

BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF)	PETITION NO. IX-2022-4
)	
SALT RIVER PROJECT AGRICULTURAL)	ORDER RESPONDING TO
IMPROVEMENT AND POWER DISTRICT)	PETITION REQUESTING
AGUA FRIA GENERATING STATION)	OBJECTION TO THE ISSUANCE OF
MARICOPA COUNTY, ARIZONA)	TITLE V OPERATING PERMIT
)	
PERMIT No. P0007595)	
)	
ISSUED BY THE MARICOPA COUNTY)	
AIR QUALITY DEPARTMENT)	
)	

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

I. INTRODUCTION

The U.S. Environmental Protection Agency (EPA) received a petition dated February 28, 2022 (the Petition) from Sierra Club (the Petitioner), 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 operating permit No. P0007595 (the Permit) issued by the Maricopa County Air Quality Department (MCAQD or the District) to the Salt River Project Agricultural Improvement and Power District (SRP) Agua Fria Generating Station (Agua Fria or the facility) in Maricopa County, Arizona. The operating permit was issued pursuant to title V of the CAA, 42 U.S.C. §§ 7661–7661f, and MCAQD Air Pollution Control Regulations Rule 210. *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 Permit, the permit record, and relevant statutory and regulatory authorities, and as explained in Section IV of this Order, the EPA grants in part and denies in part the Petition requesting that the EPA Administrator object to the Permit. Specifically, the EPA grants in part and denies in Part Claims 1, 2, and 3, denies Claim 4, and grants Claim 5.

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. Maricopa County submitted a title V

program governing the issuance of operating permits in 1993, followed by several amendments. After granting interim approval of Maricopa County's title V operating permit program in 1996, the EPA granted full approval of the program in 2001. 66 Fed. Reg. 63175 (December 5, 2001). This program, which became effective on November 30, 2001, is codified in portions of MCAQD Rules 100, 110, 120, 200, 210, 220, 230, 280, 370, 400, and Appendix B.

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. 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* 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) 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. 42 U.S.C. § 7661d(a). 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. 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. 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

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. *Id.*

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). 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 requirements of the Act. 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 in the following paragraph. A more detailed discussion can be found in the preamble to the EPA's proposed petitions rule. *See* 81 Fed. Reg. 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

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) (*BP Exploration Order*); *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).

responses to all significant comments raised during the public participation process on the draft 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.*

If the EPA grants a title V petition, a permitting authority may address the EPA's objection by, among other things, providing the EPA with a revised permit. *See, e.g.*, 40 C.F.R. § 70.7(g)(4); *see generally* 81 Fed. Reg. 57822, 57842 (August 24, 2016) (describing post-petition procedures); *Nucor II Order* at 14–15 (same). In some cases, the permitting authority's response to an EPA objection may not involve a revision to the permit terms and conditions themselves, but may instead involve revisions to the permit record. For example, when the EPA has issued a title V objection on the ground that the permit record does not adequately support the permitting decision, it may be acceptable for the permitting authority to respond only by providing an additional rationale to support its permitting decision.

When the permitting authority revises a permit or permit record in order to resolve an EPA objection, it must go through the appropriate procedures for that revision. The permitting authority should determine whether its response is a minor modification or a significant modification to the title V permit, as described in 40 C.F.R. § 70.7(e)(2) and (4) or the corresponding regulations in the state's EPA-approved title V program. If the permitting authority determines that the modification is a significant modification, then the permitting authority must provide for notice and opportunity for public comment for the significant modification consistent with 40 C.F.R. § 70.7(h) or the state's corresponding regulations.

In any case, whether the permitting authority submits revised permit terms, a revised permit record, or other revisions to the permit, and regardless of the procedures used to make such revision, the permitting authority's response is generally treated as a new proposed permit for purposes of CAA § 505(b) and 40 C.F.R. § 70.8(c) and (d). *See Nucor II Order* at 14. As such, it would be subject to the EPA's 45-day review per CAA § 505(b)(1) and 40 C.F.R. § 70.8(c), and an opportunity for the public to petition under CAA § 505(b)(2) and 40 C.F.R. § 70.8(d) if the EPA does not object during its 45-day review period.

When a permitting authority responds to an EPA objection, it may choose to do so by modifying the permit terms or conditions or the permit record with respect to the specific deficiencies that the EPA identified; permitting authorities need not address elements of the permit or the permit record that are unrelated to the EPA's objection. As described in various title V petition orders, the scope of the EPA's review (and accordingly, the appropriate scope of a petition) on such a response would be limited to the specific permit terms or conditions or elements of the permit record modified in that permit action. *See In The Matter of Hu Honua Bioenergy, LLC*, Order on Petition No. VI-2014-10 at 38–40 (September 14, 2016); *In the Matter of WPSC, Weston*, Order on Petition No. V-2006-4 at 5–6, 10 (December 19, 2007).

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 new major stationary sources and major modifications of existing major stationary sources for pollutants for which an area is designated as attainment or unclassifiable for the national ambient air quality standards (NAAQS) and for other pollutants regulated under the CAA. 42 U.S.C. §§ 7470–7479. Part D of title I of the Act establishes the major nonattainment NSR (NNSR) program, which applies to new major stationary sources and major modifications of existing major stationary sources for those NAAQS pollutants for which an area is designated as nonattainment. 42 U.S.C. §§ 7501–7515. 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’s regulations specifying requirements for state NNSR programs are contained in 40 C.F.R. § 51.165.

While parts C and D of title I of the Act address the major NSR program for major sources, section 110(a)(2)(C) addresses the permitting program for new and modified minor sources and for minor modifications to major sources. The EPA commonly refers to the latter program as the “minor NSR” program. States must also develop minor NSR programs to, along with the major source programs, 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 prescriptive than those for major sources, and, as a result, there is a larger variation of requirements in EPA-approved state minor NSR programs than in major source programs.

The EPA has approved MCAQD’s PSD, NNSR, and minor NSR programs as part of the Arizona SIP. *See* 40 C.F.R. § 52.120 (identifying EPA-approved regulations in the Arizona SIP). MCAQD’s major and minor NSR provisions, as incorporated into Arizona’s EPA-approved SIP, are contained in Regulation 2 of the MCAQD Rules.

III. BACKGROUND

A. The Agua Fria Facility

SRP owns and operates an electricity generating station known as the Agua Fria Generating Station, located in Glendale, Maricopa County, Arizona. This area is designated as nonattainment for coarse particulate matter (PM₁₀) and ozone, and attainment for all other criteria pollutants. The existing facility consists of three boilers and three simple cycle combustion turbines, each of which is fueled predominantly by natural gas (with the capability to use fuel oil in emergencies), among other units. The facility is a major stationary source, subject to various New Source Performance Standards (NSPS), National Emission Standards for

Hazardous Air Pollutants (NESHAP), SIP requirements, and preconstruction permitting requirements.

This Permit establishes emissions limitation that have been used to justify installing two additional natural gas-fired simple cycle combustion turbines without obtaining an NSR permit. MCAQD determined that this project would not be subject to PSD, NNSR, or minor NSR requirements because emission increases from this project would not exceed the relevant PSD, NNSR, or minor NSR applicability thresholds. As discussed further in Section IV of this Order, this conclusion was based on permit limitations (established solely in the present operating permit) that are designed to restrict emissions of PM₁₀, fine particulate matter (PM_{2.5}), nitrogen oxides (NO_x), volatile organic compounds (VOC), and carbon monoxide (CO).

The EPA conducted an analysis using EPA's EJScreen¹⁰ to assess key demographic and environmental indicators within a five-kilometer radius of the SRP Agua Fria facility. This analysis showed a total population of approximately 169,562 residents within a five-kilometer radius of the facility, of which approximately 60 percent are people of color and 44 percent are low income. In addition, the EPA reviewed the EJScreen Environmental Justice Indices, which combine certain demographic indicators with 12 environmental indicators. 11 of the 12 Environmental Justice Indices in this five-kilometer area exceed the 70th percentile in the State of Arizona, with three of the 12 Environmental Justice indices exceeding the 80th percentile, including Lead Paint, Hazardous Waste Proximity, and Underground Storage Tanks.

B. Permitting History

SRP first obtained a title V permit for the Agua Fria facility in 2000, which was last renewed in 2016. On November 20, 2020 and April 30, 2021, SRP applied for a title V permit renewal and a permit modification to support the installation of the two new simple cycle combustion turbines without obtaining an NSR permit. On September 15, 2021, MCAQD published notice of a draft permit (Draft Permit), along with a Technical Support Document (Draft TSD), subject to a public comment period that ran until October 20, 2021. On November 19, 2021, MCAQD submitted a proposed permit (the Proposed Permit), along with its responses to public comments (RTC), to the EPA for its 45-day review.¹¹ The EPA's 45-day review period ended on January 3, 2022, during which time the EPA did not object to the Proposed Permit. On December 9, 2021, MCAQD issued the final title V renewal permit for the Agua Fria facility, Permit No. P0007595 (the Final Permit or Permit), along with a final Technical Support Document (Final TSD).

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-

¹⁰ EJScreen is an environmental justice mapping and screening tool that provides the EPA with a nationally consistent dataset and approach for combining environmental and demographic indicators. *See* <https://www.epa.gov/ejscreen/what-ejscreen>.

¹¹ Note that the Petition describes the September 15, 2021 Draft Permit as a "proposed permit." However, it was the November 19, 2021 version of the permit, submitted to the EPA along with MCAQD's RTC, that is properly characterized as a "proposed permit" on which the public had an opportunity to petition. *See* 40 C.F.R. § 70.8(a)(1)(ii).

day review period to object. 42 U.S.C § 7661d(b)(2). The EPA’s 45-day review period expired on January 3, 2022. Thus, any petition seeking the EPA’s objection to the Proposed Permit was due on or before March 7, 2022. The Petition was dated and received February 28, 2022, and, therefore, the EPA finds that the Petitioner timely filed the Petition.

IV. DETERMINATIONS ON CLAIMS RAISED BY THE PETITIONER

Claim 1: The Petitioner Claims That “The Final Permit Fails to Properly Limit Potential to Emit of PM₁₀ and PM_{2.5} to Enable the New Simple Cycle Turbines to be Exempt from [NNSR] and [PSD] Permitting Requirements.”

Petitioner’s Claim: The Petitioner asserts that the EPA must object to the Permit because it does not include NNSR and PSD requirements that the Petitioner asserts are applicable to the new simple cycle combustion turbines. Petition at 4, 18. Specifically, the Petitioner argues that the Permit’s emission limits intended to restrict the turbines’ potential to emit (PTE) PM₁₀ and PM_{2.5} below the NNSR and PSD applicability thresholds are ineffective to restrict PTE below major source thresholds. *See id.* at 2–18. The Petitioner claims that these limits are ineffective for two reasons: first, because the emission limits are not accompanied by production or operating limits, *id.* at 7–13, and second, because the emission limits are not supported by sufficient monitoring and are therefore not enforceable as a practical matter, *id.* at 13–18.

Production/Operating Limits

In the first part of this claim, the Petitioner asserts that a permit term limiting PM₁₀ and PM_{2.5} emissions to 4.75 tons per rolling 12-month period is insufficient to restrict PTE without additional limitations on production or operations. *Id.* at 9 (citing Permit Condition 20.a). For support, the Petitioner relies on various definitions of “potential to emit,” including those contained in the county and federal regulations. *See id.* at 5, 7 (citing MCAQD Rule 100 § 200.100, Rule 240 §§ 202, 203;¹² 40 C.F.R. §§ 51.165(a)(1)(iii), 51.166(b)(4), 52.21(b)(4)). The Petitioner asserts that these definitions “require[] production or operating hour limitations to reduce [PTE],” and that emission limitations alone are not sufficient to restrict PTE. *Id.* at 9. This position is based largely on the Petitioner’s interpretation of the 1987 *Louisiana-Pacific* federal District Court decision¹³ and a 1989 EPA guidance document followed the decision.¹⁴ *Id.* at 7–8, 9–10. The Petitioner also addresses MCAQD’s justification for not including production or operating limits, reiterating the Petitioner’s view that the current permit terms are not a valid substitute for production or operating limits. *Id.* at 10–11.

The Petitioner also relies heavily on MCAQD Rule 201 § 302.1. *Id.* at 5–6, 9, 11. This regulation requires, among other things, that limits taken to avoid an applicable requirement “impose an objective and quantifiable operational or production limit or require the use of in-place air

¹² The Petitioner also cites MCAQD Rule 241 §§ 103, 202, and 203 (which do not exist); it appears that these citations were intended to refer to Rule 240 §§ 103, 202, and 203.

¹³ *United States v. Louisiana-Pacific Corp.*, 682 F. Supp. 1122, 1133 (D. Colo. 1987).

¹⁴ Petition Ex. 6, Terrell E. Hunt and John S. Seitz, EPA, *Guidance on Limiting Potential to Emit in New Source Permitting* (June 13, 1989). The Petitioner also cites a 2002 objection from EPA Region 4 articulating similar principles. *Id.* at 10 (citing Petition Ex. 8, Objection to Quebecor World Franklin Title V Permit (August 29, 2002)).

pollution control equipment.” Because the Permit does not require control equipment, the Petitioner asserts that it must include an operational or production limit in order to satisfy this regulation. *Id.* at 11.

The Petitioner concludes the first part of this claim with a comparison of the PM₁₀/PM_{2.5} emission limits with other emission limits on NO_x and CO. The Petitioner asserts that the PM₁₀/PM_{2.5} limits are effectively far more stringent than the NO_x and CO limits in terms of its impact on average hours of operation. *Id.* at 11; *see id.* at 12–13. The Petitioner asserts that this demonstrates why the Permit must include specific limits on production or hours of operation. *Id.* at 13. Additionally, the Petitioner claims that MCAQD did not respond to comments raising this point, presenting an independent basis for EPA’s objection to the Permit. *Id.* (citing 40 C.F.R. § 70.7(h)(6)).

Enforceable as Practical Matter

In the second part of this claim, the Petitioner asserts that the 4.75 ton per 12-month rolling PM₁₀/PM_{2.5} emission limits are ineffective to limit PTE because it is not practically enforceable. Quoting EPA guidance from 1995,¹⁵ the Petitioner states that in order to be enforceable, limitations must specify (1) a technically accurate limitation, (2) the time period of the limitation, and (3) the method to determine compliance, including appropriate monitoring, recordkeeping, and reporting. *Id.* at 13.

Regarding the first criteria, the Petitioner argues that because all other permit emission limits would allow significantly more hours of operation than the PM₁₀/PM_{2.5} limits, there is no assurance that the PM₁₀/PM_{2.5} limits are technically accurate or sufficient. *Id.* at 13–14.

Regarding the third criteria, the Petitioner challenges the sufficiency of monitoring used to demonstrate compliance with the PM₁₀/PM_{2.5} limits. *See id.* at 14–17. The Petitioner alleges multiple problems.

The Petitioner observes that the Permit’s methodology for calculating emissions relies on emission factors. *Id.* at 14 (citing Condition 47(a)(ii)). Specifically, the Permit specifies an initial emission factor (0.011 pounds per MMBtu during non-startup modes), to be superseded once stack test data is available. *Id.* at 14-15. The Petitioner states that the initial emission factor listed in the Permit was supplied by the vendor of the new turbines. *Id.* at 15. The Petitioner challenges this emission factor because neither the permit application nor other portions of the permit record support the accuracy of this emission factor. *Id.* (citing 40 C.F.R. §§ 70.12(a)(2), 70.13).

The Petitioner also challenges the Permit requirement to conduct performance testing every five years (62 months), and an optional provision providing for testing annually or every two years. *Id.* at 15–16 (citing Permit Conditions 26.c.i & ii). The Petitioner claims that such infrequent testing is wholly inadequate to assure continuous compliance with a rolling 12-month limit. *Id.* at 16–17. The Petitioner asserts that this infrequent stack testing is inconsistent with title V regulations governing periodic monitoring. *Id.* at 16 (citing MCAQD Rule 210 § 302.1(c)(2)).

¹⁵ Petition Ex. 10, Kathie Stein, *Guidance and Enforceability Requirements for Limiting the Potential to Emit through SIP and § 112 Rules and General Permits* at 6 (Jan. 25, 1995).

Moreover, the Petitioner asserts that the Permit contains conflicting conditions governing SRP's demonstration of compliance with the 4.75 ton per 12-month rolling PM₁₀/PM_{2.5} limits. As the Petitioner observes, the Permit indicates that, for all limits on the two turbines, "[c]ompliance with allowable emission limits and standards shall be determined by the performance tests specified in this permit." *Id.* at 14 (citing Permit Condition 26.s).¹⁶ The Petitioner suggests that this is inaccurate or incomplete as it relates to the rolling 12-month limits in Condition 20(a), and that it conflicts with the more specific provisions of Condition 47, which contains additional recordkeeping necessary to determine compliance with the rolling 12-month limit. *Id.* Relatedly, the Petitioner asserts that the Permit term establishing the methodology for calculating PM₁₀/PM_{2.5} emissions from stack test data lacks clarity *Id.* at 16 (citing Permit Condition 47.a.iii(2)(a)).¹⁷ Specifically, the Petitioner claims that this term does not explicitly require each turbine's individual PM₁₀ emission factor to be multiplied by each turbine's individual portion of aggregate fuel flows/heat input in order to calculate emissions from the individual turbine. *Id.* Additionally, the Petitioner asserts that this permit term does not acknowledge the possibility that stack testing may result in an emission factor higher than the initial vendor-based factor specified in the permit. *Id.* The Petitioner asserts that these ambiguities undermine the enforceability of the PM₁₀/PM_{2.5} limits. *Id.*

Additionally, the Petitioner notes that although the Permit specifies the test methods that SRP must use during stack tests (specifically, Method 5 and Method 202), it also allows the source to use an equivalent or alternative method, approved by the District. *Id.* at 15 (citing Permit Conditions 26.e and 26.f). The Petitioner finds fault with this allowance for alternative/equivalent methods because the Permit does not specify (i) the alternative method; (ii) the procedure for approving the alternative; or (iii) whether the public or the EPA could review the alternative method. *Id.* Because compliance could be based on a not-yet-specified test method, the Petitioner claims that the Permit fails to satisfy the requirement that compliance assurance provisions be "replicable" or "verifiable." *Id.* (citing MCAQD Rule 201 § 302.1(b) and Rule 100 § 200.113).

Further, the Petitioner asserts that the PM₁₀/PM_{2.5} limits cannot be relied upon to restrict PTE because they do not adequately address emissions from startup and shutdown events. *Id.* at 17. The Petitioner acknowledges that the Permit requires SRP to calculate startup and shutdown emissions using a vendor-supplied emission factor specified in the Permit. *Id.* (citing Permit Condition 47.a.iii(2)(b)). As with the emission factor used to determine emissions during normal operations prior to stack testing, the Petitioner faults the lack of a justification for the use of this factor within the permit record. *Id.* (citing 40 C.F.R. §§ 70.12(a)(2), 70.13). Additionally, the Petitioner asserts that the Permit does not clearly specify that the 12-month rolling total emission limits include emissions from startup and shutdowns. *Id.* (citing Permit Condition 20.a).

¹⁶ It appears that the Petitioner intended to cite Condition 26.r.

¹⁷ The cited permit term provides: "The Permittee shall calculate the quantity of emissions monthly during normal operation for PM₁₀/PM_{2.5} by multiplying the aggregate fuel flows/heat input for Units 7 and 8 by the highest PM₁₀/PM_{2.5} emission factors established during the most recent annual performance test or if annual performance testing is not conducted the Permittee shall use the normal operation emission factors in Permit Condition 47.a.ii."

In addition to the Petitioner's claims regarding the need for production or operating limits and its challenges to the sufficiency of monitoring, the Petitioner also asserts that the Permit fails to specify the consequences of violating the permit limits. *Id.* at 17. The Petitioner asserts that the Permit must make clear that a violation of the limitations on PTE will also constitute violations of the major source permitting requirements. *Id.*

The Petitioner concludes by reiterating that the foregoing alleged defects render the emission limits unenforceable as a practical matter, and accordingly insufficient to restrict the PTE from the two new turbines below the applicable NNSR and PSD major modification thresholds. *Id.* at 17–18. Accordingly, the Petitioner asserts that it was inappropriate to issue the Permit without addressing NNSR and PSD requirements. *Id.* at 18.

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

The Petitioner has demonstrated that, in some respects, the emission limits intended to restrict the two new turbines' PM₁₀ and PM_{2.5} emissions to a level below the NNSR and PSD applicability thresholds are not enforceable as a practical matter.¹⁸

For NNSR and PSD applicability purposes, determining whether emission increases associated with construction of new emission units (like the two turbines at issue here) exceed relevant thresholds for triggering major source NSR permitting requirements involves calculating PTE. Under the relevant regulations that govern this inquiry, PTE is defined as:

[T]he maximum capacity of a stationary source to emit pollutants, excluding secondary emissions, under its physical and operational design. Any physical or operational limitation on the capacity of the source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design, if the limitation or the effect it would have on emissions is legally and practically enforceable by any rule, ordinance, order or permit adopted or issued under A.R.S. Title 49, Chapter 3 or the state implementation plan.

MCAQD Rule 100 § 200.100;¹⁹ *see* MCAQD Rule 240 §§ 103, 202, 203 (SIP provisions incorporating by reference analogous federal definitions in 40 C.F.R. §§ 51.165(a)(1) and

¹⁸ The EPA has explained that in certain situations, NSR permitting decisions that are established through the NSR permitting process are not properly re-considered by the EPA in response to a title V petition. *See, e.g., In the Matter of Big River Steel, LLC*, Order on Petition No. VI-2013-10 at 8–20 (October 31, 2017). However, here, no NSR permit has been issued by MCAQD. Emission limits designed to restrict PTE to levels below which major and minor NSR permitting requirements apply were established exclusively through a title V permit action. In this situation, where MCAQD determined that no NSR requirements were applicable to construction of new emissions units, it is proper for the EPA to address the Petitioner's challenges to the emission limits on which that applicability decision rests in order to determine whether the title V permit contains all NSR-related "applicable requirements." *Cf. In the Matter of BP Products North America, Inc. Whiting Business Unit*, Order on Petition No. V-2021-9 at 13 n.24 (March 4, 2022).

¹⁹ For ease of reference, this Order refers to the current location of this regulatory definition in the SIP and in the District's rules: MCAQD Rule 100 § 200.100. At the time the Permit was issued, an identical provision was approved into the SIP at Rule 100 § 200.95.

52.21(b)); 40 C.F.R. § 52.21(b)(4) (analogous federal definition, applicable under delegated EPA authority).²⁰ Therefore, if a permit applicant asks a permitting authority to establish enforceable limits that are sufficient to restrict PTE, the facility’s “maximum capacity to emit” for PTE purposes is calculated based on those limits. Importantly, only limits that meet certain criteria may be considered enforceable and therefore effective to restrict a facility’s PTE. In sum, for a permit limit to effectively restrict PTE, it must be enforceable as both a legal and a practical matter. There is a substantial body of EPA guidance and administrative decisions reflecting the EPA’s views on the effectiveness and enforceability of limits taken to restrict PTE under EPA regulations.²¹

Production/Operating Limits

The Petitioner argues that the definition of PTE in MCAQD Rule 100 § 200.100 and 40 C.F.R. § 52.21(b)(4) requires that any limit taken to restrict PTE must be expressed as a direct limitation on operation (*e.g.*, operating hours, production levels, or types of material combusted), and that limitations on emissions alone cannot be used to restrict PTE (subject to only two exceptions). For support, the Petitioner focuses on the 1987 *Louisiana-Pacific* decision,²² a 1989 EPA guidance document addressing PTE, and a 2002 objection lodged by an EPA regional office. *See* Petition at 7, 8, 14. This is an incomplete and oversimplified view of the EPA’s interpretation of the definition of PTE in the EPA’s regulations (which the relevant Maricopa County regulations resemble). In general, the EPA does not interpret the federal regulations to require production and/or operating limits in all situations. The 1989 guidance cited by the Petitioner identified two circumstances in which emission limits (instead of production and/or operating limits) could be effectively used to restrict PTE. Over the last several decades, the EPA has explored numerous additional situations in which properly supported emission limits may be enforceable as a

²⁰ At the time the Permit was issued, MCAQD’s authority to implement the PSD program was based on a delegation of the EPA’s authority in 40 C.F.R. § 52.21, and therefore this rule was applicable to the Permit, in addition to the cited Maricopa County regulations.

²¹ *See, e.g., In the Matter of Piedmont Green Power, LLC*, Order on Petition No. IV-2015-2 at 5–8, 10–12, 14–16 (December 13, 2012) (*Piedmont Green Power Order*); *In re Tucson Electric Power*, 17 E.A.D. 675, 676–80, 687–88 n.7 (EAB 2018); *In the Matter of Yuhuang Chemical, Inc.*, Order on Petition No. VI-2015-03 at 13–15 (August 31, 2016) (*Yuhuang I Order*); *In the Matter of Hu Honua Bioenergy Facility*, Order on Petition No. IX-2011-1 at 9–13 (February 7, 2014) (*Hu Honua I Order*); *In the Matter of Kentucky Syngas, LLC*, Order on Petition No. IV-2010-9 at 28–30 (June 22, 2012) (*Kentucky Syngas Order*); *In the Matter of Cash Creek Generation, LLC*, Order on Petition No. IV-2010-4 at 14–19 (June 22, 2012) (*Cash Creek II Order*); *In re Shell Offshore, Inc.*, Kulluk 15 E.A.D. 536, 552–58 (EAB 2012); *In re Shell Offshore, Inc.*, Kulluk Drilling Unit and Frontier Discoverer Drilling Unit, 13 E.A.D. 357 (EAB 2007); *In the Matter of Pope & Talbot, Inc. Lumber Mill*, Order on Petition No. VIII-2006-04 at 5 (March 22, 2007) (*Pope & Talbot Order*); *In re Peabody W. Coal Co.*, 12 E.A.D. 22, 30–32, 39–41 (EAB 2005); *In the Matter of Orange Recycling and Ethanol Production Facility, Pencor-Masada Oxynol, LLC*, Order on Petition No. II-2001-05 at 4–7 (April 8, 2002) (*Pencor-Masada Order*); John Seitz and Robert Van Heuvelen, *Release of Interim Policy on Federal Enforceability of Limitations on Potential to Emit* (Jan. 22, 1996); John S. Seitz, *Options for Limiting the Potential to Emit (PTE) of a Stationary Source Under Section 112 and Title V of the Clean Air Act* (January 25, 1995); Kathie Stein, *Guidance on Enforceability Requirements for Limiting Potential to Emit through SIP and § 112 Rules and General Permits* (January 25, 1995); DRAFT NSR Workshop Manual, Appx. C (October 1990); Terrell E. Hunt and John S. Seitz, *Limiting Potential to Emit in New Source Permitting* (June 13, 1989).

²² Notably, the *Louisiana-Pacific* decision involved markedly different facts from those at issue here. The *Louisiana-Pacific* court held that “blanket restrictions on actual emissions” that “would be virtually impossible to verify or enforce” are not properly considered in calculating PTE. 682 F. Supp. at 1133. It is also worth noting that this decision from the U.S. District Court for the District of Colorado is not binding on the EPA beyond the specific case resolved by that 1987 decision.

practical matter and therefore used to restrict PTE. Specifically, the EPA has spoken to this issue through title V petition orders,²³ EAB decisions,²⁴ and NSR-related rules.²⁵ Thus, the Petitioners’ suggestion that the definition of PTE in the EPA’s regulations (or the Maricopa County regulations) must be read to categorically prohibit the use of emission limits (without production or operating limits) to restrict PTE is incorrect. By the same token, it would also be incorrect to assume that *all* emission limits are inherently effective to restrict PTE. Determining whether a limitation is enforceable as a practical matter and therefore effective to restrict PTE under either federal or county regulations necessarily requires a case-by-case, fact-specific inquiry.²⁶ As with all other permitting decisions, the permitting authority must explain the basis for its decision, and a petitioner challenging such a decision must demonstrate that this decision was contrary to the Act and governing regulations. 42 U.S.C. § 7661d(b)(2); 40 C.F.R. §§ 70.7(a)(5), (h)(6), 70.12(a)(2).

Here, MCAQD provided an explanation as to why it believed the emission limits at issue were enforceable as a practical matter and sufficient to restrict PTE, within the meaning of the Maricopa County regulations. *See* RTC at 9–10, 12. With respect to the District’s decision to rely on an emission limit (as opposed to a production or operating limit), the Petitioner’s brief rebuttal states simply that emission limits “are not a legal or technical substitute for operational or production limits.” *See* Petition at 11. As noted in the preceding paragraph, this argument is incomplete and unconvincing. The Petitioner has not examined the nature of the emission units and pollutants at issue—PM₁₀ and PM_{2.5} emissions from new gas-fired simple cycle turbines used as “peaking” units—or explained *why* it believes that production or operating limits are the only appropriate means of restricting PTE for this type of project.²⁷

²³ *See Piedmont Green Power Order* at 5–8, 10–12, 14–16, 19–24; *Yuhuang I Order* at 13–15; *Hu Honua I Order* at 9–13; *Cash Creek II Order* at 14–19; *Kentucky Syngas Order* at 28–30; *Pope & Talbot Order* at 4–5; *Pencor-Masada Order* at 21–25.

²⁴ *See In re Tucson Electric Power*, 17 E.A.D. at 680; *In re Shell Offshore*, 15 E.A.D. at 552–58.

²⁵ *E.g.*, 40 C.F.R. §§ 49.152 (Tribal minor NSR rule establishing criteria for the enforceability of emission limitations for purposes of restricting PTE), 52.21(aa)(2)(ii)(a), (aa)(2)(v) (Plantwide Applicability Limit regulations establishing a mechanism to create enforceable emission limits based on existing actual emissions that are designed to ensure that emissions increases from future modifications do not exceed NSR major modification thresholds).

²⁶ *In re Tucson Electric Power*, 17 EAD at 687–88 n.7 (rejecting arguments that “any permit using emission factors and monitoring of control devices to verify compliance with an emissions cap can be summarily affirmed as sufficient to ensure the practical enforceability of that cap” and noting that prior EAB decisions and EPA petition orders dealing with limits on PTE have “turned on a fact-based analysis of the permit in question, the nature of the facility, and the claims of the petitioner”).

²⁷ The Petitioner’s only fact-based argument is that specific limits on production or hours of operation are necessary because the PM₁₀/PM_{2.5} emission limits are effectively more stringent than limitations on other pollutants. *See* Petition at 11–13. However, the Petitioner does not explain—and it is not clear to the EPA—how this fact is relevant to the issue at bar. The Petitioner also claims that MCAQD did not reply to comments raising this issue. However, MCAQD did respond to the overarching public comments asserting that production or operating limits were necessary. *See* RTC at 9–10. Given that it is not clear how or why this particular factual argument is relevant to the overarching petition claim or the sufficiency of the Permit, it is not clear that this was a “significant comment” warranting a specific response from MCAQD. *See* 40 C.F.R. §70.7(h)(6); *see also* 85 Fed. Reg. 6431, 6440 (February 5, 2020) (discussing what constitutes a “significant comment”); *In re: Tucson Electric Power*, 17 E.A.D. 675, 695 (EAB 2018) (“The adequacy of a permit issuer’s response to comments must be evaluated in the context of the content, specificity, and precision of the submitted comments. . . . Where a comment lacks specificity and precision, the permit issuer’s obligation to respond is similarly tempered. It is well settled that permit issuers need not guess the meaning behind imprecise comments and are under no obligation to speculate about possible concerns that were not articulated in the comments.” (internal quotations omitted)).

In addition to the definition of PTE (cited previously), the Petitioner relies on one other legal authority to support its argument that production or operating limits are necessary: MCAQD Rule 201 § 302.1. Petition at 5–6, 9, 11. However, because MCAQD Rule 201 is not part of the EPA-approved SIP, it is therefore not a federally enforceable “applicable requirement.” *See* 40 C.F.R. § 70.2. This provision is also not part of MCAQD’s EPA-approved part 70 program regulations. Accordingly, whether the Permit complies with MCAQD Rule 201 is not an issue the EPA will address in the present Order.²⁸

In summary, the Petitioner has not demonstrated that MCAQD was categorically prohibited from relying on emission limits (without additional production or operating limits) to restrict PTE. Thus, this portion of the Petition is denied. However, whether these emission limits are enforceable as a practical matter (and therefore sufficient to restrict PTE) is another matter, addressed in the following paragraphs.

Enforceable as a Practical Matter

Regardless of the type of limitation, only limitations that are enforceable as a practical matter can restrict PTE under MCAQD Rule 100 § 200.100 and 40 C.F.R. § 52.21(b)(4). The Petitioner first asserts that the PM₁₀/PM_{2.5} emission limits are not enforceable as a practical matter because they are not “technically accurate or sufficient.” Petition at 14. For support, the Petitioner observes that the PM₁₀/PM_{2.5} limits are effectively more restrictive than limitations on other pollutants insofar as their effect on hours of operations. *Id.* at 13–14. However, the Petitioner does not explain—and the EPA is at a loss to understand—how the relative stringency of different permit limitations on other pollutants has any bearing on whether the PM₁₀/PM_{2.5} limits are themselves technically accurate or sufficient to restrict PTE. Accordingly, this part of the claim is denied.

The Petitioner next asserts that the limits are not enforceable because they are not supported by sufficient monitoring. *Id.* at 14. The Permit includes several conditions designed to assure compliance with these limits, including Conditions 26 and 47. In general, these conditions require the facility to calculate monthly PM₁₀ and PM_{2.5} emissions by multiplying fuel flows/heat input by emission factors either supplied by the turbine manufacturer or established during periodic performance tests. *See* Permit Condition 47.a.iii. The Petitioner acknowledges that this general methodology is essentially the only option available for measuring PM emissions from gas-fired turbines, conceding that “there are no other types of monitoring that can be done.” Petition at 16. Nonetheless, the Petitioner contests specific aspects of this calculation methodology.

Regarding the Petitioner’s claim that the permit record does not support the accuracy of the vendor-supplied emission factor (to be used until superseded by performance testing), the Petitioner has presented no basis for the EPA’s objection. It is the Petitioner’s burden to demonstrate that the existing permit terms are insufficient. 42 U.S.C. § 7661d(b)(2). However, the Petitioner does not provide a single reason to question the accuracy of this initial emission

²⁸ *See, e.g., In the Matter of Algonquin Gas Transmission LLC*, Order on Petitions at 23 (April 30, 2019); *see also*, 40 C.F.R. § 70.6(b)(2) (providing that state-only permit terms are not subject to various federal requirements, including the EPA’s review of title V permits).

factor. Given that the turbines in question are new, it is unclear what alternatives to a vendor-supplied emission factor would be appropriate. Moreover, MCAQD suggests that this vendor-supplied emission factor will be more conservative (*i.e.*, higher) than anticipated actual stack test results. *See* RTC at 15. To the extent that initial stack testing confirms this to be the case, the Petitioner's concerns will be proven misplaced. To the extent that stack testing reveals that the vendor-supplied emission factors underestimate emissions, MCAQD's response to the EPA's objection identified later in this response should resolve this issue.²⁹

Regarding the Petitioner's claim that stack testing every five years is not frequent enough to assure compliance with the rolling 12-month PM₁₀/PM_{2.5} limits, the Petitioner has similarly failed to demonstrate a basis for an EPA objection. Determining whether additional or more frequent monitoring is necessary requires a fact-specific analysis, guided by various technical considerations. *See, e.g., In the Matter of CITGO Refining and Chemicals Company*, Order on Petition No. VI-2007-0 at 6–8 (May 28, 2009). Although stack testing every five years would likely be insufficient if this were the only permit term designed to assure compliance with the rolling 12-month limit, such is not the case here. The Permit also requires daily recordkeeping of fuel usage, which is used in conjunction with the emission factors to calculate monthly PM₁₀ and PM_{2.5} emissions. Permit Conditions 47.a.iii, 47.e. Notably, as discussed further in the following paragraphs, it does not appear that the five-year stack test results will necessarily be used to update these emission factors; instead, stack tests appear designed primarily to confirm that the vendor-supplied emission factors are accurate. The Petitioner does not explain why more frequent stack testing is necessary to serve this purpose. For example, the Petitioner has not alleged, much less demonstrated, that emissions are likely to be highly variable or that performance is likely to degrade over time, such that more frequent confirmation of the emission factors (via more frequent stack testing) may be necessary.

Although the Petitioner has not demonstrated that the Permit's initial reliance on vendor-supplied emission factors and five-year stack tests warrants an objection, the Petitioner *has* demonstrated that the specific permit terms detailing the monthly PM₁₀/PM_{2.5} calculation methodology are too ambiguous to be enforceable as a practical matter. The Petitioner's claim focuses on an alleged conflict between Condition 26 (which addresses performance testing for the two new turbines) and Condition 47.a (which addresses monthly emission calculations from the two new turbines).

The Permit provides for three different stack test frequencies; depending on the frequency chosen, the stack test results will be used in different ways. First, at a minimum, the Permit requires an initial stack test, followed by stack testing every five years. Permit Conditions 26.a, 26.c.i. The Permit further provides that these stack tests will be used "to demonstrate ongoing compliance with the PM₁₀, PM_{2.5}, and VOC emission standards for normal operation as specified in Permit Condition 47.a.ii." Permit Condition 26.c.i; *see id.* Condition 26.a.ii. (The "emission standards" referenced in these permit terms are the vendor-supplied emission factors described in the preceding paragraphs.) Further, "If this testing schedule is followed, the Permittee shall use [the vendor-supplied emission factors specified in Permit Condition 47.a.ii] to calculate emissions for normal operation." Permit Condition 26.c.i. In other words, the five-year stack test

²⁹ *See infra* pages 16–18. In sum, MCAQD will be required to revise the Permit to more clearly address whether and how the vendor-supplied emission factors will be updated (and how rolling 12-month emissions will be calculated) in the event that stack testing exceeds those emission factors.

results will be used only to confirm compliance with the vendor-supplied emission factors (which MCAQD appears to treat as binding “standards”) and will *not* be used to establish new emission factors to calculate monthly PM₁₀ and PM_{2.5} emissions on an ongoing basis. Alternatively, SRP may elect to conduct stack tests annually (or, in certain circumstances, every two years). Permit Condition 26.c.ii.³⁰ Again, the results of these stack tests will be used “to demonstrate ongoing compliance with the PM₁₀, PM_{2.5}, and VOC emission standards for normal operation as specified in Permit Condition 47.a.ii.” *Id.* Moreover, “If this testing schedule is followed, the Permittee may use the test results to calculate emissions for normal operation.” *Id.* In other words, *if* (and only if) the source elects more frequent stack testing, then the results of stack testing *may* be used to replace the vendor-supplied emission factors used to calculate monthly PM₁₀ and PM_{2.5} emissions.

The manner in which these permit terms interact to demonstrate compliance with the rolling 12-month PM₁₀/PM_{2.5} limits is unclear for multiple reasons. As an initial matter, it is unclear why the Permit indicates that the stack test results will serve as a direct indicator of compliance with the rolling 12-month PM₁₀/PM_{2.5} limits. *See* Permit Conditions 26.r and 47.a.iii.³¹ This does not seem appropriate given that (i) these stack test results will generally not be used to update the emission factors used to calculate monthly emissions and (ii) compliance with these rolling 12-month limits depends on fuel usage (not stack tests alone).

The EPA understands that MCAQD’s intent behind this stack testing regime was to provide for a more conservative approach to calculating emissions if stack tests are conducted every five years instead of every one or two years. This appears to be based on an implicit assumption that actual stack test results will always be lower than the vendor-supplied emission factors. *See* RTC at 15 (“There is an option to use less conservative emission factors as a result of performance testing, if testing is performed on an annual basis.”). To the extent that stack test results confirm this assumption, the Permit’s approach would indeed appear to be conservative, *i.e.*, it would result in overreporting, as opposed to underreporting, actual emissions. However, as the Petitioner correctly asserts, the Permit does not adequately provide against the alternative scenario: what happens if stack test results are *higher* than the vendor-supplied emission factors? The only permit term expressly addressing this potentiality is Condition 26.r, which states: “If test results do not demonstrate compliance with the requirements of these permit conditions, the Permittee shall make the necessary repairs and/or adjustments to the equipment and demonstrate compliance through retesting.” Permit Condition 26.r; *see also* RTC at 15. But again, this permit term misses the broader issue: how will emissions be calculated (for purposes of demonstrating

³⁰ The Permit further specifies the situations in which this stack testing could be conducted every two years: “If the emission results from the performance test is less than or equal to 75 percent of the normal operation emission factors in Permit Condition 47.a.ii for the turbine, the frequency of subsequent performance tests may be reduced to once every 2 years (no more than 26 calendar months following the previous performance test). If the results of any subsequent performance test exceed 75 percent of the normal operation emission factors in Permit Condition 47.a.ii for the turbine, annual performance tests shall be resumed.” Permit Condition 26.c.iii.

³¹ Permit Condition 26.r states generally: “Compliance with allowable emission limits and standards shall be determined by the performance tests specified in this permit.” Permit Condition 47.a.iii states: “After the initial performance testing required by Permit Condition 26 is completed and demonstrates compliance with the standards of Permit Condition 20 [*i.e.*, the PM₁₀/PM_{2.5} emission limits at issue], emission calculations to demonstrate compliance shall be based on” the calculation methodology discussed later in this response. Read together, these two provisions suggest that at least some stack test results are used not only to confirm the vendor-supplied emission factors, but also as a direct indicator of compliance with the PM₁₀/PM_{2.5} emission limits at issue.

compliance with the rolling 12-month limits) if PM emissions during a non-annual performance test exceed the vendor-supplied emission factor?

As noted previously, according to the Permit, the *only* scenario in which stack test results would be used to update emission factors (for purposes of demonstrating compliance with the rolling 12-month limits) is if the source elects annual stack testing. It is unclear from the Permit and permit record whether MCAQD intended to establish additional scenarios in which stack tests would be used to update emission factors. For example, while some permit terms suggest that stack testing conducted every two years could also be used to update the vendor-supplied emission factors for calculation purposes, multiple permit terms (and parts of the record) refer exclusively to annual stack testing.³² Additionally, one other permit term ambiguously suggests that the vendor-supplied emission factors would be used only “until performance test data . . . become available and are determined more representative.” Permit Condition 47.a.ii. Various portions of the Draft TSD and Final TSD also suggest that stack test data would supplant the vendor-supplied emission factors once such data “becomes available.”³³ It is unclear whether and how Condition 47.a.ii intended to function in relation to the stack test-focused provisions in Condition 26.

Additionally, as the Petitioner recognizes, the permit term specifying the monthly PM₁₀/PM_{2.5} emissions calculation methodology contains further ambiguities. The relevant condition states:

The Permittee shall calculate the quantity of emissions monthly during normal operation for PM₁₀/PM_{2.5} by multiplying the aggregate fuel flows/heat input for Units 7 and 8 by the highest PM₁₀/PM_{2.5} emission factors established during the most recent annual performance test or if annual performance testing is not conducted the Permittee shall use the normal operation emission factors in Permit Condition 47.a.ii.

Permit Condition 47.a.iii. As the Petitioner asserts, the Permit’s reference to “aggregate fuel flows/heat input” is ambiguous. *Id.* It is unclear whether this means (i) that the total (*i.e.*, aggregate) monthly heat input for each individual turbine will be used to calculate emissions from each turbine individually, or (ii) that the monthly heat input for both new simple cycle turbines combined (*i.e.*, aggregated) will be used to calculate emissions from both turbines collectively. Relatedly, the reference to “the highest PM₁₀/PM_{2.5} emission factors established during the most recent annual performance test” is ambiguous. *Id.* It is unclear whether “highest”

³² See Permit Conditions 26.c.ii (“If this testing schedule [annually or once every two years] is followed, the Permittee may use the test results to calculate emissions for normal operation.”), 26.c.iii (“The Permittee shall use the most recent performance test data to calculate emissions *only if testing is performed annually.*”), 47.a.iii (“*If annual performance testing is not conducted* the Permittee shall use the normal operation emission factors in Permit Condition 47.a.ii.”); RTC at 15 “There is an option to use less conservative emission factors as a result of performance testing, *if testing is performed on an annual basis.*”; Final TSD at 7 (“If the SRP would like to use performance test results in required emission calculations, then performance testing is *required to be conducted annually* (no more than 15 month from the last test[.]”).

³³ See Final TSD at 3 (“PM and VOC calculations are based on fuel usage and vendor stated emissions until test data becomes available.”), 6 (“Underlying emissions estimates for all pollutants except SO_x are based on vendor guarantees, which will be supplanted for normal unit operations when performance test data becomes available.”), 7 (“[C]ompliance for these new units depend[s] mainly on CEMS and performance testing except for the interim period before CEMS or performance test data are available. During this interim period, emission estimates for compliance demonstration will be based largely on vendor guarantees, and AP-42.”); Draft TSD at 2, 4, 5.

was intended to mean (i) that the higher stack test result from the two identical turbines would be used to calculate emissions from both turbines, or (ii) something else, such as the highest emission factor from an individual test run.

These ambiguities in the Permit are compounded by the lack of a clear explanation from MCAQD, which did not specifically address public comments questioning the meaning of these permit terms. *See* RTC at 15; 40 C.F.R. § 70.7(h)(6). Overall, the ambiguity and lack of clarity among these permit terms—and particularly the fact that the Permit does not expressly address how rolling 12-month emissions would be calculated if an initial or five-year stack test exceeds a vendor-supplied emission factor—render these limits unenforceable as a practical matter. Accordingly, the EPA grants the Petition as to these issues.

The EPA also grants the Petitioner’s claim regarding the use of alternative or equivalent test methods during periodic stack testing. As a general matter, there is nothing inherently problematic with a permitting authority establishing a mechanism for approving alternative, equivalent test methods to replace the methods specified in a permit. Such a mechanism could be analogous to those provided for in the EPA’s general provisions supporting the NSPS and NESHAP regulations. *See* 40 C.F.R. §§ 60.8(b), 60.13(i), 63.7(e)(2), 63.7(f), 63.8(b)(1), and 63.8(f).³⁴ However, it *would* be problematic if a permitting authority approved an alternative test method or monitoring procedure entirely outside of the permitting process *and* the title V permit was not updated (following the appropriate procedures) to specify the test method or monitoring now being used to demonstrate compliance. Among other reasons, this would be problematic because the title V permit would no longer “set forth,” “include,” or “contain” the monitoring necessary to assure compliance with all applicable requirements and permit terms. 42 U.S.C. § 7661c(a), (c); 40 C.F.R. § 70.6(a), (a)(3), (c).³⁵ Here, the Permit states:

Performance tests shall be conducted, and data reduced in accordance with the test methods and procedures specified in the Test Methods section of this permit condition *unless otherwise specified by the Control Officer and/or Administrator*. The Control Officer and/or Administrator may specify or approve minor changes in methodology to a reference method, approve the use of an equivalent test method, approve the use of an alternative method that has been determined to be acceptable for demonstrating compliance, or waive the requirement for performance tests because the Permittee has demonstrated by other means that the source is in compliance with the standard. For NSPS facilities, only EPA has the authority to waive initial testing requirements.

Permit Condition 26.f. It is not clear from this provision whether MCAQD’s approval process would culminate in revisions to the title V permit to reflect the approved alternative test methods (as is required), or whether this process would occur entirely off-permit (which would be

³⁴ *See also* EPA Process Manual for Responding to Requests Concerning Applicability and Compliance Requirements of Certain Clean Air Act Stationary Source Programs, App’x B (July 2020), available at https://www.epa.gov/sites/default/files/2020-07/documents/111-112-129_process_manual.pdf.

³⁵ *See also In the Matter of ExxonMobil Fuels & Lubricant Co., Baton Rouge Refinery*, Order on Petition Nos. VI-2020-4, VI-2020-6, VI-2021-1, & VI-2021-2 at 25–26, 37–38 (March 18, 2022). Note that the EPA is evaluating this claim against the federal authorities cited herein, as opposed to MCAQD Rule 201, which is not a part of the EPA-approved SIP. *See supra* n.28 and accompanying text.

problematic). Moreover, MCAQD did not respond to comments addressing these concerns. 40 C.F.R. §70.7(h)(6). Accordingly, because the Permit and permit record are inadequate to determine whether the Permit will “set forth” monitoring sufficient to assure compliance with all applicable requirements, the EPA grants the Petition with respect to this issue.

Regarding the Petitioner’s brief claim that the Permit does not properly account for startup and shutdown emissions, the Petitioner has not demonstrated any basis for an EPA objection. First, contrary to the Petitioner’s assertion, the Permit *does* “make clear that 12-month rolling total emission limits include emissions due to startup and shutdown emissions.” Petition at 17; Permit Conditions 20.b (requiring compliance with the rolling 12-month limits to be demonstrated using the calculations in Condition 47.a), 47.a.iii.(2)(b) (expressly requiring startup and shutdown emissions to be included in these calculations). Thus, the Petitioner has not demonstrated that the rolling 12-month PM₁₀/PM_{2.5} limits do not account for emissions from all operating scenarios, including startup and shutdown, as is required to ensure enforceability. *See e.g., Hu Honua I Order* at 10. Second, the Petitioner presents no information to bring into question the validity of the vendor-supplied emission factor used to calculate emissions during startup and shutdown events. *See supra* pages 14–15. Thus, this portion of the Petition is denied.

Finally, regarding the Petitioner’s brief claim that the Permit must specify the consequences of violating the rolling 12-month emission limits, the Petitioner provides no citation to, or analysis of, any legal authority that would require a title V permit to contain such a provision. In general, title V permits are written to assure *compliance* with the terms of the permit and need not anticipate all possible results of *noncompliance* with permit terms. The consequences of any future noncompliance with existing permit terms are more properly handled through the enforcement process. *See In the Matter of Drummond Co., Inc., ABC Coke Plant*, Order on Petition No. IV-2019-7 at 8 (June 30, 2021). Accordingly, this portion of the Petition is denied.

In summary, the Petitioner has demonstrated that: (i) the Permit is not enforceable as a practical matter due to ambiguities in the permit terms concerning stack testing and emission calculation methodologies used to calculate PM₁₀ and PM_{2.5} emissions for purposes of demonstrating compliance with the PM₁₀/PM_{2.5} emission limits; and (ii) the permit record is inadequate to determine whether the Permit’s references to equivalent test methods are permissible. These issues all undermine the effectiveness and enforceability of the PM₁₀/PM_{2.5} limits designed to restrict PTE of the two new simple cycle turbines below the NNSR and PSD applicability thresholds. The EPA grants the Petition as to these issues and denies the Petition with respect to the other issues raised in this claim.

Direction to MCAQD: To the extent that MCAQD intends to rely on limitations to restrict the PTE of the two new simple cycle turbines below the NNSR and PSD applicability thresholds, MCAQD must ensure that such limits satisfy all applicable requirements and are enforceable as a legal and practical matter per MCAQD Rule 100 § 200.100. MCAQD must revise the Permit to more clearly and unambiguously identify the methodology by which SRP will demonstrate compliance with the PM₁₀/PM_{2.5} emission limits, addressing the specific issues granted by the EPA in the preceding section. Additionally, MCAQD must either update the Permit and/or permit record to ensure that the source’s title V permit will be updated following all relevant

procedural requirements if and when MCAQD approves a test methodology that differs from those identified in the Permit.

Claim 2: The Petitioner Claims That “The Permit Improperly Exempts the Two New Simple Cycle Turbines from Maricopa County’s Minor New Source Review Permitting Requirements.”

Petitioner’s Claim: The Petitioner contends that the EPA must object to the Permit because it fails to contain certain minor NSR requirements in MCAQD Rule 241 that the Petitioner asserts are applicable to the two new turbines. Petition at 23. The Petitioner alleges that it was inappropriate to exempt the turbines from these requirements because permit limits on PM₁₀, PM_{2.5}, VOCs, NO_x, and CO—which were designed to limit PTE below the relevant minor NSR exemption thresholds—are inadequate. *Id.* at 20, 23 (citing MCAQD Rule 100 § 200.70).

As the Petitioner explains, the MCAQD definition of “minor NSR modification” specifically defines “potential to emit” as “the lower of a source’s or emission unit’s potential to emit or its allowable emissions.” *Id.* at 20 (citing MCAQD Rule 100 § 200.69(e)(1)). The Petitioner repeats the definition of PTE (discussed in Claim 1) and also introduces the definition of “allowable emissions,” which includes a specific reference to “federally enforceable limits which restrict the operating rate or hours of operation,” among other provisions. *Id.* at 20–21 (citing MCAQD Rule 100 §§ 200.100, 200.12). The Petitioner asserts that the emission limits in the Permit do not satisfy either of these definitions for multiple reasons.

First, the Petitioner claims that the emission limits are all insufficient because they are not accompanied by limits on operating hours or production rates (for any pollutant), or sufficient requirements related to the operation of control equipment (for NO_x and CO). *Id.* at 21.

Next, the Petitioner asserts that the PM₁₀, PM_{2.5}, and VOC emission limits are not practically enforceable due to the lack of sufficient monitoring. *Id.* at 21. For support, the Petitioner references its discussion of PM₁₀/PM_{2.5} monitoring in Claim 1, which the Petitioner asserts applies to VOC emissions “for similar reasons.” *Id.*; *see id.* at 23.

The Petitioner also claims that the Permit fails to satisfy various requirements of MCAQD Rule 201. *Id.* at 21. The Petitioner states that under this regulation, an emission limit taken to avoid a requirement must contain “replicable procedures.” *Id.* at 22 (citing MCAQD Rule 201 § 302.1(b)). The Petitioner asserts that this “replicable” requirement was not satisfied for the reasons discussed above with respect to the alternative/ equivalent test method provision. *Id.* Further, the Petitioner asserts that the limits do not satisfy this regulation because they do not require operational or production limits or require pollution controls. *Id.* (citing MCAQD Rule 201 § 302.1(b)(3)). The Petitioner contests MCAQD’s suggestion that the emission limits are effectively operational limits because they are accompanied by continuous monitoring of fuel usage; the Petitioner argues that emissions are not dependent solely on the quantity of gas burned. *Id.* at 22–23. Finally, the Petitioner asserts that the monitoring for PM₁₀, PM_{2.5}, and VOC is insufficient to satisfy Rule 201 for the reasons discussed above. *Id.* at 23.

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

The Petitioner's claim challenging the limits taken to restrict the facility's PTE for purposes of minor NSR applicability overlaps to some degree with the Petitioner's major NSR-focused claim. However, this minor NSR-focused claim relies in part on different legal authorities and extends to emission limits on NO_x, CO, and VOC (in addition to PM₁₀ and PM_{2.5}).

Regarding the Petitioner's allegation that the emission limits are not enforceable as a practical matter because they are not supported by sufficient monitoring, the EPA grants this part of the claim to the extent it concerns PM₁₀, PM_{2.5}, and VOC emissions—all of which rely on the same ambiguous permit terms to which the EPA objected in the preceding claim. *See supra* pages 15–19.³⁶

The remainder of this claim is denied. Under the Maricopa County SIP definition relevant to minor NSR applicability, PTE is defined as the lower of PTE or “allowable emissions.” MCAQD Rule 100 § 200.69(e)(1). Thus, if a permit limit is sufficient to satisfy *either* the definition of PTE or allowable emissions, it can restrict PTE for minor NSR applicability purposes. The Petitioner again suggests that limits on operating hours or production rate or the installation of control devices are necessary to restrict PTE under both the general definition of PTE as well as the newly introduced definition of allowable emissions. Petition at 21. However, as explained previously, the general definition of PTE in MCAQD Rule 100 § 200.100 and 40 C.F.R. § 52.21(b)(4) does not necessarily require production or operating limits in all cases. *See supra* pages 12–13. Determining whether a limit is sufficient to restrict PTE is a case-by-case inquiry, and the Petitioner bears the burden to demonstrate that the Permit does not comply with the Act. 42 U.S.C. § 7661d(b)(2). Because the Petitioner has not provided the requisite analysis to support its claim, the Petitioner has not demonstrated that the Permit's emission limit-based approach is inadequate for purposes of restricting minor NSR applicability, and this portion of the Petition is denied.

The Petitioner also relies heavily on MCAQD Rule 201 as a basis for objection. As explained with respect to Claim 1, this Rule is not part of the Maricopa County SIP (or EPA-approved part 70 program). Thus, whether the Permit satisfies MCAQD Rule 201 is not something the EPA will address in this Order, and this portion of the Petition is denied.

Direction to MCAQD: To the extent that MCAQD intends to rely on limitations to restrict the PTE of the two new simple cycle turbines below the minor NSR applicability thresholds, MCAQD must ensure that such limits satisfy all applicable requirements and are enforceable as a legal and practical matter. As MCAQD revises the Permit to address the EPA's objection described in the preceding claim (*i.e.*, to ensure that the Permit clearly and unambiguously identifies the methodology by which SRP will demonstrate compliance with the PM₁₀/PM_{2.5} emission limits), MCAQD should make similar changes as necessary to address VOC emissions.

³⁶ With respect to NO_x and CO, the Petitioner acknowledges that the Permit requires CEMS, and the Petitioner does not appear to challenge the monitoring associated with those pollutants.

Claim 3: The Petitioner Claims That “The Permit Fails to Ensure that the Modified Agua Fria Generating Station Won’t Interfere with Attainment or Maintenance of the Ambient Air Quality Standards.”

Petitioner’s Claim: The Petitioner asserts that the Permit is deficient because MCAQD did not analyze whether the installation of the two new turbines would cause or contribute to a violation of ambient air quality standards. *Id.* at 24, 29–30. The Petitioner states that such analysis is required for projects that trigger either major NSR or minor NSR requirements. *See id.* at 25 (citing MCAQD Rule 240 §§ 303.5(b), 304.15, 305.3(b); MCAQD Rule 241 § 303; 40 C.F.R. § 52.21(k)). Because the permit limits taken to avoid major and minor NSR requirements are insufficient to restrict PTE below the major and minor NSR thresholds (as described in the previous claims), the Petitioner alleges that an air quality analysis was required. *Id.* at 24–25.

Additionally, even if the Permit adequately limits PTE below the major and minor NSR thresholds, the Petitioner contends that MCAQD was required to ensure that the modified facility will not cause a violation of the NAAQS. *Id.* at 26. For support, the Petitioner cites two sources of authority. First, the Petitioner states that MCAQD must deny a permit revision “if the applicant does not demonstrate . . . that the source may be expected to operate without emitting . . . air contaminants in violation of these rules or applicable [SIP] requirements.” *Id.* (quoting MCAQD Rule 200 § 401.1). Second, the Petitioner states that the District may only issue a permit if “the conditions of the permit require compliance with all applicable requirements.” *Id.* at 27 (quoting MCAQD Rule 210 § 301.8). The Petitioners note that the Maricopa County rules incorporate the NAAQS, and that the Arizona SIP also includes similar ambient air quality standards. *Id.* at 26. The Petitioner suggests that the NAAQS are “applicable requirements.” *See id.* at 27–28 (citing MCAQD Rule 100 § 200.16). Therefore, the Petitioner interprets these regulations to require MCAQD to “ensure that the [Agua Fria] source is designed, controlled, and operated in a manner that it will not cause air contaminants to be emitted in violation of any ambient air standard in the Arizona SIP or the NAAQS.” *Id.* at 26–27. The Petitioner asserts that MCAQD failed to address this requirement in issuing the Permit. *Id.* at 27.

The Petitioner also asserts that SRP’s permit application does not contain the information necessary to support this analysis. For support, the Petitioners state that title V permit applications must contain information required by “Filing Instructions,” including “evidence that operation of the new or modified pollution control equipment will not violate any ambient air quality standards or maximum allowable increases.” *Id.* at 27 (citing MCAQD Rule 210 § 301.1; MCAQD Rules App’x B). The Petition asserts that it would have been inappropriate for MCAQD to waive the requirement to submit of this information, in light of the requirements in MCAQD Rule 200 § 401.1. *Id.*

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

As explained in the EPA’s responses to Claims 1 and 2, the EPA is granting the Petition and objecting to the Permit because the emission limits taken to restrict PTE below the major and minor NSR thresholds are not enforceable as a practical matter. In response to this objection,

MCAQD has the option to revise the Permit to ensure that these limitations are enforceable as a practical matter, such that the project to install the two new turbines will not be subject to either major or minor NSR requirements. If this project remains exempt from major and minor NSR requirements, no analysis of the impacts of the project would be required by MCAQD Rule 240 §§ 303.5(b), 304.15, 305.3(b), MCAQD Rule 241 § 303, or 40 C.F.R. § 52.21(k). MCAQD'S response to this Order thus has the potential to render this portion of the claim moot and/or substantively change the EPA's analysis of this issue. On the other hand, if MCAQD determines that the projects do trigger major and/or minor NSR requirements, the issues raised in this claim may be relevant to and raised in such a future NSR construction permit action. Therefore, it is an appropriate exercise of the EPA's discretion and a reasonable use of agency resources to not resolve this aspect of the Petitioner's claim at this time. *E.g., Hu Honua I Order* at 14–15, 22. Accordingly, the EPA denies this aspect of the claim.

However, even if the project does not trigger major or minor NSR requirements, the Petitioner identifies additional regulatory authorities that might give rise to a NAAQS-focused impacts analysis. Petition at 26–28 (citing MCAQD Rule 200 § 401.1, Rule 210 §§ 301.1, 301.8, Rules App'x B). MCAQD's RTC does not include any response to public comments raising this issue, in contravention of 40 C.F.R. § 70.7(h)(6). *See* RTC at 20. Because of this, the record is inadequate for the EPA to determine whether these regulations actually require what the Petitioner suggests, and accordingly whether these requirements were satisfied. Thus, the EPA grants the Petitioner's claim.

Direction to MCAQD: MCAQD must respond to the public comments alleging that (i) the District must evaluate the project's impacts on the NAAQS pursuant to MCAQD Rule 200 § 401.1 and Rule 210 § 301.8 and (ii) SRP's permit application was required to do the same pursuant to MCAQD Rule 210 § 301.1 and MCAQD Rules App'x B. In responding to these comments, MCAQD may wish to consider the EPA's position on related issues raised in other jurisdictions. *See, e.g., In the Matter of Alabama Power Co., Barry Generating Plant*, Order on Petition No. IV-2021-5 at 11 (June 14, 2022).

Claim 4: The Petitioner Claims That “The Permit Fails to Include a [Best Available Control Technology] Requirement for Greenhouse Gas Emissions from the Two New Simple Cycle Turbines.”

Petitioner's Claim: The Petitioner claims that, because the PM₁₀/PM_{2.5} limits discussed in Claim 1 are inadequate to restrict PTE below PSD major modification thresholds, and because the Petitioner's calculations show that GHG emissions would exceed the relevant PSD significance levels, the new turbines are subject to the PSD requirement of Best Available Control Technology (BACT) for GHG emissions. Petition at 29 (citing 40 C.F.R. § 52.21(b)(49)(iii)).

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

As explained in the EPA's response to Claim 1, the EPA is granting the Petition and objecting to the Permit because the PM_{2.5} emission limit taken to restrict PTE below the PSD threshold is not enforceable as a practical matter. In response to this objection, MCAQD has the option to revise

the Permit to ensure that this limitation is enforceable as a practical matter, such that the project to install the two new turbines will not be subject to PSD requirements. If this project remains exempt from PSD requirements, no GHG BACT requirements would be required by 40 C.F.R. § 52.21. MCAQD'S response to this Order thus has the potential to render this portion of the claim moot and/or substantively change the EPA's analysis of this issue. On the other hand, if MCAQD determines that the projects do trigger PSD requirements, the issues raised in this claim may be relevant to and raised in such a future PSD permit action. Therefore, it is an appropriate exercise of the EPA's discretion and a reasonable use of agency resources to not resolve this aspect of the Petitioner's claim at this time. *E.g., Hu Honua I Order* at 14–15, 22. Accordingly, the EPA denies this claim.

Claim 5: The Petitioner Claims That “MACQD Revised the Final Permit to Include HAP Limits That Were Never Subject to Public Review or Comment.”

Petitioner's Claim: The Petitioner claims that MCAQD was required to provide the public an opportunity to review and comment on emission limits—added after the close of the initial comment period—taken to avoid requirements in 40 C.F.R. part 63, subpart YYYY. Petition at 30, 33.

The Petitioner explains that the TSD accompanying the Draft Permit (provided during the public comment period) indicated that subpart YYYY did not apply because Agua Fria was an area source of HAPs, not a major source. *Id.* at 30. However, the permit application indicated that the source had the potential to emit one HAP—formaldehyde—over the 10 ton per year major source threshold. *Id.* at 30–31 (citing 40 C.F.R. § 63.2). In response to public comments questioning the source's status as a minor source of HAPs and the Permit's lack of subpart YYYY requirements, MCAQD added two new emission limits (along with monitoring, recordkeeping, and reporting conditions) designed to ensure that the source's PTE remained below the HAP major source thresholds. *Id.* at 31 (citing RTC at 23).

The Petitioner asserts that these new limits and conditions on HAP could not be considered a logical outgrowth of the Draft Permit provided for public review because the limits were not discussed in the Draft Permit (or Draft TSD) and because the underlying permit record provides no support for these limits. *Id.* at 31–33. The Petitioner argues that the facts here are similar to a situation in which the EPA objected to a permit and required an additional public comment period because the final permit adopted “a fundamentally different approach to limit the source's PTE than the one found in the draft permit.” *Id.* at 32 (quoting *Pencor-Masada Order* at 9).³⁷ The Petitioner contends that here, too, the EPA must object and require MCAQD to provide the public an opportunity to comment on these HAP limits. *Id.* at 33.

The Petitioner also briefly asserts that “there is no basis in the permit record to support these HAP limits,” and that “[b]ecause the existing source is a major source of HAPs, the two new turbines should be subject to 40 C.F.R. [part 63,] Subpart YYYY.” *Id.*

³⁷ The Petitioner also cites several other EPA orders that stand for the principle that “the unavailability during the public comment period of information needed to determine applicability of or to impose an applicable requirement may also result in a deficiency in the permit's content.” *Id.* at 32 (quoting *Cash Creek II Order* at 9, among others).

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

Neither the CAA nor the EPA’s regulations expressly speak to when a second public comment period is required based on changes between draft, proposed, and final permits. As a general matter: “The determination of whether the comment period should be reopened . . . is generally left to the sound discretion of the permit issuer.” *In re Indeck-Elwood, LLC*, 13 EAD 126, 146 (EAB 2006). However, this discretion is not unlimited, and determining whether changes to a permit necessitate an additional public comment period a fact-based, case-specific decision. In the context of title V permits, the EPA has previously explained:

The CAA and its implementing regulations at part 70 provide for public comment on “draft” permits and generally do not require permitting authorities to conduct a second round of comments when sending the revised “proposed” permit to EPA for review. It is a basic principle of administrative law that agencies are encouraged to learn from public comments and, where appropriate, make changes that are a “logical outgrowth” of the original proposal.

Pencor-Masada Order at 7 (citations omitted). “The question under the ‘logical outgrowth’ test is whether the final action is in character with the original proposal and a logical outgrowth of the notice and comments.” *BP Exploration Order* at 11. Put another way, “In determining whether a changed provision in a final permit qualifies as a logical outgrowth of a draft permit, the [EPA Environmental Appeals] Board has held that the ‘essential inquiry’ is whether interested parties reasonably could have anticipated the final permit condition from the draft permit.” *In re Springfield Water and Sewer Commission*, 18 E.A.D. 430, 451 (EAB 2021) (citations omitted). Under this framework, the EPA has required an additional round of public comment where “the operational constraints imposed on the facility in the proposed permit were so significantly different from those in the draft permit” and where “the final permit ultimately adopts a fundamentally different approach to limit the source’s PTE than the one found in the draft permit.” *Pencor-Masada Order* at 8, 9.

Here, when MCAQD provided the Draft Permit for public comment, it did not include requirements of 40 C.F.R. part 63 subpart YYYYY on the two new turbines. The Draft TSD stated simply: “This regulation applies only to major sources of hazardous air pollutants. SRP’s Agua Fria Generating Station is an area source of HAPs, therefore this regulation does not apply.” Draft TSD at 4. No other portion of the Draft Permit or Draft TSD explained the basis for this statement. In response to public comments questioning this conclusion, MCAQD did *not* explain that the source’s unrestricted PTE was below the major source thresholds (*e.g.*, based on emission calculations in the existing permit record), or that existing permit terms effectively restricted the source’s PTE below the major source thresholds, such that subpart YYYYY was not applicable.³⁸ Instead, MCAQD created new permit terms designed to limit PTE in order to ensure that the facility would not be an area source of HAPs. *See* Permit Conditions 18.d (limiting facility-wide emissions of all HAPs to 22.5 tons and any single HAP to 9.0 tons per rolling 12-month period); 18.e (recordkeeping); 51.a.vii (reporting); *see also* RTC at 23; Final TSD at 5. This emission limit-based mechanism of restricting PTE below the HAP major source thresholds

³⁸ Arguably, any of those actions would have constituted a “logical outgrowth” of public comments.

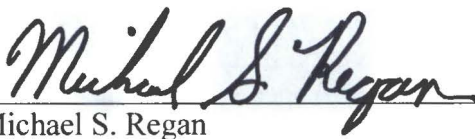
was an entirely new and “fundamentally different approach to limit the source’s PTE” to avoid subpart YYYY applicability, and this approach could not reasonably have been anticipated from the Draft Permit and Draft TSD. *Pencor-Masada Order* at 9. Accordingly, it was not a logical outgrowth of the Draft Permit and public comments, and the public should have been given an opportunity to review these new permit terms. Thus, the EPA grants the Petition with respect to this issue.³⁹

Direction to MCAQD: To the extent MCAQD relies on the newly-created limits as the basis for determining that Agua Fria is an area source of HAPs, MCAQD must provide the public an opportunity to comment on these limits and associated monitoring, recordkeeping, and reporting provisions. MCAQD may do so at the same time it allows the public to review the other changes to the Permit necessary to respond to the EPA’s objections described elsewhere in this Order.

V. CONCLUSION

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

Dated: JUL 28 2022



Michael S. Regan
Administrator

³⁹ It is worth noting that, notwithstanding the public’s lack of an opportunity to comment on these new permit terms, the Petitioner *could* have challenged the sufficiency of these permit terms in the present Petition (since the permit terms were established after the close of the public comment period). 42 U.S.C. § 7661d(b)(2); 40 C.F.R. §§ 70.8(d), 70.12(a)(2)(v). Instead of doing so, the Petitioner offers only the following conclusory and unpersuasive remarks: “There is no basis in the permit record to support these HAP limits,” and “Because the existing source is a major source of HAPs, the two new turbines should be subject to 40 C.F.R. Subpart YYYY.” Petition at 33. Given that the Petitioner does not squarely raise any alleged flaws with the HAP limits themselves, this Order does not address the sufficiency of those limits.