use a wet scrubber to control emissions. Pacer's mica plant does not use a wet scrubber to control emissions. Thus, given that the applicable requirements, in this case the NSPS for nonmetallic processing facilities, fail to require periodic monitoring of opacity emissions, 40 CFR Part 70 monitoring requirements apply to the operation of the new baghouse.

As a practical matter, in order to ensure compliance with this continuous opacity limit of 7%, the Title V permit must require continuous opacity monitoring. The Administrator must

[12] The DENR did not respond to Petitioners' comments regarding the sufficiency of opacity monitoring for the new baghouse. The failure of the DENR to respond to these significant comments likely resulted in deficiencies in the modified Title V permit.

object to the issuance of the Title V permit due to the failure to require continuous opacity monitoring in accordance with 40 CFR § 70.6(a)(3)(i)(B) and 40 CFR § 70.6(c)(1).

B. The Title V Permit Fails to Require Sufficient Periodic Opacity Monitoring and/or Monitoring that Ensures Compliance with Opacity Limits in Other Ways

Even if continuous opacity monitoring may not be required, Condition 8.1 further fails to require sufficient periodic monitoring of opacity and/or fails to require monitoring that ensures compliance with opacity limits as it fails to ensure continuous compliance with the applicable opacity limit at Condition 6.1 and the NSPS in other ways.

To begin with, the monitoring set forth at Condition 8.1 fails to require actual monitoring of opacity using quantitative measurements. Condition 8.1 only requires monitoring for visible emissions, which does not indicate whether or not the source is in compliance with the 7% opacity limit. Although Step 2 of Condition 8.1 requires Method 9 observations if a visible emission is observed, as a practical matter, this allows the source to exceed the applicable opacity limit. Indeed, visible emissions could exceed the 7% limit, but until such time as a Method 9 observation is conducted, it would be impossible to determine the opacity of any visible emissions and impossible to determine the compliance status of the source . The visible emissions monitoring required by Condition 8.1 cannot substitute for Method 9 readings and as such, the modified Title V permit fails to require sufficient periodic monitoring and/or monitoring that ensures compliance with the 7% opacity limit in relation to the operation of the baghouse. The Administrator must therefore object to the issuance of the modified Title V permit.

Although Condition 8.1 is flawed because it relies upon visible emissions monitoring to ensure compliance with the 7% opacity limit, the monitoring set forth at Condition 8.1 is further

flawed because it only requires monitoring for visible emissions once-per-month. As a practical matter, such infrequent monitoring allows the source to violate opacity limits. Indeed, monitoring visible emissions once-per-month allows the source to exceed the 7% opacity limit for up to 30 days, depending on the month, and as such fails to ensure compliance with the 7% opacity limit set forth in the modified Title V permit.

The EPA itself has noted that monitoring of visible emissions must occur at least on a daily basis. In an April 18, 1997 memo from EPA Region 7, the EPA stated:

> [T]he permit authority should require the source to certify at least annually—or more frequently—that they conducted a visible emissions survey each day the plant operated and that they were in compliance with, or in violation of, with the applicable opacity requirements.

Ex. 9.[13] On its face, the monitoring set forth at Condition 8.1 is insufficient as it fails to ensure monitoring of opacity at least on a daily basis from the new baghouse, or Unit #6, and the Administrator must object to the issuance of the modified Title V permit.

C. The Title V Permit Inappropriately Allows for Less Frequent Opacity Monitoring

The modified Title V permits further fails to require sufficient periodic monitoring and/or monitoring that ensures compliance with the 7% opacity limit set forth in Condition 6.1 because Condition 8.1 allows for visible emissions monitoring only once every six months to only once every year. Under Condition 8.1, visible emissions monitoring frequency can be reduced to semiannually if "no visible emissions are observed from a unit in six consecutive monthly visible emission readings" and to annually if "no visible emissions are observed from a unit in two consecutive semiannual visible emission readings."

[13] This policy document is attached as Exhibit 9.

The fact that visible emissions may not be observed during the required monthly observations for six consecutive months or for one consecutive year does not justify and/or support less frequent monitoring. Indeed, nothing in the Statement of Basis, the modified Title V permit, or the Response to Comments explains why such infrequent monitoring can possibly be allowed. The EPA itself has determined that a large margin of compliance alone is insufficient to demonstrate that emissions will not change over the life of the permit. See *In the Matter of Fort James Camas Mill*, Petition No. X-1999-1 (December 22, 2000) at 17-18. As a practical matter, by allowing the source to conduct less frequent visible emissions monitoring, such as semiannually or annually, the modified Title V permit increases the chances of exceedances and/or violations occurring undetected. Furthermore, by allowing such infrequent monitoring, Condition 8.1 fails to provide data representative of the source's compliance with the 7% opacity limit. The Administrator must object to the modified Title V permit because Condition 8.1 inappropriately allows monitoring of opacity from the new baghouse to occur only semiannually and even annually, thereby failing to require sufficient periodic monitoring and/or monitoring that ensures compliance with the applicable requirements and the limits and conditions in the modified Title V permit in accordance with 40 CFR § 70.6(a)(3)(i)(B) and 40 CFR § 70.6(c)(1).

D. There is no Reasonable Explanation as to how the Monitoring Constitutes Sufficient Periodic Monitoring and/or Ensures Compliance with the 7% Opacity Limit

Finally, compounding the aforementioned flaws is that the DENR has provided no explanation as to how and/or why the opacity monitoring set forth at Condition 8.1 constitutes sufficient periodic monitoring and/or how the monitoring ensures compliance with the 7% opacity limit set forth at Condition 6.1 in relation to the operation of the new baghouse. In neither its response to comments nor the Statement of Basis for the modified Title V permit does

the DENR explain how and/or why it determined the monitoring set forth at Condition 8.1 constitutes sufficient periodic monitoring in accordance with 40 CFR § 70.6(a)(3)(i)(B) or ensures compliance with the 7% opacity limit in accordance with 40 CFR § 70.6(c)(1). Although the DENR cites compliance with opacity monitoring requirements at 40 CFR, Part 63, Subpart LLL as CAM in the Statement of Basis, as already explained, the DENR's reliance upon 40 CFR, part 63, Subpart LLL to ensure compliance with opacity limits is unfounded, especially given that opacity limits are less stringent under Subpart LLL. The failure of the DENR to explain how and/or why the opacity monitoring set forth at Condition 8.1 constitutes sufficient periodic monitoring and/or ensures compliance with the 7% opacity limit renders the Title V permit fatally flawed. The Administrator must therefore object to the issuance of the Title V permit.

V. The Permit Fails to Require Prompt Reporting of Permit Deviations

The modified Title V permit fails to require prompt reporting of permit deviations resulting from the operation of the new baghouse, in violation of 40 CFR § 70.6(a)(3)(iii)(B). The Administrator must therefore object to the issuance of the modified Title V permit.[14]

A. The Permit Fails to Require Prompt Reporting of Opacity Deviations

Condition 6.2 of the modified Title V permit exempts compliance with opacity limits "during periods of startup, shutdown, and malfunctions." Unfortunately, the modified Title V permit fails to require prompt reporting of opacity deviations in the event of startup, shutdown, and malfunction. Petitioners raised concerns over this issue with reasonable specificity on page 7 of their comments on the Title V Permit.

[14] The DENR did not respond to Petitioners' comments regarding the failure of the modified Title V permit to ensure prompt reporting of permit deviations resulting from the operation of the new baghouse. The failure of the DENR to respond to these significant comments likely resulted in deficiencies in the modified Title V permit.

While the modified Title V permit requires reporting of permit violations under Condition 5.10, according to Condition 6.2, opacity deviations during startup, shutdown, and malfunction may not be violations and thus, would not be required to be reported under Condition 5.10, despite the fact that they are deviations from opacity limits. Furthermore, although the DENR may claim that Condition 5.7 requires visible emissions to be recorded in a monitoring log, this requirement does not fulfill prompt permit deviation reporting requirements under 40 CFR § 70.6(a)(3)(iii)(B). Indeed, Condition 5.7 only requires Pacer to record visible emissions, but requires no reporting to the DENR, the EPA, or the public.

B. The Permit Does not Require "Prompt" Reporting

Finally, while Condition 5.10 of the modified Title V permit requires reporting of permit violations, this Condition fails to require prompt reporting of permit violations, as required by 40 CFR § 70.6(a)(3)(iii)(B). Of concern is that the Condition allows the Secretary to extend the submittal deadline for a written report of permit violations up to 30 days. **Thirty days is not "prompt" in relation to prompt reporting.**

Compounding the fact that 30-days is not prompt is that nowhere in the Statement of Basis, the modified Title V permit, or the Response to Comments does the DENR explain why it considers 30 days to be prompt in relation to all permit violations. As the EPA recently noted in regards to a Title V permit issued to Onyx Environmental Services:

> The permit record does not include IEPA's explanation of why the deviation reporting required for the applicable emissions limitations is prompt "in relation to the degree and type of deviation likely to occur and the applicable requirements." In this case, Onyx incinerates hazardous and toxic materials and IEPA has not explained why it considers a thirty day reporting period to be prompt for all deviations. For this reason, U.S. EPA is granting on this issue. U.S. EPA directs IEPA to explain how a thirty day reporting requirement for all deviations is prompt or require a shorter reporting period for deviations as is provided for in 40 C.F.R. Part 71.

See, *In the Matter of Onyx Environmental Services*, Petition No. V-2005-1 (February 1, 2006) at 15 (emphasis added). In this strikingly similar case, the DENR has failed to explain why 30 days is "prompt" in relation to the degree and type of violations likely to occur and the applicable requirements and the Administrator must object to Pacer's modified Title V permit and direct the DENR to explain how a 30 day reporting requirement for all violations is prompt or require a shorter reporting period for violations.

VI. Problems with Other Permit Conditions Warranting Objection by the Administrator

A. Condition 6.2

Condition 6.2 exempts Pacer from compliance with opacity limits during periods of malfunction. Unfortunately, nothing in the Title V permit requires Pacer to explain the reason for the occurrence of any and all malfunctions related to the operation of the new baghouse.[15]

Although Section 5.6 requires Pacer to maintain records of the occurrence and duration of malfunctions, neither this section nor any other section of the modified Title V permit requires Pacer to explain the reason for the occurrence of any and all malfunctions related to the operation of the new baghouse. This is problematic. The modified Title V permit explains at Condition 6.2 that a malfunction:

> means any sudden and unavoidable failure of air pollution control equipment, process equipment, or a process to operate in a normal or usual manner. A failure caused entirely or in part by poor maintenance, careless operation, preventable equipment breakdown, or any other cause within the control of the owner or operator of the source is not a malfunction[.]

As is clear, malfunctions cannot be claimed if they result entirely or in part because of poor maintenance, careless operation, preventable equipment breakdown, or any other cause within

[15] The DENR did not respond to Petitioners' concerns regarding Condition 6.2. The failure of the DENR to respond to these significant comments likely resulted in deficiencies in the modified Title V permit.

the control of Pacer. Unfortunately, nothing in the modified Title V permit requires Pacer to explain the circumstances surrounding any and all malfunctions related to the operation of the new baghouse to verify that they are, in fact, malfunctions and not an attempt to avoid compliance with the applicable standards at Condition 6.1. As a practical matter, it is impossible to enforce the Conditions 6.2 and 6.1 because no monitoring and/or reporting requirements are set forth in the modified Title V permit to ensure the proper application of the opacity exemption during malfunctions related to the operation of the new baghouse.

B. Condition 6.6

Condition 6.6 is flawed because it implies an affirmative defense to Pacer with respect to injunctive relief in relation to the operation of the new baghouse.[16] An affirmative defense to excess emissions may be permitted only with respect to civil penalties, not to injunctive relief, and only when no single source or small group of sources has the potential to cause exceedance of National Ambient Air Quality Standards ("NAAQS") or PSD requirements and when there is no violation of federally promulgated performance standard or emission limitation. Indeed, if an affirmative defense was provided with respect to injunctive relief, Pacer would be allowed to exceed the NAAQS and/or violate PSD requirements with respect to its mica plant, in clear contravention to the CAA.

EPA has also stated on numerous occasions that all excess emissions are considered violations of the CAA. For example, in 1978 EPA adopted a policy which considers all periods of excess emissions to be violations of the CAA. In subsequent EPA policy statements, CAA interpretations, guidance documents, and administrative rules and orders, EPA has consistently and clearly reaffirmed that position. See, Mich. Dep't of Envtl. Quality v. Browner, 230 F.3d

[16] The DENR did not respond to Petitioners' concerns regarding Condition 6.6. The failure of the DENR to respond to these significant comments likely resulted in deficiencies in the modified Title V permit.

181, 183 (6th Cir. 2000) (citing, 42 Fed Reg 21472 (Apr. 27, 1977)); see also, Memorandum from Eric Shaeffer, Dir., Office of Regulatory Enforcement, and John S. Seitz, Dir., Office of Air Quality Planning and Standards, to Reg'l Adm'rs, Regions I-X (Dec. 5, 2001); Memorandum from Steven A. Herman, Assistant Adm'r for Enforcement and Compliance Assurance, to Reg'l Adm'rs, Regions I-X (Sept. 20, 1999); Memorandum from Kathleen M. Bennett, Assistant Adm'r for Air Noise, and Radiation, to Reg'l Adm'rs, Regions I-X (Sept. 29, 1982). EPA has also stated that automatic exemptions will not be allowed. Memorandum from Kathleen M. Bennett, Assistant Adm'r for Air Noise, and Radiation, to Reg'l Adm'rs, Regions I-X, 1 (Sept. 28, 1982). EPA has specifically stated that it "has a fundamental responsibility under the Clean Air Act to ensure that SIPs provide for attainment and maintenance of the national ambient air quality standards (NAAQS) and protection of prevention of significant deterioration (PSD) increments. Thus, an affirmative defense provision that would undermine the fundamental requirement of attainment and maintenance of the NAAQS, or any other requirement of the Clean Air Act," is illegal. Memorandum from Steven A. Herman, Assistant Adm'r for Enforcement and Compliance Assurance, to Reg'l Adm'rs, Regions I-X, 3 (Sept. 20, 1999) (citing, 42 USC § 7410(a) and (1)).

Petitioners do not object to the inclusion of an affirmative defense with respect to emergency conditions in the modified Title V permit. Indeed, the South Dakota SIP explicitly provides for such an affirmative defense. However, neither the South Dakota SIP at ARSD 74:35:05:16:01(18) nor 40 CFR § 70.6(g) explicitly state when the emergency condition exemption is applicable as an affirmative defense. Thus, the applicable requirements related to modified Title V operating permits demand that Condition 6.6 explicitly state that the emergency conditions affirmative defense applies only with respect to civil penalties and not with injunctive

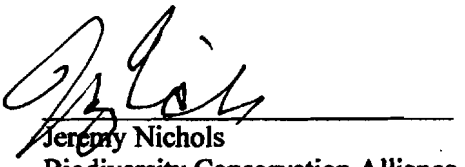
relief. Because the modified Title V permit fails to explain that Condition 6.6 applies only as an affirmative defense with respect to civil penalties and not injunctive relief, the Administrator must object to the issuance of the modified Title V permit for the mica plant.

CONCLUSION

In issuing the modified Title V permit, the DENR failed to respond to Petitioners' significant comments. Furthermore, the modified Title V permit for Pacer's mica plant fails to address emissions from an adjacent and interrelated source, fails to require sufficient particulate matter monitoring, fails to require sufficient opacity monitoring, fails to require prompt reporting of permit deviations, and fails to ensure compliance with the CAA in other ways. Petitioners therefore request the Administrator object to the modified Title V operating permit proposed for issuance by DENR for Pacer's mica plant. As thoroughly explained, the proposed modified Title V permit fails to comply with the requirements of the CAA and other applicable requirements. The Administrator thus has a nondiscretionary duty to issue an objection to the proposed permit within 60 days in accordance with Section 505(b)(2) of the CAA.

Dated this 15th day of May, 2006.

Respectfully Submitted,



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EXHIBITS TO PETITION

1. Proposed Modified Title V Operating Permit for Pacer Corporation White Bear Mica Plant (February 13, 2006);
2. Statement of Basis for Modified Title V Operating Permit for Pacer Corporation White Bear Mica Plant (February 13, 2006);
3. Title V Operating Permit for Pacer Corporation White Bear Mica Plant (March 5, 2005);
4. Comments on Draft Modified Title V Operating Permit for Pacer's White Bear Mica Plant (January 9, 2006);
5. South Dakota Department of Environment and Natural Resources Response to Comments (February 13, 2006)
6. U.S. Forest Service Brite-X Mica Mine Expansion Environmental Assessment (March 2006);
7. Department of Environment and Natural Resources E-mail to EPA Region 8 (April 14, 2006);
8. 1998 Letter from EPA Region 8 to Utah Division of Air Quality (May 21, 1998);
9. EPA Region 7, Policy on Periodic Monitoring for Opacity (April 18, 1997).