BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Petition Nos. VIII-2022-16 & VIII-2022-17

In the Matter of

Terra Energy Partners, Rocky Moutain LLC, Parachute Water Management Facility

Permit No. 09OPGA330

Issued by the Colorado Department of Public Health and Environment

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ORDER GRANTING IN PART AND DENYING IN PART PETITIONS FOR OBJECTION TO A TITLE V OPERATING PERMIT

I. INTRODUCTION

The U.S. Environmental Protection Agency (EPA) received two petitions dated November 22, 2022 and November 23, 2022 (collectively the Petitions) 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 first petition (the WildEarth Guardians Petition) was submitted by WildEarth Guardians (the Petitioner). The second petition (the Center for Biological Diversity Petition) was submitted by the Center for Biological Diversity and Grand Valley Citizens Alliance (the Petitioners). Both Petitions request that the EPA Administrator object to operating permit No. 09OPGA330 (the Permit) issued by the Colorado Department of Public Health and Environment (CDPHE) to the Parachute Water Management Facility (Parachute Facility or the facility) in Garfield County, Colorado. The operating permit was issued pursuant to title V of the CAA, 42 U.S.C. §§ 7661–7661f, and 5 Code of Colorado Regulations (CCR) 1001-5, Part 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 Petitions 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, EPA grants in part and denies in part the Petitions requesting that the EPA Administrator object to the Permit. Specifically, EPA grants Claim V in part of the Center for Biological Diversity Petition and denies the rest of the claims.

II. STATUTORY AND REGULATORY FRAMEWORK

A. Title V Permits

Section 502(d)(1) of the CAA, 42 U.S.C. § 766la(d)(1), requires each state to develop and submit to EPA an operating permit program to meet the requirements of title V of the CAA and EPA's implementing regulations at 40 C.F.R. part 70. The state of Colorado submitted a title V program governing the issuance of operating permits on November 5, 1993. EPA granted interim approval to the title V operating permit program in January 1995 and full approval in August 2000. *See* 60 Fed. Reg. 4563 (January 24, 1995) (interim approval); 61 Fed. Reg. 56368 (October 31, 1996) (revising interim approval); 65 Fed. Reg. 49919 (August 16, 2000) (full approval). This program is codified in 5 CCR 1001-5, Part C.

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 EPA for review. 42 U.S.C. § 7661d(a). Upon receipt of a proposed permit, EPA has 45 days to object to final issuance of the proposed permit if 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 EPA does not object to a permit on its own initiative, any person may, within 60 days of the expiration of 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 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).

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 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 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 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*).

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[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*.

[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.

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, 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 persuasive.").[6] Relatedly, 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 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 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*.

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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 (January 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 (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); *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).

The information that 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 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*.

C. New Source Review

The major New Source Review (NSR) program encompasses 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. 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 EPA's federal PSD program, which applies in areas without a SIP-approved PSD program. 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. 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.

EPA has approved Colorado's PSD, NNSR, and minor NSR programs as part of its SIP. *See* 40 C.F.R. § 52.320(c) (identifying EPA-approved regulations in the Colorado SIP). Colorado's

major and minor NSR provisions, as incorporated into Colorado's EPA-approved SIP, are contained in portions of 5 CCR 1001-5, Parts B and D.

III. BACKGROUND

A. The Parachute Facility

Terra Energy Partners, Rocky Mountain LLC owns the Parachute Water Management Facility located in Garfield County, Colorado. The facility receives and processes produced water, flowback water, and other fluids from natural gas production. The facility is a major source under title V for hazardous air pollutants (HAPs).

EPA conducted an analysis using EPA's EJScreen[10] to assess key demographic and environmental indicators within a 5-kilometer radius of the Parachute Facility. This analysis showed a total population of approximately 3,902 residents within a 5-kilometer radius of the facility, of which approximately 20 percent are people of color and 32 percent are low income. In addition, EPA reviewed the EJScreen Environmental Justice Indices, which combine certain demographic indicators with 12 environmental indicators. The following table identifies the Environmental Justice Indices for the 5-kilometer radius surrounding the facility and their associated percentiles when compared to the rest of the State of Colorado.

EJ Index	Percentile in State
Particulate Matter 2.5	11
Ozone	38
Diesel Particulate Matter	9
Air Toxics Cancer Risk	48
Air Toxics Respiratory Hazard	72
Traffic Proximity	43
Lead Paint	48
Superfund Proximity	4
RMP Facility Proximity	56
Hazardous Waste Proximity	14
Underground Storage Tanks	43
Wastewater Discharge	53

B. Permitting History

On March 1, 2009, WPX Energy, Rocky Mountain LLC submitted an application for an initial title V permit. Updates to the application were submitted on June 28, 2013, May 14, 2014, September 1, 2016, and October 12, 2020. On August 2, 2017, Colorado approved a transfer of ownership of the Parachute Facility from WPX Energy, Rocky Mountain LLC to Terra Energy

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

Partners, Rocky Mountain LLC. Colorado published notice of a draft permit and draft technical review document on March 31, 2022, subject to a public comment period that ran until April 30, 2022. On August 9, 2022, Colorado submitted the Proposed Permit, along with its responses to public comments (RTC), to EPA for its 45-day review. EPA's 45-day review period ended on September 23, 2022, during which time EPA did not object to the Proposed Permit. Colorado issued the final title V permit for the Parachute Facility (Final Permit) with a final technical review document (Final TRD) on October 1, 2022. This is the initial title V permit for the Parachute Facility.

C. Timeliness of Petition

Pursuant to the CAA, if 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). EPA's 45-day review period expired on September 23, 2022. EPA's website indicated that any petition seeking EPA's objection to the Permit would be due on or before November 23, 2022. The WildEarth Guardians Petition was received on November 22, 2022, and the Center for Biological Diversity Petition was received on November 23, 2022, and, therefore, EPA finds that the Petitioners timely filed the Petitions.

Section IV of this Order responds to the WildEarth Guardians Petition, and Section V responds to the Center for Biological Diversity Petition.

IV. DETERMINATIONS ON THE CLAIM IN THE WILDEARTH GUARDIANS PETITION

Claim I: The Petitioner Claim[s] That "The Final Permit Fails to Assure Compliance with Applicable PSD and Related Requirements in the Colorado State Implementation Plan."

Petitioner's Claim: The Petitioner claims that the title V permit does not assure compliance with the PSD requirements in Colorado's SIP because the title V permit categorizes emissions from four uncovered produced water/flowback storage ponds (emission unit HPS-013) as fugitive emissions. WildEarth Guardians Petition at 3–4. Specifically, the Petitioner asserts the title V permit does not comply with 40 C.F.R. §§ 70.6(a)(1) and 70.7(a)(1)(iv) because CDPHE "improperly classified the emissions from HPS-013 as fugitive" and "improperly classified the Parachute Waste Facility as a non-major source under applicable PSD requirements set forth in the Colorado SIP." *Id.* at 7–8.

The Petitioner contends that emissions from HPS-013 are not fugitive under the CAA PSD Regulations (40 C.F.R. § 51.166(b)(20)) and Section I of the Colorado Air Quality Control Commission (AQCC) Common Provisions Regulations (5 C.C.R. § 1001-2), which both define fugitive emissions as "emissions that could not reasonably pass through a stack, chimney, vent or other functionally equivalent opening." *Id.* at 4. The Petitioner asserts that EPA "has consistently held that a determination of 'reasonableness' should be construed 'broadly.'" *Id.* at 5 (quoting John S. Seitz, *Classification of Emissions from Landfills for NSR Applicability Purposes* at 2 (October 21, 1994)). The Petitioner states that EPA has also generally held that "where

emissions-collection technology is in use by other sources within the same source category or by a similar pollutant emitting activity, there is a presumption that collection is reasonable." *Id.* (citing Petition Ex. 2, Thomas C. Curran, *Interpretation of the Definition of Fugitive Emissions in Parts 70 and 71* at 2 (February 10, 1999)).

The Petitioner claims that emissions from HPS-013 are not fugitive because "technology is in use by other sources within the same source category or by a similar pollutant emitting activity demonstrating a presumption that collection of emissions from HPS-013 is reasonable." *Id*. For support, the Petitioner provides two examples of companies that specialize in floating cover and gas collection systems for oil and gas industrial purposes that the Petitioner claims are similar to the ponds that comprise HPS-013, as well as several other companies that provide similar covers for other industrial purposes (*e.g.*, anaerobic lagoons at wastewater treatment facilities) that the Petitioner claims are similar pollutant emitting activities. *Id.* The Petitioner also notes that a separate pond at the Parachute facility (unit PD1-003) "utilizes a membrane cover to capture and gather VOCs and an enclosed combustor to reduce VOC emissions," and that CDPHE classified emissions from PD1-003 as point source emissions. *Id.* at 5–6 (citing Final Permit at 8).

In rebuttal to CDPHE's RTC, the Petitioner first claims that CDPHE did not respond to its comments regarding the "feasibility, availability, and use of floating cover and gas collection systems for waste ponds." *Id.* at 6 n.4. In addition, the Petitioner asserts that "[t]he fact that emissions from HPS-013 were determined to be fugitive under the original construction permit issued in 2011, that the system is not being modified with the Title V permitting action, and that there are no new federal or state standards that require covers for oil and gas wastewater ponds have no bearing on whether emissions from HPS-013 are properly considered fugitive." *Id.* Therefore, the Petitioner contends that CDPHE "must write the permit in such a way as to bring [Terra Energy Partners, or TEP] into compliance, which could include either a compliance schedule, consistent with 40 C.F.R. § 70.5(c)(8)(iii)(C), to bring the facility into compliance with PSD or require TEP to limit facility-wide VOC emissions to below PSD major source levels." *Id.*

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

Under Colorado's EPA-approved SIP, new sources proposing to construct, or existing sources proposing to undertake a modification, are required to obtain a preconstruction permit that complies with applicable preconstruction review requirements. *See* 5 CCR 1001-5, Parts B and D. It is in this context that a source's potential to emit (PTE) is evaluated (including whether certain emissions are fugitive) to determine whether the source is subject to major NSR requirements, including the requirement to obtain a PSD permit. *See* 5 CCR 1001-5-D.I.A. All preconstruction requirements are derived on a case-by-case basis through this source-specific process that produces permit terms and conditions applicable to the individual source. CDPHE evaluated the Parachute Facility's PTE prior to September 27, 2011, when it determined that the VOC emissions from HPS-013 were fugitive and that the non-fugitive VOC emissions from the facility did not exceed the major source permitting threshold, and therefore issued Air Permit No. 03GA0243 specifying preconstruction and operating requirements that were then applicable to the facility, including HPS-013. *See* TRD at 1, 6. Notably, the Petitioner does not allege an error with CDPHE's determination that emissions from HPS-013 were fugitive back in 2011. The

Petitioner does not claim that the emissions were not fugitive in 2011. Further, the Petitioner does not claim that CDPHE should have required the facility to apply for a PSD permit in 2011. Thus, the Petitioner has not shown that CDPHE erred in 2011 based on the record before the state at that time.

Rather than claiming that CDPHE improperly characterized the emissions from HPS-013 as fugitive in 2011, the Petitioner claims that the emissions from HPS-013 should not have been considered fugitive when the title V permit was proposed *in 2022*, when that permit incorporated the requirements from the 2011 preconstruction permit. The Petitioner's statement that "[a] determination today that emissions from HSP-013 are no longer fugitive would simply require the facility to be classified as a major source under PSD and would not negate or otherwise retroactively undo any past permitting" indicates that the Petitioner thinks the source should be classified as major *now and in the future. Id* at 6–7. The Petitioner claims that "because emissions from HPS-013 *are* non-fugitive, the Parachute Waste Facility *is currently* a major source under PSD and TEP *is currently* operating out of compliance with the Clean Air Act." WildEarth Guardians Petition at 7 (emphasis added). But claiming that that the source is now major for PSD does not demonstrate that the source was major for PSD in 2011 and that PSD was triggered by construction at that time. Even if the Petitioner is correct that emissions from HPS-013 should no longer be considered fugitive and that the facility should now be classified as a major source, this is relevant only for any modifications that occurred after the emissions could no longer be classified as fugitive. The Petitioner has not demonstrated that there is any flaw in the current title V permit based on the incorporated 2011 construction permitting requirements. Nor has the Petitioner demonstrated that the title V permit is missing construction permitting requirements from additional construction that occurred after 2011. The Petitioner has not identified additional construction or modification that occurred after 2011.

The Petitioner's concerns are better characterized as forward-looking NSR permitting issues. *See In the Matter of Drummond Co., Inc., ABC Coke Plant*, Order on Petition No. IV-2019-7 at 18 n.25 (June 30, 2021); *In the Matter of Salt River Project, Coronado Generating Station*, Order on Petition No. IX-2022-1 at 11 (June 14, 2022); *In the Matter of AK Steel, Dearborn Works*, Order on Petition No. V-2016-16 at 14–15 (January 15, 2021). The Petitioner's claims about the fugitive or nonfugitive nature of VOC emissions from HPS-013 could potentially manifest if the Parachute facility undertakes a modification in the future. If that occurs, fugitive emissions categorizations could indeed be relevant to determining the applicability of major NSR to the specific project at issue.[11] If the Petitioner has concerns that the facility may not apply for the proper NSR permit with respect to future, hypothetical projects, the Petitioner could raise those concerns in public comments on a future draft NSR permit. If still concerned after the state's permitting decision, the Petitioner could then invoke available remedies to contest it.

In summary, the Petitioner has not provided any information to demonstrate that emissions from HPS-013 should not have been considered fugitive in 2011 when the NSR permitting decision was made. The Petitioner does not provide any citations to any particular title V permit terms that are in violation of the CAA or the state's title V program. The Petitioner does not identify any other applicable requirement related to PSD that is missing from the Permit. Therefore, the

[11] EPA expects that CDHPE would evaluate the reasonableness of covering the oil and gas wastewater ponds of HPS-013 should the facility's PSD major source status be assessed by CDHPE in the future.

Petitioner has not identified any specific permit terms or demonstrated that the title V permit fails to assure compliance with any specific applicable requirement. 40 C.F.R. § 70.12(a)(2)(i)–(iii).[12] Rather, the Petitioner has only attempted to demonstrate that these emissions should no longer be characterized as fugitive emissions in 2022, which does not show a flaw in the current title V permit.

In addition, the Petitioner's general claim that CDPHE did not respond to part of the public comment regarding the feasibility, availability, and use of floating cover and gas collection systems for waste ponds is factually incorrect. CDPHE's response acknowledges the existence of floating covers and gas collection systems, and explains why source-specific factors, such as technical feasibility and cost, are also relevant factors to consider when determining whether it is reasonable to cover an oil and gas wastewater pond. *See* RTC at 4. Furthermore, as the EPA already explained, CDPHE correctly determined that the issues raised in public comment and now in the Petition are not related to a flaw in the current title V permit because they are related to a forward-looking NSR permitting issue.

V. DETERMINATIONS ON CLAIMS IN THE CENTER FOR BIOLOGICAL DIVERSITY PETITION

Claim I: The Petitioners Claim That "The Permit Unjustifiably Assumes a Control Efficiency of 95 Percent for Control Devices, without Proper Testing, Monitoring, and Reporting to Ensure This, and Despite Evidence to the Contrary."

Petitioners' Claim: The Petitioners claim that the Permit lacks testing, monitoring, and reporting requirements that assure compliance with the requirement for three enclosed flares (F-600, F-610, and F-620) to achieve a control efficiency of at least 95 percent of VOC emissions. Center for Biological Diversity Petition at 5–6.

The Petitioners assert that title V permits "must include compliance certification, testing, monitoring, reporting, and recordkeeping requirements sufficient to assure that the permitted source complies with the terms and conditions of the permit." *Id.* at 5 (citing 42 U.S.C. § 7661c(c); 40 C.F.R. §§ 70.6(a)(1), (c)(1)). The Petitioners also state that title V permits must contain "periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit[.]" *Id.* (quoting 40 C.F.R. § 70.6(a)(3)(i)(B); citing 40 C.F.R. § 70.6(c)(1)). Finally, the Petitioners claim that the failure to include sufficient monitoring to assure compliance makes a permit unenforceable as a practical matter. *Id.* (citing 42 U.S.C. § 7661c(a)).

The Petitioners assert that three permit conditions (20.2.2, 20.2.3, and 20.2.5) relating to two enclosed flares (F-610 and F-620) for the facility's storage tanks all presume VOC control efficiencies of 95 percent. *Id.* at 5–6 (citing Permit at 10, 65–66). The Petitioners claim that this presumption is improper unless supported by "testing, measurement, and reporting of control efficiency throughout the lifetime of the device." *Id.* at 6 (citing 42 U.S.C. § 7661c(c); 40 C.F.R. §§ 70.6(a)(1), (c)(1); 57 Fed. Reg. 32,250, 32,251 (July 21, 1992); Order Granting in Part and Denying in Part Petition for Objection to Permit, *In the Matter of Cash Creek Generation, LLC*,

[12] *See supra* note 7 and accompanying text.

Petition No. IV-2010-4 (June 22, 2012) at 52–56). The Petitioners also state: "This is also true of the enclosed combustor for the five condensate sales tanks at the Parachute Facility—Enclosed Flare F-600. Section II, Condition 1.1.1.3." *Id*.

In support of this argument, the Petitioners present several examples of enclosed combustion devices (ECDs) for storage tanks that were found via direct measurement by CDPHE to have control efficiencies of less than 95 percent (*i.e.*, 68.61 to 93.04 percent). *Id.* at 6–7 (citing Petition Ex. 4, Stack Tests for Enclosed Combustion Devices (January 2022)). The Petitioners also quote a report authored by EPA Region 8 and the Wyoming Department of Environmental Quality, stating that ECDs operate "over a wide range of combustion efficiencies ranging from below 20% to above 99%" and "test conditions/operational setup can dramatically affect individual ECD performance." *See id.* at 7 (citing Petition Ex. 5, Michael Stovern et al., *Measuring Enclosed Combustion Device Emissions Using Portable Analyzers Phase 1: Test Summaries* at 9 (May 14, 2020)). The Petitioners claim that ECDs are unreliable because they do not control key parameters like temperature and residence time, and the composition of the gas being combusted is too variable to assume any control efficiency without testing. *Id.* (citing Petition Ex. 7, Ranajit Sahu, *Technical Comments on the Proposed CDPHE Permit No. 20AD0062 for Haugen #1-30* at 2–5). The Petitioners list numerous other site-specific variables which they claim affect control efficiency (*e.g.*, weather, altitude, proper installation, *etc.*) and thus necessitate on-site testing to provide reliable data to ensure compliance. *Id.* at 9 (citing Petition Ex. 7 at 2–5; Petition Ex. 9, U.S. EPA Office of Air Quality Planning and Standards, *Parameters for Properly Designed and Operated Flares* (April 2012)).

Finally, the Petitioners reject CDPHE's explanation in the RTC of the actions the permittee must perform for the presumption of 95 percent control efficiency to apply (*i.e.*, operating the control device consistent with manufacturer specifications and operating an auto-igniter), claiming that these same requirements applied to control devices in two of the previously discussed examples where control efficiencies were found to be less than 95 percent. *Id.* at 8–9 (citing RTC at 3–4). The Petitioners further claim that opacity and visible emissions testing provide no information on VOC emissions from flares and only testing can "provide the data needed to ensure compliance." *Id.* at 9 (citing Petition Ex. 7 at 5).

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

The Petitioners raise testing, monitoring, recordkeeping, and reporting concerns related to three flares, F-600, F-610, and F-620, that control VOC emissions from sales tanks CST-001, storage tanks SWT-010, and sales tanks FCT-005 respectively.[13] The Final Permit relies on these three flares achieving a 95 percent destruction efficiency to assure compliance with VOC emissions limits for the tanks CST-001 (Final Permit, Section II, permit condition 1.1.1.3, 20.2.3, and 20.2.5), SWT-010 (Final Permit, Section II, permit condition 20.2.2, 20.2.3, and 20.2.5), FCT-005 (Final Permit, Section II, permit condition 20.2.5). Notably, the Final Permit identifies all conditions under permit condition 20.2 as "state-only enforceable."

[13] The Petitioners seem to misstate the specific relationship of individual flares to tanks, incorrectly linking F-620 to the facility's storage tanks. Center for Biological Diversity Petition at 5.

As an initial matter, the Petitioners' claims about permit condition 20.2 assuming a 95 percent destruction efficiency relate to permit terms that are all clearly labeled as state-only enforceable. Therefore, those terms and conditions, and the basis for them, are not subject to the requirements of CDPHE's EPA-approved title V program or 40 C.F.R part 70. As specified in 40 C.F.R part 70, permitting authorities may include terms and conditions in a title V permit "that are not required under the Act or under any of its applicable requirements" so long as such terms and conditions are "specifically designate[d] as not being federally enforceable." 40 C.F.R. § 70.6(b)(2). State-only permit terms are not subject to the requirements of 40 C.F.R. §§ 70.6, 70.7, or 70.8 and will not be evaluated by EPA. *Id*. [14] The only situations in which EPA will review state-only labeled permit terms are if they either impair the effectiveness or enforceability of the federally enforceable title V permit conditions, or if they are mislabeled.[15] Therefore, the Petitioners' claims regarding permit condition 20.2 are denied since those provisions are not subject to the petition process under 40 C.F.R. 70.8(d).

With regard to the remainder of the Petitioners' claim relating to CST-001 and F-600, which also require a 95 percent destruction efficiency under Section II, permit condition 1.1.1.3, the Petitioners have failed to demonstrate a flaw in the title V permit. The majority of the Petitioners' claim is focused on the permit condition 20.2 and the fact that the Final Permit specifies that absent credible evidence the 95 percent VOC control efficiency "shall be presumed" as long as permit condition 20.2 are met. However, the Petitioners do not provide any explanation as to how the requirements of permit condition 20.2 are related to the separate federally enforceable requirement in permit condition 1.1.1.3. In fact, nowhere in permit condition 1 for CST-001 or permit condition 19 for F-600 does the permit state that the 95 percent destruction efficiency is "presumed" as the Petitioners seem to claim. In addition, the Petitioners do not analyze the monitoring, recordkeeping, and reporting requirements for the flare itself, F-600, in permit condition 19 (*e.g.*, the requirement to monitor for the presence of a pilot flame at all times in permit condition 19.4.1, the requirement to conduct visual emissions observations in permit condition 19.4.2, or the references in permit condition 19.5 to additional monitoring requirements under permit condition 1.5).[16] The title V permit is clear that the 95 percent destruction efficiency in permit condition 1.1.1.3 shall be achieved by routing emissions to the flare as required by permit condition 1.4, which in turn requires that the flare meet all requirements of permit condition 19. Other than briefly stating that their claims related to 20.2 are "also true of the enclosed combustor for the five condensate sales tanks at the Parachute

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[14] *See also, e.g.*, *In the Matter of Waupaca Foundry, Inc. Plants 2/3*, Order on Petition No. V-2016-21 at 9 (June 7, 2017) (declining to address issues raised in the petition regarding Wisconsin's state-only hazardous air pollutant requirements); *In the Matter of Waupaca Foundry, Inc. Plant 1*, Order on Petition No. V-2015-02 at 9 (July 14, 2016) ("These regulations are not part of Wisconsin's SIP, are not applicable requirements under title V, and are therefore not appropriate to address in a title V petition."); *In the Matter of Hu Honua Bioenergy Facility,* Order on Petition No. IX-2011-1 at 21 (February 7, 2014) ("[T]his provision is a state only requirement and not part of Hawaii's SIP; therefore, it is not an applicable requirement for purposes of title V and not subject to review in a title V petition."); *In the Matter of Harquahala Generating Station Project,* Order on Petition, at 5 (July 2, 2003) (*Harquahala Order*) ("State-only terms are not subject to the requirements of Title V and hence are not [to] be evaluated by EPA unless those terms are drafted in a way that might impair the effectiveness of the permit or hinder a permitting authority's ability to implement or enforce the permit.").

[15] *Harquahala Order* at 5.

[16] EPA notes that the Petitioners raise separate claims relating to the opacity and hours of operations requirements in permit condition 19 but do not analyze those requirements in light of the 95 percent destruction efficiency requirement of 1.1.1.3.

Facility—Enclosed Flare F-600 Section II, Condition 1.1.1.3," the Petitioners do not provide any citations or analysis to any other permit terms that assure compliance with permit condition 1.1.1.3. 40 C.F.R. § 70.12(a)(2)(i)–(iii).[17] The Petitioners have failed to analyze key permit terms in permit condition 19 and their general allegations do not meet the demonstration burden under CAA § 505(b)(2).[18]

Claim II: The Petitioners Claim That "The Permit Improperly Presumes Compliance with Visible Emissions and Opacity Requirements Applicable to the Control Devices."

The Petitioners repeat one aspect of this claim—about reporting requirements—in Claim III (which is solely about that issue), and EPA will therefore respond to it there.

Petitioners' Claim: The Petitioners claim that the Permit lacks testing, monitoring, recordkeeping, and reporting requirements that assure compliance with opacity limits applicable to flares (specified in permit conditions 5.1.1 and 19.3) and a requirement concerning venting hydrocarbon emissions from storage tanks (specified in permit condition 20.2.9.3). Center for Biological Diversity Petition at 10 (citing Final Permit at 28, 62, 69).

The Petitioners claim that CDPHE's RTC does not explain why the monitoring requirements are sufficient but "simply states that the monitoring requirements it included in the Permit are 'a direct copy of Colorado Regulation No. 7, Part D, Section II.C.2.a.(iii) . . . .'" *Id.* (quoting RTC at 5). The Petitioners argue that a state's regulations are not necessarily sufficient to comply with title V standards. *Id.* (citing *Sierra Club v. EPA*, 536 F.3d 673, 675–76, 678–79 (D.C. Cir. 2008)).

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

As explained in EPA's Response to Center for Biological Diversity's Claim I, permit condition 20.2 is clearly labeled as state-only enforceable in the Final Permit and those terms and the basis for them are not subject to the requirements of CDPHE's EPA-approved title V program or 40 C.F.R. part 70. Therefore, the Petitioners' claims regarding permit conditions in 20.2.2.9.3 are denied since those provisions are not subject to the petition process under 40 C.F.R. 70.8(d).[19]

With regard to the remainder of the Petitioners' claim about permit conditions 5.1.1 and 19.3, the Petitioners have not demonstrated that the monitoring, reporting, and recordkeeping requirements associated with those conditions are insufficient to assure compliance with the applicable requirements.[20] The Petitioners allege that the Permit lacks "the necessary testing, monitoring, recordkeeping, and reporting requirements to ensure that [permit conditions 5.1.1

[17] *See supra* note 7 and accompanying text.
[18] *See supra* notes 6 and 8 and accompanying text.
[19] *See supra* notes 14 and 15 and accompanying text.
[20] Condition 20.2.9.3 and its associated recordkeeping requirements are currently labeled state-only enforceable. Depending on the state's resolution of Claim I, these terms could possibly become federally enforceable. The Petitioners, however, have not demonstrated that the monitoring, reporting, and recordkeeping requirements are insufficient to assure compliance, regardless of whether these terms are federally enforceable.

and 19.3] are met" but do not actually acknowledge, cite, or analyze any of the associated monitoring, recordkeeping, and reporting requirements in the Permit (specified in permit conditions 5.2 and 19.4, respectively), which are key elements of this particular issue. Center for Biological Diversity Petition at 10; Final Permit at 28, 62–63, 71–72. The Petitioners only claim the permit cannot "presume" compliance in 5.1.1 and 19.3 without necessary monitoring, recordkeeping, and reporting. Center for Biological Diversity Petition at 10. As explained by CDPHE in the RTC, the permit only allows compliance to be "presumed" if the operating requirements, and monitoring, recordkeeping, and reporting in the permit at met. *See* RTC at 5. CDPHE further explained that the permit does contain adequate monitoring, recordkeeping, and reporting in permit conditions 5.2 and 19.4, which require "ongoing monitoring for the presence of a pilot light and daily visual observations for six minutes (additional requirements are specified in the permit if visual emissions are observed)." RTC at 5; Final Permit at 28 and 62–63. Therefore, the Petitioners have failed to consider key permit terms, address the entirety of the state's final reasoning, and have not otherwise demonstrated a flaw in the title V permit. 40 C.F.R. § 70.12(a)(2)(vi).[21]

Claim III: The Petitioners Claim That "The Permit Denies the Public and EPA Access to Monitoring, Testing, and Recordkeeping Information Needed to Assure Compliance with the Applicable Requirements."

Petitioners' Claim: The Petitioners claim that many[22] of the reporting requirements in the Permit do not assure compliance with their associated applicable requirements because they only require the permittee to maintain records and make them available to CDPHE upon request, thereby limiting public access to those records. Center for Biological Diversity Petition at 11–12.

The Petitioners elaborate further on permit condition 19.6, which the Petitioners assert requires the permittee to monitor monthly hours of operation of enclosed flares and keep them in a log, but only provide the log to CDPHE upon request. *Id.* at 11 (citing Permit at 63). The Petitioners claim that these records are crucial for calculating emissions, and therefore demonstrating compliance with the requirements of the Permit. *Id.*

The Petitioners argue that being deprived of access to basic information, like flare operating hours, severely impairs the public's and EPA's ability to determine whether the source is meeting the requirements of its permit. *Id.* (quoting 57 Fed. Reg. at 32251; citing 42 U.S.C. § 7661c(c); 40 C.F.R. § 70.6(c)(1)).

The Petitioners criticize CDPHE's response to their comments, claiming it "merely elaborates upon the on-site retention requirements in the Permit instead of explaining how these permit terms meet the requirements that apply to Title V permits." *Id.* at 12.

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[21] *See supra* notes 6, 8, and 9 and accompanying text.

[22] The Petitioners list permit conditions 19.6, 1.1.2, 1.2, 1.3, 2.1.1.2, 2.2, 3.1, 3.2.3, 3.3, 3.7, 4.1, 4.2.3, 4.3, 4.5.2, 4.7.1, 4.9, 5.2.1, 5.2.2.1, 5.2.2.2, 5.2.2.3, 6.1, 6.2, 6.3, 7.1.2, 7.2, 7.3, 8.1.2, 8.2, 8.4.4, 9.1.2, 9.4.4, 10.1.2, 10.2, 10.4, 11.1.2, 11.2, 12.1.2, 12.2, 12.4, 13.1, 13.2.3, 13.3, 13.5.2, 13.7.1, 13.9, 14.1, 14.2, 14.3, 14.4, 15.1.3, 15.2, 15.3, 15.4, 15.5, 15.6.3, 16.1, 16.2, 16.3, 17.1.2, 17.2, 17.4, 18.1.2, 18.2, 18.4, 19.1, 19.2, 19.4, 20.2.10, 20.2.11.5, Appendix A, 4, Appendix H, Appendix J, 3, and Appendix K, II and III. Center for Biological Diversity Petition at 11.

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

In the RTC, CDPHE included a detailed response spanning two pages that explained why certain records, like the records of hours of operation in permit condition 19.6, are required to be maintained on site for 5 years but do not have specific reporting requirements to CDPHE. RTC at 1. CDPHE explained, "Section IV, Condition 22.b. requires the permittee to submit to the Division all reports of any required monitoring at least every six (6) months." RTC at 2. As a basis for CDPHE's decisions that the permit conditions identified did not require reporting of raw data, CDPHE referenced EPA's "Questions and Answers on the Requirements of Operating Permits Program Regulations" document from July 7, 1993, which states:

> Does a source have to submit raw data on monitoring/testing as part of its monitoring report? No. The permittee is not required to submit raw data, but is required to keep required monitoring data and support information. Support information includes all calibration and maintenance records for continuous monitoring, and copies of all reports required by the permit. Reports are required to contain the results of the monitoring required in the permit. This issue will be dealt with in greater detail in monitoring guidance EPA will be providing at a later date.

Section 6.5, Question 3; *see* RTC at 2.

The Petitioners have failed to address the state's final reasoning provided in the RTC and have failed to otherwise demonstrate a flaw in the title V permit. Subparagraph (vi) of 40 C.F.R. § 70.12(a)(2) requires, *inter alia*, that a petition "identify where the permitting authority responded to the public comment, including page number(s) in the publicly available written response to comment, and explain how the permitting authority's response to the comment is inadequate to address the issue raised in the public comment."[23] While the Petitioners acknowledge that the RTC explained the on-site recordkeeping requirements, the Petitioners do not actually address CDPHE's reasoning that not all raw data must be reported. Specifically, the Petitioners ignore CDPHE's reliance on prior EPA statements that raw data is not required to be reported in semi-annual monitoring reports. The Petitioners' mere acknowledgement of the state's response does not satisfy the requirement to address the state's final reasoning in not requiring reporting of the raw data required to be maintained by permit condition 19.6 and the other permit conditions cited by the Petitioners.[24]

In addition, the Petitioners have failed to provide any citations or analysis that specifically requires data, like hours of operation in permit condition 19.6, to be reported on any particular frequency to rebut CDPHE's reliance on EPA statements that raw data like this is not required to be reported in semi-annual monitoring reports. 40 C.F.R. § 70.12(a)(2)(iii). The Petitioners' mere reference to U.S.C. § 7661c(c) and 40 C.F.R. § 70.6(c)(1) does not demonstrate that a different type of reporting requirement is necessary here. Furthermore, the Petitioners general allegation and reference to over 70 different permit terms without any analysis of the

[23] *See supra* note 9 and accompanying text.
[24] *See supra* note 9 and accompanying text.

requirements in those permit terms does not meet the demonstration standard. Therefore, even if the Petitioners had adequately addressed the state's final reasoning, the Petitioners' general allegations citing to over 70 permit terms—without the necessary analysis or identification of applicable requirements or provisions of EPA's regulations the Permit fails to meet—does not satisfy the requirements of 40 C.F.R. 70.12(a)(2) and does not demonstrate a flaw in the title V permit.[25]

Claim IV: The Petitioners Claim That "The Permit Includes an Invalid "Director's Discretion" Provision That Allows [CDPHE] to Approve any Alternative Means of Ensuring Control Devices Are Operating Properly."

Petitioners' Claim: The Petitioners claim that part of permit condition 20.1.4 allowing the permittee the option to determine whether combustion devices are operating properly by "other means approved by [CDPHE]" is too broad and vague to assure compliance with the Permit's requirements. Center for Biological Diversity Petition at 12 (quoting Permit at 64; citing *In the Matter of Salt River Project Ag. Improvement & Power Dist., Agua Fria Generating Station*, Order on Petition No. IX-2022-4 at 52–54 (July 28, 2022)).

The Petitioners claim that the Permit lacks requirements that ensure that any alternative compliance demonstration method that CDPHE may approve will be enforceable or guarantee "proper operation of the devices and achievement of a 95 percent control efficiency." *Id.* The Petitioners note that the Permit does not specify whether the Permit will be amended to include the alternative method, or whether the public or EPA will be informed that an alternative has been approved. *Id.* at 12–13.

Although the Petitioners acknowledge CDPHE's response provided examples of alternative methods it has approved in the past and stated that it would evaluate whether any alternative method would provide a similar demonstration of proper operations, the Petitioners reject these justifications because they are not explicitly required in the Permit. *Id.* at 13 (citing RTC at 2).

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

As explained in EPA's Response to Center for Biological Diversity's Claim I with respect to permit condition 20.2, state-only permit terms and the basis for them are not subject to the requirements of the CDPHE EPA-approved title V program or 40 C.F.R part 70. Condition 20.1 is also clearly labeled as state-only enforceable in the Final Permit. Therefore, the Petitioners' claims regarding permit condition 20.1.4 are denied since those provisions are not subject to the petition process under 40 C.F.R. 70.8(d).[26]

Claim V: The Petitioners Claim That "The Permit Improperly Allows the Use of an Emissions Model That is No Longer Available."

[25] *See supra* notes 6–8 and accompanying text.
[26] *See supra* notes 14 and 15 and accompanying text.

Petitioners' Claim: The Petitioners claim that the public "cannot determine compliance with the VOC emissions limits" applicable to the facility's condensate sales tanks (CST-001) because permit condition 1.1.1 allows the permittee to demonstrate compliance via the American Petroleum Institute's E&P Tanks, Version 3.0 program, which is no longer available to the public. Center for Biological Diversity Petition at 13 (citing Permit at 10; Petition Ex. 10, API Tanks Model Information).

Additionally, the Petitioners claim that part of the same permit condition, allowing the permittee to request an alternative method to determine compliance with the VOC limits, is impermissible because it "deprives the ability of the public and EPA to evaluate and provide feedback on the method that the permittee will actually use to determine compliance with the Permit's requirements." *Id.* at 14. The Petitioners, referring to previous arguments made under Claim IV, argue that this provision provides unlimited discretion as to the adequacy of any alternative methods of determining compliance. *Id.*; *see supra* pages 10–11.

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

With regard to the Petitioners' claim that the use of American Petroleum Institute's E&P Tanks, Version 3.0 program does not allow the public or EPA determine if compliance with the requirement for CST-001, the Petitioners have failed to address the state's final reasoning as required by 40 C.F.R. § 70.12(a)(2)(vi) and otherwise failed to demonstrate a flaw in the title V permit. While the Petitioners acknowledge that CDPHE conceded that the program can no longer be purchased, the Petitioners do not actually address CDPHE's reasoning that EPA and the public can use other programs, "such as AP-42 equations, Promax, HYSIS or TankESP" to confirm compliance. RTC at 5. CDPHE further explained that E&P Tanks was based on AP-42 equations in Chapter 7. *Id.* The Petitioners do not explain why they need to be able to purchase E&P Tanks itself rather than just use the AP-42 equation suggested by CDPHE or any of the other available tanks programs. The Petitioners' mere acknowledgement of part of the state's response does not satisfy the requirement to address the state's final reasoning for continuing to rely on E&P Tanks to simplify calculation of tanks emissions.[27] In addition, the Petitioners have not otherwise demonstrated why the use of E&P Tanks to calculate emissions violates any applicable requirement. In particular, the Petitioners do not provide any citations to the Clean Air Act, title V, or any applicable requirements that require a source to use software solutions that the public must have access to calculate emissions, especially considering that the state explained that these calculations can be performed without the particular program. The Petitioners' general argument without any citations to support their allegation fails to demonstrate a flaw in the title V permit. 40 C.F.R. § 70.12(a)(2)(ii).[28]

With regard to the Petitioners' claim regarding the use of an alternative calculation method to demonstrate compliance with the VOC emission limits applicable to the facility's condensate sales tanks, EPA grants this claim. As a general matter, there is nothing inherently problematic with a permitting authority establishing a mechanism for approving alternative calculation methods to replace the methods specified in a permit. CDPHE's response indicates that there are

[27] *See supra* note 9 and accompanying text.
[28] *See supra* notes 6–8 and accompanying text.

many methods "for calculating working and breathing emissions from tanks" that it has already approved and that this provision merely allows "the source to switch to a different but approved method for estimating emissions." *Id.* It *would* be problematic, however, if CDPHE allowed such a switch to occur entirely outside of the permitting process, without also updating the V permit (following the appropriate procedures) to specify the calculation method that would then be used to demonstrate ongoing 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).[29]

It is not clear from permit condition 1.1.1,[30] and the RTC does not clarify, whether CDPHE's approval process would culminate in revisions to the title V permit to reflect the approved alternative calculation (as is required), or whether this process would occur entirely off-permit (which would not comply with the requirements of title V). 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, EPA grants the Center for Biological Diversity Petition with respect to this issue.

Direction to CDPHE: CDPHE must 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 CDPHE approves a calculation methodology for demonstrating compliance with the VOC emission limits applicable to the facility's condensate sales tanks that differs from that identified in the Permit.[31]

Claim VI: The Petitioners Claim That "The Permit Improperly Excuses Monitoring of Storage Tanks and Associated Equipment That Is Unsafe, Difficult, or Inaccessible to Monitor."

Petitioners' Claim: The Petitioners claim that permit conditions 20.2.7 and 20.2.8 improperly allow periodic exemptions from monitoring requirements for equipment that is unsafe, difficult, or inaccessible to monitor. Center for Biological Diversity Petition at 14.

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[29] *See In the Matter of Salt River Project Ag. Improvement & Power Dist., Agua Fria Generating Station,* Order on Petition No. IX-2022-4 at 18–19 (July 28, 2022); *see also In the Matter of ExxonMobil Fuels & Lubricant Co., Baton Rouge Refinery,* Order on Petition Nos. VI2020-4, VI-2020-6, VI-2021-1, & VI-2021-2 at 25–26, 37–38 (March 18, 2022).

[30] Permit condition 1.1.1 states: "The operator may request, in writing, to use an alternative calculation method and upon Division approval, implement the proposed alternative method."

[31] In reviewing permit condition 1 of the Final Permit, EPA observed that permit condition 1.6.2.1.a includes the requirement from 40 C.F.R. part 60, Subpart Kb to develop an operating plan for a closed vent system and to operate under that plan. *See* 40 C.F.R. § 60.113b(c). EPA notes that it is unclear whether the permit contains this plan, as it is required to—since the plan is necessary to assure compliance with applicable requirements in Subpart Kb. *See In the Matter of Drummond Co., Inc., ABC Coke Plant* at 13–14 (June 30, 2021). EPA also notes that the Final TRD includes a statement that "Colorado Regulation No. 7, Part D, Section II.C requirements for CST-001 and SWT-010 will constitute as an approvable operating plan under §60.113b(c)(1)(ii)." Final TRD at 16. However, Colorado Regulation No. 7, Part D, Section II.C is only mentioned in "State-Only Enforceable" terms of the Final Permit. Since, the operating plan under Subpart Kb is an applicable requirement under title V, it would need to be included or incorporated by reference in the federally enforceable side of the title V permit.

The Petitioners assert that title V permits "must include monitoring requirements that assure compliance with the permit's requirements at all times, not just when it is convenient for the polluting facility." *Id.* (citing 42 U.S.C. § 7661c(c); 40 C.F.R. § 70.6(c)(1)).

The Petitioners argue that the criteria for excusing equipment from monitoring are subjective and not enforceable. *Id.* The Petitioners note that the permit lacks any requirement for the permittee to document the decision to forgo monitoring or to report the reason for such a decision. *Id.* The Petitioners also reject CDPHE's justification of these provisions, which references federal regulations (40 C.F.R. part 60, subpart OOOOa) that establish options for alternative monitoring schedules for equipment that is unsafe, difficult, or inaccessible to monitor. *See id.* at 715 (citing RTC at 7). The Petitioners argue that permit conditions 20.2.7 and 20.2.8 do not actually require the permittee to establish alternative monitoring schedules, nor do they specify the circumstances under which it would be feasible to resume monitoring. *Id.*

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

As explained in EPA's Response to Center for Biological Diversity's Claim I, permit condition 20.2 is clearly labeled as state-only enforceable in the Final Permit and those terms and the basis for them are not subject to the requirements of CDPHE EPA-approved title V program or 40 C.F.R part 70. Therefore, the Petitioners' claim regarding permit conditions 20.2.7 and 20.2.8 is denied since those provisions are not subject to the petition process under 40 C.F.R. 70.8(d).[32]

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 Petitions as described in this Order.

Dated: JUN 14 2023

Michael S. Regan
Administrator

[32] *See supra* notes 14 and 15 and accompanying text.