BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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Petition No. IX-2024-31

In the Matter of

Freeport-McMoRan Morenci Inc., Copper Ore Mining and Processing Operations

Permit No. 99245

Issued by the Arizona Department of Environmental Quality

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ORDER DENYING A PETITION FOR OBJECTION TO A TITLE V OPERATING PERMIT

I. INTRODUCTION

The U.S. Environmental Protection Agency (EPA) received a petition dated December 6, 2024 (the Petition) from the Center for Biological Diversity (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. 99245 (the Permit) issued by the Arizona Department of Environmental Quality (ADEQ) to the Freeport-McMoRan Morenci Inc., Copper Ore Mining and Processing Operations (Morenci Mine) in Greenlee County, Arizona. The Permit was issued pursuant to title V of the CAA, 42 U.S.C. §§ 7661–7661f, and Title 18, Chapter 2, Article 3 of the Arizona Administrative Code (A.A.C.). *See also* 40 Code of Federal Regulations (C.F.R.) part 70 (title V implementing regulations). This type of operating permit is also known 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 denies the Petition requesting that the EPA Administrator object to the Permit.

II. STATUTORY AND REGULATORY FRAMEWORK

A. Title V Permits

Section 502(d)(1) of the CAA, 42 U.S.C. § 7661a(d)(1), requires each state to develop and submit to the EPA an operating permit program to meet the requirements of title V of the CAA and the EPA's implementing regulations at 40 C.F.R. part 70. The state of Arizona submitted a title V program governing the issuance of operating permits in 1993. The EPA granted interim approval of ADEQ's title V operating permit program in 1996. 61 Fed. Reg. 55910 (Oct. 30, 1996). The EPA granted full approval of Arizona's title V operating permit program in 2001. 66 Fed. Reg. 63175 (Dec. 5, 2001). This program,

which became effective on November 30, 2001, is codified in Title 18, Chapter 2, Article 3 of the Arizona Administrative Code.

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. 40 C.F.R. § 70.1(b); 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. 32250, 32251 (July 21, 1992). 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 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).

[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*.

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 (Aug. 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 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

[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.

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 (Jan. 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 contained in the permit record. 81 Fed. Reg. at 57832; *see Voigt v. EPA*, 46 F.4th 895, 901–02 (8th Cir. 2022); *MacClarence*, 596 F.3d at 1132–33.[9] This includes a requirement that petitioners 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). 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 determining whether to grant or deny a petition submitted under 40 C.F.R. § 70.8(d) generally includes, but is not limited to, the administrative record for the proposed permit and the petition, including attachments to the petition. 40 C.F.R. § 70.13. The administrative record for a particular proposed permit includes the draft and proposed permits; any permit applications that relate to the draft or proposed permits; the statement required by § 70.7(a)(5) (sometimes referred to as the "statement of basis"); any comments the permitting authority received during the public participation process on the draft permit; the permitting authority's written responses to comments, including responses to all significant comments raised during the public participation process on the draft 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

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[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); *In the Matter of Georgia Power Company*, Order on Petitions at 9–13 (Jan. 8, 2007) (*Georgia Power Plants Order*); *In the Matter of Chevron Products Co., Richmond, Calif. Facility*, Order on Petition No. IX-2004–10 at 12, 24 (Mar. 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); *Georgia Power Plants Order* at 9–13 (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).

during the agency's review of a petition on a proposed permit, those documents may also be considered when determining whether to grant or deny the petition. *Id*.

III. BACKGROUND

A. The Morenci Facility

The Morenci Mine, owned by Freeport-McMoRan Morenci Inc., is a large industrial complex comprised of mining, ore processing, and multiple support operations located in Greenlee County, Arizona. The facility consists of five major operations, including mining operations, the Morenci Concentrator, the MFL Fine Crushing Plant, solution extraction/estrowinning operations, and the Metcalf Concentrator, in addition to several supporting operations. The facility is a title V major source of nitrogen oxides, carbon monoxide, and particulate matter (PM_{10} and $PM_{2.5}$). Among other requirements, the facility is subject to New Source Performance Standards (NSPS) under 40 C.F.R. part 60 subpart LL (the subpart LL NSPS).

B. Permitting History

Freeport-McMoRan Morenci Inc. first obtained a title V permit for the Morenci Mine in 2008, which was subsequently renewed. On June 15, 2023, Freeport-McMoRan Morenci Inc. applied for a title V permit renewal. ADEQ published notice of a draft permit on May 15, 2024, subject to a public comment period that ran until June 14, 2024. On August 23, 2024, ADEQ submitted the Proposed Permit, along with its responses to public comments (RTC), to the EPA for its 45-day review. The EPA's 45-day review period ended on October 7, 2024, during which time the EPA did not object to the Proposed Permit. ADEQ issued the final title V renewal permit for the Morenci Mine on October 23, 2024.

C. Timeliness of Petition

Pursuant to the CAA, if the EPA does not object to a proposed permit during its 45-day review period, any person may petition the Administrator within 60 days after the expiration of the 45-day review period to object. 42 U.S.C § 7661d(b)(2). The EPA's 45-day review period expired on October 7, 2024. Thus, any petition seeking the EPA's objection to the Permit was due on or before December 6, 2024. The Petition was submitted December 6, 2024. Therefore, the EPA finds that the Petitioner timely filed the Petition.

IV. EPA DETERMINATION ON PETITION CLAIM

Claim: The Petitioner Claims That "Emission Limitations and Standards in the Title V Permit are Unenforceable and Fail to Assure Compliance with Applicable Requirements."

Petition Claim: The Petitioner challenges a total of 27 permit conditions[10] related to requirements for emission controls, arguing that the Permit makes these requirements discretionary, unenforceable, and incapable of assuring compliance with applicable requirements. *See* Petition at 5–64.

[10] Specifically, the Petitioner cites Conditions I.A.3.a–c, I.B.4.a, II.A.3, II.B.4.a, II.B.4.b, III.A.3.a, III.A.3.b, III.B.4, IV.A.3, IV.B.4, V.C.3, VI.D.1–5, VII.D.1–3, VIII.D.2, and X.D.1–5.

The Petitioner notes that each of the 27 conditions requires the use of a specific emission control (*e.g.*, wet suppression, wet scrubber, water sprays, mist eliminator, fabric filter dust collectors, bag collector, hydrogen sulfide scrubber system, dust filters, bin vent filters, water spray mist control system, etc.) "to the extent practicable" to control emissions from associated units. *E.g.*, *id.* at 5. The Petitioner argues that the phrase "to the extent practicable" is ambiguous, undefined, and understood to qualify an action as completely discretionary. *Id.* at 6 (citing *Cope v. Scott*, 45 F.3d 445 (D.C. Cir. 1995); *Oceana, Inc. v. Locke*, 670 F.3d 1238 (D.C. Cir. 2011)). Because the phrase is not included in the authorities cited in the Permit for the relevant conditions, the Petitioner alleges that its inclusion in the Permit is contrary to applicable requirements, including the subpart LL NSPS, and undermines the enforceability of the Arizona SIP. *Id.*

The Petitioner dismisses ADEQ's response that explains "to the extent practicable" is a common phrase used in various regulations, arguing that this response is irrelevant to the issue of how the phrase is used in the Permit. *Id.* at 6–7 (citing RTC at 7). The Petitioner elaborates that while federal regulations may contain "a general duty provision requiring polluters to maintain and operate facilities consistent with good air pollution control practices to the extent practicable, this general duty provision does not mean that that polluters are allowed to 'execute' specific applicable NSPS provisions only 'to the extent practicable.'" *Id.* at 7.

The Petitioner also asserts that ADEQ's explanation that the phrase "to the extent practicable" ensures the permittee will use the best air pollution controls possible makes little sense and seems the opposite of how the phrase functions in the Permit. *Id.* (citing RTC at 7).

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

The Petitioner claims the inclusion of the phrase "to the extent practicable" in the Permit renders emission control requirements "completely discretionary" and unenforceable. However, the Petitioner's interpretation of this phrase ignores its context in the Permit and ADEQ's explanation of its meaning in the RTC.

The phrase "to the extent practicable" does not confer complete discretion to the permittee as to whether or not to comply with the requirements of the Permit, as the Petitioner asserts. The phrase does not excuse the permittee from the obligation to use emission controls to minimize emissions. As ADEQ explains, the phrase means that emission controls must be applied to the extent they are feasible (*i.e.*, "consistent with . . . plans and/or operating scenarios") *and no less than is necessary to comply with applicable limits*. RTC at 7.

Contrary to the Petitioner's suggestion, the emission control requirements challenged by the Petitioner are not provisions of the Arizona SIP or the subpart LL NSPS. Therefore, the inclusion of the phrase "to the extent practicable" does not alter the enforceability of applicable requirements of the SIP or the NSPS in any way, as the Petitioner claims. The Petitioner does not identify any other applicable requirements with which the Permit does not assure compliance by virtue of the "to the extent practicable" language.

Moreover, the Petitioner fails to consider other compliance assurance mechanisms for the limits underlying the emission control requirements in the Permit. For example, Condition I.A.3 requires the facility to utilize wet suppression and operate dust collectors and bag collectors for various processes to comply with PM and opacity limits set forth in Condition I.A.2. The facility is also required to conduct periodic opacity monitoring (in Condition I.A.4) to assure compliance with the same limits. Similar combinations of emission limits, emission control requirements, and monitoring requirements can be found throughout the Permit associated with all of the conditions challenged by the Petitioner. The Petitioner does not acknowledge the monitoring requirements or address how they might indicate whether the emission controls have been successfully utilized. By neglecting to consider all of the compliance assurance requirements together in assessing how the Permit assures compliance with its limits, the Petitioner has failed to demonstrate any flaw in the Permit. The EPA, therefore, denies the Petitioner's request for an objection.

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 deny the Petition as described in this Order.

Dated: 9/30/2025

Lee Zeldin
Administrator