

On July 2, 2020, the U.S. Court of Appeals for the Tenth Circuit issued a decision vacating and remanding a portion of EPA's October 16, 2017 response to the PacifiCorp-Hunter petition. On January 13, 2021, the EPA Administrator issued an Order responding to the court's remand.

BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF	)	PETITION No. VIII-2016-4
	)	
PACIFICORP ENERGY	)	
HUNTER POWER PLANT	)	ORDER RESPONDING TO
EMERY COUNTY, UTAH	)	PETITION REQUESTING
	)	OBJECTION TO THE ISSUANCE OF
PERMIT No. 1500101002	)	A TITLE V OPERATING PERMIT
	)	
ISSUED BY THE UTAH DEPARTMENT OF	)	
ENVIRONMENTAL QUALITY,	)	
DIVISION OF AIR QUALITY	)	
	)	

ORDER DENYING A PETITION FOR OBJECTION TO PERMIT

I. INTRODUCTION

The U.S. Environmental Protection Agency (EPA) received a petition dated April 11, 2016 (the Petition) from Sierra Club (the Petitioner), pursuant to section 505(b)(2) of the Clean Air Act (CAA or Act), 42 U.S.C. § 7661d(b)(2). The Petition requests that the EPA object to the operating permit no. 1500101002 (2016 Permit) issued by the Utah Department of Environmental Quality, Division of Air Quality (UDAQ) to PacifiCorp Energy for the Hunter Power Plant (PacifiCorp-Hunter or the facility) in Castle Dale, Emery County, Utah. The operating permit was proposed pursuant to title V of the CAA, CAA §§ 501–507, 42 U.S.C. §§ 7661–7661f, and Utah Admin. Code R307-415. *See also* 40 C.F.R. part 70 (title V implementing regulations). This type of operating permit is also referred to as a title V permit or part 70 permit.

Based on a review of the Petition and other relevant materials, including the 2016 Permit, the permit record, and relevant statutory and regulatory authorities, and as explained further below, the EPA denies the Petition requesting that the EPA object to the 2016 Permit.

II. STATUTORY AND REGULATORY FRAMEWORK

A. Title V Permits

Section 502(d)(1) of the CAA, 42 U.S.C. § 7661a(d)(1), requires each state to develop and submit to the EPA an operating permit program to meet the requirements of title V of the CAA and the EPA's implementing regulations at 40 C.F.R. part 70. The state of Utah submitted a title V program governing the issuance of operating permits on April 14, 1994. The EPA granted full approval of Utah's title V operating permit program in 1995. 60 Fed. Reg. 30192 (June 8, 1995).

This program, which became effective on July 10, 1995, is currently codified in Utah Admin. Code R307-415.¹

All major stationary sources of air pollution and certain other sources are required to apply for title V operating permits that include emission limitations and other conditions as necessary to assure compliance with applicable requirements of the CAA, including the requirements of the applicable implementation plan. CAA §§ 502(a), 504(a), 42 U.S.C. §§ 7661a(a), 7661c(a). The title V operating permit program generally does not impose new substantive air quality control requirements, but does require permits to contain adequate monitoring, recordkeeping, reporting, and other requirements to assure sources' compliance with applicable requirements. 57 Fed. Reg. 32250, 32251 (July 21, 1992); *see* CAA § 504(c), 42 U.S.C. § 7661c(c). One purpose of the title V program is to "enable the source, States, the EPA, and the public to understand better the requirements to which the source is subject, and whether the source is meeting those requirements." 57 Fed. Reg. at 32251. Thus, the title V operating permit program is a vehicle for compiling the air quality control requirements as they apply to the facility's emission units and for providing adequate monitoring, recordkeeping, and reporting to assure compliance with such requirements.

B. Review of Issues in a Petition

State and local permitting authorities issue title V permits pursuant to their EPA-approved title V programs. Under CAA § 505(a), 42 U.S.C. § 7661d(a), and the relevant implementing regulations found at 40 C.F.R. § 70.8(a), states are required to submit each proposed title V operating permit to the EPA for review. Upon receipt of a proposed permit, the EPA has 45 days to object to final issuance of the proposed permit if the EPA determines that the proposed permit is not in compliance with applicable requirements under the Act. CAA § 505(b)(1), 42 U.S.C. § 7661d(b)(1); *see also* 40 C.F.R. § 70.8(c). If the EPA does not object to a permit on its own initiative, any person may petition the Administrator, within 60 days of the expiration of the EPA's 45-day review period, to object to the permit. CAA § 505(b)(2), 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d).

The petition shall be based only on objections to the permit that were raised with reasonable specificity during the public comment period provided by the permitting authority (unless the petitioner demonstrates in the petition to the Administrator that it was impracticable to raise such objections within such period or unless the grounds for such objection arose after such period). CAA § 505(b)(2), 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d)). In response to such a petition, the Act requires the Administrator to issue an objection if a petitioner demonstrates that a permit is not in compliance with the requirements of the Act. CAA § 505(b)(2), 42 U.S.C.

¹ The Utah operating permit program regulations that were approved by the EPA were originally codified in Utah Admin. Code R307-15. These regulations were subsequently re-numbered to R307-415. The Petition refers to the relevant provisions of the Utah Administrative Code as the Utah Air Conservation Regulations or Utah Air Conservation Rules (UACR). Both the Utah Administrative Code and UACR section numbers and content are identical.

§ 7661d(b)(2); 40 C.F.R. § 70.8(c)(1).² Under section 505(b)(2) of the Act, the burden is on the petitioner to make the required demonstration to the EPA.³

The petitioner's demonstration burden is a critical component of CAA § 505(b)(2). As courts have recognized, CAA § 505(b)(2) contains both a "discretionary component," to determine whether a petition demonstrates to the Administrator that a permit is not in compliance with the requirements of the Act, and a nondiscretionary duty to object where such a demonstration is made. *Sierra Club v. Johnson*, 541 F.3d at 1265–66 ("[I]t is undeniable [that CAA § 505(b)(2)] also contains a discretionary component: it requires the Administrator to make a judgment of whether a petition demonstrates a permit does not comply with clean air requirements."); *NYPIRG*, 321 F.3d at 333. Courts have also made clear that the Administrator is only obligated to grant a petition to object under CAA § 505(b)(2) if the Administrator determines that the petitioner has demonstrated that the permit is not in compliance with requirements of the Act. *Citizens Against Ruining the Environment*, 535 F.3d at 677 (stating that § 505(b)(2) "clearly obligates the Administrator to (1) determine whether the petition demonstrates noncompliance and (2) object *if* such a demonstration is made" (emphasis added)).⁴ When courts have reviewed the EPA's interpretation of the ambiguous term "demonstrates" and its determination as to whether the demonstration has been made, they have applied a deferential standard of review. *See, e.g., MacClarence*, 596 F.3d at 1130–31.⁵ Certain aspects of the petitioner's demonstration burden are discussed below; however, a more detailed discussion can be found in *In the Matter of Consolidated Environmental Management, Inc., Nucor Steel Louisiana*, Order on Petition Nos. VI-2011-06 and VI-2012-07 at 4–7 (June 19, 2013) (*Nucor II Order*).

The EPA has looked at a number of criteria in determining whether a petitioner has demonstrated noncompliance with the Act. *See generally Nucor II Order* at 7. For example, one such criterion is whether the petitioner has addressed the state or local permitting authority's decision and reasoning. The EPA expects the petitioner to address the permitting authority's final decision, and the permitting authority's final reasoning (including the state's response to comments), where these documents were available during the timeframe for filing the petition. *See MacClarence*, 596 F.3d at 1132–33.⁶ Another factor the EPA has examined is whether a

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

³ *WildEarth Guardians v. EPA*, 728 F.3d 1075, 1081–82 (10th Cir. 2013); *MacClarence v. EPA*, 596 F.3d 1123, 1130–33 (9th Cir. 2010); *Sierra Club v. EPA*, 557 F.3d 401, 405–07 (6th Cir. 2009); *Sierra Club v. Johnson*, 541 F.3d 1257, 1266–67 (11th Cir. 2008); *Citizens Against Ruining the Environment v. EPA*, 535 F.3d 670, 677–78 (7th Cir. 2008); *c.f. NYPIRG*, 321 F.3d at 333 n.11.

⁴ *See also Sierra Club v. Johnson*, 541 F.3d at 1265 ("Congress's use of the word 'shall' . . . plainly mandates an objection *whenever* a petitioner demonstrates noncompliance." (emphasis added)).

⁵ *See also Sierra Club v. Johnson*, 541 F.3d at 1265–66; *Citizens Against Ruining the Environment*, 535 F.3d at 678.

⁶ *See also, e.g., In the Matter of Noranda Alumina, LLC*, Order on Petition No. VI-2011-04 at 20–21 (December 14, 2012) (denying a title V petition issue where petitioners did not respond to the state's explanation in response to comments or explain why the state erred or the permit was deficient); *In the Matter of Kentucky Syngas, LLC*, Order on Petition No. IV-2010-9 at 41 (June 22, 2012) (denying a title V petition issue where petitioners did not acknowledge or reply to the state's response to comments or provide a particularized rationale for why the state erred or the permit was deficient); *In the Matter of Georgia Power Company*, Order on Petitions, at 9–13 (January 8, 2007) (*Georgia Power Plants Order*) (denying a title V petition issue where petitioners did not address a potential defense that the state had pointed out in the response to comments).

petitioner has provided the relevant analyses and citations to support its claims. If a petitioner does not, the EPA is left to work out the basis for petitioner's objection, contrary to Congress's express allocation of the burden of demonstration to the petitioner in CAA § 505(b)(2). *See MacClarence*, 596 F.3d at 1131 (“[T]he Administrator’s requirement that [a title V petitioner] support his allegations with legal reasoning, evidence, and references is reasonable and persuasive.”).⁷ Relatedly, the EPA has pointed out in numerous orders that, in particular cases, general assertions or allegations did not meet the demonstration standard. *See, e.g., In the Matter of Luminant Generation Co., Sandow 5 Generating Plant*, Order on Petition Number VI-2011-05 at 9 (January 15, 2013).⁸ Also, the failure to address a key element of a particular issue presents further grounds for the EPA to determine that a petitioner has not demonstrated a flaw in the permit. *See, e.g., In the Matter of EME Homer City Generation LP and First Energy Generation Corp.*, Order on Petition Nos. III-2012-06, III-2012-07, and III-2013-02 at 48 (July 30, 2014).⁹

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

C. New Source Review

The major New Source Review (NSR) program is comprised of two core types of preconstruction permit requirements for major stationary sources. Part C of title I of the CAA establishes the Prevention of Significant Deterioration (PSD) program, which applies to major new sources and major modifications of existing major sources for pollutants for which an area is designated as attainment or unclassifiable for the national ambient air quality standards (NAAQS) and other pollutants regulated under the CAA. CAA §§ 160–169, 42 U.S.C. §§ 7470–7479. Part D of title I of the Act establishes the major nonattainment NSR program, which

⁷ *See also In the Matter of Murphy Oil USA, Inc.*, Order on Petition No. VI-2011-02 at 12 (September 21, 2011) (denying a title V petition claim where petitioners did not cite any specific applicable requirement that lacked required monitoring); *In the Matter of Portland Generating Station*, Order on Petition, at 7 (June 20, 2007) (*Portland Generating Station Order*).

⁸ *See also Portland Generating Station Order* at 7 (“[C]onclusory statements alone are insufficient to establish the applicability of [an applicable requirement].”); *In the Matter of BP Exploration (Alaska) Inc., Gathering Center #1*, Order on Petition Number VII-2004-02 at 8 (April 20, 2007); *Georgia Power Plants Order* at 9–13; *In the Matter of Chevron Products Co., Richmond, Calif. Facility*, Order on Petition No. IX-2004–10 at 12, 24 (March 15, 2005).

⁹ *See also In the Matter of Hu Honua Bioenergy*, Order on Petition No. IX-2011-1 at 19–20 (February 7, 2014); *Georgia Power Plants Order* at 10.

applies to those NAAQS pollutants for which an area is designated as nonattainment. CAA §§ 171–193, 42 U.S.C. §§ 7501–7515.

The PSD program requires a major stationary source to obtain a PSD permit before beginning construction of a new facility or undertaking certain modifications. CAA § 165(a)(1), 42 U.S.C. § 7475(a)(1); CAA § 169(2)(C), 42 U.S.C. § 7479(2)(C). Once a source is subject to the PSD permitting program, permitting authorities must address several requirements in issuing a permit, including: (1) an evaluation of the impact of the proposed new or modified major stationary source on ambient air quality in the area, and (2) the application of the Best Available Control Technology (BACT) for each pollutant subject to regulation under the Act. CAA §§ 165(a)(3), (4), 42 U.S.C. §§ 7475(a)(3), (4); 40 C.F.R. § 52.21(j), (k).

The EPA has two largely identical sets of regulations implementing the PSD program. One set, found at 40 C.F.R. § 51.166, contains the requirements that state PSD programs must meet to be approved as part of a state implementation plan (SIP). The other set of regulations, found at 40 C.F.R. § 52.21, contains the EPA’s federal PSD program, which applies in areas without a SIP-approved PSD program. The EPA has approved Utah’s PSD program as part of its SIP. *See* 47 Fed. Reg. 6472 (February 12, 1982) (initial approval of Utah PSD program); 40 C.F.R. § 52.2320(c) (listing EPA-approved PSD provisions contained in Utah Admin. Code R307). Utah’s PSD provisions are currently contained in Utah Admin. Code R307-101-1, R307-101-2, R307-110-09, R307-401, and R307-405, as approved by the EPA into Utah’s SIP.¹⁰

CAA § 110(a)(2)(c), 42 U.S.C. § 7410 (a)(2)(c), requires that every SIP include a program to regulate the construction and modification of stationary sources, including a permit program as required by parts C and D of title I of the Act, to ensure attainment and maintenance of the NAAQS. While parts C and D address the major NSR program for major sources, section 110(a)(2)(c) addresses the permitting program for new and modified minor sources, and minor modifications to major sources. The EPA commonly refers to the latter program as the “minor NSR” program. States must develop minor NSR programs to attain and maintain the NAAQS. The federal requirements for state minor NSR programs are outlined in 40 C.F.R. § 51.160 through 51.164. These federal requirements for minor NSR programs are less prescribed than those for major sources, and, as a result, there is a larger variation of requirements in the minor NSR programs. Utah’s EPA-approved minor NSR SIP rules are codified at Utah Admin. Code R307-101-1, R307-101-2, R307-110-3, and R307-401.¹¹

In Utah, both major and minor NSR permits issued by UDAQ are termed Approval Orders. An application to obtain an Approval Order is referred to as a Notice of Intent.

¹⁰ Many of Utah’s PSD and minor NSR regulations were initially codified in different numbered sections of the Utah Administrative Code, which were subsequently re-numbered.

¹¹ *See supra* note 10.

III. BACKGROUND

A. The PacifiCorp-Hunter Facility

PacifiCorp Energy is the majority owner and sole operator of the Hunter Power Plant, located in Castle Dale, Emery County, Utah. The PacifiCorp-Hunter plant is comprised of three coal-fired electric utility steam generating units (designated as Units 1, 2 and 3), with a total gross capacity of 1,455 megawatts (MW). Units 1 and 2 are rated at 480 MW and feature dry bottom, tangentially-fired boilers. Unit 3 is rated at 495 MW and features a dry bottom, wall-fired boiler. All three units are currently equipped with low nitrous oxide (NO_x) burners/overfire air (for NO_x control), a wet flue gas desulfurization system (or scrubber) with no bypass (for sulfur dioxide, or SO₂ control), and a baghouse (for particulate matter, or PM control). The facility is a major stationary source of air pollution.

B. Permitting History

UDAQ initially issued a title V permit to the PacifiCorp-Hunter facility in 1998. Following various permit actions, including several permit amendments and modifications and a renewal permit action in 2005 that was not completed, UDAQ released a draft renewal title V permit on September 15, 2015. After a public comment period that closed on November 13, 2015, UDAQ submitted a proposed title V permit, including a memorandum containing UDAQ's Response to Public Comments (RTC), to the EPA on January 11, 2016. The EPA's 45-day review period concluded on February 25, 2016. The EPA did not object to the proposed permit. UDAQ issued a final title V permit to PacifiCorp-Hunter on March 3, 2016.

C. Timeliness of Petition

Pursuant to the CAA, if the EPA does not object to a proposed permit during its 45-day review period, any person may petition the Administrator within 60 days after the expiration of the 45-day review period to object. 42 U.S.C § 7661d(b)(2). The EPA's 45-day review period expired on February 25, 2016. Thus, any petition seeking the EPA's objection to the 2016 Permit was due on or before April 25, 2016. The Petition was dated and received on April 11, 2016, and, therefore, the EPA finds that the Petitioner timely filed the Petition.

IV. DETERMINATIONS ON CLAIMS RAISED BY THE PETITIONER

Claim A: The Petitioner's Claim that "The Administrator Must Object to the Hunter Permit Because It Fails to Include PSD Requirements For Major Modifications Constructed at Hunter in the Late 1990s."

Petitioner's Claim: The Petitioner claims that the PacifiCorp-Hunter title V permit is deficient because it does not include PSD permitting program requirements—specifically, BACT as well as terms and conditions necessary to adequately protect NAAQS and PSD increments—that the Petitioner asserts are "applicable requirements." Petition at 9, 16. The Petitioner also asserts that the 2016 Permit is deficient because it lacks a compliance schedule to ensure that PacifiCorp-Hunter is brought into compliance with the PSD requirements the Petitioner claims are

applicable. *Id.* at 9. The Petitioner claims that these PSD requirements are applicable because they were triggered by modifications to the facility between 1997 and 1999 involving boiler projects and turbine upgrades at all three PacifiCorp-Hunter units, which the Petitioner contends should have been considered “major modifications.” *Id.* at 9, 16.

The Petitioner also claims that in applying for an Approval Order authorizing the 1997–1999 boiler and turbine modifications, PacifiCorp-Hunter requested and accepted emission limits restricting its potential to emit to the PSD baseline emission inventory, in order to avoid triggering PSD requirements. *Id.* at 10.¹²

The Petitioner asserts that at the time the projects at issue were undertaken, the Utah SIP regulations for determining whether a project constitutes a major modification were based on the same applicability test as in the EPA’s 1980 federal PSD regulations. *Id.* (citing 45 Fed. Reg. at 52676-748 (August 7, 1980)).¹³ The Petitioner claims that these rules required a comparison of pre-project actual emissions to post-project potential emissions. *Id.* (citing definitions of “major modification,” “net emissions increase,” and “actual emissions” contained in Utah Air Conservation Regulation R307-1-1 (1995)).¹⁴

The Petitioner asserts that, instead of determining applicability by comparing pre-project actual emissions to post-project potential emissions, UDAQ compared the PSD Baseline Inventory (which the Petitioner claims was similar to “allowable” emissions, rather than actual emissions) to post-project potential emissions. *Id.* at 10–11.¹⁵ The Petitioner asserts the “PSD Baseline Inventory” values relied upon were much higher than the facility’s actual emissions during the pre-project baseline period. *Id.* at 10–12. The Petitioner presents a summary of the Petitioner’s own calculations (based on U.S. Energy Information Administration data and the EPA’s AP-42 emission factors) estimating the actual baseline emission values that the Petitioner claims should have been used instead of the “PSD Baseline Inventory.” *See id.* at 11–13. Based on these estimated actual emission values, the Petitioner claims that the modifications should have been projected to result in a significant emission increase of SO₂, NO_x, PM, and other pollutants at each PacifiCorp-Hunter unit. *Id.* at 12. Moreover, the Petitioner claims that there were no creditable, contemporaneous decreases at the units, and accordingly that the 1997–1999 projects should have been projected to result in a significant net emissions increase of SO₂, NO_x, PM, and other pollutants. *Id.* at 14.

¹² The Petitioner asserts that these emission limits became ineffectual due to the relaxation of those limits in a 1998 title V permitting action, which incorporated exemptions from these limits during startup, shutdown, and malfunction periods. *Id.* at 15.

¹³ The Petitioner claims that although the EPA revised its PSD applicability rules in 1992, the EPA did not approve those changes into the Utah SIP until 2004. Petition at 11 (citing 69 Fed. Reg. 51368, 51368–70 (August 19, 2004); 40 C.F.R. § 52.2320(c)(58)(i)(A)).

¹⁴ The Petitioner also claims that a limited exception within the PSD rules for projects that can be classified as routine maintenance, repair, and replacement, was not applicable. *Id.* at 11.

¹⁵ The Petitioner claims that EPA recently recognized that UDAQ had been applying the same type of faulty PSD applicability analyses in other permitting actions. *Id.* at 14. Specifically, the Petitioner claims that in a permit action for the Deseret Power Electric Cooperative’s Bonanza Plant, the EPA highlighted that UDAQ’s evaluation of a project “failed to use actual pre-project emissions as the baseline for determining the amount of increase.” *Id.* at 14–15 (citations omitted).

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

In responding to the Petitioner's comments on the draft permit, UDAQ did not consider the Petitioner's comments relevant to the title V permit for PacifiCorp-Hunter. UDAQ stated that "[a]ny concerns regarding previous permits should have been raised during public comments at the time those permitting actions took place . . . [A] Title V operating permit does not impose any new requirements but simply brings together all existing requirements from pervious [sic] permitting actions to aid enforcement The first 100 pages of Sierra Club's letter pertain to the underlying requirements that are now simply incorporated into the Title V operating permit." RTC at 2–3.

This response by UDAQ raises the fundamental issue of whether decisions made during previous preconstruction permitting, like the 1997 Approval Order, should be reconsidered when issuing or renewing a title V operating permit. The Petitioner's Claim A asks the EPA to object to the title V permit for PacifiCorp-Hunter because the title V permit does not include PSD requirements that the Petitioner claims are applicable due to modifications that were approved in the 1997 Approval Order issued by UDAQ under its SIP-approved minor NSR program. The EPA has previously considered similar preconstruction permitting issues when they were raised in citizen petitions for an EPA objection to a state-issued title V permit, but the nature of UDAQ's response and the facts of this case justify a renewed examination of whether such a review is necessary or appropriate in this instance. After a review of the structure and text of the CAA and the EPA's regulations in part 70, in light of the circumstances presented here, the EPA has concluded that the title V permitting process is not the appropriate forum to review the preconstruction permitting decisions addressed in Claim A of the Petition. The EPA is aware that this conclusion differs from the agency's position in prior title V petition orders involving similar circumstances. However, for the legal and policy reasons discussed below, the EPA believes this position better aligns with the structure of the Act and the EPA's original understanding of the relationship between the operating and construction permitting programs under the CAA after the enactment of title V.

Section 504 of the CAA requires that title V permits "include enforceable emissions limitations and standards . . . to assure compliance with applicable requirements of this chapter, including the requirements of the applicable implementation plan." 42 U.S.C. § 7661c(a).¹⁶ However, the term "applicable requirements" is not defined in the Act and the statute does not otherwise

¹⁶ Similar requirements appear in other parts of title V. "Schedule of compliance. The term 'schedule of compliance' means a schedule of remedial measures, including an enforceable sequence of actions or operations, leading to compliance with an applicable implementation plan, emission standard, emission limitation, or emission prohibition" 42 U.S.C. § 7661(3). "Nothing in this subsection shall be construed to alter the applicable requirements of this chapter that a permit be obtained before construction or modification." 42 U.S.C. § 7661a(a). Permitting authorities "have adequate authority to . . . issue permits and assure compliance . . . with each applicable standard, regulation, or requirement under this chapter." 42 U.S.C. § 7661a(b)(5). The regulations to implement the program shall include a "requirement that the applicant submit with the application a compliance plan describing how the source will comply with all applicable requirements under this chapter." 42 U.S.C. § 7661b(b). However, like section 504, these sections do not specify the scope of the term "applicable requirements" or how the permitting authority or the EPA is to determine what the applicable requirements are for an individual source as part of its title V permit.

specify how to determine the “applicable requirements of this chapter” for a particular source. In accordance with Congressional direction, 42 U.S.C. § 7661a(b), the EPA developed regulations to implement the title V program, and those regulations include a definition of the term “applicable requirement.”

Applicable requirement means all of the following *as they apply* to the emission units in a part 70 source . . . :

- (1) Any standard or other requirement provided for in the applicable implementation plan approved or promulgated by EPA through rulemaking under title I of the Act that implements the relevant requirements of the Act, including any revisions to that plan promulgated in part 52 of this chapter [and]
- (2) *Any* term or condition of *any* preconstruction permits issued pursuant to regulations approved or promulgated through rulemaking under title I, including Parts C or D, of the Act

. . .

40 C.F.R. § 70.2 (emphasis added).¹⁷ It is clear from this language that the “applicable requirements” include the terms and conditions of preconstruction permits issued under title I of the Act. The language in section (2) of the definition of “applicable requirement” expressly includes both PSD (part C) and nonattainment NSR (part D) permits.

Applicable requirements also include the terms and conditions of minor NSR permits issued pursuant to an approved SIP like the 1997 Approval Order issued for PacifiCorp-Hunter. The context of the rest of the title V regulations and statements in the final preamble support this clear reading. First, the language in section (2) does not indicate that terms and conditions from major NSR permits constitute the only source of “applicable requirements” from preconstruction permits. This reflects a change from the proposed language in section (2) which only included major NSR permitting: “any preconstruction permits issued pursuant to title I, part C or D of the Act.” 56 Fed. Reg. 21738, 21768 (May 10, 1991). When the EPA explained the change in the definition of “applicable requirement” in the final part 70 rules, the EPA stated that the changes were “to clarify that applicable requirements include terms and conditions of preconstruction permits *issued pursuant to SIP’s* and other regulations approved by the EPA in formal rulemaking after notice and an opportunity for public comment.” 57 Fed. Reg. 32250, 32276 (July 21, 1992) (emphasis added).¹⁸ This change makes clear that the EPA viewed the terms and conditions of *all* preconstruction permits as “applicable requirements,” including minor NSR permits issued pursuant to an approved SIP.¹⁹

¹⁷ Utah’s title V regulations employ a parallel structure to define applicable requirement to include:

“(a) Any standard or other requirement provided for in the State Implementation Plan;

(b) Any term or condition of any approval order issued under R307-401” R307-415-3.

¹⁸ The meaning of the phrase “preconstruction permits issued pursuant to . . . other regulations” was not discussed in the preamble, but is best understood to ensure that preconstruction permits issued pursuant to federal regulations, like federal PSD permits issued pursuant to 40 C.F.R. § 52.21 or other permits issued under Federal Implementation Plans (FIPs), are included in a title V permit as applicable requirements.

¹⁹ This is buttressed by other provisions in part 70. For instance, while allowing interim approval of state programs to issue title V permits that do not include all minor NSR permit requirements, 40 C.F.R. § 70.4(d) makes clear that the terms and conditions of minor NSR permits must eventually be included in the source’s title V permit. *Accord*

Therefore, if a minor preconstruction permit has been issued under an approved title I program, the clear meaning of the second section of the definition of “applicable requirement” at 40 C.F.R. § 70.2 requires that the terms and conditions of that minor preconstruction permit are included in a source’s title V permit.

However, the definition of “applicable requirement” does not on its face include the requirement to obtain a preconstruction permit in the first instance. The Petition addressed in this Order argues that PacifiCorp-Hunter failed to obtain such a required permit. As discussed in detail below, *see infra* p. 11–13, the EPA has previously construed section (1) of the definition of “applicable requirement” to cover the requirement to obtain a preconstruction permit. Specifically, the EPA has read the phrase “[a]ny standard or other requirement provided for in the applicable implementation plan” to include the *requirement to obtain* a preconstruction permit. *See e.g., In the Matter of Shintech, Inc.*, Order on Petition, Permit Nos. 2466-VO, 2467-VO, 2468-VO at 3 n.2 (September 10, 1997) (emphasis added). But when a source *has obtained* a preconstruction permit, for purposes of writing a title V permit, this presents an ambiguity in the definition of “applicable requirement” because section (2) includes the terms and conditions of that permit. The EPA has previously interpreted its regulations to apply both sections (1) and section (2) to title I preconstruction permitting requirements after a preconstruction permit has been obtained. But this reading can lead to a requirement that a title V permitting authority or the EPA reconsider, in issuing a title V permit or responding to a petition, whether a validly issued preconstruction permit is the appropriate type of permit. While such an expansive reading of section (1) may have been applied by the EPA in the past in title V petition responses, this leads to an incongruous result that is inefficient and can upset settled expectations—on the part of a state, an owner/operator, and the public at large—in circumstances where a source has obtained a legally enforceable preconstruction permit in accordance with the requirements of title I.

In circumstances such as those present here where a preconstruction permit has been duly obtained, the regulations should be read to mean, consistent with the EPA’s contemporaneous expressions of the purpose of title V permitting, that when a permitting authority has made a source-specific permitting decision with respect to a particular construction project under title I, those decisions “define certain applicable SIP requirements for the title V source” for purposes of title V permitting. 57 Fed. Reg. 32250, 32259 (July 21, 1992). The EPA is now interpreting the regulations to mean that the issuance of a minor NSR permit defines the applicability of preconstruction requirements under section (1) of the definition of “applicable requirement” for the approved construction activities for the purposes of permitting under title V of the Act.²⁰ These source-specific permitting actions take the general preconstruction permitting requirements of the SIP—the requirement to obtain a particular type of permit and the substantive requirements that must be included in each type of permit—and evaluate at the time

Public Citizen, Inc. v. US EPA, 343 F.3d 449, 459-460 (5th Cir. 2003) (noting that the EPA granted interim, instead of final, approval to Texas’s title V program because—along with other deficiencies—the program failed to recognize the terms and conditions of minor NSR permits as applicable requirements). It is also clear that the EPA was aware of how to distinguish between preconstruction permits issued under title I and only major NSR permits. For instance, in 40 C.F.R. § 70.7(a)(3), which requires reasonable procedures for giving priority to major NSR permits under parts C and D, the requirement is clearly not extended to minor NSR permits.

²⁰ A minor preconstruction permit only defines the applicable requirement for purposes of title V permitting. The interpretation today does not address anyone’s ability to review under other titles of the Act a determination that major NSR was not applicable. *See infra* p. 20–21.

of the permitting decision whether and how to apply them to a proposed construction or modification. The definition of “applicable requirement” says that the determination of “applicable requirements” is “as they apply” to the source and includes “any term or condition of any preconstruction permits issued.” 40 C.F.R. § 70.2. In issuing a preconstruction permit to a source, the permitting authority provides the terms and conditions of the preconstruction permitting requirements of the SIP “as they apply” to the source at that time for purposes of inclusion into the title V permit. *Id.* In the circumstance present here, the source-specific preconstruction permit issued by UDAQ determined for purposes of title V permitting the preconstruction requirements of the Utah SIP under section (1) of the definition of “applicable requirement” for the particular modification that was permitted. When UDAQ applied those requirements of the SIP to issue the preconstruction permit, it derived the source-specific “applicable requirements” for purposes of section (2) of that definition.²¹ The EPA finds no error in UDAQ’s decision in this case to incorporate the terms and conditions of the previously issued preconstruction permits into the title V operating permit without further review of whether those conditions were properly derived or whether a different type of permit was required for the same construction activity.

Previous Interpretations by the EPA

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

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

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

²¹ This interpretation applies to the facts of this Claim, where a permitting authority issued a source-specific title I preconstruction permit subject to public notice and comment and for which judicial review was available. The EPA is not considering at this time whether other circumstances may warrant a different approach.

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

In a 1999 letter responding to requests from permitting authorities, the Director of the Office of Air Quality Planning and Standards articulated the EPA’s then-current understanding of the interaction of title I and title V. Letter from John S. Seitz, U.S. EPA, to Robert Hodanbosi, STAPPA/ALAPCO (May 20, 1999).²² The letter stated that “applicable requirements include the requirement to obtain preconstruction permits that comply with applicable preconstruction review requirements under the Act, EPA regulations, and SIP’s.” *Id.* Enclosure A at 2. The letter expressed the view that section 505(b) of the Act provides a form of corrective action in addition to all the other enforcement authorities the EPA has under the Act. *Id.* While it stated that generally the agency will not object to a title V permit for determinations “made long ago[,] . . . EPA may object to [a more recent] title V permit due to an improper [preconstruction] determination.” *Id.* Enclosure at 2-3. Additionally, the letter said that the EPA could object to a title V permit where “EPA believes that an emission unit has not gone through the proper preconstruction permitting process.” *Id.* Enclosure at 3.²³ However, the letter did not provide any explanation for why decisions “made long ago” were entitled to more deference than recent decisions for purposes of title V permitting.

More recently, the EPA has implicitly or explicitly assumed that preconstruction permitting decisions were ripe for review when responding to title V petitions. For instance, while not substituting its own judgment for that of a state permitting authority, the EPA has reviewed

²² Available at <https://www.epa.gov/sites/production/files/2015-08/documents/hodan7.pdf>.

²³ The EPA has also used this reading of the agency’s oversight authority under title V as part of the justification for approving state PSD programs. *See* Approval and Promulgation of Implementation Plans; Oregon, 68 Fed. Reg. 2891, 2899 (January 22, 2003); *see also* Approval and Promulgation of Implementation Plans; Idaho; Designation of Areas for Air Quality Planning Purposes; Idaho, 68 Fed. Reg. 2217, 2221 (January 16, 2003). In these approvals the EPA pointed to its authority under title I, sections 113 and 167, and stated that title V “has added new tools” for addressing concerns with implementation of PSD requirements by allowing for objection to title V permits under section 505(b) of the Act. However, the authority to revisit an issued preconstruction permit does not appear to have been dispositive to the approval of these PSD programs as EPA could still conduct oversight using its enforcement authorities. *See infra* p. 20–21.

whether a petitioner demonstrated that the permitting authority's exercise of discretion under its SIP-approved regulations was unreasonable or arbitrary. *See e.g., In the Matter of American Electric Power – John W. Turk Plant*, Order on Petition No. VI-2008-01 (December 15, 2009); *In the Matter of Cash Creek Generation*, Order on Petition Nos. IV-2008-1 & IV-2008-2 (December 15, 2009) (“Cash Creek I”); *In the Matter of Cash Creek Generation*, Order on Petition No. IV-2010-4 (June 22, 2012) (“Cash Creek II”). The EPA has also considered applicability of major NSR in responding to petitions. *See e.g., In the Matter of CEMEX, Inc. – Lyons Cement Plant*, Order on Petition VIII-2008-01 (April 20, 2009); *In the Matter of Wisconsin Power and Light – Columbia Generating Stations*, Order on Petition No. V-2008-1 (October 8, 2009). In these title V orders, the EPA indicated that the agency could review whether previous preconstruction permitting decisions complied with the requirements of the SIP, which would appear to be inconsistent with the preamble of the regulations in part 70 described above.²⁴

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

The EPA's Approach Moving Forward

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

First, the interpretation expressed in this Order—that preconstruction permit terms and conditions should be incorporated without further review—aligns with that expressed contemporaneous with the promulgation of the title V regulations in 40 C.F.R. part 70. This provides the best indication of the intention of the agency when it issued those regulations. A contemporaneous interpretation is often given great weight in understanding the meaning of a

²⁴ However, during this time the EPA has suggested that the demonstration burden may require a final determination to overturn an applicability decision made by the permitting authority. In denying a petition for objection in *In the Matter of Midwest Generation-Joliet Generating Station and Will County Generating Stations*, Order on Petition No. V-2005-2 at 9 (June 14, 2007), the EPA stated that the permitting authority “has not reached a final determination in this permitting context that PSD is an applicable requirement for these sources, that the USEPA has not determined otherwise, and that a court has not issued a determination in the litigation context. Accordingly, there is no requirement under the facts of this case for the permits to include either PSD limits or a compliance schedule for the source to come into compliance with such limits at this time.” The EPA concluded that “even if IEPA were to recognize that the potential for noncompliance [with title I preconstruction permitting requirements] exists, it is not required to pursue inquiries further in the title V context.” *Id.* at 10. This is consistent with the approach advanced in this Order that instead of reviewing preconstruction permitting decisions in title V, oversight of title I preconstruction permitting decisions should be conducted under title I authorities, such as enforcement actions under section 113 or section 167, or state court appeals of preconstruction permits, or through citizen enforcement actions under section 304.

statute. See e.g., *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 414 (1993) (“Of particular relevance is the agency’s contemporaneous construction which ‘we have allowed . . . to carry the day against doubts that might exist from a reading of the bare words of a statute’” (citing *FHA v. The Darlington, Inc.*, 358 U.S. 84, 90 (1958))). Much as an agency’s contemporaneous interpretation of a statute through a regulation is given great weight, an agency’s contemporaneous interpretation of its own regulations in the preamble for those regulations should carry similar weight.

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

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

Before title V of the CAA was enacted, Congress enacted the title I preconstruction permitting requirements in the 1977 Amendments to the CAA. At that time, Congress understood that the adequacy of state preconstruction permitting decisions would be subject to review in state administrative and judicial forums.²⁵ Congress has also given the EPA specific oversight authority under title I to, among other authorities, approve or disapprove state permitting

²⁵ “In order to challenge the legality of a permit which a State has actually issued . . . a citizen must seek administrative remedies under the State permit consideration process, or judicial review of the permit in State court.” Staff of the Subcommittee on Environmental Pollution of the Senate Committee on Environment and Public Works, 95th Congress, 1st Session, A Section-by-section Analysis of S. 252 and S. 253, Clean Air Act Amendments 36 (1977), reprinted in 5 Legislative History of the Clean Air Act Amendments of 1977 3892 (1977).

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

There is no clear indication in the terms of the 1990 Amendments to the CAA or its legislative history that the addition of the title V provisions to the Act was intended to add another opportunity to review the merits of a construction permitting decision in addition to the title I authorities that existed already or that were added as part of the 1990 Amendments. There is no clear indication that Congress intended to alter the balance of oversight that the EPA had over state preconstruction permitting through title V review. Congress “does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, one might say, hide elephants in mouseholes.” *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 468 (2001). A reading of part 70 that would transform title V into an opportunity to reevaluate previous preconstruction approvals, instead of simply incorporating existing air pollution requirements into one document, would “alter the fundamental details” of the oversight authorities the EPA has under title I of the Act. For instance, instead of disapproving the preconstruction requirements in a state SIP or issuing a stop construction order to an individual source, which Congress explicitly authorized, the EPA could issue administrative orders on a case-by-case basis under title V.²⁶ The text of the Act does not indicate that Congress intended to create this type of additional administrative oversight mechanism for preconstruction permitting actions in an operating permit program designed to consolidate and enforce existing requirements. While there is language in title V requiring that a permit “assure compliance with applicable requirements of this chapter,” *e.g.*, 42 U.S.C. § 7661c(a), and similarly broad language, this type of general language does not clearly or specifically say that a title V permitting authority must reevaluate preconstruction permitting decisions that have already been made under title I each time that it issues or renews a title V permit. Consistent with the EPA’s contemporaneous interpretation of its part 70 regulations, this general language in the statute should be read to mean that the title V permit must include conditions to ensure compliance with the terms and conditions of the source-specific preconstruction permits that have been issued for the source. Absent language providing a clearer or direct indication that the provisions in title V of the Act require the reevaluation of preconstruction permitting decisions for a source, the EPA is determining that it should not read general and broad terms to find such a preconstruction permitting oversight tool “hidden” in the title V permitting program.

The EPA’s preconstruction permitting oversight authority under title I of the Act supports reading the title V provision to supply a more limited oversight role for the EPA with regard to state implementation of preconstruction permitting programs.²⁷ The EPA believes that in-depth oversight of case-specific state title I permitting decisions should be handled under title I, such as through the state appeal process or an order or action under sections 113 or section 167. Citizen oversight may still be accomplished through the state appeal process or through a citizen suit

²⁶ As described in more detail below, an interpretation of title V that excludes revisiting preconstruction decisions does not fundamentally alter or limit the EPA’s authority under title I of the Act and, absent specific circumstance does not provide an effective title V permit shield. *See infra* p. 20–21.

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

under title III. As described in this Order, for purposes of title V, the permitting authority should incorporate the terms and conditions of preconstruction permits into the source's title V permit, unless and until those preconstruction permits are revised, reopened, suspended, revoked, reissued, terminated, augmented, or invalidated through one of these mechanisms.²⁸ Similarly, broader programmatic issues should be handled under the EPA's existing title I authorities instead of through case-by-case objections under title V.

Other provisions of title V support the interpretation in this Order rather than an obligation to reevaluate previous permitting decisions. For instance, title V requires state programs to have "[a]dequate, streamlined, and reasonable procedures . . . for expeditious review of permit actions . . ." 42 U.S.C. § 7661a(b)(6). Requiring a permitting authority, or the EPA, to go back and review final permitting decisions that have already been subject to the safeguards of public notice and judicial review could frustrate the goal of "expeditious review of permit action." The facts underlying this Order bear this out. If, instead of simply incorporating the terms and conditions of the 1997 Approval Order, UDAQ were required to reevaluate that decision now and each time it renews the title V permit in the future, then it could require substantial resources and unsettle expectations and reliance interests on the part of the state, owner/operators, and the broader public. UDAQ would have to find any data or analyses that were used 20 years ago or more, to justify its title V permitting decision.²⁹

Similarly, Congress also provided abbreviated timeframes for the EPA to review a proposed title V permit: 45 days for the EPA's independent review, and 60 days if confronted with a petition to object. 42 U.S.C. § 7661d(b). These timeframes are inconsistent with an in-depth and searching review of every source-specific preconstruction permitting decision that has previously been made by the permitting authority.³⁰ Instead, these provisions suggest that the EPA's role in oversight over the issuance of title V permits should be limited. The Administrator will object to a title V permit if it does not include the "applicable requirements" or does not otherwise comply with part 70. 40 C.F.R. § 70.8(c). The EPA's oversight ensures that the permitting authority has properly included the "applicable requirements" as they apply to the source³¹ and follows the requirements of title V by including adequate monitoring, recordkeeping, and reporting to assure compliance with those requirements. *See* 42 U.S.C. § 7661c(a), 7661c(c); 40 C.F.R. § 70.6(a)(3),

²⁸ In this way, this interpretation is consistent with the EPA's statements in *In the Matter of Midwest Generation-Joliet Generating Station and Will County Generating Station*, Order on Petition No. V-2005-2 (June 14, 2007). *See supra* note 24 and accompanying text.

²⁹ In fact, it may simply be impossible in a title V permitting action to recreate a complete defensible administrative record to support the review of a preconstruction permitting decision made long ago. For instance, it appears records from the NSR section of DAQ are only maintained by the Utah Division of Archives and Record Services for 11 years. *See* Utah Division of Archives and Record Service, Records Management, Series 22001, page 81, New Source Review Section green copies, available at https://axaearchives.utah.gov/cgi-bin/pdfreport.cgi?agency=00062&INCLUDE_CLOSED=N&A=B.

³⁰ For instance, here the Petition itself is 36 pages and includes 8 separate attachments. However, this includes the Petitioner's comments to UDAQ on the draft title V permit and the associated attachments. The Petitioner's comments are 127 pages and includes 93 separate attachments.

³¹ For instance, the EPA would review whether the title V permit includes all the terms and conditions of the preconstruction permit and whether they appear as they appear in the preconstruction permit. If terms or conditions are left out, then title V permit does not include all the applicable requirements, i.e., the terms and conditions of the preconstruction permit.

70.6(c)(1). In the case of a preconstruction permit, the EPA's oversight role under title V is to ensure that the terms and conditions of the preconstruction permit are properly included as "applicable requirements," and that the permit contains monitoring, recordkeeping, and reporting sufficient to assure compliance with those permit terms and conditions.

It is inefficient for permitting agencies, and the EPA,³² to review as part of the title V permitting process the preconstruction permitting decisions that have already been subject to public notice and comment and an opportunity for judicial review. In the case of the 1997 Approval Order issued to PacifiCorp-Hunter, the public notice specifically stated that the Approval Order included emission limits intended to avoid the need for the source to obtain a PSD permit. In the notice for the 1997 Approval Order, published on October 9, 1997, UDAQ stated that:

Pacificorp [sic] is requesting that additional enforceable emission limits be established which will limit the potential to emit (PTE) from this source. These limits are being imposed to demonstrate that the consolidation will not exceed the Prevention of Significant Deterioration (PSD) baseline emission inventory. A number of projects, which may increase the capacity or capacity utilization of the three units, have been planned or completed. The net effect of these projects could be an increase in emissions, hence the newly requested limits to insure an emissions decrease.

Sierra Club's Comments on the PacifiCorp-Hunter Power Plant DRAFT Title V Renewal Permit (Permit Number: 1500101002-Draft), Exhibit 91, at 3. The Utah Administrative Procedures Act (UAPA) allows an aggrieved party to obtain judicial review of a final agency action like UDAQ's issuance of the 1997 Approval Order. See Utah Code § 63G-4-401(1) (renumbered from Utah Code § 63-46b-14(1) by 2008 Utah Laws ch. 382, § 1391). Utah provided the public with an opportunity to submit comments on the manner in which UDAQ was proposing to set the baseline emission rate in the proposed 1997 Approval Order. Had those comments not convinced UDAQ to change its proposed permitting decision or if UDAQ's response to those comments had been inadequate, the public had the right to challenge UDAQ's decision in state court under the UAPA. Yet, no one availed themselves of these available remedies to correct what the Petitioner claims are invalid readings of the Utah SIP and the CAA. The Petitioner is now, in essence, asking for a "second bite at the apple" through EPA oversight in title V. The availability of notice, opportunity to comment, and ability to seek judicial review of the underlying preconstruction permit—here issued *twenty years ago*—weigh heavily against an interpretation of title V as being an appropriate avenue to reevaluate these previous permitting authority decisions made by UDAQ.

Additionally, the availability of these avenues to address concerns with preconstruction permitting decisions at the time they were made illustrates how the title V permitting process and the EPA's oversight of state title V permits are ill-suited forums for considering these issues. As noted above, the EPA only has 45 days and 60 days to review a title V permit and any subsequent petition to object, respectively. Given the complex technical review required to consider some of the substantive requirements of a preconstruction permit, this timeframe is

³² Title I of the CAA specifically contemplates that the "interested persons" who may comment on state-issued PSD permits include "representatives of the Administrator." 42 U.S.C. § 7475(a)(2).

often inadequate to fully consider the issues presented. A state adjudicatory process or an enforcement action would allow more time for development and consideration of the potential issues raised in a state's application of preconstruction permitting requirements—another indication that these state processes and mechanisms are the appropriate forum for resolving preconstruction permitting issues.

The interpretation of the title V rules and statutory provisions reflected in this Order also respects the finality of the permitting authority's preconstruction permitting decision. Because that decision was reached through a process that included public input and the opportunity for judicial review, it would not be appropriate for the EPA to raise questions at a later date about the state's final decisions through a limited administrative review process via title V. Other avenues for consideration of these issues allow for more input and review than the title V petition process. The interpretation of the title V rules and statutory provisions reflected in this Order more closely aligns, for purposes of title V permitting, the respect the EPA accords permits that are issued pursuant to federal regulations and reviewable by the Environmental Appeals Board with those like the 1997 Approval Order that are issued pursuant to federally-approved state regulations and are reviewable in state administrative tribunals and courts. *See In the Matter of Kawaihe Cogeneration Project*, Order on Petition, Permit No. 0001-01-C (March 10, 1997). Given that the EPA's oversight of title V permitting is ill-suited to serve as a forum for considering these kinds of potentially complex problems, it makes sense that for purposes of title V permitting, permitting authorities and the EPA should only consider whether the terms and conditions of final preconstruction permitting decisions made under title I have been properly included in a title V operating permit and whether there is sufficient monitoring, recordkeeping, and reporting to assure compliance with those terms and conditions.

The interpretation of the title V rules and statutory provisions reflected in this Order also aligns the EPA's treatment of preconstruction permits with how the EPA has consistently treated other "applicable requirements" under title V. For many other "applicable requirements," the EPA does not reconsider the content of those requirements in title V or in its oversight role of title V permitting. For instance, the EPA would not allow a permitting authority to revise the substantive requirements of New Source Performance Standards established under section 111, or National Emission Standards for Hazardous Air Pollutants established under section 112.³³ These substantive requirements have already been established pursuant to a process that included public notice and comment and the opportunity for judicial review.³⁴ It would, therefore, be inappropriate to reevaluate these standards in title V permitting. Likewise, source-specific preconstruction permitting that includes consideration of applicability of SIP preconstruction requirements that has been put out for notice and comment and the opportunity for judicial review has gone through a similar process at the state level. For purposes of title V permitting, it makes sense to treat decisions that go through similar processes similarly.

³³ As noted above, the permitting authority may use the title V permit to consider enhancing the monitoring, recordkeeping, or reporting under these standards. *See e.g., In the Matter of Wheelabrator Baltimore*, Order on Petition, Permit No. 24-510-01886 at 11–13 (April 14, 2010).

³⁴ However, the applicability of these standards to the particular source would not necessarily have been through such a process. To the extent that the applicability of these standards has not been subject to notice and comment and the opportunity for judicial review, it may be appropriate for EPA to review the applicability to a particular source in title V permitting.

The EPA has also declined to second-guess the content of “applicable requirements” even when a title V permit incorporates SIP provisions that the EPA has determined are inconsistent with the CAA. The EPA has said that the proper forum to address whether a SIP provision is inconsistent with the CAA is through a “SIP Call” under section 110(k). *In the Matter of Piedmont Green Power*, Order on Petition Number IV-2015-2 at 28–29 (December 13, 2016) (*Piedmont Green Power Order*); see *In the Matter of Midwest Generation, LLC, Joliet Generating Station*, Order On Petition No. V-2004-5 at 17, 20–21, 23–24 (June 24, 2005) (“[A] permitting authority cannot use a title V permit to modify a requirement from a federally approved SIP.”).³⁵ Until the EPA approves a corrective SIP revision or issues a FIP, no action within the title V permits is required. *Piedmont Green Power Order* at 29. Even though the EPA has concluded that the SIP provision is inconsistent with the Act, the title V permit should continue to incorporate the SIP provision because it is an “applicable requirement.” Similarly, just because the EPA does not object to a title V permit that includes the terms and conditions of a title I permit, it does not suggest that the EPA agrees that those terms and conditions comply with the applicable SIP or the CAA. However, until the terms and conditions of the title I permit are revised, reopened, suspended, revoked, reissued, terminated, augmented, or invalidated through some other mechanism, such as a state court appeal or enforcement action, the “applicable requirement” remains the terms and conditions of the issued preconstruction permit and they should be included in the source’s title V permit. Consistent with 40 C.F.R. part 70, this Order treats the reviewability of final preconstruction permitting decisions made by the permitting authority in a manner similar to those decisions made in promulgating the SIP for purposes of title V permitting.

For these reasons, the interpretation in this Order of title V and part 70 (and embodied in the 1991 Preamble) more closely aligns with the intent and purpose of title V than the departure from that interpretation expressed in certain previous orders and other agency statements, as discussed above. Consistent with this reading, permitting agencies and the EPA need not reevaluate—in the context of title V permitting, oversight, or petition responses—previously issued final preconstruction permits, especially those that have already been subject to public notice and comment and an opportunity for judicial review. Concerns with these final preconstruction permits should instead be handled under the authorities found in title I of the Act. Where a final preconstruction permit has been issued, whether it is a major or minor NSR permit, the terms and conditions of that permit should be incorporated as “applicable requirements” and the permitting authority and the EPA should limit its review to whether the title V permit has accurately incorporated those terms and conditions and whether the title V permit includes adequate monitoring, recordkeeping, and reporting requirements to assure compliance with the terms and conditions of the preconstruction permit. See 42 U.S.C. § 7661c(a); 40 C.F.R. § 70.6(a)(3), 70.6(c)(1).

The CAA requires the EPA to object to a permit if the petitioner demonstrates to the Administrator that the permit is not in compliance with the requirements of the CAA. 42 U.S.C. § 7661d(b)(2). “The Administrator shall include in regulations under this subchapter provisions to implement” the title V petition process. *Id.* The EPA’s title V regulations state that the

³⁵ See also; *In the Matter of Monroe Power Company*, Order on Petition IV-2001-8 at 14 (October 9, 2002); *In the Matter of PacifiCorp’s Jim Bridger and Naughton Electric Utility Steam Generating Plants*, Order on Petition No. VIII-00-1 at 23-24 (November 16, 2000).

“Administrator will object to the issuance of any proposed permit determined by the Administrator not to be in compliance with *applicable requirements* or requirements under this part.” 40 C.F.R. § 70.8(c)(1) (emphasis added). If the EPA does not object during its 45-day review period, any person may petition the EPA to issue “such objection.” 40 C.F.R. § 70.8(d).

The Petitioner has not alleged that UDAQ did not incorporate the terms and conditions of a preconstruction permit “issued pursuant to regulations approved or promulgated through rulemaking under title I.” 40 C.F.R. § 70.2 (definition of “applicable requirement”). Further, the Petitioner has not alleged that the monitoring, recordkeeping, or reporting found in the title V permit are inadequate to assure compliance. Therefore, the Petitioner has not demonstrated in Claim A that the title V permit is “not . . . in compliance with applicable requirements” or the requirements of part 70. 40 C.F.R. § 70.8(c)(1); *see* 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d). The EPA therefore denies the Petition with regard to Claim A.

Interaction with Enforcement

The interpretation of the provisions of title V and part 70 reflected in this Order does not limit the EPA’s preconstruction permit oversight or enforcement authority under title I of the Act. For example, the EPA retains the ability to bring an enforcement action under section 113 alleging a violation of title I of the Act for a source’s failure to obtain a major NSR (PSD or nonattainment NSR) permit where the EPA has evidence that the construction or modification of a source triggered NSR permitting requirement. The EPA’s view that reevaluation of NSR permits is not appropriate in the context of a title V permit does not diminish the opportunities to review construction permitting decisions under title I of the CAA. Where an EPA investigation indicates that a source failed to obtain a required permit (even if a minor source permit was obtained), the EPA may seek to remedy its disagreement with state permitting decisions through enforcement actions. *See e.g., U.S. v. S. Ind. Gas & Elec. Co.*, No. IP99-1692-CM/F, 2002 WL 1760699, at *3-5 (S.D. Ind. July 26, 2002); *United States v. Ford Motor Co.*, 736 F. Supp. 1539, 1550 (W.D. Mo. 1990). This is not inconsistent with the EPA’s view of the role of title V of the Act as addressed in this Order.

That the EPA views the incorporation of the terms and conditions of these preconstruction permits into the title V operating permit as proper for purposes of title V does not indicate that the EPA agrees that the state reached the proper decision when setting terms and conditions in the preconstruction permits. For instance, even when the EPA has made a determination that a provision of the SIP is not in compliance with the Act, the EPA will not object to a permit that includes that provision until there is final action to remove it from the SIP. *Piedmont Green Power Order* at 28-29; *see also supra* discussion on p. 19. The EPA’s lack of objection to the inclusion of that requirement in the title V permit does not indicate that the EPA agrees that it is legal or complies with the Act; it merely indicates that a title V permit is not the appropriate venue to correct any such flaws in the preconstruction permit. Similarly, even though the EPA might disagree with the preconstruction permitting decisions made by the permitting authority, for purposes of the title V operating permit, the terms of the preconstruction permit should be incorporated into the title V operating permit until such time that there is a final action to revise, reopen, suspend, revoke, reissue, terminate, augment, or invalidate the preconstruction permit, such as a court order in a state court appeal or through an enforcement action.

The incorporation of the terms and conditions of the minor NSR permit into the title V permit does not, by itself, diminish the ability to review the preconstruction permitting decision in an enforcement action by the EPA or citizens. The EPA does not view this interpretation of the part 70 regulations as changing the agency's interpretation or enlarging the scope of a permit shield under 42 U.S.C. § 7661c(f) and implementing regulations in 40 C.F.R. § 70.6(f). A permit shield, if part of an approved title V program and included in the title V permit, would only provide a sufficient defense from enforcement actions that allege a major NSR permit is required when the facility only received a minor NSR permit under certain circumstances.

There are two types of "permit shields" under title V. The first, default "permit shield" states that compliance with the title V permit "shall be deemed compliance with" title V. 42 U.S.C. § 7661c(f). However, where a facility is entitled only to this default permit shield, requirements of the CAA outside of title V are still independently enforceable against the facility. A permitting authority may go farther to provide a facility with a second, more expansive type of permit shield. Under the first prong of an expanded permit shield, the permitting authority can provide that compliance with the title V permit "shall be deemed compliance with other [non-title V] applicable provisions" if "the permit includes the applicable requirements of such provision." *Id.* Otherwise, the permitting authority can only provide a shield from non-applicable requirements if it "in acting on the permit application makes a determination relating to the permittee that such other provisions (which shall be referred to in such determination) are not applicable and the permit includes the determination or a concise summary thereof." *Id.* While the EPA interprets the issuance of a final minor NSR permit to define the "applicable requirements" for the construction or modification covered by the minor NSR permit for purposes of what a permitting authority should incorporate into a title V permit, the first prong of the more expansive title V permit shield would only allow that compliance with the title V permit that includes the minor NSR permit to be deemed compliance with the terms and conditions of that minor NSR permit. Compliance with such a title V permit would not be deemed compliance with any major NSR applicability requirements. Therefore, compliance with the title V permit would not preclude an enforcement action alleging a violation of title I of the Act for failure to obtain a major NSR permit. However, if the permitting authority, "in acting on the [title V] permit application," makes a determination that major NSR requirements "are not applicable," to that construction or modification under the second prong of the more expansive permit shield provision, and the permit includes a summary of that non-applicability determination, that could provide a proper title V permit shield.³⁶ In such a case, the non-applicability determination would be part of the title V permit action and subject to judicial review under § 7661a(b)(6).

³⁶ In this case, UDAQ did not make a determination, in acting on the title V permit application, that PSD was not applicable requirement for the construction approved under the 1997 Approval Order.

Claim B: The Petitioner's Claim that "The Administrator Must Object to the Hunter Title V Renewal Permit Because It Includes 10-Year Plantwide Applicability Limits (PALs) for SO₂ and NO_x that Are Unlawful and Invalid."

Petitioner's Claim: The Petitioner claims that in 2008, "UDAQ issued an Approval Order for various projects that also established ten-year Plantwide Applicability Limits (PALs)³⁷ for SO₂ and NO_x." Petition at 16. The Petitioner claims that these PALs for SO₂ and NO_x "were unlawful, invalid and ineffective for . . . three main reasons . . . and must be removed from Hunter's title V permit." *Id.* at 17.

First, the Petitioner contends that UDAQ lacked the legal authority to impose 10-year PALs in 2008 because the EPA did not approve Utah's revised PSD rules that provide for 10-year PALs until 2011. *Id.* The Petitioner notes that the EPA, in comments on the draft Approval Order in 2008, informed UDAQ that "[u]ntil EPA approves Utah's NSR reform rules (including PAL provisions) into the SIP, PacifiCorp cannot rely on the ten-year PAL provisions in this permit to avoid federal enforcement of current SIP requirements for major NSR/PSD, in the event of a future major modification at the facility." *Id.* (quoting April 5, 2007, Letter from EPA to UDAQ). The Petitioner claims that states cannot unilaterally alter a SIP, and that SIPs cannot be considered legally amended until the EPA approves such revisions. *Id.* (citing multiple cases and 40 C.F.R. § 51.105). The Petitioner, therefore, concludes that UDAQ lacked the authority to establish the 10-year PALs. *Id.*

Second, the Petitioner claims that the PALs were not established in accordance with federal PAL rules or Utah's EPA-approved PSD SIP regulations. *Id.* at 18. Based on the premise asserted in Claim A—that PacifiCorp-Hunter should have been subject to BACT requirements for SO₂ and NO_x for the 1997–1999 projects—the Petitioner asserts that the facility's actual emissions during the baseline period should have been lower than the baseline emissions upon which the SO₂ and NO_x PALs were based. *Id.*

Third, the Petitioner claims that the federal and SIP PAL regulations required UDAQ to "specify a reduced PAL level(s) . . . to become effective on the future compliance date(s) of any applicable Federal or State regulatory requirement(s) that the reviewing authority is aware of prior to issuance of the PAL permit." *Id.* (citing 40 C.F.R. § 52.21(aa)(6), incorporated by reference into Utah Admin. Code R307-405-21(1), approved into the SIP at 76 Fed. Reg. 41712 (July 15, 2011)). The Petitioner claims that at the time the PAL permit was issued, UDAQ was aware that PacifiCorp-Hunter Units 1 and 2 would be subject to future NO_x and SO₂ limitations under the regional haze plan requirements. *Id.* Accordingly, the Petitioner asserts that the PAL limits should have been reduced to reflect compliance with the regional haze requirements, to become effective on the compliance date of those requirements. *Id.* at 19.

The Petitioner further claims that the current title V renewal is the first time that the public has had an opportunity to comment on the incorporation of the PAL provisions into the title V

³⁷ As the Petitioner explains, "The establishment of a PAL for a particular pollutant allows a source to make physical or operational changes to existing emission units without having to individually review those changes for PSD applicability for the PAL pollutant as long as total Plantwide emissions remain under the level of the PAL." *Id.* at 16–17.

permit. *Id.* The Petitioner claims that the provisions were initially inappropriately incorporated into the title V permit after the initial title V permit had expired—which the Petitioner asserts was contrary to title V rules—and that this was done through administrative amendment procedures without adequate public notice—which the Petitioner also contends was unlawful. *Id.* at 20–22.

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

Relevant Legal Background

In accordance with part C of title I of the CAA, and EPA’s implementing regulations, an existing major stationary source located in an area that is designated as attainment or unclassifiable for the NAAQS is required to obtain a PSD permit prior to beginning construction of a major modification. 42 U.S.C. §§ 7475, 7479(1) and (2)(C); 40 C.F.R. § 51.166; Utah Admin. Code R307-3.6-5.³⁸ The terms “Major Modification” and “Net Emissions Increase” were defined, in part, under the applicable PSD SIP at the time the 2008 Approval Order was issued as follows:

“Major Modification” means any physical change or change in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the Clean Air Act.

...

Utah Admin. Code R307-405-1. Further,

“Net Emissions Increase” means the amount by which the sum of the following exceeds zero:

1. any increase in actual emissions from a particular physical change or change in method of operation at a source; and
2. any other increases and decreases in actual emissions at the source that are contemporaneous with the particular change and are otherwise creditable. ...

Utah Admin. Code R307-1-1.

The EPA finalized PAL provisions as part of the 2002 NSR reform rules.³⁹ PAL provisions were added to all of the major NSR rules, including the PSD rules in 40 C.F.R. § 51.166 and § 52.21. A PAL is an optional alternative major NSR applicability approach based on a pollutant-specific facility-wide emissions cap. Once a facility accepts a PAL, it may undertake modifications without the requirement to conduct a formal NSR applicability analysis (i.e., determining whether the project would result in a significant emissions increase and a significant net emissions increase), provided the facility’s emissions will remain within the levels established in the PAL. A PAL can provide owners or operators of major stationary sources with the ability to manage facility-wide emissions without triggering major NSR. Once a PAL is issued, it has a

³⁸ Here and elsewhere in this response to the Petitioner’s Claim B, references to the Utah Administrative Code are to those regulations, and codification, approved into the Utah SIP at the time of the subject Approval Order in 2008.

³⁹ 67 Fed. Reg. 80186, 80206 (December 31, 2002).

term of 10 years, and the source must submit an application for renewal of the PAL prior to its expiration. 40 C.F.R. § 52.21(aa)(4)(i)(f), (aa)(8)(i), (aa)(10).

In 2006, Utah incorporated by reference the revised federal PSD regulations (40 C.F.R. § 52.21) into its regulation R307-405, with some changes and submitted those rules to the EPA for SIP-approval in submittals dated September 15, 2006, October 1, 2007, and March 7, 2008.⁴⁰ Relevant portions of those rules, including the PAL provisions in R307-405-21, were approved by the EPA as part of the Utah SIP on July 15, 2011.⁴¹

Relevant Permit History

On November 27, 2007, PacifiCorp submitted a Notice of Intent (2007 Notice of Intent) to apply for authorization to complete various construction projects on Units 1, 2 and 3 at the PacifiCorp-Hunter plant, and to establish PALs for NO_x and SO₂. A public notice was published in the Salt Lake Tribune on February 3, 2008, initiating a 30-day public comment period on the draft Approval Order and accompanying engineering evaluation. On March 13, 2008, UDAQ issued the final Approval Order DAQE-AN010237012-08 (2008 Approval Order) containing, among other things, the NO_x and SO₂ PALs.

EPA's Analysis

As described above in Section II.B of this Order, the burden is on the Petitioner to identify a flaw in the title V permit such that it is not in compliance with the CAA. Thus, to the extent that a Petitioner is concerned with a defect related to an underlying applicable requirement (e.g., preconstruction permit or PAL), the Petitioner must demonstrate why such a purported flaw would cause the title V permit to be deficient.⁴² Here, the Petitioner's claim is based on three alleged defects that it asserts affect the validity or federal enforceability of the SO₂ and NO_x limits established in 2008 under PAL provisions incorporated into state law but not yet approved into the Utah SIP at the time. As explained in detail below, regardless of any purported deficiencies in the PALs, the Petitioner has not demonstrated how any such deficiencies resulted in a flaw in the current title V permit.

As an initial matter, the Petitioner has not demonstrated that the title V permit is missing any particular applicable requirement as a result of the alleged flaws with the SO₂ and NO_x PALs. The Petitioner does not allege or otherwise demonstrate in Claim B that any particular projects would have triggered applicable NSR requirements but for reliance on the PAL, and, therefore, that the title V permit is missing applicable requirements. Although the Petitioner elsewhere alleges that some modifications of the PacifiCorp-Hunter facility triggered PSD requirements, *see* Claim D, below, the Petitioner has not demonstrated that the facility would have been subject to PSD requirements but for the inclusion of the PALs. Therefore, the Petitioner has not

⁴⁰ 74 Fed. Reg. 667 (January 7, 2009).

⁴¹ 76 Fed. Reg. 41712 (July 15, 2011).

⁴² *See In the Matter of Shell Deer Park*, Order on Petition Nos. VI-2014-04 and VI-2014-05 at 33 (September 24, 2015); *In the Matter of Consolidated Environmental Management, Inc. – Nucor Steel*, Order on Petition Nos. VI-2010-05, VI-2011-06, VI-2012-07 at 44 (January 30, 2014) (Nucor III Order).

demonstrated that the title V permit is missing any applicable requirements as a result of any purported deficiencies in the PALs.

Moreover, the Petitioner does not explain why, if its allegation that the PALs are “unlawful, invalid and ineffective” is true because the PALs were not federally-enforceable or incorrectly calculated, Petition at 17–19, the title V permit would be deficient. While the Petitioner claims that the PALs “must be removed from the title V permit,” *id.* at 17; *see id.* at 36, the Petitioner includes no additional explanation as to why the PALs must be removed. Nor does the Petitioner provide any citation to any legal authority that would mandate this result. Even if the PALs based on enacted Utah regulations were not federally-enforceable because EPA had not yet approved those regulations into the Utah SIP at the time the 2008 Approval Order was issued, the Petitioner has not demonstrated that title V regulations mandate their “removal” from the title V permit. Although not cited by Petitioner, 40 C.F.R. § 70.6(b)(2) requires that “the permitting authority shall specifically designate as not being federally enforceable under the Act any terms and conditions included in the permit that are not required under the Act or under any of its applicable requirements.”⁴³ This provision does not mandate “removing” the PAL provisions at issue from the title V permit if the Petitioner is correct that they are not federally-enforceable; instead, it would at most require that the provisions be designated as not federally enforceable. The Petition, however, does not allege such a deficiency in the title V permit.

Moreover, Utah cited regulations that were in the SIP as authority for the title V permit condition establishing the SO₂ and NO_x emission limits at issue. 2016 Permit at 19, Condition II.B.1.i (citing Utah Admin. Code R307-401-8(1)(a)). Thus, even if the Petitioner is correct that UDAQ lacked the authority to establish PALs that would be effective as a federally-enforceable alternative to NSR applicability determination procedures because the 10-year PAL provisions of 40 C.F.R. § 52.21(aa) were not approved into Utah’s SIP at the time the 2008 Approval Order was issued,⁴⁴ the Petitioner has not demonstrated that UDAQ lacked the independent authority

⁴³ Utah Admin. Code R307-415-6b(2) similarly requires “[A]pplicable requirements that are not required by the Act or implementing federal regulations shall be included in the permit but shall be specifically designated as being not federally enforceable under the Act and shall be designated as ‘state requirements.’”

⁴⁴ The EPA acknowledges that in 2007, EPA Region 8 submitted a comment letter to UDAQ indicating that, “Until EPA approves Utah’s NSR reform rules (including PAL provisions) into the SIP, PacifiCorp cannot rely on the ten-year PAL provisions in this permit to avoid Federal enforcement of current SIP requirements for major NSR/PSD, in the event of a future major modification at the facility.” April 5, 2007, Letter from EPA to UDAQ, Re: EPA Region 8 Comments on Intent-to-Approve (Draft PSD Permit) for PacifiCorp’s Hunter Power Plant, Enclosure at 5. Notably, this comment letter did not suggest that the Approval Order or the emission limits contained therein were deficient in their own right; it only indicated that the facility could not rely on the plantwide emission limits in the permit to avoid major NSR requirements for potential future actions that may occur at PacifiCorp-Hunter. Furthermore, the EPA notes that this regional comment letter was not a final agency position, and the EPA need not make any determination as to the validity of the PALs in order to respond to this title V petition, because the Petitioner has not demonstrated why any purported deficiency in the PAL permit resulted in a flaw in the title V permit. *See In the Matter of Appleton Coated, LLC*, Order on Petition Nos. V-2013-12 and V-2013-15 at 12 n.6 (October 14, 2016); *In the Matter of Chevron USA Inc. – 7Z Steam Plant*, Order on Petition No. IX-2016-8 at 8-9 (April 24, 2017). Moreover, the EPA notes that the PacifiCorp-Hunter PAL permit will expire on March 30, 2018. The title V permit clearly specifies the procedures by which PacifiCorp-Hunter will be required to apply for a renewal PAL permit. *See* 2016 Permit at 19, Condition II.B.1.i. Such a renewal permit will be issued according to, and must necessarily comply with, Utah’s EPA-approved SIP regulations governing PAL permits (which, as described by Condition II.B.1.i, require compliance with 40 C.F.R. § 52.21(aa)(9)(i)–(v)). This future PAL permit

under the referenced EPA-approved SIP rule to establish the SO₂ and NO_x emission limits (and accompanying monitoring, recordkeeping, and reporting provisions) that are incorporated into the title V permit at Condition II.B.1.i. Similarly, the Petitioner has not demonstrated why, even accepting any purported deficiencies related to how the PAL levels were set or adjusted, this would result in the SO₂ and NO_x emission limits being invalid under the SIP provision cited by Condition II.B.1.i. Therefore, the Petitioner has not demonstrated that these emissions limits could not be included in the title V permit as federally enforceable. Overall, the Petitioner has not demonstrated why any of the three alleged deficiencies related to the PALs established in 2008 have led to an objectionable flaw in the title V permit.

Regarding the Petitioner's claim that this is the first time the public has had an opportunity to comment on the incorporation of these facility-wide SO₂ and NO_x emissions limits into the title V permit, and other concerns alleging that the prior incorporation of these terms was improperly processed, the Petitioner has not demonstrated that this resulted in a flaw in the 2016 title V permit. To the extent that these procedural issues concern any title V permit other than the 2016 Permit that is the subject of the Petition, those issues are outside of the scope of the 2016 title V permit proceeding, and, therefore, the current petition opportunity.⁴⁵ As explained in Section III.B of this Order, UDAQ did provide an opportunity for public comment on the 2016 Permit, consistent with 40 C.F.R. 70.7(h) and Utah Admin. Code R307-415-7i. The Petitioner took advantage of the opportunity to comment on the 2016 Permit, including the facility-wide SO₂ and NO_x limits included in the 2016 Permit, submitting five pages of comments relevant to this Petition claim.⁴⁶

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

Claim C: The Petitioner's Claim that "The Administrator Must Object to the Hunter Title V Renewal Permit Because It Fails to Include Approval Order Requirements, including BACT, for Unpermitted Modifications at Hunter Unit 1 in 2010."

Petitioner's Claim: The Petitioner claims that the PacifiCorp-Hunter title V permit is deficient because it does not identify, include, or assure compliance with BACT requirements for SO₂, NO_x, and PM and other requirements reflected in the Approval Order rule in the Utah SIP. The Petitioner asserts these requirements should have been applicable to allegedly unpermitted modifications to the facility in 2010 (referred to in Claim C as the 2010 "modifications" or 2010 "projects"). Petition at 22, 26. The Petitioner also asserts that PacifiCorp-Hunter's operation without an Approval Order authorizing these modifications (and without the BACT requirements) has resulted in continuing violations of the Utah SIP, for which the title V permit must include a compliance schedule. *Id.* at 23, 27.

action may involve, among other things, a reevaluation of the PAL levels set by the permit. Utah's EPA-approved rules require that the public will have the opportunity to participate in this future proceeding, including to comment on any relevant outstanding concerns with the PAL renewal. *See* Utah Admin. Code R307-405-18.

⁴⁵ *See In the Matter of Hu Honua Bioenergy, LLC*, Order on Petition No. VI-2014-10 at 38–40 (September 14, 2016).

⁴⁶ *See* Petition Exhibit B, Sierra Club's Comments on the PacifiCorp-Hunter Power Plant DRAFT Title V Renewal Permit (Permit Number: 1500101002-Draft) at 74–78 (November 13, 2015) (Sierra Club Comments).

The Petitioner asserts that under the EPA-approved SIP rules that were applicable at the time of the 2010 modifications, prior to commencing a planned modification where there is a reasonable expectation of any emissions increase, the source must obtain an Approval Order imposing BACT limits and other requirements. *Id.* at 23 (citing the SIP Approval Order rule formerly codified at R307-1-3). The Petitioner acknowledges that PacifiCorp-Hunter applied for (in 2007) and ultimately received (in 2008) an Approval Order authorizing pollution control equipment and other identified projects at the facility. *Id.* at 24–25. However, the Petitioner claims that in addition to the projects specifically applied for and authorized by this Approval Order, the source undertook a number of additional modifications in 2010—including replacement of Unit 1’s economizer, low temperature superheater, finishing superheater, pulverizer components, and various turbine upgrades—that “were not covered by the 2007 [Notice of Intent] or the 2008 Approval Order,” and which, therefore, were “unpermitted.” *Id.* at 25. The Petitioner asserts, and provides various arguments supporting its assertion, that it was reasonable to expect that these allegedly unpermitted projects would result in additional increases of emissions, and, as such, required an Approval Order. *Id.* at 26. The Petitioner challenges UDAQ’s alleged failure to identify or include conditions in the title V permit reflecting SIP Approval Order permitting requirements (including BACT⁴⁷), claiming that UDAQ must have “either erroneously relied on inapplicable and unlawful PALs or it simply ignored its Approval Order rules.” *Id.*⁴⁸

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

Relevant Legal Background

The air permitting rules in the approved SIP at the time of issuance of the 2008 Approval Order and the 2010 modifications were contained in Utah Admin. Code R307-1-3 *et seq.* Notice of Intent and Approval Order requirements, implementing in part the state’s minor NSR program, were contained in Utah Admin. Code R307-1-3.1 (the Approval Order rule that the Petitioner references). The relevant requirements read, in part, as follows:

Except for the exemptions listed herein, any person planning to construct a new installation which will or might reasonably be expected to become a source or an indirect source of air pollution or to make modifications or relocate an existing installation which will or might reasonably be expected to increase the amount or change the effect of, or the character of, air contaminants discharged, so that such installation may be expected to become a source or indirect source of air pollution, or any person planning to install an air cleaning device or other equipment intended to control emission of air contaminants

⁴⁷ The Petitioner references public comments, wherein the Petitioner claims to have demonstrated the current controls and limits would not constitute BACT. The Petitioner further asserts, “Although the Title V permit identifies the authority for the SO₂, NO_x, and PM Limits . . . as [BACT], the permit records for the Hunter Plant do not indicate that any recent evaluation of BACT was conducted for the Hunter units for any pollutant except CO in 2008.” *Id.* at 27 n.112.

⁴⁸ The Petitioner’s claim that the PALs were unlawful is discussed in Claim B above. The Petitioner claims that even lawfully established PALs may not be relied upon to exempt sources from the requirement to obtain an Approval Order. *Id.* at 24 (citing Utah Admin. Code R307-401-13 (2010) and a UDAQ memorandum from 2006). The Petitioner also claims that none of the exceptions contained in the Approval Order rule are applicable to the 2010 modifications, nor were any claimed. *Id.* at 24.

from a stationary source, shall submit to the Executive Secretary a notice of intent and receive an approval order prior to initiation of construction, modification or relocation.

Utah Admin. Code R307-1-3.1.1. Further,

The Executive Secretary shall issue an approval order if he determines through plan review that the following conditions have been met:

- A. The degree of pollution control for emissions, to include fugitive emissions and fugitive dust, is at least best available control technology except as otherwise provided in these regulations.

Utah Admin. Code R307-1-3.1.8.

The term “modification” is defined as “any planned change in a source which results in a potential increase of emission.” Utah Admin. Code R307-1-1.

Relevant Permit History

As noted under the Relevant Permit History for Claim B, on March 13, 2008, UDAQ issued Approval Order DAQE-AN010237012-08 authorizing modifications to Units 1, 2 and 3 at the PacifiCorp-Hunter plant, including pollution control projects and other capital and operation and maintenance projects. Based on the 2007 Notice of Intent, the projects were scheduled to be completed by 2010, thus spanning multiple years.⁴⁹ PacifiCorp also indicated in its 2007 Notice of Intent that “[t]he projects listed are based on current plans which may be refined as overhaul schedules and equipment status change. As PacifiCorp further refines the project lists, that information will be provided to the Utah Division of Air Quality.”⁵⁰ UDAQ acknowledged in its 2008 Modified Source Plan review that “[t]he replacement, addition or upgrade of existing emissions controls will result in a potential increase of some air pollutant emissions, necessitating the issuance of an approval order pursuant to [Utah Admin. Code] 307-401.”⁵¹

In a letter from to UDAQ dated December 18, 2009, PacifiCorp identified that there would be a delay in the schedule for installation of pollution controls on Units 1 and 2.⁵² In addition to the

⁴⁹ Specific projects identified in the 2007 Notice of Intent included: 1) Installation of low NOx burners and overfire air systems on Units 1, 2 and 3; 2) Upgrade of FGD systems on Units 1, 2 and 3 to achieve 90 percent control via elimination of bypass; and 3) Replacement of electrostatic precipitators with baghouses on Units 1 and 2. Additionally, a number of capital and operation and maintenance (O&M) projects were identified on Units 1–3 that were proposed to be completed contemporaneously with the pollution control projects.

⁵⁰ 2007 Notice of Intent at 2-1.

⁵¹ UDAQ Modified Source Plan Review, RE: Installation of Pollution Control Equipment, Establishing Plantwide Applicability Limitations and Approval Orders Consolidation at 24 (January 25, 2008) (Ex. 38 to Sierra Club Comment Letter) (2008 Modified Source Plan Review).

⁵² Specifically, PacifiCorp indicated that the completion of pollution controls on Unit 2 would be delayed one year and the final completion of pollution controls on Unit 1 would be delayed until 2014. Letter from William K. Lawson, PacifiCorp, to Ms. Cheryl Heying, UDAQ RE: Status of Hunter Plant’s Pollution Control Equipment and Capital and O&M Projects (December 18, 2009) (Ex. 39 to Sierra Club Comment Letter) (December 2009 PacifiCorp Letter). To address any potential emissions increases associated with the deferral of the Unit 1 pollution control projects without deferring the contemporaneous capital projects at that unit, PacifiCorp proposed that, with

changes to the project schedule, PacifiCorp indicated that it was moving forward with other contemporaneous capital projects authorized by the 2008 Approval Order and that it would perform a series of Unit 1 “capital and operations and maintenance projects” in 2010–2011, not specifically identified in the 2007 Notice of Intent.⁵³ PacifiCorp stated that “[t]he turbine upgrades will take advantage of technological improvements to increase the efficiency of the steam turbine to provide increased power to the generator without increasing the heat input from the boilers.”⁵⁴

UDAQ responded to PacifiCorp’s update on the 2008 Approval Order projects in a letter dated February 1, 2010. UDAQ found that PacifiCorp’s proposal was “consistent with the requirements of [the 2008 Approval Order].”⁵⁵ UDAQ also concluded that a permit extension was not necessary because, in part, “PacifiCorp’s [Approval Order] does not specify any order in which construction must proceed”⁵⁶

EPA’s Analysis

The Petitioner’s claim relies upon the supposition that the changes to Unit 1 undertaken by PacifiCorp in 2010 were “unpermitted” because they “were not covered by the 2007 [Notice of Intent] or the 2008 Approval Order.” However, the Petitioner has not demonstrated that the 2010 modifications were not authorized by the 2008 Approval Order. In fact, as explained above, it is clear from the permit record and relevant correspondence that UDAQ considered the projects on Unit 1 identified in PacifiCorp’s 2010 letter to be authorized under the 2008 Approval Order. Indeed, the 2008 Approval Order authorized numerous different modifications and control projects at the PacifiCorp-Hunter plant “installations,” projected to be completed over a period of years. The facility said the following in its initial 2007 Notice of Intent: “As PacifiCorp further refines the project lists, that information will be provided to the Utah Divisions of Air Quality.”⁵⁷ Moreover, with respect to the 2010 modifications, UDAQ explicitly found that PacifiCorp’s proposal was “consistent with the requirements of [the 2008 Approval Order],” and noted that an extension to the initial 2008 Approval Order was not necessary to accommodate the proposed

the exception of NO_x and SO₂ that were covered by PALs, it would follow the requirements of 40 C.F.R. § 52.21(r)(6)(iv) and submit annual reports to UDAQ until completion of the pollution control projects. *Id.* UDAQ determined that this proposal was “consistent with . . . 40 C.F.R. § 52.21 (r), as incorporated into the Utah Air Quality Rules at Utah Admin. Code R307-401-19.” Letter from M. Cheryl Heying, UDAQ to William K. Lawson, PacifiCorp. RE: Status of Hunter Plant’s Pollution Control Equipment and Capital and O&M Projects, DAQE-GN0102370018-10 (February 1, 2010) (Ex. 40 to Sierra Club Comment Letter) (February 2010 UDAQ Letter). While UDAQ found PacifiCorp’s proposal to submit annual reports pursuant to 40 C.F.R. § 52.21 (r)(6)(iv) an acceptable method to demonstrate continued compliance, it also required the submittal of semiannual project status reports to “assure the agency that no increase in emissions is taking place, and that the construction is proceeding in a timely manner.” *Id.*

⁵³ December 2009 PacifiCorp Letter. The changes to Unit 1 described by PacifiCorp included turbine upgrades and replacement of the economizer, low temperature superheater, finishing superheater, and pulverizer components.

⁵⁴ *Id.*

⁵⁵ February 2010 UDAQ Letter.

⁵⁶ *Id.*

⁵⁷ 2007 Notice of Intent at 2-1.

modifications.⁵⁸ Overall, the Petitioner has failed to demonstrate that the 2010 modifications were unpermitted.

The Petitioner appears to suggest that these changes were required to be evaluated as a separate modification under the applicable Approval Order rule, rather than in aggregate with the other changes to the PacifiCorp-Hunter plant authorized by the 2008 Approval Order. However, the Petitioner has not demonstrated that there was any requirement in the applicable SIP that limited UDAQ's discretion to determine the construction, modification, relocation and pollution control installation activities that should or could be aggregated for the purposes of meeting the Approval Order rule requirements.⁵⁹ The Petitioner has not demonstrated that UDAQ's consideration and authorization of the 2010 projects as part of the broad set of changes covered by the 2008 Approval Order was prohibited by the SIP or otherwise unreasonable. Thus, the Petitioner has not demonstrated that the 2010 projects were "unpermitted," or that the 2010 projects warranted a separate Approval Order.

Even assuming for purposes of argument that the Petitioner's premise that the 2010 projects should have been evaluated and permitted separately under the Utah Approval Order rule is valid, the Petitioner has not demonstrated that UDAQ should have determined that those projects "will or might reasonably be expected to increase the amount or change the effect of, or the character of, air contaminants discharged..." thus requiring an approval order under the SIP.⁶⁰ The Petitioner stated:

The unpermitted 2010 Unit 1 work, individually or collectively, had the potential to result in increases of emissions of air contaminants, including, but not limited to, SO₂, NO_x, and PM from Hunter Unit 1. It was reasonable to expect that this work might increase those air contaminants due to an expected increase in the maximum hourly fuel burning capacity of Unit 1, an increase in its operating capacity factor, and/or an increase in the total number of hours in a year that Unit 1 could operate as a consequence of improvements in reliability and/or availability and/or improvements in efficiency, which could lead to an increase in dispatching of the unit.

Petition at 26. Other than the alleged increase in the heat input capacity of Unit 1—which, as described in the EPA's response to Claim D, the Petitioner has not adequately demonstrated—the Petitioner's conclusion that the projects would have triggered the requirement for an approval order are based on speculative and unsubstantiated assertions.⁶¹ As the EPA has

⁵⁸ In the February 2010 UDAQ Letter to PacifiCorp, UDAQ stated: "Since the capital improvements and pollution control equipment are related to existing facilities, the agency considers these activities to be site specific. Moreover, since PacifiCorp's Approval Order does not specify any order in which construction must proceed, the Executive Secretary has reviewed your letters in terms of whether the commence construction requirement has been satisfied., regardless of whether the construction is for capital improvements or for pollution control equipment."

⁵⁹ See Utah Admin. Code R307-1-3.1. The plain language of this provision does not explicitly limit or define the scope of the construction, modification, relocation and pollution control installation activities that could be considered in aggregate for the purposes of approval order applicability and requirements.

⁶⁰ *Id.*

⁶¹ To the extent that the public comments incorporated into the Petition contained more detailed support for these assertions, the EPA notes that these arguments are similarly speculative and do not demonstrate that the 2010

previously stated, vague or general assertions are inadequate to demonstrate a flaw in a title V permit.⁶²

Furthermore, the Petitioner provided no analysis of the 2008 Approval Order record indicating a flaw in any BACT requirements applied to Unit 1. As the Petitioner acknowledges, the title V permit identifies the authority for the SO₂, NO_x, and PM limits on Unit 1 as the limits selected as BACT in the 2008 Approval Order.⁶³ The Petitioner does not explain why the 2010 projects, which were modifications to an existing unit (Unit 1) that UDAQ considered authorized by the 2008 Approval Order, would require different BACT controls and limits than the BACT that was established for that existing unit in the 2008 Approval Order. The Petitioner claims in a footnote that its public comments purportedly “demonstrated that the currently [sic] pollution controls and/or emission limits of the Title V permit would not constitute BACT.” For the reasons discussed in response to Claim A, the title V process is not the appropriate place for Petitioner to address its disagreements with UDAQ’s prior determination of the conditions in a preconstruction permit. Even if it were, the Petition does not substantiate the assertion in this footnote that the limits do not constitute BACT under the Utah approval order regulations for the 2010 modifications covered by the 2008 Approval Order. Therefore, the Petitioner has not demonstrated that, even assuming the 2010 changes required additional permitting, the BACT limits applied to Unit 1 in the title V permit are not appropriate for the 2010 modification to which they apply under the 2008 Approval Order. Overall, the Petitioner has not demonstrated that the title V permit is deficient with respect to any applicable requirements associated with the SIP Approval Order rules and the 2010 modifications.⁶⁴

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

projects triggered the requirement for an additional Approval Order. For example, the public comments, which rely in part on examples from purportedly similar projects at other sources and “turbine vendor literature,” allege that the 2010 projects “might increase the amount of” SO₂, NO_x, and PM, “could lead to an increase in dispatching of the unit,” “are known to have propensity to result in an increase in annual emissions,” “could very well have required additional heat input,” etc. Sierra Club Comments at 65–66.

⁶² See *supra* note 8 and accompanying text.

⁶³ See 2016 Permit conditions II.B.2.a (PM limit, citing, in part, “R307-401-8(1)(a) (BACT)” as authority), II.B.2.b & c (NO_x limits, same), II.B.2.d (SO₂ limit, same). Moreover, as noted above, UDAQ in its 2008 Modified Source Plan Review acknowledged the BACT requirements applicable to the Approval Order, and concluded that BACT for the group of projects falling within the scope of the 2008 Approval Order—which would result in a “substantial reduction in emissions” across all projects—would be satisfied by the controls that the source was seeking approval to install. See 2008 Modified Source Plan Review at 35.

⁶⁴ Because the Petitioner has not demonstrated that the title V permit is missing any applicable requirements, or that the source was otherwise not in compliance with any applicable requirements at the time of title V permit issuance, it has not demonstrated that a compliance schedule is warranted. See 42 U.S.C. § 7661c(a); 40 C.F.R. §§ 70.5(c)(8) & 70.6(c)(3); Utah Admin. Code R307-415-5c(8)(c)(iii); 307-415-6c(3); see also, e.g., *In the Matter of CEMEX, Inc., Lyons Cement Plant*, Order on Petition No. VIII-2008-01 at 7 (April 20, 2009).

Claim D: The Petitioner's Claim that "The Administrator Must Object to the Hunter Title V Permit Because It Fails to Include PSD Requirements for NOx including BACT for the 2010 Projects at Hunter Unit 1."

Petitioner's Claim: The Petitioner asserts that the 2010 projects discussed in Claim C above should have triggered PSD requirements, including BACT, for NOx. Petition at 28.⁶⁵ The Petitioner asserts that the EPA must object to the title V permit because it does not include these PSD requirements, and because the 2016 Permit does not include a schedule of compliance to ensure that these requirements are ultimately incorporated into the title V permit. *Id.* at 30.

The Petitioner further claims that, under the SIP provisions applicable at the time of the 2010 projects,⁶⁶ the 2010 projects should have triggered PSD. The Petitioner claims that a 2007 Notice of Intent reflects a 50 MMBtu/hour heat input increase, which the Petitioner asserts "was likely related to the HP/IP/LP turbine upgrades and possibly also the boiler component replacement projects completed at Hunter Unit 1 in 2010." Petition at 28–29. The Petitioner claims that its public comments demonstrate that this alleged 50 MMBtu/hour heat input increase should have been projected to result in a significant emissions increase of NOx as well as a significant net emissions increase of NOx, thereby triggering PSD requirements for NOx. *Id.*⁶⁷

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

Relevant Legal Background

Refer to the Relevant Legal Background for Claim B.

Relevant Permit History

Refer to the Relevant Permit History for Claims B and C.

⁶⁵ The Petitioner's argument in Claim D that the 2010 projects triggered PSD for NOx is based on the "[a]ssumption" that the NOx PAL was not validly established," as discussed in Claim B. *Id.* at 28. The Petitioner argues that, because the NOx PAL was not lawfully established, the NOx PAL should not have been relied upon to exempt the 2010 projects at PacifiCorp-Hunter Unit 1 from PSD requirements. *Id.* at 29. The Petitioner also claims that various turbine upgrades and boiler component replacements should not qualify for routine maintenance, repair, and replacement (RMRR) exemptions, challenging a contention by the facility in a 2009 letter that "many" of the 2010 projects were considered RMRR. *Id.* at 28.

⁶⁶ The Petitioner asserts that the applicable SIP requirements related to PSD applicability were based on the EPA's 1992 "WEPCO Rule," and required a comparison of pre-project actual emissions to post-project representative actual emissions. *Id.* at 28 (citations omitted).

⁶⁷ Specifically, after claiming that the alleged heat input increase should have been projected to result in a significant emissions increase, the Petitioner claims that project would have also involved a significant net emissions increase because any emission reductions associated with the control projects authorized by the 2008 Approval Order would not have been creditable for netting. *Id.* at 29.

EPA's Analysis

As described above in Claim B, PSD requirements apply to, among other things, “major modifications,” defined as “any physical change or change in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the Clean Air Act.” Utah Admin. Code R307-405-1. Necessarily, this analysis requires a determination of the set of related activities that must be evaluated either together or separately as the “physical change or change in the method of operation.” In Claim D, the Petitioner appears to argue that the 2010 projects discussed in Claim C⁶⁸ were required to be evaluated as a separate “physical change or change in the method of operation” of the PacifiCorp-Hunter plant for purposes of determining PSD applicability under the applicable SIP regulations, rather than considered in aggregate with the other changes authorized by the 2008 Approval Order.⁶⁹ However, as discussed above, the Petitioner has not demonstrated any deficiency with respect to how UDAQ evaluated the projects authorized in the 2008 Approval Order, including whether and how UDAQ determined that the 2010 projects did not trigger PSD.

As discussed in Claim C, the permit record and relevant correspondence shows that UDAQ considered the modifications to Unit 1 identified in PacifiCorp’s 2010 letter to be activities authorized under the 2008 Approval Order. In any case, the Petitioner did not demonstrate that there was any requirement in the applicable SIP that limited UDAQ’s discretion to determine the “physical change[s] or change[s] in the method of operation” that in aggregate constitute a project that must be evaluated to determine PSD applicability.⁷⁰ The Petitioner did not claim that the aggregation of projects initially authorized by the 2008 Approval Order was flawed nor did it demonstrate that the changes identified in PacifiCorp’s 2010 update letter could not, consistent with the applicable SIP and EPA policy,⁷¹ be considered in the aggregate with other changes authorized by the 2008 Approval Order. Furthermore, the Petitioner provided no analysis of the 2008 Approval Order record indicating a flaw in the emissions increase and PSD applicability conclusions resulting from the 2010 changes to Unit 1.

Even assuming for the sake of argument that the changes to Unit 1 described in PacifiCorp’s 2009 letter should have been considered as a separate “physical change or change in the method

⁶⁸ Note that the 2010 “projects” discussed in Claim D refer to the same activities as the 2010 “modifications” or “projects” introduced in Claim C.

⁶⁹ Similar to the Petitioner’s arguments in Claim C relating to Approval Order Rule requirements, Claim D is based on the premise that the 2010 projects were either not permitted under the 2008 Approval Order or should have been evaluated separately from the other projects authorized by the Approval Order for purposes of determining PSD applicability.

⁷⁰ Utah Admin. Code R307-405-1 (definition of “major modification” for purposes of PSD applicability).

⁷¹ The EPA’s policy on aggregation outlines an approach relying upon case-specific factors (e.g., timing, funding, and the company’s own records) and the relationship between nominally-separate changes, and does not preclude the aggregation of multiple physical or operational changes when such changes taken together can be reasonably viewed as sufficiently related to be a single project even if individually or smaller groupings also could be viewed as physical or operational changes. For a collection of prior EPA memoranda relevant in determining whether projects should be aggregated, see 75 Fed. Reg. 19567, 19570–71 (April 15, 2010). While the policy discussion in this reconsideration notice does not represent a final agency position without further action by the agency, the numerous memoranda cited in this notice stand for themselves as examples of our historic approach to aggregation.

of operation,” and would not have been exempt routine maintenance repair and replacement,⁷² and granting the Petitioner’s premise that PSD applicability should not have been based on the PALs in the 2008 Approval Order, the Petitioner has not demonstrated that PSD should have applied to the 2010 projects. Specifically, the Petitioner’s emissions increase analysis and PSD applicability conclusion are deficient. The Petitioner’s argument that PSD should have applied to the 2010 projects rests on a purported 50 MMBtu/hour heat input increase, which the Petitioner claims “was *likely* related to the HP/IP/LP turbine upgrades and *possibly* also the boiler component replacement projects completed at Hunter Unit 1 in 2010.” Petition at 28–29 (emphasis added). This alleged 50 MMBtu/hour heat input increase on Unit 1 is based on a comparison of the “maximum demonstrated heat input” reported in a 1997 Notice of Intent to the “maximum nominal heat input rating” reported in a July 19, 2007, updated Notice of Intent. As an initial matter, the EPA notes that the maximum nominal heat input rating cited by the Petitioner is associated with the list of projects in the July 19, 2007, updated Notice of Intent, not the 2010 projects. Therefore, the Petitioner has not provided any direct evidence that the 2010 projects themselves resulted in an increase in the heat rate input that could increase emissions.

However, even the Petitioner’s evaluation of a potential increase in heat input from the 2010 projects is flawed. The comparison of *demonstrated* heat input (based on production data and heat and material balance) to the *nominal* heat input rating is a comparison of heat input capacity values based on different estimation approaches. It does not follow that had the comparison been made using a consistent approach, i.e., demonstrated capacity before and after the projects or nominal capacity before and after the projects, the same result or conclusion would be reached. Therefore, the Petitioner’s analysis cannot be relied upon in concluding that the 2010 projects resulted in a 50 MMBtu/hour heat input capacity increase on Unit 1. Moreover, PacifiCorp stated in its 2009 letter describing the 2010 projects on Unit 1 that “[t]hese projects will increase the thermal efficiency of the steam turbine and will not result in a heat input increase.” Overall, the Petitioner did not demonstrate that the 2010 projects resulted in a heat input capacity increase on Unit 1. Therefore, the Petitioner did not demonstrate that those projects, if considered separately from other activities authorized by the 2008 Approval Order and if analyzed under the SIP rules that the Petitioner asserts were applicable, would have resulted in a significant emissions increase or a significant net emissions increase of NO_x,⁷³ triggering PSD requirements. Accordingly, the Petitioner has not demonstrated that the PacifiCorp-Hunter title V permit is missing any applicable requirement.⁷⁴

⁷² PacifiCorp indicated, in its December 2009 Letter, that “[m]any of these projects are considered like-kind replacements and routine maintenance, repair and replacement projects...” The Petitioner cites this in Claim D, and presents arguments to support its position that the projects did not qualify as RMRR. However, there is no evidence that PacifiCorp or UDAQ relied upon the RMRR exemption in determining PSD was not applicable to the 2010 projects on Unit 1. Therefore, these arguments concerning RMRR are not relevant.

⁷³ Because the Petitioner has not demonstrated that a significant emissions increase occurred, it necessarily follows that the Petitioner has not demonstrated that the 2010 projects, considered separately, constituted a major modification, irrespective of the Petitioner’s assertions regarding the creditability of certain emission reductions. In addition, it does not appear that either PacifiCorp or UDAQ relied on a contemporaneous net emissions increase analysis in determining PSD applicability with respect to the 2010 projects, so the Petitioner’s argument is not relevant.

⁷⁴ As noted above, because the Petitioner has not demonstrated that the title V permit is missing any applicable requirements, or that the source was otherwise not in compliance with any applicable requirements at the time of title V permit issuance, it has not demonstrated that a compliance schedule is warranted. See 42 U.S.C. § 7661c(a);

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

Claim E: The Petitioner's Claim that "The Administrator Must Object to the Hunter Title V Renewal Permit Because UDAQ has Failed to Consider and Respond to Sierra Club's Comments."

Petitioner's Claim: The Petitioner asserts that UDAQ's RTC was deficient with respect to comments that raised the issues discussed above.⁷⁵ The Petitioner claims that UDAQ was "required by law" to substantively respond to public comments, and that UDAQ's failure to do so compels an EPA objection. Petition at 30–31 (citing Utah Admin. Code R307-415-7i). The Petitioner claims that UDAQ did not consider or respond to the issues raised in public comments, but rather rejected the comments out of hand, claiming that they were "not applicable to this Title V renewal action" but instead "pertain to the underlying requirements that are now simply incorporated into the Title V operating permit." *Id.* at 30 (quoting RTC at 3).

The Petitioner claims that, contrary to UDAQ's assertions in title V renewal permits (as opposed to permit modifications), all aspects of the permit are subject to review. *Id.* at 32 (citing *In the Matter of Wisconsin Public Service Corporation – Weston Generating Station*, Order on Petition No. V-2006-4 at 5 (December 19, 2007)). The Petitioner asserts that "[t]his broad scope of review necessarily invites comments challenging the erroneous omission of applicable requirements from Title V renewal permits, and comfortably encompasses all the issues raised in Sierra Club's comments and this Petition." *Id.* at 32–33. The Petitioner claims that "in the context of a Title V renewal permit, prior permitting actions that are relevant to the existence or application of applicable requirements are within the scope of permit review." *Id.* at 20 n.81.⁷⁶

The Petitioner additionally challenges UDAQ's assertion that some of the comments related to compliance and were, therefore, an enforcement matter beyond the scope of this permitting action. The Petitioner asserts that many issues in the title V process could be viewed as broadly relating to compliance and enforcement, but nothing in the CAA or title V regulations suggests that such issues are excluded from review in the title V process. *Id.* at 34. The Petitioner also claims that no potential jurisdictional bar exists that would prohibit the Petitioner from pursuing these claims here. *Id.* at 33–34.

The Petitioner claims that the EPA has previously objected to a title V permit featuring the same types of alleged shortcomings—namely, the failure of a state agency to respond to public comments concerning PSD applicability for previous modifications—and suggests that the EPA must object here for the same reasons. *Id.* at 31 (citing *In the Matter of Tennessee Valley Authority, Paradise Fossil Fuel Plant*, Order on Petition No. IV-2007-3 at 5 (July 13, 2009) (2009 TVA Paradise Order)). Specifically, the Petitioner notes that in the TVA Paradise Order,

40 C.F.R. §§ 70.5(c)(8) & 70.6(c)(3); Utah Admin. Code R307-415-5c(8)(c)(iii); 307-415-6c(3); *see also, e.g., In the Matter of CEMEX, Inc., Lyons Cement Plant*, Order on Petition No. VIII-2008-01 at 7 (April 20, 2009).

⁷⁵ The Petitioner also briefly raised challenges to UDAQ's RTC within each of the claims discussed above, to which the EPA is collectively responding in this claim. *See* Petition at 15–16 (Claim A); 19 (Claim B); 27 (Claim C), 29 (Claim D).

⁷⁶ With respect to public comments concerning PALs, the Petitioner also claims that these comments went well beyond questioning a past permitting action, because the PALs define the mechanism for whether PSD is triggered for SO₂ or NO_x in the future (through 2018). *Id.* at 19, 22.

the EPA objected because the state's failure to respond to a significant comment "may have resulted in one or more deficiencies in the permit." *Id.* (quoting 2009 TVA Paradise Order at 6).

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

UDAQ's Response

UDAQ responded to all of the Petitioner's NSR-related comments, including those raised in Claims A, B, C, and D of the Petition, by stating that: (1) those claims pertain to compliance, previous NSR permitting, and the Utah SIP; (2) compliance is an enforcement matter for UDAQ and is not addressed in this permitting action; (3) any concerns regarding previous permits should have been raised during public comments at the time those permitting actions took place, and any concerns regarding the SIP should have been raised during public comment period for the applicable rulemaking actions by the Utah Air Quality Board; and (4) the renewal title V permit is simply incorporating applicable requirements, and thus the comments are not applicable to the 2016 title V permit renewal action. *See* RTC at 2–3.

Additionally, regarding the Petitioner's comments that the PALs should have been adjusted to reflect regional haze requirements, UDAQ stated that the title V renewal permit is based on the April 6, 2015, Approval Order and applicable state and federal rules, and that the comments are not applicable to the title V renewal permitting action. *Id.* at 4. Finally, regarding the Petitioner's comments on the process UDAQ used to incorporate the 2008 Approval Order (including the PALs) into the title V permit, UDAQ responded that whether UDAQ properly followed permitting procedures in previous permitting actions is not at issue in this proceeding and thus the comments are not applicable to the title V renewal action. *Id.* at 5–6.

EPA's Analysis

As described above, in the EPA's response to Claim A, the Petitioner has not demonstrated that UDAQ improperly incorporated the terms and conditions of the 1997 Approval Order into the title V permit for PacifiCorp-Hunter. Under the interpretation of the EPA's part 70 regulations in this Order, the terms and conditions of that minor NSR permit were incorporated without further review as part of the title V permitting process. This is reflected in UDAQ's response to comments when they explain that "[a]ny concerns regarding previous permits should have been raised during public comments at the time those permitting actions took place . . . [A] Title V operating permit does not impose any new requirements but simply brings together all existing requirements from pervious [sic] permitting actions to aid enforcement" RTC 2–3. This is consistent with the EPA's interpretation of the requirements of part 70. Therefore, with regards to the issues raised by the Petitioners in Claim A, the Petition does not demonstrate that UDAQ's RTC was inadequate.

As described above, in the EPA's response to Claim B, the Petitioner has not demonstrated that the title V permit for PacifiCorp-Hunter is flawed because of the inclusion of the SO₂ and NO_x PALs established in the 2008 Approval Order. To the extent that the Petitioner's claim is that UDAQ lacked the authority to establish PALs that would be effective as a federally enforceable

alternative to NSR applicability determination procedures, the Petitioner has not pointed to any particular inappropriate use of these PALs. The use of PALs as an alternative to other NSR applicability determination procedures in any future permitting action is a forward looking compliance issue. The Petitioner has not demonstrated that UDAQ was unreasonable in responding that “[c]ompliance is an enforcement matter for UDAQ and is not addressed in this permitting action.” RTC at 2. Therefore, to the extent that Claim B raised these issues, the Petition does not demonstrate that UDAQ’s RTC was inadequate.

To the extent that UDAQ did not substantively address the issues implicated in Claims C and D, the Petitioner has not demonstrated how this violated any title V permitting requirement or otherwise resulted in a flaw in the permit.⁷⁷ As described above, in the EPA’s response to Claims C and D, the Petition has not demonstrated that the 2016 Permit fails to include applicable requirements or is inconsistent with part 70. Therefore, the Petitioner has not demonstrated in Claim E that the title V permit is “not . . . in compliance with applicable requirements” or the requirements of part 70. 40 C.F.R. § 70.8(c)(1); *see* 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d).

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

V. CONCLUSION

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

Dated: OCT 16 2017



E. Scott Pruitt,
Administrator.

⁷⁷ The Petitioner claims that UDAQ was required by law to “substantively respond” to the Petitioner’s comments by pointing to Utah Admin. Code R307-415-7i. This provision details the public participation requirements for UDAQ’s issuance of title V operating permits. However, the Petition does not include any legal analysis of this provision to demonstrate that UDAQ was required to “substantively respond” to the Petitioner’s comments. The EPA notes that while this provision requires UDAQ to provide notice to the public and affected states, R307-415-7i(1)-(3), and to “keep a record of the commenters and also of the issues raised during the public participation process,” R307-415-7i(5), this provision does not appear to require UDAQ to “substantively respond” to such comments or issues raised.