BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF	)	PETITION NO. IX-2020-12
	)	
COLTON POWER, LP	)	ORDER RESPONDING TO
DREWS AND CENTURY POWER GENERATING FACILITIES	)	PETITION REQUESTING
SAN BERNARDINO COUNTY, CA	)	OBJECTION TO THE ISSUANCE OF
PERMIT NOS. 182561 AND 182563	)	TITLE V OPERATING PERMITS
	)	
ISSUED BY THE SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT	)	

ORDER DENYING A PETITION FOR OBJECTION TO PERMIT

I. INTRODUCTION

The U.S. Environmental Protection Agency (EPA) received a petition on November 24, 2020, (the Petition) from the Sierra Club and the Center for Community Action and Environmental Justice (the Petitioners), pursuant to section 505(b)(2) of the Clean Air Act (CAA or Act), 42 United States Code (U.S.C.) § 7661d(b)(2). The Petition requests that the EPA Administrator object to proposed operating permits for Facility ID Nos. 182561 and 182563 (the Proposed Permits or the Permits) issued by the South Coast Air Quality Management District (SCAQMD) for the Drews and Century Power Generating Facilities (facilities) in San Bernardino County, California. On October 9, 2020, SCAQMD issued the final operating permits for these two facilities pursuant to title V of the CAA, CAA §§ 501–507, 42 U.S.C. §§ 7661–7661f, and SCAQMD Regulation XXX. *See also* 40 Code of Federal Regulations (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 Permits, the permit record, and relevant statutory and regulatory authorities, and for the reasons provided below, the EPA denies the Petition requesting that the EPA Administrator object to the Permits.

II. STATUTORY AND REGULATORY FRAMEWORK

A. Title V Permits

Section 502(d)(l) of the CAA, 42 U.S.C. § 766la(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 SCAQMD first submitted a title V program governing the issuance of operating permits on December 27, 1993. The EPA published interim approval of its title V operating permit program on August 29, 1996, and final full

approval of SCAQMD's title V program on December 7, 2001. 66 Fed. Reg. 63503. SCAQMD's title V program is codified in SCAQMD Regulation XXX.

All major stationary sources of air pollution and certain other sources are required to apply for and operate in accordance with 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), 503, 504(a), 42 U.S.C. §§ 7661a(a), 7661b, 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 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, 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 source'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, within 60 days of the expiration of the EPA's 45-day review period, petition the Administrator to object to the permit. CAA § 505(b)(2), 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d).

Each petition must identify the proposed permit on which the petition is based and identify the petition claims. 40 C.F.R. § 70.12(a). Any issue raised in the petition as grounds for an objection must be based on a claim that the permit, permit record, or permit process is not in compliance with applicable requirements or requirements under part 70. 40 C.F.R. § 70.12(a)(2). Any arguments or claims the petitioner wishes the EPA to consider in support of each issue raised must generally be contained within the body of the petition.[1] *Id.*

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).

---

[1] If reference is made to an attached document, the body of the petition must provide a specific citation to the referenced information, along with a description of how that information supports the claim. In determining whether to object, the Administrator will not consider arguments, assertions, claims, or other information incorporated into the petition by reference. 40 C.F.R. § 70.12(a)(2).

CAA § 505(b)(2), 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d); *see also* 40 C.F.R. § 70.12(a)(2)(v).

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 applicable requirements of the Act, including requirements of an applicable implementation plan. CAA § 505(b)(2), 42 U.S.C. § 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," under which the Administrator determines whether a petition demonstrates that a permit is not in compliance with the requirements of the Act, and a nondiscretionary duty on the Administrator's part 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. A more detailed discussion can be found in the preamble to the EPA's proposed petitions rule. *See* 81 FR 57822, 57829–31 (August 24, 2016); *see also 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 considers 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 a petitioner has provided the relevant analyses and citations to support its claims. For each claim, the petitioner must identify (1) the specific grounds for an objection, citing to a specific permit term or condition where applicable; (2) the applicable requirement as defined in 40 C.F.R. § 70.2, or requirement under part 70, that is not met; and (3) an explanation of how the term or condition in the permit, or relevant portion of the permit record or permit process, is not adequate to comply with the corresponding applicable requirement or requirement under part 70. 40 C.F.R. § 70.12(a)(2)(i)–(iii). If a petitioner does not identify these elements, the EPA is left to

---

[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); *cf. 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.

work out the basis for the 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.").[6] Relatedly, the EPA has pointed out in numerous previous orders that 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).[7] 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).[8]

Another factor the EPA examines is whether the petitioner has addressed the state or local permitting authority's decision and reasoning. Petitioners are required to address the permitting authority's final decision and final reasoning (including the state's response to comments) where these documents were available during the timeframe for filing the petition. 40 C.F.R. § 70.12(a)(2)(vi); *see MacClarence*, 596 F.3d at 1132–33.[9] Specifically, the petition must identify where the permitting authority responded to the public comment and explain how the permitting authority's response is inadequate to address (or does not address) the issue raised in the public comment. *Id.*

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) generally includes, but is not limited to, the administrative record for the proposed permit and the petition, including attachments to the petition. 40 C.F.R. § 70.13. 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 required by § 70.7(a)(5) (sometimes referred to as the 'statement of basis'); any comments the permitting authority received during the public participation process on the draft permit; the permitting authority's written responses to comments, including responses to all significant comments raised during the public participation process on the draft

---

[6] *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*).

[7] *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).

[8] *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.

[9] *See also, e.g., Finger Lakes Zero Waste Coalition v. EPA*, 734 Fed. App'x *11, *15 (2d Cir. 2018) (summary order); *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 why 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).

permit; and all 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). *Id.* 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 when making a determination whether to grant or deny the petition. *Id.*

III. BACKGROUND

A. The Drew and Century Generating Facilities

Both the Century Generating Station and Drews Generating Station are natural gas-fired power generating facilities that provide peaking power to the grid. Each facility consists of four 10 megawatt (MW) simple cycle gas turbines, and each turbine is equipped with selective catalytic reduction (SCR) and an oxidation catalyst. The potential to emit (PTE) for each facility's nitrogen oxides (NO_X) emissions is greater than the applicable major source threshold (10 tons per year) making them subject to title V requirements.

B. Permitting History

Both facilities were issued initial title V permits in October 2001 while under the ownership of Alliance Colton, LLC. The current owner, Colton Power, LP (Colton), submitted title V renewal applications for each facility on April 26, 2019. SCAQMD submitted the proposed title V permits to the EPA on September 10, 2019, and issued public notices for the permits on September 17, 2019, and January 31, 2020. The Petitioners provided comments on the proposed permits to SCAQMD, which SCAQMD responded to on August 7, 2020. Pursuant to 40 C.F.R. § 70.8(a)(ii), on September 16, 2020, SCAQMD resubmitted the proposed title V permits and associated response to comments documents to the EPA for review.

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 November 2, 2020. Thus, any petition seeking the EPA's objection to the Proposed Permit was due on or before January 2, 2021. The Petition was received November 24, 2020, and, therefore, the EPA finds that the Petitioners timely filed the Petition.

IV. DETERMINATIONS ON CLAIMS RAISED BY THE PETITIONERS

The Petitioners' claims concern SCAQMD Rule 1134, which, as the Petitioners note, was adopted in 1989 and amended on April 5, 2019. Petition at 7. Rule 1134 sets forth, among other requirements, NOx emission limits which will apply to facilities beginning on January 1, 2024. The Petitioners claim that the permits for the Drew and Century facilities fail to include the requirements of Rule 1134, specifically the 2.5 parts per million by volume (ppmv) NOx emissions limit that the Petitioners claim will apply beginning in 2024, as well as requirements to assure compliance with this limit. The Petitioners assert that these requirements must be included

since the permit term extends beyond the date that compliance is required by SCAQMD Rule 1134. The Petitioners have presented their argument in two sub-claims as outlined below. Given the overlapping issues presented in each sub-claim, the EPA will address all sub-claim issues together in one response following the summaries of Petitioners' claims.

Claim A.1: The Petitioners Claim That "SCAQMD Title V Rules Require that the Title V Renewal Permits Include Conditions to Assure Compliance with All Regulatory Requirements at the Time of Permit Issuance, and Both Plants Must Comply with Rule 1134 During the 5-Year Term of the Title V Renewal Permit."

Petitioners' Claim: The Petitioners claim that the Permits should include the 2.5 ppmv NOx emissions limit required by the April 5, 2019 amended version of Rule 1134 ("amended Rule 1134"). Petition at 6. The Petitioners note that "Rule 3004(b) of SCAQMD's title V rules in Chapter XXX requires that the permit content for RECLAIM facilities such as Century Power Generating Facility include, among other things, all requirements of Rule 3004(a). Rule 3004(a)(1) requires that each Title V permit 'shall include…[e]mission limitations and those operational requirements that assure compliance with all regulatory requirements at the time of permit issuance.'"[10] Petition at 7.

The Petitioners assert that because the title V permit term extends beyond the date compliance is required for the NOx emission rates found in amended Rule 1134[11] that SCAQMD must include the requirements of amended Rule 1134 in the Permits now. Petition at 9.

The Petitioners cite to Section K of each Permit, which states that amended Rule 1134 is pending EPA approval as part of the state implementation plan (SIP) and upon the effective date of that approval, amended Rule 1134 will become federally enforceable. Petition at 7, citing to Revised Century Draft Permit & Statement of Basis at 61. The Petitioners assert that "despite the current pending status of the SIP, EPA guidance provides that a permitting authority can properly rely on pending rules when 'the pending rule will probably be approved, or when the source believes it can show that the pending rule is more stringent than the rule it would replace.'" Petition at 7, citing to EPA Memorandum from Lydia N. Wegman, *White Paper Number 2 for Improved Implementation of The Part 70 Operating Permits Program* (March 5, 1996) at 2-3 (*White Paper Number 2)*. The Petitioners argue that this is such a case here since amended Rule 1134 NOx emission rate is more stringent than the NOx rate that would otherwise be in place and that the pending rule will probably be approved. "In these circumstances, the SCAQMD can and should properly rely on Rule 1134 to be implemented." Petition at 8.

The Petitioners acknowledge that the Statement of Basis for each facility notes that the permits can be later revised to incorporate the requirements of amended Rule 1134 and that "the facility has not yet decided which compliance option it will choose and subsequent change(s) will require permit revision." Petition at 10, citing to Revised Century Draft Permit & Statement of

---

[10] RECLAIM Facilities are defined in SCAQMD Regulation XXX, Rule 3000(b)(22) as any facility that is subject to the requirements of Regulation XX – Regional Clean Air Incentives Market (RECLAIM).

[11] SCAQMD Rule 1134 was most recently amended on April 5, 2019. SCAQMD's current EPA approved SIP includes an earlier version of Rule 1134, which was adopted on August 8, 1997. *See* 65 Fed. Reg. 46873 (August 1, 2000).

Basis at 81-82. However, the Petitioners assert that SCAQMD cannot issue a title V renewal permit that does not include all regulatory requirements in reliance on some future permit revision. Petition at 10.

Claim A.2: Petitioners Claim that "Revisions to the Title V Permits for the Drews and Century Gas Plants are Needed to Ensure that the Plants Will Comply with Rule 1134 Requirements Starting January 1, 2024."

Petitioners' Claim: The Petitioners acknowledge that there are two compliance options – either meeting the emission limits or the criteria for a low-use exemption – for demonstrating compliance with Rule 1134, and assert that SCAQMD must include provisions in the title V permit to ensure that one of the two compliance options are met by January 1, 2024. The Petitioners claim that if either facility intends to be exempt from the 2.5 ppmv NOx emission limit in amended Rule 1134(d)(3) through the low-use exemption compliance option, which requires a rolling 3 year average annual capacity factor of less than 10 percent, this annual capacity factor requirement "must be in effect by January 1, 2020 to ensure that this criteria for exemption of the emission limits of Rule 1134(d)(3) is met by the January 1, 2024 compliance deadline…" Petition at 12. Petitioners assert that, if the company has not selected a compliance approach, SCAQMD should put in place two sets of requirements, one for each compliance option. The Petitioners state that these revisions would increase clarity about which rules apply to the plants and provide additional regulatory certainty to the plant owner and community stakeholders that SCAQMD intends to fully implement amended Rule 1134. The Petitioners claim that the ability to make the revisions at some unidentified later date is simply insufficient to ensure that amended Rule 1134 will be enforced. Petition at 14.

EPA's Response: For the following reasons, the EPA denies the Petitioners' request for an objection on both claims.

Legal Background

The title V permit program was developed to enable sources, states, the EPA, and the public to understand which permitting requirements apply to a given source. *See* 57 FR 32251. In order to achieve that goal, the EPA developed regulations that set forth specific elements which must be included in title V permits including "[e]missions limitations and standards, including those operational requirements and limitations that assure compliance with all applicable requirements at the time of permit issuance." *See* 40 C.F.R. §70.6(a)(1). The regulations define "applicable requirement" by a specified list of standards and requirements "as they apply to emission units … [including] any standard or other requirement provided for in the applicable implementation plan approved or promulgated by the EPA through rulemaking under title I of the Act and that implements the relevant requirements of the Act…"[12] 40 C.F.R. §70.2. The regulations clarify that "applicable requirement" includes "requirements that have been promulgated or approved by EPA through rulemaking at the time of issuance but have future-effective compliance dates." *Id.*

[12] SCAQMD defines "applicable requirement" as it is defined in 40 CFR 70.2.

EPA Analysis

EPA has previously stated that in order to demonstrate grounds for an EPA objection to a title V permit, a petitioner must demonstrate to the EPA that the permit does not comply with the applicable requirements of the CAA, including requirements of an applicable implementation plan. *See In the Matter of Hyland Facility Associates,* Order on Petition No. II-2016-3 (April 10, 2019) (citing to 42 U.S.C. §7661d(b)(2)). The CAA requires that title V permits contain "conditions as are necessary to assure compliance with applicable requirements." 42 U.S.C. § 7661c(a). As noted above, "applicable requirements" include those that are provided for in a SIP that has been approved or promulgated by EPA and that implement relevant requirements of the Act. The regulatory definition of "applicable requirements" refers to such requirements "*as they apply* to emission units in a part 70 source." 40 C.F.R. § 70.2 (emphasis added). Therefore, only requirements that *currently, actually* apply to a source are considered "applicable requirements." *In the Matter of Newark Bay Cogeneration Partnership LP*, Order on Petition No. II-2019-4 at 13 (August 16, 2019).

Petitioners' claims concern SCAQMD's amended Rule 1134, which, as they acknowledge, has not been approved into SCAQMD's SIP. Therefore, amended Rule 1134, by definition, is not an "applicable requirement" necessary to be included in the Permits. The Petitioners do not argue that the Rule should be considered an "applicable requirement;" rather, their argument for its inclusion in the Permits is that the Rule is more stringent than the current requirement and "will probably be approved." Petition at 8. The Petitioners identified a 1996 EPA guidance "providing that a permitting authority can properly rely on pending rules" under such circumstances. Petition at 7, quoting *White Paper Number 2*, at 3. However, Petitioners' reliance on that 1996 guidance is misplaced. To begin, the guidance addresses situations where state and local rules have been submitted for SIP approval; contrary to Petitioners' assertion that "Rule 1134 is pending approval as part of the state implementation plan (SIP)," Petition at 7, amended Rule 1134 has not been submitted to the EPA for approval into the SIP.[13] Further, the guidance does not – and cannot – mandate including in a title V permit state rules pending SIP approval; therefore a decision to not include such provisions in a title V permit is not a basis for the EPA to object during its 45-day review period or a basis to grant a claim in a title V petition.[14] *See In the Matter of Waupaca Foundry, Inc. Plants 2/3,* Order on Petition No. V-2016-21, 9 (June 7, 2017) citing to 70.6(b)(2) ("*Waupaca Foundry*") (requiring that terms and conditions not required by the CAA or any applicable requirements must be specifically labeled in a source's title V permit as not federally enforceable, and providing that these terms are not subject to, among other things, the EPA review and petition requirements of 40 C.F.R. § 70.8 (citing 40 C.F.R. §

---

[13] SCAQMD confirmed via email on March 15, 2021, that amended Rule 1134 has not been submitted to the EPA for review and approval into SCAQMD's SIP.

[14] If a more stringent rule, such as amended Rule 1134, has been submitted to EPA for approval into the SIP, *White Paper 2* explains that, under certain conditions, SCAQMD would have had the *discretion*—not an *obligation*—to include that rule's requirements in the Permits if it assures compliance with the requirements of the SIP. *See White Paper 2* at 21-27; *id.* at 21 ("Where the permitting authority or the source has demonstrated to EPA's satisfaction that the local rule is more stringent and therefore assures compliance with the current SIP for all subject sources, a permit application relying on the local rule *may* be deemed to be complete and a permit containing the requirements of the local rule rather than the current SIP *could* be issued for part 70 purposes." (emphasis added) (footnote omitted)). However, as noted above, the exercise of this discretion is not subject to review by EPA during its 45-day review period or in response to a petition to object.

70.6(b)(2))). We are also not swayed by the argument that compliance with amended Rule 1134 will be required prior to the end of the permit term and therefore it should be included in the permit now. While applicable requirements, which must be included in a title V permit, could have future-effective compliance dates, as discussed above, amended Rule 1134 is not an applicable requirement because it has not been approved into the SCAQMD SIP through rulemaking at the time of permit issuance. *See* 40 C.F.R § 70.2. Indeed, as noted above, amended Rule 1134 has not been submitted to EPA for review. The Petitioners therefore have failed to demonstrate that the Permits are flawed for failing to include amended Rule 1134 and its associated compliance requirements.

The Petitioners do not claim that amended Rule 1134 is an applicable requirement; rather, they note that SCAQMD's Title V rules require permits for RECLAIM facilities, such as the Drew and Century power plants, to include all "regulatory requirements." Petition at 7. SCAQMD defines "regulatory requirements" broadly to include not only applicable requirements but also "District Rules and Regulations, and all State requirements pertaining to the regulation of air contaminants." *See* SCAQMD Rule 3000(b)(25). However, failure to include in a title V permit regulatory requirements that are not applicable requirements of the CAA is not a ground for EPA's objection.[15]

Although SCAQMD declined to include in the Proposed Permits the requirements of amended Rule 1134, SCAQMD acknowledged in the Statement of Basis for each of the Permits that "Rule 1134 will apply to each plant beginning January 1, 2024." Petition at 6. SCAQMD further acknowledges that, depending on what compliance option under the amended Rule 1134 the company chooses, there may be steps with which it must comply prior to the compliance date of January 1, 2024. In its response to Petitioners' request for a title V public hearing, SCAQMD stated that "the facilities must submit a permit application prior to performing any modifications or changes to the gas turbines in order to comply with the Rule 1134 requirements . . . Once the facility chooses their compliance path under the rule for the turbines and submits the requisite permit applications, the facility's title V permit will be modified at that time to incorporate the

---

[15] We note that Petitioners were not without recourse, as they could have sought judicial review of the Permits in state court for alleged violation of SCAQMD regulations requiring that a title V permit include all regulatory requirements. *See* CAA § 502(b)(6) and 40 C.F.R. § 70.4(b)(3)(x) (requiring that a state permitting program provide an opportunity for judicial review in state court of final title V permit actions); *see also*, Letter from Bill Lockyer, Attorney General for the State of California, to Christine Todd Whitman, EPA Administrator, Re: California's Authority to Implement Title V (Operating Permits) of the Clean Air Act, at 14 (March 21, 2011) ("State law provides an opportunity for judicial review in state court of any final permit action by the applicant, any person who participated in the public-participation process provided pursuant to the Clean Air Act and 40 CFR § 70.7(h), or any other person who could obtain judicial review of such actions under state laws, including the air pollution control officer."). In fact, state court would appear to be the proper recourse in this case as it concerns a state-only requirement. In contrast, Petitioners would not be assured the relief they seek even if EPA were to object in this case on the ground that SCAQMD failed to follow its own rules. If, for example, EPA objected and SCAQMD declined to align the Permits with its own requirement to include all "regulatory requirements," then EPA would be in a position to issue the permits itself. *See* CAA § 505(c). An EPA-issued title V permit, however, would not include state-only "regulatory requirements" that are not also federally-enforceable applicable requirements, such as amended Rule 1134. *Compare* 40 C.F.R. § 70.6(b)(2), which explains how state-issued title V permits are to handle state requirements that are not federally enforceable under the CAA, *with* the regulations at 40 C.F.R. Part 71, which govern EPA's issuance of title V permits and do not provide for inclusion of state-only requirements.

changes." SCAQMD Response to Hearing Request at 2-3. However, the Petitioners claim that "the ability to make the same revisions at some unidentified later date is simply insufficient to ensure that Rule 1134 will be enforced at these plants." Petition at 14. Though not relevant to our decision here, we note that SCAQMD Rule 1134(d)(8) requires that an application for permit revision be submitted by July 1, 2022, not "some unidentified later date" as the Petitioners' claim. But more importantly, as the EPA previously noted, amended Rule 1134, including the compliance options stated therein, has not been approved into SCAQMD's SIP; it is therefore a state-only rule and not an applicable requirement subject to EPA review.[16] *See Waupaca Foundry* at 9. The fact that the company will be required to choose a compliance option for this state-only rule or that there may be other compliance requirements prior to the final compliance date of January 1, 2024, does not change EPA's analysis that the CAA does not require non-applicable requirements be included in the title V permit.

As discussed above, title V permits are required to contain applicable requirements and requirements to assure compliance with all applicable requirements at the time of permit issuance. Here, the Petitioners have not demonstrated that the requirements of amended Rule 1134 are applicable requirements. Therefore, the Petitioners have failed to demonstrate that the Permit does not comply with the applicable requirements of the CAA.

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: May 10, 2021

Michael S. Regan
Administrator

[16] Regarding Petitioners' concern that the permit term extends beyond the compliance date contained in amended Rule 1134, in the event that the amended Rule 1134 is approved into the SIP and there are 3 or more years remaining in the Permit term, 40 C.F.R. § 70.7(f)(1) requires that the Permits be reopened and modified to include the requirements of this Rule even if they have future-effective compliance dates. *See* 40 C.F.R. 70.2 ("*Applicable requirement* … [includes] requirements that have been promulgated or approved by EPA through rulemaking at the time of issuance but have future-effective compliance dates.") If approval takes place with fewer than 3 years remaining in the Permit term, amended Rule 1134 will be included when the Permits are renewed.