

BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF)	
Public Service Company of Colorado,)	
dba Xcel Energy,)	
Pawnee Station)	ORDER RESPONDING TO
)	PETITIONER'S REQUEST THAT
Permit Number: 96OPMR129)	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-2010-XX
)	
)	

**ORDER GRANTING IN PART AND DENYING IN PART PETITION FOR
OBJECTION TO PERMIT**

The United States Environmental Protection Agency (EPA) received a petition, dated February 26, 2010, from WildEarth Guardians (WEG or Petitioner) requesting that the EPA object, pursuant to section 505(b)(2) of the Clean Air Act (CAA or the Act), 42 U.S.C. § 7661d, to the issuance of an operating permit renewal to Public Service Company of Colorado, dba Xcel Energy ("Xcel"), to operate the Pawnee Power Station (Pawnee), located at 14940 County Road 24, near the city of Brush, Morgan County, Colorado. Pawnee is a coal-fired power plant.

The Colorado Department of Public Health and Environment, Air Pollution Control Division ("CDPHE"), issued the Pawnee operating permit 96OPMR129 (Permit) on January 1, 2010, pursuant to title V of the Act, the federal implementing regulations at 40 C.F.R. Part 70, and the Colorado State Implementing Regulations at No. 3 Part C.

The petition alleges that the Permit does not comply with 40 C.F.R. part 70 in that it fails to ensure compliance with: (I) Prevention of Significant Deterioration (PSD) requirements; (II) particulate matter (PM) limits applicable to the coal-fired boiler; (III) other applicable PM emission limits (and fails to require the facility to sufficiently monitor fugitive PM emissions); (IV) the 20-percent opacity limit under the New Source Performance Standards (NSPS), Subpart Y, which applies to coal unloaded to storage activities; (V) PM emission limits applicable to specified point sources (and fails to require the facility to sufficiently monitor PM from those point sources); (VI) CAA §112(j) for air toxics; and (VII) PSD requirements in regard to carbon dioxide (CO₂) emissions.

Based on a review of the petition and other relevant materials, including the Permit and permit record, and relevant statutory and regulatory authorities, I grant in part and deny in part the petition requesting that the EPA object to the Permit.

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 the EPA an operating permit program intended to meet the requirements of title V of the CAA. The EPA granted interim approval to the title V operating permit program submitted by CDPHE effective February 23, 1995. 60 Fed. Reg. 4563 (January 24, 1995); 40 C.F.R. Part 70, Appendix A. *See also* 61 Fed. Reg. 56368 (October 31, 1996) (revising interim approval). Effective October 16, 2000, the EPA granted full approval to CDPHE's title V operating permit program. 65 Fed. Reg. 49919 (August 16, 2000).

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 the 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 (referred to as "applicable requirements"), but does require permits to contain monitoring, recordkeeping, reporting, and other conditions to assure compliance by sources with applicable emission control requirements. *See* 57 Fed. Reg. 32250, 32250-51 (July 21, 1992) (the EPA final action promulgating the Part 70 rule). One purpose of the title V program is to "enable the source, States, the EPA, and the public to better understand the applicable requirements to which the source is subject, and whether the source is meeting those requirements." *Id.* Thus, the title V operating permit program is a vehicle for ensuring that air quality control requirements are appropriately applied to facility emission units and that compliance with these requirements is assured.

Under § 505(a), 42 U.S.C. § 7661d(a), of the CAA and the relevant implementing regulations (40 C.F.R. § 70.8(a)), States are required to submit each proposed title V operating permit to the EPA for review. Upon receipt of a proposed permit, the EPA has 45 days to object to final issuance of the permit if it is determined not to be in compliance with applicable requirements or the requirements under title V. *See* 40 C.F.R. § 70.8(c). If the EPA does not object to a permit on its own initiative, § 505(b)(2) of the Act provides that any person may petition the Administrator, within 60 days of expiration of the EPA's 45-day review period, to object to the permit. [42 U.S.C. § 7661d(b)(2).] *See also* 40 C.F.R. § 70.8(d). The petition must "be based only on objections to the permit that were raised with reasonable specificity during the public comment period provided by the permitting agency (unless the petitioner demonstrates in the petition to the Administrator that it was impracticable to raise such objections within such period or unless the grounds for such objection arose after such period)." CAA § 505(b)(2), 42 U.S.C. § 7661d(b)(2). 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 C.F.R. § 70.8(c)(1);

New York Public Interest Research Group (NYPIRG) v. Whitman, 321 F.3d 316, 333 n.11 (2d Cir. 2003). Under § 505(b)(2) of the Act, the burden is on the petitioner to make the required demonstration to the EPA. *Sierra Club v. Johnson*, 541 F.3d 1257, 1266-67 (11th Cir. 2008); *Citizens Against Ruining the Environment v. EPA*, 535 F.3d 670, 677-78 (7th Cir. 2008); *Sierra Club v. EPA*, 557 F.3d 401, 406 (6th 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, the EPA objects to a permit that has already been issued, the EPA or the permitting authority will modify, terminate, or revoke and reissue the permit consistent with the procedures set forth in 40 C.F.R. §§ 70.7(g)(4) and (5)(i) – (ii), and 40 C.F.R. § 70.8(d).

BACKGROUND

I. The Facility

Pawnee, which is owned and operated by Public Service Company of Colorado, is located approximately three miles southwest of the city of Brush at 14940 County Road 24, in Morgan County, Colorado. The area in which the plant operates is designated as attainment for all criteria pollutants. There are no federal Class I designated areas within 100 kilometers (km) of this facility.

The facility is classified as an electrical services facility under Standard Industrial Classification (SIC) 4911. The facility consists of one coal-fired electric generating unit (EGU) known as the Unit 1 boiler. The Unit 1 boiler and turbine generator is rated at 547 gross Megawatts (MW). Unit 1 utilizes a baghouse to control PM emissions, and low NO_x burners (LNBs) with over-fire air (OFA) to control nitrogen oxide (NO_x) emissions.

In addition to the coal-fired boiler, other significant sources of emissions at this facility include a natural gas-fired auxiliary boiler, fugitive emissions from coal handling and storage, ash handling and disposal, and vehicle traffic on paved and unpaved roads. Point sources of PM include coal handling (crushers, transfer towers and conveying systems), ash handling (ash silo), and the soda ash handling system (for the water treatment system). Additionally, the facility has one cooling tower.

II. The Permit

The original title V operating permit for Pawnee was issued on January 1, 2003. The expiration date for that permit was January 1, 2008. On November 20, 2006, Xcel submitted a title V renewal application to CDPHE. CDPHE published a notice of the draft title V permit on June 3, 2009. The public comment period for the draft permit closed on July 6, 2009. CDPHE proposed the permit to the EPA on November 9, 2009; the EPA did not object to the permit. On January 1, 2010, CDPHE issued the final Permit to Public Service Company of Colorado. Following the issuance of the Permit and receipt by the EPA of the petition, Xcel requested a modification to the Permit which was issued as a minor modification on August 10, 2010.¹

¹ Petitioner petitioned on the January 1, 2010, Permit. The January 1, 2010, Permit is the version referred to throughout this Petition as the "Permit."

ISSUES RAISED BY PETITIONER

I. The Title V Permit Fails to Assure Compliance with PSD Requirements

Petitioner alleges that Pawnee underwent major modifications between 1994 and 1997, without first obtaining the required PSD permit(s) and that the title V Permit must include PSD requirements, such as Best Available Control Technology (BACT) limits, and include a compliance plan, and that must lead the EPA to object to the title V permit. Related to this overarching claim, Petitioner makes three specific claims, which we describe and respond to below.

EPA's Response: In responding to claim I, the EPA notes that it is important to first address what is required to trigger PSD applicability. PSD applies to both the construction of new major stationary sources and major modifications of existing major stationary sources. The issue raised by Petitioner is whether various changes that allegedly took place at Pawnee constituted a major modification. Under the Colorado SIP, a major modification is any physical change in the method of operation of, or addition to, a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the Federal Act or the Act. To determine whether a net emissions increase (and thus a major modification) would occur, the Colorado SIP requires: (1) a determination of the actual emissions increase that would result from a particular physical change or change in the method of operation; and (2) a determination of any other increases and decreases in actual emissions at the source that are contemporaneous with the particular change and are otherwise creditable.² In a petition to object, the burden is on the petitioner to supply information sufficient to demonstrate the validity of each objection raised. CAA section 505(b)(2), 42 U.S.C. §7661d(b)(2).

A. The EPA Issuance of a Notice of Violation (NOV) Constitutes a Finding of Noncompliance

Petitioner alleges that an NOV dated July 26, 2002, and issued to Mr. Olon Plunk, Vice President, Environmental Services, Xcel Energy, by Carol Rushin, EPA Assistant Regional Administrator, R8, Office of Enforcement Compliance and Environmental Justice, ("the 2002 NOV") establishes that the EPA conclusively found that Pawnee was in violation of PSD requirements. In support of its position, Petitioner cites a Second Circuit case in which a state-issued NOV was found to be sufficient to demonstrate noncompliance with PSD for the purpose of title V permitting. Petition at 4-5 (citing *NYPIRG v. Johnson*, 427 F.3d 172, 180 (2d Cir. 2005)). Petitioner also cites to an Eleventh Circuit case, *Sierra Club v. Johnson*, 541 F.3d 1257 (11th Cir. 2008), and asserts that "only one circuit has issued a holding in conflict with the Second Circuit position on NOV's." Petition at 5.

² See SIP-approved Colorado Regulation 3, Part A.I. B. 35.b (definition of major modification) and 36 (definition of net emissions increase). These SIP- approved definitions were applicable at the time of the alleged modifications in 1993-2000.

EPA's Response: As explained below and previously explained by the EPA in several title V Orders, the issuance of an NOV and reference to information contained therein are not sufficient to satisfy the demonstration requirement under section 505(b)(2).³ See generally: *In the Matter of Georgia Power Company, Bowen Steam - Electric Generating Plant, et al*, Final Order at 5-9 (January 8, 2007)(*Georgia Power/Bowen Steam Final Order*); *In the Matter of East Kentucky Power Cooperative, Inc., Hugh L. Spurlock Generating Station, Petition IV-2006-4*, Final Order at 13-18 (August 30, 2007)(*Spurlock Final Order*; and *In the Matter of CEMEX, Inc., Petition VIII-2008-01*, Final Order at 6 (April 20, 2009) (*CEMEX Final Order*). CDPHE, in its response to comments (RTC) on the Permit, stated that an NOV is only an allegation of a violation and is not conclusive evidence that a violation occurred. RTC at 3.

Petitioner asserts that the United States Court of Appeals for the Second Circuit decision *NYPIRG v. Johnson (NYPIRG)* is applicable here. The EPA disagrees. As recently explained by the United States Court of Appeals for the Sixth Circuit, the *NYPIRG* case involved an NOV and enforcement lawsuit filed by the state of New York, which relied on specific state regulations that “may have required a more robust determination than the EPA must make before it issues a notice of violation or files a complaint, prompting the court to lean more heavily on the existence of that prior agency action.” *Sierra Club v. EPA*, 557 F.3d 401, 410 (6th Cir. 2009). The present case regarding Pawnee’s NOV, however, does not involve state regulation. In addition, courts outside of the Second Circuit have declined to find an NOV and/or complaint to be sufficient to meet the demonstration requirement under CAA section 505(b)(2). *Id.*; *Sierra Club v. Johnson*, 541 F.3d 1257, 1259 (11th Cir. 2008).

Under § 113(a)(1) of the Act, “[w]henever, 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 notify the person and the State in which the plan applies of such finding.” Such notification (in this instance an NOV) is simply one early step in the EPA’s enforcement process. 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 (9th Cir. 1988); *Absetec Constr. Servs. v. EPA*, 849 F.2d 765, 768-69 (2d Cir. 1988); *Union Elec. Co. v. EPA*, 593 F.2d 299, 304-06 (8th Cir. 1979); *West Penn Power Co. v. Train*, 522 F.2d 302, 310-11 (3d Cir. 1975). See also *Sierra Club v. Johnson*, 541 F.3d at 1267; *Sierra Club v. EPA*, 557 F.3d at 406-409.

The EPA may consider an NOV or complaint as a relevant factor when determining whether the overall information presented by Petitioner – in light of all the

³ Similarly, EPA’s filing of a complaint for the alleged violations in the NOV is not sufficient to demonstrate applicability and violation of a requirement. *Sierra Club v. Johnson*, 541 F.3d 1257, 1259 (11th Cir. 2008).

factors that may be relevant – demonstrates the applicability of a requirement for the purposes of title V. 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 Petitioner does not present information concerning them, then the EPA may find that Petitioner has failed to present sufficient information to demonstrate that the requirement is applicable.

Another factor the EPA considers is that the Act's enforcement and permitting authorities are complementary and it is reasonable to give full effect to both. *See, e.g., Sierra Club v. EPA*, 557 F.3d at 405-412 (discussing several aspects of the relationship between the enforcement and permitting authorities and processes). The Act provides the EPA relatively short time periods in which to review title V permits. Under section 505(b)(1), the EPA has only 45 days to review a proposed permit and determine if an objection is necessary. Similarly, under section 505(b)(2), the EPA has only 60 days to review a petition seeking an objection and to determine if a petitioner has demonstrated the permit does not comply with the requirements of the Act. Congress deliberately established these short timeframes consistent with its intent that title V permitting be streamlined. The permit process may not allow the EPA to fully investigate and analyze contested allegations. In contrast, the Act provides the EPA with broad enforcement authority and several tools to resolve issues of compliance. For example, section 114 of the Act authorizes the EPA to issue administrative information requests. And the enforcement process can involve significant information gathering through discovery, expert testimony, hearing, and the like.

In evaluating the nature of demonstration burden under section 505(b)(2) of the Act, the EPA also considers the potential impact enforcement cases and title V decisions have on one another, as illustrated by the following example. The EPA could bring a civil judicial enforcement action for violations by a source of a substantive rule. The source and the EPA would be engaged in litigation over the merits of the allegations of the EPA's judicial complaint. Should the EPA prevail in that enforcement proceeding, or should the source and the 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 the EPA for relief, and appeal to the appropriate circuit court. In these circumstances, the source and the 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 CEMEX Final Order*, at 7; *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, at 18-20 (February 19, 2003) (Lovett Final Order); 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. See Permit at page 41 (noting that the permit “shield does not protect the source from any violations that occur as a result of any modifications or reconstruction on which construction commenced prior to permit issuance”).

Based on the above, a petitioner cannot rely solely on the existence of a previously issued NOV to “demonstrate” that a title V operating permit does not comply with the CAA, but rather must provide additional information in support of a claim of deficiency. In this case, as discussed in more detail below, Petitioner has failed to provide sufficient additional information to “demonstrate” that PSD applies. As a result, the EPA denies the petition with respect to this claim.

B. Major Modifications Have Occurred at the Pawnee Plant Triggering PSD

Petitioner alleges that even if the 2002 NOV does not constitute a finding of non-compliance, at a minimum the NOV shows clear evidence of a valid suspicion of noncompliance. Petitioner asserts that “[t]his valid suspicion is confirmed by actual documents from Xcel Energy that demonstrate major modifications occurred at the Pawnee coal-fired power plant without prior approval under PSD.” Petition at 5. Petitioners assert further that Xcel’s documentation demonstrates major modifications occurred during the 1990s.

(1) Reheater Redesign and Replacement

Petitioner alleges that between September 30, 1994, and December 31, 1994, Xcel planned a “major turbine overhaul” and the 256 reheater assemblies in the two middle banks were replaced. Furthermore, Petitioner claims that planned outages data and the EPA operations data confirm a major modification occurred. Petition at 5.

EPA’s response: Petitioner has not demonstrated for purposes of CAA section 505(b)(2) that PSD should have applied to the 1994 reheater redesign and replacement. To the extent this claim is based on information in the NOV, as noted above, the issuance of an NOV, and reference to information contained therein, are not sufficient to satisfy the demonstration requirement under section 505(b)(2). Further, a capital project summary sheet, planned outage data and hours of operation data are not sufficient to make the requisite demonstration that a major modification occurred. The test for PSD applicability is laid out in the Colorado SIP at Regulation 3, Part A. As discussed above, and explained in the RTC (RTC at 7), the test for PSD applicability is whether there has been a major modification under the Colorado SIP. To determine whether a net emissions increase would occur, the Colorado SIP requires: (1) a determination of the actual emissions increase that would result from a particular physical change or change in the method of operation; and (2) a determination of any other increases and decreases in actual emissions at the source that are contemporaneous with the particular change and

are otherwise creditable. In responding to Petitioner's comment on the draft title V permit in this regard, CDPHE concluded that the record was insufficient to indicate a major modification occurred. RTC at 6-7. Petitioner has not submitted information sufficient to demonstrate that CDPHE was incorrect in this regard. Specifically, for example, the emissions information in the petition does not demonstrate the existence of a significant net emissions increase since it fails to show the increase in actual emissions from the reheater design and replacement, identify the contemporaneous period, determine any other contemporaneous increases and decreases in emissions, or determine whether the contemporaneous increases and decreases were creditable. See *CEMEX Final Order* at 3 (stating, "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 . . . 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"). Petitioner has not demonstrated that PSD was triggered and the EPA denies the petition on this issue.

(2) Upgrade of Condenser Tubes

Petitioner alleges that a July 10, 1996, Xcel Request for Specific Appropriation that states that \$4.5 million in emergency funding was allocated for the new condenser tubes demonstrates a showing of non-compliance. Petitioner claims that the project happened during the time period between January 4, 1997, and March 2, 1997. Petitioner relies on the EPA operational data to show minimal operating hours during February, March, and April confirming that the 1997 modification noted in the NOV occurred. Xcel referred to the modification as "major." Petitioner also claims that the NOV states these modifications are not routine maintenance, increased hours of operation, or demand growth. Therefore, Petitioner asserts that the NOV is evidence of Xcel's need for a PSD permit. Petition at 5-6. Petitioner also asserts that activities related to upgrading the condenser tubes were modifications and that these modifications resulted in "net significant increases of criteria pollutants." *Id.*

EPA's response: Petitioner has not demonstrated for purposes of CAA section 505(b)(2) that PSD should have applied to the 1997 condenser tube upgrade. To the extent this claim is based on information in the NOV, as noted above, the issuance of an NOV, and reference to information contained therein, are not sufficient to satisfy the demonstration requirement under section 505(b)(2). Further, planned outages data, request for appropriations to retube the condenser, a project description of the condenser retubing, and hours of operation data alone are not sufficient to demonstrate in the context of a title V petition that a modification occurred. Rather, to demonstrate that a modification triggering the application of PSD has occurred, Petitioner must show the actual emissions increase that would result from a particular physical change in the method of operation, as well as any other increases and decreases in actual emissions at the source that are contemporaneous with the particular change and are otherwise creditable, pursuant to the Colorado SIP Regulations 3 Part A.I.B.36. The petition does not demonstrate that this test was met. For example, the emissions information in the petition does not demonstrate the existence of a significant net emission increase since it

fails to show the increase in actual emissions from the upgrade of the condenser tubes, identify the contemporaneous period, determine any other contemporaneous increases and decreases in emissions, or determine whether the contemporaneous increases and decreases were creditable. See *CEMEX Final Order* at 3.

(3) Other Modifications

Lastly, Petitioner alleges that other modifications have occurred in the past twenty years as shown by Xcel's records: June 1989 – major turbine overhaul; April 1998 – major boiler overhaul; and March 2000 – major boiler overhaul. Petitioner claims that planned outages data confirm that these were major modifications. Petition at 6.

EPA's response: Petitioner has not demonstrated for purposes of CAA section 505(b)(2) that PSD should have applied to the alleged 1989, 1998 and 2000 physical changes at Pawnee. To the extent this claim is based on information in the NOV, as noted above, the issuance of an NOV, and reference to information contained therein, are not sufficient to satisfy the demonstration requirement under section 505(b)(2). Further, planned outage data and emissions reporting data are not in themselves sufficient to demonstrate that a major modification occurred. As discussed above, the test for PSD applicability is set forth in Colorado SIP, Regulation 3. Petitioner has neither used these methods to demonstrate that PSD applies, nor submitted sufficient information to sustain this claim. For example, the petition does not demonstrate the existence of a significant net emission increase since it fails to show the increase in actual emissions from the other modifications, identify the contemporaneous period, determine any other contemporaneous increases and decreases in emissions, or determine whether the contemporaneous increases and decreases were creditable. Therefore, the EPA denies the petition on these issues.

C. The Division's Response to Wild Earth Guardians' Comments Fails to Demonstrate that PSD is not an Applicable Requirement or that a Compliance Plan was not Required

Petitioner alleges that CDPHE failed to adequately respond as to the basis (e.g., citing to current or historical evidence, or lack thereof) that supports CDPHE's conclusion that PSD/NSR was or was not applicable in relation to the circumstances described in sections I.A. and I.B of the Petition. Petition at 7-9 (citing the *CEMEX Order*).

EPA's Response: In the RTC, CDPHE responded to WEG's comments, finding inadequate evidence that a major modification had occurred. In support of this view, CDPHE explained that the fact that certain projects took place does not necessarily indicate that a major modification occurred. CDPHE stated that a major modification is a physical change or change in the method of operation, or addition to, a major stationary source that would result in a significant net emissions increase. Also, CDPHE noted that the EPA and the Colorado Public Service Company have disagreed on the facts at issue in the NOV, and stated that the NOV is not conclusive evidence that PSD had been triggered. CDPHE further explained that the characterization of the projects as a "major

turbine overhaul” and “major boiler overhauls” does not necessarily contemplate the PSD definition of major.⁴

CDPHE discussed the allegations of PSD triggering modifications, and provided a rationale in the context of the title V permit proceeding as to why it was not determining that PSD had been triggered. RTC at 3-7. Petitioners have not demonstrated that CDPHE’s determination was improper. The petition is denied on this issue.

II. The Title V Permit Fails to Assure Compliance with Particulate Matter Limits Applicable to the Coal-Fired Boiler

Petitioner alleges that the title V permit does not require actual monitoring of PM emissions, that stack testing is too infrequent, that CDPHE cannot rely on compliance assurance monitoring (CAM) to meet title V monitoring requirements, and that CDPHE inappropriately rejected requiring the use of PM Continuous Emissions Monitoring Systems (CEMS). The coal-fired boiler has a PM limit of 0.1 pounds per million British thermal units (“lb/MMBtu”). Permit at 5. Petitioner asserts that the underlying requirements do not stipulate monitoring and the permit does not require direct PM monitoring for comparison/compliance with the numeric limit.

Petitioner notes that the PM emission rate for the boiler (0.1 lb/ MMBtu) is listed at Permit Section II, Condition 1.1. Petitioner also notes that the SIP (Regulation No. 1, Section III.A.1.c) does not require monitoring to assure compliance with this SIP-based PM emissions rate for the boiler, and claims that CDPHE failed to add monitoring to the Permit to assure compliance with this SIP-based PM limit as required by the court’s decision in *Sierra Club v. EPA*, 536 F.3d 673, 680 (D.C. Cir. 2008). Petitioner further notes that the DC Circuit Court of Appeals has held that even when the underlying applicable requirement stipulates monitoring, permitting authorities must supplement that monitoring if it is inadequate to assure compliance with permit conditions. *Id.* at 680. Related to this overarching claim, Petitioner makes three specific claims, which we describe and respond to below.

A. The Title V Permit Does Not Require Actual Monitoring of PM Emissions

Petitioner claims Section II, Condition 8.1, in conjunction with Condition 1.1, of the Permit is “vague and unenforceable.” Petitioner alleges that the Permit states “compliance with [PM limits] shall be demonstrated by ... [m]aintaining and [o]perating the baghouses in accordance with the requirements identified in Condition 8.1,” and by “[c]onducting performance tests in accordance with Condition 8.2.” Petition at 10.⁵

⁴ Petitioner critiques CDPHE for questioning whether these overhauls were “modifications” and for stating that routine maintenance and repair activities would not constitute modifications. We note that CDPHE found inadequate evidence that these activities met the PSD definition of major (even if they did constitute modifications).

⁵ Condition 8.1 is the “Operation and Maintenance Requirements” and requires “the boiler baghouse shall be maintained and operated in accordance with good engineering practices.” Condition 8.2 lists the “Stack Testing” requirements for particulate matter and generally requires testing for particulate matter emissions to be performed on the main boiler within 180 days of renewal permit issuance in accordance with the requirements and procedures set forth in EPA Test Method 5. Frequency of testing,

Petitioner further claims, “[n]one of these Conditions explicitly require monitoring of actual particulate matter emissions to ensure compliance with the rate set forth in Section II, Condition 1.1.” Petition at 10. Petitioner claims no correlation is provided to demonstrate that compliance with good engineering practices (“GEP”) will maintain compliance with the numeric limit in Condition 1.1. *Id.* at 10-11. Petitioner further claims that GEP are not defined in the permit and that, as a result, it is impossible to understand what such practices are and whether they will, in fact, be sufficient to assure compliance with the emission rate specified in Condition 1.1. *Id.* Finally, Petitioner alleges that although Condition 8.2 requires stack testing, the condition does not require monitoring of PM emissions to assure compliance with the emission rate in Condition 1.1. *Id.*

B. Stack Testing is too Infrequent, Even if it Could Demonstrate Compliance

Petitioner claims that the stack testing specified in Section II, Condition 8.2 cannot substitute for particulate matter monitoring. Petition at 11. Petitioner claims that this is so for several reasons. First, Petitioner claims that Condition 8.2 requires at most annual stack testing, but also allows for less frequent stack testing (one test every three years if test results are between 50 and 75% of the limit, or one test every five years if test results indicate emissions are less than 50% of the limit) and that this is not adequate to assure compliance with the continuously applicable PM limit. *Id.* Second, Petitioner argues that the heat input rate, on which the PM emission rate is dependent, has varied over the years and concludes that the variability of the heat input data calls into question the validity of relying on annual, or even less frequent, stack testing to assure continuous compliance with the PM emission rate. *Id.* Finally, Petitioner argues that the PM emission rate is an “emission limitation” as defined in CAA § 302(k) and as such applies on a continuous basis and that annual stack testing is, therefore, wholly inadequate to assure compliance. Petition at 12.

C. The Division Cannot Rely on CAM to Meet Title V Monitoring Requirements

Finally, Petitioner claims CDPHE’s RTC reasserts the belief that CAM is sufficient for periodic monitoring as required by §70.6(a)(3)(i)(B) (reliable data from the relevant time period that are representative of the source’s compliance with the permit) and assures compliance with the PM emission rate as required by 40 C.F.R. §70.6(c)(1). (“All Part 70 permits shall contain the following with respect to compliance: ... testing, monitoring, reporting, and recordkeeping requirements sufficient to assure compliance with the terms and conditions of the permit.”) Petition at 12. Petitioner alleges that as written, the Permit does not support a relationship between compliance with CAM requirements and compliance with the limits in Condition 1.1. *Id.* Petitioner further

thereafter shall be annual except that: (1) if the first test required by this renewal permit or any subsequent test results indicate emissions are less than or equal to 50% of the emission limit, another test is required within five years; (2) if the first test required by this renewal permit or any subsequent test results indicate emissions are more than 50%, but less than or equal to 75% of the emission limit, another test is required within three years; (3) if the first test required by this renewal permit or any subsequent test results indicate emissions are greater than 75% of the emission limit, an annual test is required until the provisions of (1) or (2) are met.

asserts that there is nothing in the Permit that demonstrates that compliance with the CAM indicator (opacity) automatically means compliance with the numeric PM limit. Petition at 13.

EPA's Response: We view the three claims above, II.A. – II.C., as being logically related and are, therefore, responding to them together.

The Permit must contain sufficient monitoring to assure compliance with the terms and conditions of the Permit. 40 C.F.R. § 70.6(c)(1). *See also* 40 C.F.R. § 70.6(a)(3)(i)(B). Subsequent to the filing of the Petition, the Colorado Public Service Company applied for and the CDPHE issued a modified permit for Pawnee (the Modified Permit). As was the case with the Permit, the Modified Permit utilizes a three-pronged approach for assuring compliance with the PM limit: (1) performance testing to demonstrate that the specified limit is being met; (2) operation and maintenance of the baghouse to ensure that it continues to operate properly; and (3) the CAM plan to provide a mechanism for assessing the performance of the baghouse on an ongoing basis. While Petitioner finds the requirements as specified in the Permit to be inadequate in several ways, we conclude that viewed as a whole, this three-pronged approach, as specified in the Modified Permit, is adequate to assure compliance with the applicable PM limit.

We begin our analysis with the Modified Permit's CAM provisions. The Modified Permit's CAM requirements and the attached CAM plan pertain to compliance assurance for the PM limit at the boiler. Modified Permit at 8-13; Permit App. H at 1-5. The Modified Permit addresses, among other matters, the Public Service Company's request to have the opacity baseline value for Pawnee's CAM plan written into the permit. (See May 10, 2010, correspondence from George Hess, Acting General Manager – Power Generation Colorado, Xcel Energy, to Jacqueline Joyce, Colorado Department of Public Health and Environment, Air Pollution Control Division, regarding Pawnee Station, Operating Permit No. 96OPMR129, Minor Permit Modification Request.) The baseline opacity value of 5% included in the modification request was based on PM compliance testing required by the Permit and conducted on April 27, 2010, which resulted in a 24-hour average indicator range (as the primary indicator of performance of the baghouse) of 5% opacity being adopted. (See Air Pollution Control Division Stack Test memo.) CDPHE subsequently issued the Modified Permit, which incorporates the 5% opacity baseline value. (Modified Permit at 9 and Appendix H, page 2.)

The rationale for the selected monitoring requirements must be clear and documented in the permit record. 40 C.F.R. § 70.7(a)(5). *See In the Matter of Public Service Company, Hayden Station*, Petition Number VIII-2009-01, at 7-8 (March 24, 2010). In conjunction with issuing the Modified Permit, CDPHE also issued a modified technical review document (TRD) dated July 10, 2010, (the Modified TRD) in support thereof. The Modified TRD contains a discussion regarding the rationale for the adoption of the CAM indicator on pages 5-8. The Modified TRD also presents a rationale regarding the adequacy of the three-pronged approach on pages 7-8. In particular, the Modified TRD contains a section titled, "Addendum to the Technical Review Document prepared for the January 1, 2010, Renewal permit" (TRD at 7). In that section CDPHE states:

The CAM monitoring sets specific indicators that are used to monitor the operation of the control device. Under the CAM requirements, ranges are specified for the indicators and operation of the unit outside of the indicator range is subject to investigation, and, if applicable, corrective action in addition to reporting requirements.

The performance tests provide direct evidence of compliance and provided the baghouse is properly operated and maintained, continued compliance with the standard is expected. The CAM requirements serve as specific indicators that the baghouse is operated properly. As a result, all three prongs together are appropriate measures to assure compliance with the particulate matter emission limitations.

(TRD at 8.)

We conclude that this is a reasonable explanation of why the three-pronged approach, as identified in the Modified Permit, is sufficient to assure compliance with the applicable PM limit. Further, based on the record, we find that CDPHE has in fact established a reasonable three-pronged approach for assuring compliance with the PM limit and specifically find that the primary CAM indicator (a 24-hour average indicator range of 5% opacity) is adequate to assure proper operation and maintenance of the PM control device (baghouse) in the context of this approach. (The intent of the CAM rule is to promote proper operation and maintenance of the control device to assure compliance with the applicable emission limit. 62 Fed. Reg., 54900, 54902 (Oct. 22, 1997).) As the 5% opacity baseline was established on the basis of a performance test demonstrating compliance with the specified PM emission limit, we further find that there is a reasonable correlation between compliance with the 5% opacity baseline and compliance with the specified PM emission rate. Opacity emissions must be monitored by a continuous opacity monitor (COM) (Modified Permit, Appendix H at 2), thereby assuring continuous compliance with the 5% opacity baseline. Thus, the CAM monitoring requirements, along with the other two prongs of the three pronged approach, are adequate to assure compliance with Pawnee's PM limit at the boiler.

We conclude that the Modified TRD contains an explanation of both CDHPE's rationale for the adoption of the 5% opacity CAM indicator and the adequacy of the three-pronged approach for demonstrating compliance with the applicable PM limit. We further conclude that the three-pronged approach for assuring compliance with the applicable PM limit as specified in the Modified Permit is adequate for that purpose. On this basis, we deny the claim.

D. The Division Inappropriately Rejected PM CEMS as a Means of Assuring Compliance with Particulate Limits

In its comments on the Permit, Petitioner requested that CDPHE require the use of PM CEMS to assure compliance with the PM emission limit in the Permit. The Petitioner asserts that the EPA has required other coal-fired power plants to install,

operate, calibrate, and maintain PM CEMS citing consent decrees in *United States v. Tampa Electric Company*, *United States v. Minnkota Power Cooperative*, *United States v. Electric Power Company*, and *United States v. Illinois Power*. In further support of this position, the petition cites to proposed amendments to the NSPS for electric utility steam generating units where the EPA concluded: “[T]here is no technical reason that PM CEMS cannot be installed and operate reliably on electric utility steam generating units.” 70 Fed. Reg. 9865, 9872, (February 27, 2006). The petition acknowledges that the final amendments to the NSPS did not require the utilization of PM CEMS, but also indicates that the EPA has stated that PM CEMS may be used to demonstrate continuous compliance with PM emission limits. Petition at 14.

CDPHE’s RTC affirmed that PM CEMS represent the most direct method of assuring compliance with emission limits. Nevertheless, CDPHE concluded that the CAM requirements in the Permit (in addition to the other two prongs of the three-pronged approach discussed in the EPA’s response to II.A. - C.) were sufficient to assure compliance with the PM emission limit in the Permit. The petition asserts that CDPHE’s failure to require PM CEMS was arbitrary.

In response to CDPHE’s statement that the CAM requirements in the Permit assure compliance with the applicable PM limit, the petition asserts that the CAM requirements do not assure compliance. This is in part because the Permit does not stipulate that an exceedance of the site-specific opacity trigger (CAM indicator) represents a violation of the PM limits. *Id.*

EPA’s response: A title V permit must address all applicable requirements. *E.g.*, 40 C.F.R. §§ 70.5(c)(4) and 70.6(a)(1). It must also include monitoring necessary to assure compliance with applicable requirements. *See* CAA § 504(a). *See also In the Matter of Anadarko Petroleum Corporation*, Petition Number VIII-2010-4, at 2 (February 2, 2011); *In the Matter of U.S. Steel Corporation*, Petition Number V-2009-03, at 1 (January 31, 2011). Petitioner fails to identify any applicable requirement that requires the use of PM CEMS for monitoring compliance with the PM limit specified in the Permit. In fact, Petitioner specifically acknowledges that the underlying applicable requirement (i.e., the Colorado SIP requirements relative to the boiler’s PM limit) does not specify such monitoring. Petition at 10. Petitioner also has not alleged or demonstrated that PM CEMS are the only monitoring that can assure compliance with the PM limit, and, therefore, must be included in the title V permit. As discussed above, we believe that CDPHE’s three pronged approach to monitoring, including the general CAM approach set forth in the Permit and the Pawnee CAM plan (Appendix H of the Permit), is capable of providing adequate PM monitoring at the boiler.

Petitioner has not demonstrated that PM CEMS are required as either an applicable requirement or as monitoring necessary to assure compliance with an applicable requirement. Further, CDPHE adequately explained its rationale for not requiring PM CEMS. Therefore, the EPA denies the petition on the issue that the Permit must include PM CEMS to assure compliance with the boiler’s PM limit.

III. The Title V Permit Fails to Ensure Compliance and Sufficiently Monitor Fugitive Particulate Emissions.

Petitioner alleges generally that Condition 4 of the Permit lacks sufficient monitoring to assure compliance with fugitive PM₁₀ limits. Petition at 15. Petitioner also makes a number of additional allegations concerning the specific inadequacies of the terms in Condition 4.

EPA's response: Petitioner stated in its original comments that the permit failed to include the NSPS opacity requirements for fugitive emissions from coal handling and storage, ash handling and disposal, and paved and unpaved roads (WEG comments at 7-8). Petitioner did not comment on the asserted inadequacy of the fugitive PM emission requirements in Condition 4, as set forth in the SIP, even though these requirements were clearly included in the draft permit that was available for public review. A review of the record reveals that this issue was not raised with reasonable specificity by any commenter. Therefore, pursuant to § 505(b)(2) of the Act, 42 U.S.C. § 7661d(b)(2) and implementing regulations at 40 C.F.R. § 70.8(d), Petitioner's claim was not raised with reasonable specificity during the comment period. *See In the Matter of Waste Management of LA. L.L.C.*, Petition Number VI-2009-01, at 12.) (May 27, 2010), 36-37 (Waste Management Final Order); *CEMEX Final Order* at 3. Petitioner has also failed to explain why it was impracticable to raise these allegations to the State. In addition, there is no evidence that the grounds for objection arose after the public comment period. The EPA, therefore, denies the petition on this claim.

IV. The 20 Percent Opacity Limit Under NSPS Subpart Y Applies to Coal Unloaded to Storage

Petitioner alleges that NSPS Subpart Y, which applies to coal preparation and processing plants, applies to coal unloaded to storage activities at Pawnee (including the outdoor storage pile) and that the Permit fails to identify Subpart Y as an applicable requirement for these activities. The petition states that CDPHE indicated in both the TRD and RTC that NSPS Subpart Y in effect at the time the permit was issued did not apply to coal unloaded to storage activities at Pawnee and asserts that this is incorrect.

The petition notes that CDPHE's interpretation is based on the October 5, 1998, *Federal Register* notice for Subpart Y (63 Fed. Reg. 53288, 53288-90) which appeared to exclude coal unloading to storage from the 20% opacity requirement. The petition further asserts that this interpretation was not explained, nor was a basis provided for the exclusion. The petition cites *U.S. v. Mead Corp.*, 533 U.S. 218, 232 (2001), for the proposition that, while courts typically give some deference to interpretive rules, they do not merit *Chevron* deference, nor do they have any legally binding effect. Finally, the petition asserts that the NSPS in effect clearly applied to "coal storage systems, and coal transfer and loading systems" that process more than 200 tons/day, citing 40 CFR §60.250(2008). The petition contends that CDPHE failed to demonstrate that coal unloaded to storage at Pawnee is not a "coal storage system, and coal transfer and loading system" that processes more than 200 tons/day, and therefore not subject to NSPS Subpart Y. Petition at 19.

EPA's response: As noted by CDPHE in its RTC, "Final revisions to NSPS Subpart Y were published in the *Federal Register* on October 8, 2009 and the final rule defines a 'coal storage system' as 'any facility used to store coal, except for open storage piles.' The final revisions do regulate open storage piles but only piles that are constructed, reconstructed or modified **after** May 27, 2009." RTC at 13 (emphasis in original). The pile at Pawnee has not been modified since May 27, 2009. The EPA, therefore, agrees with CDPHE's conclusion in the RTC on the draft renewal permit that NSPS Subpart Y does not apply to coal unloaded to the outdoor storage pile, and on that basis denies Petitioner's claim.

V. The Title V Permit Fails to Ensure Compliance and Sufficiently Monitor Particulate Emissions from Point Sources

Petitioner argues generally that the title V permit fails to assure compliance with the PM limits in Condition 5 for the coal handling system, ash silo, soda ash handling system, and sorbent storage silos. Petition at 19. Additionally, Petitioner asserts that the Permit fails to assure sufficient monitoring and lacks enforceable standards. *Id.* The only detail Petitioner provided to demonstrate this claim is included in the specific claims in V.B. through D., and we respond to those claims below.

A. Permit Section II, Condition 5 Requires no Actual Monitoring of PM Emissions

Petitioner claims that the Permit violates 40 CFR §70.6(a)(3)(i)(B) in that it does not require sufficient monitoring to provide reliable data from the relevant time period that is representative of the source's compliance with the particulate limits for the coal handling system, ash silo, soda ash handling system, and sorbent storage silos. The petition alleges that this is so because the Permit does not actually require any monitoring of particulate emissions from any point associated with these sources. *Id.* The only detail Petitioner provided to demonstrate this claim is included in the specific claims in V.B. through D., and we respond to those claims below.

B. Condition 5.1

Section II, Condition 5.1 of the Permit establishes presumptive compliance with PM/PM₁₀ limits for the coal handling system (specified in Condition 5.1.6) based on fulfilling the work practice standards in Conditions 5.1.1 through 5.1.5. Petitioner claims generally that these provisions are vague and unenforceable and contends that a system of presumptive compliance is insufficient to ensure that the particulate matter limitations are met. Petitioner relies on a number of factors in support of this contention. First, Petitioner states that Section II, Condition 5.1.1, does not define "good engineering practices" and fails to explain whether such practices will actually ensure compliance with the applicable particulate emission limits. Petitioner contends that without any associated periodic monitoring requirements, the condition is unenforceable as a practical matter and in violation of 40 CFR § 70.6(a)(3)(i)(B). According to Petitioner, the Permit must describe periodic monitoring that is sufficient to assess whether "good engineering practices" have been followed and the Permit must define "good engineering practices"

to achieve this. Similarly, Petitioner contends that Section II, Condition 5.1.3, which relates to the operation of conveyors and crushers, is vague and unenforceable because it neither defines “integrity of enclosures” nor states how such integrity will be maintained to prevent particulate emissions. Petitioner also claims that Condition 5.1.3 does not explain what “used as necessary” means with regards to the operation of water spray suppression systems. Petitioner contends that to ensure compliance with Section II, Condition 5.1.3, the Permit must include periodic monitoring of the conveyor and crusher enclosures and periodic monitoring of the use of the water spray systems, and that the failure to include such requirements constitutes a violation of 40 CFR § 70.6(a)(3). Finally, Petitioner contends that Section II, Condition 5.1.5, violates 40 CFR § 70.6(a) because it fails to identify each transfer point so that the number of transfer points can be monitored to ensure compliance with the 13-transfer point limit.

EPA's response: We view the claims in V.B as logically related and are responding to them together. The only detail Petitioner provided to demonstrate the general claim that the conditions in permit term 5.1 for the coal handling system are vague and unenforceable is included in the specific claims regarding Conditions 5.1.1, 5.1.3, and 5.1.5.

Concerning Condition 5.1.1 for the transfer tower/tripper deck and crusher baghouse, Petitioner has not demonstrated that the monitoring is inadequate to assure compliance. CDPHE explained that the permit requires the transfer tower/tripper deck and crusher baghouse to operate according to manufacturer’s recommendations and good engineering practices. CDPHE further explained that monitoring results, review of operation and maintenance records, and inspection of the source would assure that the manufacturer’s specifications and good engineering practices are met (RTC at 14). CDPHE also explained that the permit requires quarterly inspections of the transfer tower/tripper deck and crusher baghouse (RTC at 15). These requirements are in Condition 5.4, which requires quarterly inspections and records of inspections. CDPHE also noted that the primary control used to reduce particulate matter emissions, including opacity, from the coal handling system is enclosures (RTC at 15). CDPHE provided a rationale for why the permit terms for the transfer tower/tripper deck and crusher baghouse are sufficient to assure compliance, consistent with 40 CFR 70.6(a)(3)(i)(B), and Petitioner has not demonstrated this rationale to be inadequate.

Concerning Condition 5.1.3 for the conveyors and crushers, Petitioner also has not demonstrated that the monitoring is inadequate to assure compliance. CDPHE stated that in its judgment enclosures, in conjunction with water spray systems, are effective in controlling particulate emissions. CDPHE further explained that in some cases, depending on the moisture content in the coal transported, the enclosures alone are effective in controlling particulate matter emissions. As the State also explained, correct operation and maintenance of equipment, as required in Permit Condition 5.1.1, are important in assuring that particulate matter emissions are controlled (RTC at 15). Petitioner has not demonstrated that the terms “integrity of enclosures” and “used as necessary” render the terms in Condition 5.1.3 inadequate to assure compliance. According to the terms of the permit, the coal handling system, including the conveyors and crushers, must remain enclosed and a 20% opacity limit met. These permit terms,

along with the other requirements in Condition 5, ensure the integrity of the enclosures. Concerning the term “used as necessary,” as CDPHE indicated, the primary control used to reduce particulate matter emissions from the coal handling system is enclosures and in some cases a water spray system is utilized to further reduce emissions. In other cases, air within the enclosure is mechanically vented through a baghouse (RTC at 16). The State also explained that the water spray system must be inspected quarterly, with records of the inspections maintained. *Id.*

In addition, Petitioner has not demonstrated that Condition 5.1.5 regarding transfer points must be amended to assure compliance with the PM limits. CDPHE stated that its judgment is that enclosures, in conjunction with water spray systems, are effective in controlling particulate emissions. CDPHE further explained that in some cases, depending on the moisture content in the coal transported, the enclosures alone are effective in controlling particulate matter emissions (RTC at 15). As CDPHE explained, the number of transfer points is more appropriately viewed as a part of the design of the system. As CDPHE stated, the number of transfer points is limited by the design of the equipment and the addition and/or removal of transfer points is unlikely absent a physical modification to the coal conveying system (RTC at 15). In response to Petitioner’s comments that transfer points could be monitoring points, CDPHE noted that the coal handling system in general offers no “points” from which to monitor emissions because it is enclosed (RTC at 16). As the State also noted, correct operation and maintenance of equipment, as required in Permit Condition 5.1.1, are important in assuring that particulate matter emissions are controlled (RTC at 15). CDPHE provided a rationale for monitoring sufficient to assure compliance, and Petitioner has not demonstrated this rationale to be inadequate.

Additionally, in making the general claim that a system of presumptive compliance is insufficient to ensure that the particulate matter limitations are met, it appears that Petitioner may have misinterpreted the intent of Permit Condition 5.1.6, in particular its relationship to the remainder of the permit terms in Condition 5.1. Permit Condition 5.1.6 states that compliance with the PM and PM₁₀ limits is presumed, absent credible evidence otherwise, if the requirements in Conditions in 5.1.1 through 5.1.5 are met. These provisions include Permit Condition 5.3.1, which requires monthly monitoring and records to ensure the coal handling shall not exceed the permit limitations; Permit Condition 5.1.2, which requires quarterly inspections and records of the baghouse and spray system; and Permit Condition 5.1.4, which requires sampling of the coal moisture content. These provisions also include Permit Condition 5.1.3, which requires enclosure of the coal handling system and use of water spray systems, methods which CDPHE asserts effectively control particulate matter emissions. As the State also noted, correct operation and maintenance of equipment, as required in Permit Condition 5.1.1, are important in assuring that particulate matter emissions are controlled (RTC at 15). Also, Condition 5.1.6 provides that monitoring methods other than those identified in the permit can provide evidence that the source was not in compliance. As noted above, Petitioner has not demonstrated that CDPHE failed to provide an adequate rationale for the sufficiency of the monitoring in Condition 5.1. Moreover, Condition 5.1.6 provides for consideration of other information to demonstrate that the source was not in compliance with the permit terms. Petitioner has not demonstrated that the

monitoring in Permit Condition 5.1 is inadequate to ensure compliance, or that Permit Term 5.1 includes a system of presumptive compliance that is insufficient to ensure that particulate matter emission limitations are met.

For the reasons stated above, the EPA denies the petition with regard to the Claims in V.B.

C. Condition 5.6

Petitioner alleges that the Permit Conditions 5.6.2 and 5.6.3 fail to comply with 40 CFR § 70.6(a)(3)(i)(B). Petition at 20. Petitioner claims that sufficient reporting and recordkeeping requirements must be added to assure compliance with the GEP in Conditions 5.6.2 and 5.6.3 for the soda ash silo, soda ash day tanks, and sorbent silos.

EPA's response: In responding to Petitioner's public comments on Conditions 5.6.2 and 5.6.3, CDPHE stated that while manufacturer's recommendations and GEP are not specified in the permit, the Division can review these procedures during an inspection. CDPHE also noted that consistent with the EPA statements in the *Lovett Order*,⁶ manufacturer's specifications are not required to be in the permit. CDPHE also stated that whether GEP and manufacturer's specifications are being used will be determined by monitoring results, review of operation and maintenance records, and inspection of the source. The State indicated that it is not necessary to include specific procedures/requirements for baghouse and bin vent filter. CDPHE further indicated that the EPA Region 8 had advised the use of the term GEP (RTC at 14).

As CDPHE noted, the EPA Region 8 advised that the term GEP could be used to replace the term "documented operating practices and procedures developed by the permittee" (RTC at 14). The EPA Region 8 statement is unrelated to Petitioner's claim, which is whether GEP alone are sufficient to assure compliance with the opacity limits in Condition 5.6. As the EPA noted in the *Lovett Order*, "...manufacturer's recommendations alone are not sufficient periodic monitoring... Most manufacturer's specifications are intended to be guidelines and are frequently updated to improve operator and equipment performance." Manufacturer's specifications alone are not sufficient to assure compliance with the opacity limits in this case. CDPHE has not given an adequate rationale for why the Permit does not require records of the GEP practices or otherwise require monitoring to assure opacity limits for the ash silo, soda ash silo, soda ash day tanks, and sorbent silos are met. The EPA grants the petition on this issue. CDPHE must ensure the permit contains conditions sufficient to assure compliance with the opacity limits for these sources. These conditions may include records of actions taken to meet the requirements of Condition 5.6, including Condition 5.2.1.2. and any other conditions referenced in 5.6 that do not already have records associated with them. Alternatively, CDPHE may develop other conditions sufficient to assure compliance with the opacity limitations in Condition 5.6, consistent with the requirements in the Colorado SIP and requirements under title V.

⁶ See Lovett Final Order at 26.

D. Conditions 5.7 and 5.8

Petitioner asserts that in CDPHE's RTC, the State agreed to require annual Method 9 observations for compliance with the opacity limit for the transfer tower/tripper deck and crusher baghouses. Petitioner asserts that an annual Method 9 test is inadequate to assure compliance with the opacity limits in Condition 5.7 for the transfer tower/tripper deck and crusher/baghouses and rotary plows.

Petitioner also claims that Conditions 5.7 and 5.8 fail to require periodic monitoring sufficient to assure compliance with the opacity limits for the coal handling system point sources other than the transfer tower/tripper deck and crusher baghouses, including crushers and conveyors 7-13, 17, 18. Furthermore, Petitioner takes issue with the expression "shall be presumed to be in compliance" in Conditions 5.7 and 5.8, which refer back to Conditions 5.1.1 through 5.1.3. Petitioner claims that even if Conditions 5.1.1 and 5.1.3 were corrected to include monitoring, presumptive compliance with the opacity requirements is not sufficient to comply with 40 C.F.R. § 70.6(c)(1). Citing *Sierra Club v. EPA*, 536 F.3d 673, 678 (D.C. Cir. 2008), Petitioner concludes that the permit must be revised to require actual monitoring of opacity for all point sources associated with the coal handling system.

EPA's response: In response to Petitioner's public comments on Conditions 5.7 and 5.8, the State explained generally that the primary method to reduce particulate matter emissions, including opacity, from the coal handling system is the use of enclosures. The State also indicated that a water spray system is utilized within the enclosure to further reduce emissions. In response to Petitioner's specific comment that Method 9 testing should be required, CDPHE added a requirement for an annual Method 9 test. The State explained that in general the coal handling system offers no "points" from which to take a Method 9 opacity reading, and that baghouses are operated under negative pressure to capture particulate emissions. The State also explained that its position on compliance with the coal handling opacity limits is supported by the EPA's response in the *Dynergy Order*,⁷ in which the EPA stated that annual Method 9 testing was adequate where coal handling systems were enclosed and coal fugitives are controlled with water spray.

Concerning Petitioner's claim regarding Method 9 testing, CDPHE does point to the rationale articulated in the *Dynergy Order* concerning the adequacy of an annual Method 9 test for monitoring opacity emissions where the coal handling system is enclosed. However, there is no discussion in CDPHE's RTC of why a single test annually would be sufficient to assure compliance under the Colorado SIP at Pawnee, given the characteristics particular to its coal handling system. Additionally, CDPHE does not explain why the frequency of baghouse inspections (quarterly) is adequate to ensure compliance with the opacity limit (RTC at 16-17).

⁷ In *Dynergy*, EPA concluded that "[b]ecause the coal fugitives are properly controlled and a Method 9 test is performed initially, it is acceptable... to perform an annual Method 9 subsequently to ensure that compliance with the opacity standard is maintained." See *In the Matter of Dynergy Northeast Generation*, Petition Order II-2001-06 at 11 (February 14, 2003).

The EPA grants on Petitioner's claim regarding Method 9 testing. CDPHE must provide for monitoring sufficient to assure compliance with the opacity limits for the transfer tower/tripper deck and crusher baghouses in Condition 5.7 or provide a sufficient rationale for why annual observations are sufficient. In identifying monitoring sufficient to assure compliance, CDPHE may include terms and conditions such as those required in the NSPS Subpart Y [See 40 C.F.R. § 60.255(f)(1)(i)], or other monitoring that the State determines is sufficient to assure compliance.

Concerning the claims that Conditions 5.7 and 5.8 fail to require sufficient periodic monitoring for sources other than the transfer tower/tripper deck and crusher baghouses, including crushers and conveyors 7-13, 17, 18, Petitioner has not demonstrated that the monitoring is inadequate to assure compliance with the opacity limits for these sources. CDPHE did explain in its RTC that Method 9, in conjunction with enclosed conveyors and water sprays, is adequate to assure compliance with the opacity limits in Permit Conditions 5.7 and 5.8 for the coal processing and conveying equipment, coal storage system and coal transfer and loading system, including the crushers and conveyors 7-13, 17 and 18. CDPHE also explained that the permit requires quarterly inspections of the water/surfactant spray systems on the crusher, live storage rotary plows, transfer tower/tripper deck and crusher baghouses. The permit also requires records of these inspections. Therefore, the EPA denies Petitioner's claims concerning whether Conditions 5.7 and 5.8 require sufficient periodic monitoring for sources other than the transfer tower/tripper deck and crusher baghouses, including crushers and conveyors 7-13, 17, 18.

With regard to the presumptive compliance language, it appears that Petitioners may have misinterpreted the intent of the permit conditions. The EPA notes that Permit Conditions 5.7.1, 5.8.1, and 5.8.2 provide that monitoring methods other than those identified in the permit can provide evidence that the source was not in compliance. This provision is in addition to the requirement for an annual Method 9 test, enclosed conveyors, the use of a water spray system, and the requirements for quarterly inspections and records of inspections of the water/surfactant spray systems on the crusher, live storage rotary plows, transfer tower/tripper deck and crusher baghouses. Petitioners have not demonstrated that the monitoring in Permit Conditions 5.7.1, 5.8.1, and 5.8.2 for the crushers and conveyors is inadequate to ensure compliance, or that Permit Conditions 5.7 and 5.8 include a system of presumptive compliance that is insufficient to ensure that opacity emission limitations are met. The EPA therefore denies the petition with respect to the use of the terms "presumptive compliance" in Conditions 5.7.1, 5.8.1, and 5.8.2.

VI. The Title V Permit Fails to Ensure Compliance with Air Toxic Limits Under Section 112(j) of the Clean Air Act

Petitioner claims the Permit fails to ensure compliance with CAA § 112(j). Petitioner asserts that Pawnee is a major source of hazardous air pollutants (HAPs) and in light of the February 8, 2008, DC Circuit Court ruling which vacated the Clean Air Mercury Rule (CAMR) rule, CDPHE is required to develop a case-by-case Maximum

Achievable Control Technology (MACT) limit for Pawnee plant and include it in the Permit.

Petitioner notes that CDPHE's RTC asserted, "Although electric utility steam generating units (EUSGUs) were added to the list of source categories in § 112(c) in December 2000, a deadline for promulgation of those standards was never set. Therefore, the case-by-case MACT requirements of 112(j) do not apply to EUSGUs." Petition at 22; RTC at 17.

Petitioner asserts this argument in the RTC is misplaced because there was a deadline for promulgation of MACT standards for EGUs, which was "within 2 years after the date" on which EGUs were added to the list of source categories under § 112. Petitioner also states that § 112(j) requires a standard 18 months after the deadline for promulgation of a MACT and that the requirements of § 112(j) have therefore applied since May 2004.

Petitioner further asserts that the RTC's argument for a §112(j) EGU exemption makes no sense. First, Petitioner asserts that § 112(e)(1) and (3) specifically reference § 112(c)(1), which provides that the list of categories may be periodically revised. Second, Petitioner asserts that § 112(c)(5) sets forth the standards for listing new source categories and sets deadlines for MACT promulgation for new sources. Together, Petitioner asserts that it would seem that § 112(j) was intended to apply to new source categories listed under § 112(c)(1) in accordance with § 112(c)(5).

EPA's response: Section 112(j) does not apply to coal and oil-fired EGUs. As the EPA explained in the preamble to a recent proposed rule addressing § 112(j) (75 Fed. Reg. 15655, 15658 (March 30, 2010)), § 112(j) applies to categories or subcategories of sources that are subject to a schedule for promulgation of MACT standards pursuant to § 112(e)(1) and (3), (See § 112(j)(2)). The scheduling requirements of section 112(e)(1) and (e)(3) apply to categories and subcategories of sources "initially listed" for regulation pursuant to § 112(c)(1). Coal and oil-fired EGUs were not initially listed pursuant to § 112(c)(1) and thus are not covered by the schedules in § 112 (e)(1) and (e)(3). See 57 Fed. Reg. 31576, 15991/1 (July 16, 1992) (initial source category list); and 58 Fed. Reg. 63941 (Dec. 3, 1993) (the schedule establishing deadlines for the promulgation of emission standards for the categories of sources initially listed pursuant to § 112(c)(1) and (3)).

The EPA does not agree with Petitioner's claim that § 112(j) applies to EGUs merely because § 112(c)(5) establishes a deadline for promulgation of MACT standards for source categories "listed after publication of the initial list." As noted above and as Petitioner recognizes, § 112(j) applies to source categories subject to a schedule under § 112(e)(1) and (3). These provisions of § 112(e) clearly address only sources initially listed. Section 112(e)(1) describes the EPA's obligation to promulgate standards for "categories and subcategories of sources initially listed for regulation pursuant to subsection (c)(1) of this section." Petitioner's argument that § 112(j) applies to later-listed sources because § 112(e)(1) refers to § 112(c)(1) and subsection (c)(1) authorizes

revisions to the initial list is without merit because it ignores the fact that § 112(e)(1) by its terms applies only to sources “initially listed” under § 112(c)(1).

In addition, the deadline in § 112(e)(3) for establishing a schedule for promulgation of standards (“24 months after November 15, 1990”) also must be read to apply only to sources “initially listed” under § 112(c)(1) and (c)(3). If it applied to source categories listed “at any time” pursuant to § 112(c)(5), the November 15, 1990, date would be impossible to meet for any listings after that date. The EPA denies Petitioner’s claim that CAA § 112(j) applies to the EGU at Pawnee.

VII. The Title V Permit Fails to Ensure Compliance with Prevention of Significant Deterioration Requirements in Regards to Carbon Dioxide Emissions

Petitioner argues that in issuing the Permit, the Division failed to appropriately assess whether CO₂ is subject to regulation in accordance with PSD requirements and whether the source should go through PSD for CO₂ under the CAA, PSD regulations, and the Colorado SIP. Petitioner argues that PSD for CO₂ is an applicable requirement that must be in the permit.

Petitioner states the PSD permitting threshold under the Colorado SIP is 250 tons per year (tpy) “of any air pollutant subject to regulation under the Federal Act.” Petition at 23. Petitioner also mentions that a major source undergoing a significant modification must only be above the significance threshold.

A. The Division Did Not Assess Whether Carbon Dioxide is Subject to Regulation under the Clean Air Act, in Accordance with the Recent Environmental Appeals Board Ruling

Petitioner argues that the Division inappropriately relied on the EPA’s interpretation of the term “subject to regulation” when issuing the Title V Permit and completely ignored whether CO₂ emissions should be limited by the application of BACT as required by PSD provision in the Colorado SIP, the CAA, and PSD regulations. Petitioner asserts that CDPHE’s purported reliance on the EPA’s interpretation is impermissible after the opinion of the EPA’s Environmental Appeals Board in *In re: Deseret Power Cooperative*. Petitioner acknowledges that the EPA subsequently issued an interpretive memorandum on December 18, 2008, to cure the deficiency identified in the EAB decision, but then argues that, because the EPA’s interpretation is not binding on states, CDPHE must provide its own independent interpretation of the meaning of the phrase “subject to regulation” as set forth in the Colorado SIP. Petitioner then argues that although the Colorado SIP does not define “subject to regulation,” three reasons provide a basis to interpret the SIP to allow the Division to find that CO₂ emissions are subject to regulation: (1) the U.S. Supreme Court held in *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007) that CO₂ is a “pollutant” under the CAA; (2) CO₂ is explicitly regulated under the CO SIP for CEM monitoring, and the permit at issue requires CO₂ CEMs; and (3) CO₂ is “subject to regulation” because it falls under the definition of “air pollutant” in Colorado’s SIP, and the SIP requires PSD provisions to apply to each air pollutant regulated under state law and the CAA. Accordingly, Petitioner argues that the

Administrator must object to this permit “to ensure a consistent and reasonable interpretation of PSD in the context of CO₂ emissions.” Petition at 24.

EPA's response: Petitioner has failed to demonstrate that CDPHE's permit is deficient under the CAA. The petition generally repeats public comments submitted to CDPHE on July 3, 2009. However, CDPHE provided a response to these comments on November 6, 2009, and those responses illustrate that CDPHE did assess, as Petitioner requested, whether CO₂ should be addressed in this permit under PSD permitting regulations in the Colorado SIP. The petition fails to acknowledge or address the response to these comments provided by CDPHE on November 6, 2009, *see MacClarence v. EPA*, 596 F.3d 1123 (9th Cir. 2010), and also fails to demonstrate that CDPHE was required under the PSD provisions of the Colorado SIP to regulate CO₂ emissions in this Title V permit.

First, the Division explained that the existing PSD requirements in the CAA and Colorado SIP were not applicable requirements for this permit, because it was not apparent that Unit 1 of the Pawnee Station had experienced a modification that would trigger the PSD requirements after the original PSD permit for Pawnee was issued in 1976. The Division clearly stated that “even if CO₂ were currently considered a regulated pollutant for purposes of the Colorado program and subject to PSD review and BACT, the PSD review requirements would not apply unless a major modification was made.” RTC at 23. CDPHE concluded that it was “not apparent that any such modification has been made to Unit 1 based on the current proceedings, and thus PSD would not apply for purposes of CO₂ with the respect to this Title V permit action.” *Id.* The petition does not address this aspect of CDPHE's response or demonstrate any error in CDPHE's conclusion that PSD requirements to cover CO₂ were not applicable to Unit 1 of the Pawnee Station.

Second, CDPHE explained that, even if additional PSD requirements were applicable to this permit, that the Colorado PSD provisions did not provide explicit or implied authority for CDPHE to apply these PSD requirements to CO₂. CDPHE explained that the “specific provisions of the PSD regulations reflected in Colorado's [SIP] program, which have been approved by the EPA, do not directly regulate CO₂, for example through significance levels” and thus concluded that the “regulatory provisions of the PSD program [] do not presently afford an explicit foundation for the Division to evaluate this permit with respect to PSD control provisions for CO₂ emissions.” RTC at 23. In addition, the CDPHE response explains that “the Division's implementation practices have maintained consistency with the understanding that the phrase ‘subject to regulation’ does not include pollutants which are only subject to monitoring or reporting requirements.” *Id.* at 23-24. Later in its response, CDPHE explains that “the Division is not interpreting the state regulatory provisions as implying that CO₂ is a regulated pollutant under the Act.” *Id.* at 25. Thus, Petitioner has not demonstrated that CDPHE failed to consider whether the PSD provisions in the Colorado SIP were applicable to CO₂ emissions.

Nevertheless, the EPA notes the lack of any discussion in CDPHE's response of the basis for its understanding that the term “subject to regulation” does not include

pollutants that are only subject to monitoring and reporting requirements. The response notes that CDPHE's interpretation is consistent with the EPA's, but CDPHE does not explain that it incorporated the EPA's reasoning as its basis for interpreting the term "subject to regulation" not to cover pollutants subject to monitoring or reporting requirements. However, the EPA does not consider this weakness in CDPHE's record sufficient to justify granting the petition on this issue. CDPHE provided a rationale for not regulating CO₂ emissions in the Title V permit, including its conclusion that the Colorado SIP did not require CO₂ to be treated as a pollutant "subject to regulation" at the time of its permitting decision.

Colorado's interpretation of that phrase in its SIP as not including pollutants subject only to monitoring or reporting requirements was consistent with the EPA's interpretation at the time under the December 18, 2008, interpretative memorandum. Memorandum from Stephen Johnson, the EPA Administrator, to the EPA Regional Administrators, *EPA's Interpretation of Regulations that Determine Pollutants Covered by Federal Prevention of Significant Deterioration (PSD) Permit Program* (December 18, 2008); *see also* RTC at 25 (noting that CDPHE's interpretation is supported by the EPA's analysis in that memorandum). This memorandum addressed the concern identified by the EAB in the *Deseret* opinion, and thus established an interpretation of the federal PSD regulations that states were authorized, but not required, to follow to the extent state regulations contained similar language. Memorandum from Stephen Johnson at fn. 1. While Administrator Jackson later granted reconsideration of Administrator Johnson's memo, in order to take public comment on the issues addressed in the Memo and the *Deseret* decision, she did not stay the effectiveness of that memo pending reconsideration. Letter from Lisa P. Jackson, the EPA Administrator, to David Bookbinder, Chief Climate Counsel at Sierra Club (February 17, 2009); *see also* 74 *Fed. Reg.* 51535, 51539 (Oct. 7, 2009) (initiating the public comment process for reconsideration of the interpretation, but stating that the interpretation in Administrator Johnson's memo would continue to apply). Thus, CDPHE was not precluded from applying the same interpretation of "subject to regulation" that the EPA applied at the time and that the EPA had determined to be a permissible interpretation of the CAA and the EPA regulations, in deciding not to regulate CO₂ emissions in this title V permit. *See In the Matter of American Electric Power Service Corporation, Southwest Electric Power Company, John W. Turk Plant*, Petition Number VI-2008-01 (Order on Petition) at 20-24 (December 15, 2009); *In the Matter of BP Products North America, Inc., Whiting Business Unit*, Order on Petition, at 12-15 (October 16, 2009).

Furthermore, the three additional arguments provided by Petitioner do not demonstrate that CDPHE was required to include PSD requirements for CO₂ in this permit.⁸ As to the first basis provided in the petition – that the U.S. Supreme Court in *Massachusetts v. EPA* had found that CO₂ was a pollutant under the CAA – we note that

⁸ EPA has since finalized actions that result in the promulgation of final standards controlling the emission of greenhouse gases (GHGs) from light-duty vehicles. *See* 75 *Fed. Reg.* 25324 (May 7, 2010). Under EPA's final interpretation of "subject to regulation," *see* 75 *Fed. Reg.* 17004 (April 2, 2010), the light-duty vehicle rule would control the emission of GHGs such that PSD permitting requirements for GHGs began to apply on January 2, 2011. EPA has also taken corresponding action to ensure orderly application of PSD and title V permitting requirements to GHGs, *see* 75 *Fed. Reg.* 31514 (June 3, 2010).

Petitioner acknowledges that this decision does not mean that CO₂ is “subject to regulation” for PSD purposes. Petition at 24. The fact that CO₂ is a pollutant under the Act does not, in and of itself, make it “subject to regulation” for the purposes of PSD permitting. Accordingly, the Supreme Court’s conclusion in *Massachusetts v. EPA* forms no basis for objecting here.

As to the second basis regarding regulation of CO₂ under the Colorado SIP for CEM monitoring, we note that pursuant to § 505(b)(2) of the Act, 42 U.S.C. § 7661d(b)(2) and implementing regulations at 40 C.F.R. § 70.8(d), a petition must be based on objections raised with reasonable specificity during the public comment period provided by the permitting agency, unless 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. The EPA reviewed Petitioner’s comments submitted to Colorado during the public comment period for this title V permit, and they did not include any discussion of the CO₂ regulations or the particular CO₂ CEMs in this permit. See WEG Comments at 10-12 (addressing only the *Massachusetts* case and the air pollutant definition to argue that CO₂ was “subject to regulation” under the Colorado SIP). A review of the record also reveals that this issue was not raised with reasonable specificity by any other commenter. Petitioner has also failed to explain why it was impracticable to provide this reason to the State during the public comment period. Thus, the alleged regulation of CO₂ CEMs, either generally or in this permit, does not provide a basis for objecting to this permit. See *Waste Management Final Order* at 36-37. (May 27, 2010), 36-37; *CEMEX Final Order* at 3. Moreover, as explained above, the Division provided an interpretation of the Colorado SIP finding that pollutants are not subject to PSD permitting requirements when they are subject only to monitoring and reporting requirements, and we have found no basis to reject that interpretation. Thus, there is no additional basis for objecting on this point.

As its third ground, Petitioner argues that CO₂ is “subject to regulation” because it falls under the definition of “air pollutant” in Colorado’s SIP, and the SIP requires PSD provisions to apply to each air pollutant regulated under state law and the CAA. The petition simply asserts that CO₂ is regulated under the definition because it is “a gas emitted into the atmosphere” and then argues that this alleged regulation triggers the obligation that PSD provisions apply to the pollutant. Petition at 24. However, at no point does the petition explain how falling within the bounds of the air pollutant definition alone “regulates” a pollutant. Accordingly, there is also no basis for objecting on this ground.

For the reasons stated above, the EPA denies the petition to object to CDPHE’s determination that CO₂ was not subject to PSD regulation at the time this permit was issued.

B. Significant Increases in CO₂ Emissions Have Occurred at the Pawnee Coal-Fired Power Plant

Petitioner claims that significant increases of CO₂ have occurred at Pawnee, relying on the EPA’s Clean Air Market data for 1998 through 2008. Petitioner presents a

table of increases, and decreases, in total CO₂ emissions to argue that in 2006, there was an increase of more than 600,000 tpy of CO₂ emissions in the two-year baseline average emissions. Petitioner claims that under Colorado regulations, this amounts to a significant increase of a regulated pollutant at an existing major source, such that this permit must address PSD BACT for CO₂ emissions.


EPA's response: Petitioner's comments on the draft permit did not include any discussion of the CO₂ emission increases now set forth in this petition, even though these data were clearly available during the period the draft permit was available for public review. Compare WEG Comments at 10-12 (addressing failure of permit to consider CO₂ emissions) to *id.* at 4-5 (presenting SO₂ and NO_x emissions data taken from the EPA's Clean Air Market Data). A review of the record also reveals that this issue was not raised with reasonable specificity by any other commenter. Therefore, pursuant to § 505(b)(2) of the Act, 42 U.S.C. § 7661d(b)(2) and implementing regulations at 40 C.F.R. § 70.8(d), Petitioner's claim was not raised with reasonable specificity during the comment period. See *Waste Management Final Order* at 36-37. (May 27, 2010), 36-37; *CEMEX Final Order* at 3 (April 20, 2009). Petitioner has also failed to explain why it was impracticable to raise these allegations to the State during the public comment period. Therefore, these arguments cannot demonstrate a basis for objection, and the EPA denies the petition on this claim.

In addition, even if the EPA were to consider these claims, the EPA denies the petition to object on this issue because Petitioner has not demonstrated that PSD requirements should have applied to the CO₂ emission increases. As explained above, CDPHE determined that greenhouse gases, including CO₂, were not subject to regulation under the PSD program contained in the Colorado SIP at the time this permitting action occurred (or during any prior time, including the period covered by the emissions data presented in the Petition). Accordingly, any changes in CO₂ emissions that may have occurred would not have triggered PSD permitting obligations. See also the EPA's Response to I. B.(1) (finding that presentation of similar SO₂ and NO_x emissions data was insufficient to show that PSD applied under the Colorado SIP). For these reasons, the EPA denies the petition to object on this issue.

CONCLUSION

For the reasons set forth above and pursuant to section 505(b)(2) of the Clean Air Act and 40 C.F.R. § 70.8(d), I hereby grant in part and deny in part the petition from WildEarth Guardians objecting to the title V Permit issued to Xcel for the Pawnee coal-fired power plant.

Dated: ~~JUN 30 2011~~



Lisa P. Jackson
Administrator