

**BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

IN THE MATTER OF)	
)	
Clean Air Act Final Renewed Class I)	
Title V Operating Permit)	
)	
Issued to Freeport-McMoRan Morenci Inc.,)	Title V Permit No. 99245
for the Morenci Mine)	
)	
Issued by the Arizona Department of)	
Environmental Quality)	
)	

**PETITION TO OBJECT TO FINAL CLASS I TITLE V OPERATING PERMIT
NO. 99245 FOR FREEPORT MCMORAN’S MORENCI MINE**

Pursuant to Section 505(b)(2) of the Clean Air Act, 42 U.S.C. § 7661d(b)(2), and 40 C.F.R. § 70.8(d), the Center for Biological Diversity (“Center” or “Petitioner”) petitions the Administrator of the United States Environmental Protection Agency (“Administrator” or “EPA”) to object to the final renewed Class I Title V Operating Permit (“Title V Permit”) issued by the Arizona Department of Environmental Quality (“ADEQ”) authorizing Freeport McMoRan Morenci Inc. (hereafter “Freeport”) to operate the Morenci Mine in Greenlee County, Arizona. The final renewed Title V Permit and Technical Support Document (“TSD”) are attached as Exhibits 1 and 2, respectively.

Petitioners request the EPA object on the basis that the Title V Permit fails to assure compliance with Title V requirements under the Clean Air Act. Of primary concern is that air pollution control requirements of the Title V Permit are not enforceable as a practical matter and fail to assure compliance with applicable emission limits.

THE MORENCI MINE

The Morenci Mine is a large open pit copper mining complex that consists of extensive mining and processing activities. The air pollution source itself consists of mining operations, the Morenci concentrator, mine for leaching fine crushing plant, solution extraction and electrowinning operations, and the Metcalf concentrator. Numerous air pollutant emitting activities comprise the Morenci Mine. *See* Exhibit 2, Final TSD at 1-4 (detailing operations and pollutant emitting activities).

The Morenci Mine releases hundreds of tons of air pollutants known to endanger public health and welfare. In addition to releasing a number of harmful criteria air pollutants for which

national ambient air quality standards (“NAAQS”) have been established, the mine also releases a number of hazardous air pollutants. Hazardous air pollutants are a group of especially toxic substances regulated under Section 112 of the Clean Air Act that pose disproportionately harmful impacts to public health and the environment. Among the hazardous air pollutants that are released by mining operations: heavy metals including lead, arsenic, manganese, nickel, and selenium; benzene, a known carcinogen; and other toxic organic compounds including acetaldehyde, acrolein, formaldehyde, xylene, and toluene, hexane, and methanol. The mine also has the potential to release more than one hundred thousand tons of greenhouse gases annually. The table below details the Morenci Mine’s potential to emit for key pollutants. *See* Exhibit 2, Final TSD at 16.

Potential Air Pollution Emissions from Morenci Mine

Pollutant	Total Potential to Emit (tons/year)
Particulate Matter (“PM”)	196.19
Coarse particulate matter (“PM ₁₀ ”)	169.30
Fine particulate matter (“PM _{2.5} ”)	157.72
Nitrogen oxides (“NO _x ”)	203.61
Carbon monoxide (“CO”)	122.63
Sulfur dioxide (“SO ₂ ”)	232.08
Volatile organic compounds (“VOCs”)	63.71
Lead	0.35
Manganese compounds	5.76
Benzene	0.57
Formaldehyde	18.24
Total Hazardous Air Pollutants	15.44
Carbon dioxide equivalent	94,538

PETITIONER

The Center for Biological Diversity is a nonprofit, 501(c)(3) conservation organization. The Center’s mission is to ensure the preservation, protection, and restoration of biodiversity, native species, ecosystems, public lands and waters, and public health through science, policy, and environmental law. Based on the understanding that the health and vigor of human societies and the integrity and wildness of the natural environment are closely linked, the Center is working to secure a future for animals and plants hovering on the brink of extinction, for the ecosystems they need to survive, and for a healthy, livable future for all of us.

PROCEDURAL BACKGROUND

ADEQ released the draft renewed Title V Permit for the Morenci Mine on May 15, 2024.¹ Petitioners submitted timely comments on the draft Title V Permit on June 14, 2024. *See* Exhibit 3, Comments of the Center for Biological Diversity on the draft Title V Permit for the Morenci Mine (June 14, 2024). Petitioners' comments included detailed technical comments and provided sufficient specificity to alert ADEQ to numerous deficiencies in the draft Title V Permit.

ADEQ responded to comments on August 23, 2024. *See* Exhibit 4, ADEQ Responsiveness Summary to Public Comments (Aug. 23, 2024). The agency concurrently issued a proposed final Title V Permit and proposed final Technical Support Document. *See* Exhibit 5, Proposed Final Morenci Mine Title V Permit and Exhibit 6, Proposed Final TSD for Proposed Final Morenci Mine Title V Permit. The proposed Title V Permit was then transmitted to EPA for the agency's 45-day review, which ended on October 7, 2024.

The EPA did not object to the proposed permit during its 45-day review period. ADEQ issued the final Title V Permit and final TSD for the Morenci Mine on October 23, 2024.

Pursuant to 42 U.S.C. § 7661d(b)(2), this petition is now timely submitted within 60 days following a lack of objection from the EPA during the agency's 45-day review period.

GENERAL TITLE V PERMITTING REQUIREMENTS

The Clean Air Act prohibits qualifying stationary sources of air pollution from operating without or in violation of a valid Title V permit, which must include conditions sufficient to “assure compliance” with all applicable Clean Air Act requirements. 42 U.S.C. §§ 7661c(a), (c); 40 C.F.R. §§ 70.6(a)(1), (c)(1). “Applicable requirements” include all standards, emissions limits, and requirements of the Clean Air Act, including all requirements in an applicable implementation plan, or state implementation plan (“SIP”). 40 C.F.R. § 70.2. Congress intended for Title V to “substantially strengthen enforcement of the Clean Air Act” by “clarify[ing] and mak[ing] more readily enforceable a source’s pollution control requirements.” S. Rep. No. 101-228, at 347, 348 (1990), *as reprinted in* A Legislative History of the Clean Air Act Amendments of 1990, at 8687, 8688 (1993). As EPA explained when promulgating its Title V regulations, a Title V permit should “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.” Operating Permit Program, Final Rule, 57 Fed. Reg. 32,250, 32,251 (July 21, 1992). Among other things, a Title V permit must include compliance certification, testing, monitoring, reporting, and recordkeeping requirements sufficient to assure compliance with the terms and conditions of the permit. 42 U.S.C. § 7661c(c); 40 C.F.R. §§ 70.6(a)(1), (c)(1).

¹ Under Arizona’s SIP and EPA’s approved Arizona Title V operating permit program, a Title V Permit is referred to as a “Class I Permit.” For purposes of consistency with federal statutory and regulatory language, as well as EPA’s prevalent usage of the phrase “Title V Permit” in its review of Title V Petitions, we use the phrase “Title V Permit” to refer to the permit for the Morenci Mine.

Under the Clean Air Act, “any person” may petition EPA to object to a proposed permit “within 60 days after the expiration of [EPA’s] 45-day review period.” 42 U.S.C. § 7661d(b)(2); *see also* 40 C.F.R. § 70.8. Each objection in the petition must have been “raised with reasonable specificity during the public comment period provided for in § 70.7(h) of this part, unless the petitioner demonstrates that it was impracticable to raise such objections within such period, or unless the grounds for such objection arose after such period.” 40 C.F.R. § 70.8(d). Any objection included in the petition “must be based on a claim that the permit, permit record, or permit process is not in compliance with applicable requirements or requirements [of 40 C.F.R. Part 70].” 40 C.F.R. § 70.12(a)(2).

Upon receipt of a petition, EPA “*shall* issue an objection within [60 days] if the petitioner demonstrates to the Administrator that the permit is not in compliance with the requirements of this chapter, including the requirements of the applicable implementation plan.” 42 U.S.C. § 7661d(b)(2) (emphasis added); *see also* 40 C.F.R. § 70.8(c) (“The Administrator will object to the issuance of any proposed permit determined by the Administrator not to be in compliance with applicable requirements or requirements under this part.”). When deciding whether a petitioner has met this demonstration requirement, EPA will evaluate the entirety of the permit record, including the statement of basis and response to comments. *See In re Valero Refining-Texas, L.P.*, Order on Petition No. VI-2021-8 (June 30, 2022).

GROUNDINGS FOR OBJECTION

For the reasons set forth below, the Title V Permit fails to comply with applicable requirements under the Clean Air Act and requirements under Title V. All of the issues discussed below were raised in comments on the draft Title V Permit for the Morenci Mine.

I. The Title V Permit’s air pollution control requirements are unenforceable and fail to assure compliance with applicable limits

Many of the Title V Permit’s applicable air pollution control requirements are not enforceable as a practical matter and fail to assure compliance with applicable limits, including emission limitations and operational requirements. Given this, the Title V Permit does not comply with applicable requirements under the Clean Air Act and specifically the provisions of Title V.

A. Background

Emission limitations and standards within a Title V permit must be “enforceable.” 42 U.S.C. § 7661c(a). To be enforceable, terms and conditions must be enforceable as a practical matter. *In the Matter of Plains Marketing LP, et al.*, Order on Petition Nos. IV-2023-1 and IV-2023-3 at 30 (Sept. 18, 2023). Inherent in this requirement is that limitations and standards must be unambiguous, understandable, and capable of informing regulators and the public as to what is actually required. *See e.g., In the Matter of West Elk Coal Mine*, Order on Petition VIII-2024-3 at 33 (May 24, 2024) (noting that ambiguity can render conditions unenforceable).

B. Emission Limitations and Standards in the Title V Permit are Unenforceable and Fail to Assure Compliance with Applicable Requirements

The following permit conditions, which are set forth in Attachment “C” of the Title V Permit, are unenforceable as a practical matter and/or otherwise fail to assure compliance with applicable requirements. These conditions are all set forth under various “Air Pollution Control Requirements,” which establish requirements for the operation of air pollution controls meant to assure compliance with applicable emission limitations and other requirements. Below Petitioner details the deficiencies with each of these conditions, address ADEQ’s response to comments, and explain the need and duty for the Administrator to object to each Condition.

1. Attachment “C,” Condition I

This Condition establishes operational and other limitations for Mining Operations at the Morenci Mine. Unfortunately, the “Air Pollution Control Requirements” set forth under this Condition are not enforceable as a practical matter and fail to assure compliance with applicable requirements. Petitioner raised this issue with reasonable specificity on pages 3-4 of its technical comments.

a) Attachment “C”, Condition I.A.3.a

This Condition requires Freeport to utilize wet suppression for six processes subject to A.A.C. R18-2-721, yet the condition is not enforceable as a practical matter and does not assure compliance with applicable requirements.²

Of primary concern is while the Condition requires Freeport to utilize emission control practices in order to minimize particulate matter emissions—specifically wet suppression, the Condition states that Freeport shall do so only “to the extent practicable.” Specifically, the Condition states that Freeport:

At all times, including periods of startup, shutdown, and malfunction the Permittee shall, *to the extent practicable*, utilize wet suppression on the following processes to minimize particulate matter emissions and comply with the applicable limitations and standards of Condition I.A.2 above.

Exhibit 1, Title V Permit at 56 (emphasis added). The phrase “to the extent practicable” is ambiguous and not defined. Indeed, neither the identified underlying authority for Condition I.A.3.a, namely A.A.C. R18-2-306.A.2, nor the Arizona SIP set forth or define “to the extent practicable.” This lack of definition is problematic as it suggests there are no clear means of

² The six processes are set forth under Attachment “C”, Condition I.A.3.a(1)-(6) and include: Process 001-002, Haul Truck Unloading to Dump Pocket Feed Hoppers 1-3; Process 001-187, Apron Feeder AF2 to In-Pit Crusher 2; Process 001-249, Apron Feeder AF3 to In-Pit Crusher 3; Process 001-344, Conveyor Belt P12 to Conveyor Belt P10; Process 001-016, Conveyor Belt P6 to Mill IOS; and Process 001-226, Conveyor Belt P10 to MFL IOS. See Exhibit 1, Title V Permit at 56.

assessing whether Freeport is or is not in compliance with Condition I.A.3.a, making the Condition unenforceable.

A lack of specific definition is especially problematic because the phrase “to the extent practicable” is understood to qualify an action as discretionary in nature. The term “practicable” is understood to also mean “feasible,” meaning an action that must be undertaken “to the extent practicable” must only be undertaken to the extent it happens to be feasible. Courts have noted the phrase conveys complete discretion. *See e.g., Cope v. Scott*, 45 F.3d 445 (D.C. Cir. 1995) and *Oceana, Inc. v. Locke*, 670 F.3d 1238 (D.C. Cir. 2011). The U.S. Court of Appeals for the D.C. Circuit has described the phrase as “the essence of discretion.” *Cope v. Scott*, 45 F.3d 445, 450. Thus, inclusion of the phrase “to the extent practicable” makes compliance completely discretionary. As Petitioner noted in its comments, the inclusion of the phrase means that Freeport can “operate the mine contrary to the applicable requirements set forth in the draft Title V permit.” Exhibit 3, Comments on Draft Title V Permit at 3. This means Condition I.A.3.a is completely unenforceable and cannot serve to ensure that particulate matter emissions are limited from the six processes in order to ensure compliance with the applicable limits at Attachment “C”, Condition I.A.2.

Even if the phrase “to the extent practicable” could be defined so as to establish enforceable sideboards, its inclusion in the Title V Permit is fundamentally contrary to applicable requirements. The Arizona SIP at A.A.C. R18-2-721, which sets forth the applicable limits under Condition I.A.2, does not contain the phrase “to the extent practicable” or otherwise state that compliance is discretionary. Further, the authority cited for Condition I.A.3.a—A.A.C. R18-2-306.A.2—also does not include or reference the phrase. A.A.C. R18-2-306.A.2 specifically states that permit conditions must be enforceable and assure compliance with applicable requirements. The discretionary inclusion of the phrase “to the extent practicable” in Condition I.A.3.a of the Title V Permit therefore undermines the enforceability of the Arizona SIP and the Title V Permit, contrary to applicable requirements and Title V of the Clean Air Act.

1) ADEQ’s Response to Comments did not Resolve This Issue

In response to Petitioner’s concerns over the inclusion of the phrase “to the extent practicable” in various Title V Permit conditions, including Condition I.A.3.a, ADEQ provided a brief and generic response. The agency stated that the phrase is a “common” phrase “utilized in state and federal rules” and that it appears “in the Arizona Administrative Code as well as the Code of Federal Regulations.” Exhibit 4, Responsiveness Summary to Public Comments at 7. As an example, ADEQ stated that the phrase is included in the “New Source Performance Standards (NSPS) or National Emission Standards for Hazardous Air Pollutants (NESHAP).” *Id.*

While ADEQ is correct that the phrase “to the extent practicable” makes appearances in the Arizona Administrative Code and the Code of Federal Regulations, including in some portions of the NSPS, this response does not address the effect that the phrase has on the enforceability of Condition I.A.3.a. Simply because the phrase “to the extent practicable” may

make appearances in state and federal regulations does not make its inclusion in Condition I.A.3.a of the Title V Permit appropriate or justified.³

ADEQ also asserts that, “The NSPS or NESHAP requires facilities to execute certain actions ‘to the extent practicable’. This means the facility will be expected to be consistent with the conditions of their plans and/or operating scenarios.” Exhibit 4, Responsiveness Summary to Public Comments at 7. While the NSPS and NESHAP are not applicable requirements related to Condition I.A.3.a, the NSPS and NESHAP do not require compliance only “to the extent practicable.” While 40 C.F.R. § 60.11(d) of the NSPS contains 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.” Further, there is no provision under the NESHAP that states that polluters must comply only “to the extent practicable” and it is unclear what ADEQ is referring to in referencing the NESHAP. It is finally not clear what ADEQ means when it says the phrase “to the extent practicable” will mean the Morenci Mine will be “expected to be consistent with the conditions of their plans and/or operating scenarios.”

ADEQ further stated that the phrase “to the extent practicable” will “ensure the facility will implement the latest processes, controls, and/or technologies available within the mining industry that make a commitment to reduce air pollution.” Exhibit 4, Responsiveness Summary to Public Comments at 7. It is unclear what this response actually means, but ADEQ appears to believe that inclusion of the phrase “to the extent practicable” in the Title V Permit will assist the mining industry in fulfilling its commitment to reduce air pollution. Contrary to this belief, from a practical standpoint, the inclusion of the phrase “to the extent practicable” in Condition I.A.3.a will allow Freeport to renege on its duty to control air pollution at all times. Inclusion of the phrase expressly provides discretion for Freeport to operate the Morenci Mine contrary to the applicable limits at Condition I.A.2, rendering Condition I.A.3.a, as well as Condition I.A.2, unenforceable as a practical matter and contrary to applicable requirements.

2) The Administrator Must Object

Condition I.A.3.a is unenforceable as a practical matter and contrary to applicable requirements given the inclusion of the phrase “to the extent practicable.” ADEQ’s response to Petitioner’s comments did not resolve this issue. The Administrator must object over the failure of the Title V Permit to set forth enforceable emission limitations and standards and comply with applicable requirements, including the Arizona SIP.

³ ADEQ did not specifically identify where the phrase “to the extent practicable” makes an appearance in state and federal regulations or explain the context in which it appears. To the extent the phrase makes an appearance, it often has no relation to emission control requirements. For instance, A.A.C. R18-2-325(I)(1) uses the phrase “to the extent practicable,” but it is in the context of conducting expedited reviews of permit applications.

b) Attachment “C”, Condition I.A.3.b

This Condition requires Freeport to maintain and operate 10 fabric filter dust collectors, which are subject to A.A.C. R18-2-721, in a manner consistent with good air pollution control practices for minimizing particulate matter emissions, yet the condition is not enforceable as a practical matter and does not assure compliance with applicable requirements.⁴

Of primary concern is while the Condition requires Freeport to operate the fabric filter dust collectors consistent with good air pollution control practices for minimizing particulate matter emissions, the Condition states that Freeport shall do so only “to the extent practicable.” Specifically, the Condition states that Freeport:

At all times, including periods of startup, shutdown, and malfunction, the Permittee shall, *to the extent practicable*, maintain and operate the following fabric filter dust collectors in a manner consistent with good air pollution control practices for minimizing particulate matter emissions.

Exhibit 1, Title V Permit at 56 (emphasis added). The phrase “to the extent practicable” is ambiguous and not defined. Indeed, neither the identified underlying authority for Condition I.A.3.b, namely A.A.C. R18-2-331.A.3.e, nor the Arizona SIP set forth or define “to the extent practicable.” This lack of definition is problematic as it suggests there are no clear means of assessing whether Freeport is or is not in compliance with Condition I.A.3.b, making the Condition unenforceable.

A lack of specific definition is especially problematic because, as discussed above, the phrase “to the extent practicable” is understood to qualify an action as discretionary in nature. Thus, inclusion of the phrase “to the extent practicable” makes compliance completely discretionary. As Petitioner noted in its comments, the inclusion of the phrase means that Freeport can “operate the mine contrary to the applicable requirements set forth in the draft Title V permit.” Exhibit 3, Comments on Draft Title V Permit at 3. This means Condition I.A.3.b is completely unenforceable and cannot serve to ensure the 10 fabric filter dust collectors limit particulate emissions and ensure compliance with the applicable limits set forth under A.A.C. R18-2-721.⁵

Even if the phrase “to the extent practicable” could be defined so as to establish enforceable sideboards, its inclusion in the Title V Permit is fundamentally contrary to applicable requirements. The Arizona SIP at A.A.C. R18-2-721 does not contain the phrase “to the extent

⁴ The 10 fabric filter dust collectors are set forth at Attachment “C”, Condition I.A.3.b(1)-(10) and include: P11/P5 and P11/P12 FFDC (Process 001-251); P5/P6 FFDC (Process 001-015); DC2/P9 and P9/P10 FFDC (Process 001-225); DC2/P5 FFDC (Process 001-325); Mill IOS/R1A FFDC (Process 001-299); Mill IOS/R1B FFDC (Process 001-300); R1A and R1B/R7 FFDC (Process 001-272); R2/R11 FFDC (Process 001-278); MFL IOS/R8 FFDC (Process 001-228); and R8/R9 FFDC (Process 001-229). See Exhibit 1, Title V Permit at 56-57.

⁵ The discretionary nature and unenforceability of Condition I.A.3.b also indicates the permit fails to ensure the 10 fabric filter dust collectors will comply with applicable particulate matter limits set forth at Attachment “C”, Condition I.C.2 of the Title V Permit.

practicable” or otherwise provide that compliance is discretionary. Further, the authority cited for Condition I.A.3.b—A.A.C. R18-2-331.A.3.e—also does not include or reference the phrase. The discretionary inclusion of the phrase “to the extent practicable” in Condition I.A.3.b of the Title V Permit therefore undermines the enforceability of the Arizona SIP and the Title V Permit, contrary to applicable requirements and Title V of the Clean Air Act.

1) ADEQ’s Response to Comments did not Resolve This Issue

In response to Petitioner’s concerns over the inclusion of the phrase “to the extent practicable” in Condition I.A.3.b, ADEQ provided a brief and generic response. The agency stated that the phrase is a “common” phrase “utilized in state and federal rules” and that it appears “in the Arizona Administrative Code as well as the Code of Federal Regulations.” Exhibit 4, Responsiveness Summary to Public Comments at 7. As an example, ADEQ stated that the phrase is included in the “New Source Performance Standards (NSPS) or National Emission Standards for Hazardous Air Pollutants (NESHAP).” *Id.*

While ADEQ is correct that the phrase “to the extent practicable” makes appearances in the Arizona Administrative Code and the Code of Federal Regulations, including in some portions of the NSPS, this response does not address the effect that the phrase has on the enforceability of Condition I.A.3.b. Simply because the phrase “to the extent practicable” may make appearances in state and federal regulations does not make its inclusion in Condition I.A.3.b of the Title V Permit appropriate or justified.

ADEQ also asserts that, “The NSPS or NESHAP requires facilities to execute certain actions ‘to the extent practicable’. This means the facility will be expected to be consistent with the conditions of their plans and/or operating scenarios.” Exhibit 4, Responsiveness Summary to Public Comments at 7. While the NSPS and NESHAP are not applicable requirements related to Condition I.A.3.b, the NSPS and NESHAP do not require compliance only “to the extent practicable.” While 40 C.F.R. § 60.11(d) of the NSPS contains 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.” Further, there is no general duty provision under the NESHAP that states that polluters must comply only “to the extent practicable” and it is unclear what ADEQ is referring to in referencing the NESHAP. It is finally not clear what ADEQ means when it says the phrase “to the extent practicable” will mean the Morenci Mine will be “expected to be consistent with the conditions of their plans and/or operating scenarios.”

ADEQ further stated that the phrase “to the extent practicable” will “ensure the facility will implement the latest processes, controls, and/or technologies available within the mining industry that make a commitment to reduce air pollution.” Exhibit 4, Responsiveness Summary to Public Comments at 7. It is unclear what this response actually means, but ADEQ appears to believe that inclusion of the phrase “to the extent practicable” in the Title V Permit will assist the mining industry in fulfilling its commitment to reduce air pollution. Contrary to this belief, from a practical standpoint, the inclusion of the phrase “to the extent practicable” in Condition I.A.3.b will allow Freeport to renege on its duty to control air pollution at all times. Inclusion of the

phrase expressly provides discretion for Freeport to operate the 10 fabric filter dust collectors contrary to the applicable limits, rendering Condition I.A.3.b unenforceable as a practical matter and contrary to applicable requirements.

2) The Administrator Must Object

Condition I.A.3.b is unenforceable as a practical matter and contrary to applicable requirements given the inclusion of the phrase “to the extent practicable.” ADEQ’s response to Petitioner’s comments did not resolve this issue. The Administrator must object over the failure of the Title V Permit to set forth enforceable emission limitations and standards and comply with applicable requirements, including the Arizona SIP.

c) Attachment “C”, Condition I.A.3.c

This Condition requires Freeport to maintain and operate the “R1A and R1B/R2 Bag Collector,” which is subject to A.A.C. R18-2-721, in a manner consistent with good air pollution control practices for minimizing particulate matter emissions, yet the condition is not enforceable as a practical matter and does not assure compliance with applicable requirements.

Of primary concern is while the Condition requires Freeport to operate the bag collector consistent with good air pollution control practices for minimizing particulate matter emissions, the Condition states that Freeport shall do so only “to the extent practicable.” Specifically, the Condition states that Freeport:

At all times, including periods of startup, shutdown, and malfunction, the Permittee shall, **to the extent practicable**, maintain and operate the R1A and R1B/R2 Bag Collector 1 (Process #001-277) in a manner consistent with good air pollution control practices for minimizing particulate matter emissions.

Exhibit 1, Title V Permit at 57 (emphasis added). The phrase “to the extent practicable” is ambiguous and not defined. Indeed, neither the identified underlying authority for Condition I.A.3.c, namely A.A.C. R18-2-331.A.3.e, nor the Arizona SIP set forth or define “to the extent practicable.” This lack of definition is problematic as it suggests there are no clear means of assessing whether Freeport is or is not in compliance with Condition I.A.3.c, making the Condition unenforceable.

A lack of specific definition is especially problematic because, as discussed above, the phrase “to the extent practicable” is understood to qualify an action as discretionary in nature. Thus, inclusion of the phrase “to the extent practicable” makes compliance completely discretionary. As Petitioner noted in its comments, the inclusion of the phrase means that Freeport can “operate the mine contrary to the applicable requirements set forth in the draft Title V permit.” Exhibit 3, Comments on Draft Title V Permit at 3. This means Condition I.A.3.c is completely unenforceable and cannot serve to ensure the R1A and R1B/R2 Bag Collector 1

limits particulate emissions and ensures compliance with the applicable limits set forth under A.A.C. R18-2-721.⁶

Even if the phrase “to the extent practicable” could be defined so as to establish enforceable sideboards, its inclusion in the Title V Permit is fundamentally contrary to applicable requirements. The Arizona SIP at R18-2-721 does not contain the phrase “to the extent practicable” or otherwise provide that compliance is discretionary. Further, the authority cited for Condition I.A.3.c—A.A.C. R18-2-331.A.3.e—also does not include or reference the phrase. The discretionary inclusion of the phrase “to the extent practicable” in Condition I.A.3.c of the Title V Permit therefore undermines the enforceability of the Arizona SIP and the Title V Permit, contrary to applicable requirements and Title V of the Clean Air Act.

1) ADEQ’s Response to Comments did not Resolve This Issue

In response to Petitioner’s concerns over the inclusion of the phrase “to the extent practicable” in Condition I.A.3.c, ADEQ provided a brief and generic response. The agency stated that the phrase is a “common” phrase “utilized in state and federal rules” and that it appears “in the Arizona Administrative Code as well as the Code of Federal Regulations.” Exhibit 4, Responsiveness Summary to Public Comments at 7. As an example, ADEQ stated that the phrase is included in the “New Source Performance Standards (NSPS) or National Emission Standards for Hazardous Air Pollutants (NESHAP).” *Id.*

While ADEQ is correct that the phrase “to the extent practicable” makes appearances in the Arizona Administrative Code and the Code of Federal Regulations, including in some portions of the NSPS, this response does not address the effect that the phrase has on the enforceability of Condition I.A.3.c. Simply because the phrase “to the extent practicable” may make appearances in state and federal regulations does not make its inclusion in Condition I.A.3.b of the Title V Permit appropriate or justified.

ADEQ also asserts that, “The NSPS or NESHAP requires facilities to execute certain actions ‘to the extent practicable’. This means the facility will be expected to be consistent with the conditions of their plans and/or operating scenarios.” Exhibit 4, Responsiveness Summary to Public Comments at 7. While the NSPS and NESHAP are not applicable requirements related to Condition I.A.3.b, the NSPS and NESHAP do not require compliance only “to the extent practicable.” While 40 C.F.R. § 60.11(d) of the NSPS contains 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.” Further, there is no general duty provision under the NESHAP that states that polluters must comply only “to the extent practicable” and it is unclear what ADEQ is referring to in referencing the NESHAP. It is finally not clear what ADEQ means when it says the phrase “to

⁶ The discretionary nature and unenforceability of Condition I.A.3.c also indicates the permit fails to ensure the R1A and R1B/R2 Bag Collector 1 will comply with applicable particulate matter limits set forth at Attachment “C”, Condition I.C.2 of the Title V Permit.

the extent practicable” will mean the Morenci Mine will be “expected to be consistent with the conditions of their plans and/or operating scenarios.”

ADEQ further stated that the phrase “to the extent practicable” will “ensure the facility will implement the latest processes, controls, and/or technologies available within the mining industry that make a commitment to reduce air pollution.” Exhibit 4, Responsiveness Summary to Public Comments at 7. It is unclear what this response actually means, but ADEQ appears to believe that inclusion of the phrase “to the extent practicable” in the Title V Permit will assist the mining industry in fulfilling its commitment to reduce air pollution. Contrary to this belief, from a practical standpoint, the inclusion of the phrase “to the extent practicable” in Condition I.A.3.c will allow Freeport to renege on its duty to control air pollution at all times. Inclusion of the phrase expressly provides discretion for Freeport to operate the R1A and R1B/R2 Bag Collector 1 contrary to the applicable limits, rendering Condition I.A.3.c unenforceable as a practical matter and contrary to applicable requirements.

2) The Administrator Must Object

Condition I.A.3.c is unenforceable as a practical matter and contrary to applicable requirements given the inclusion of the phrase “to the extent practicable.” ADEQ’s response to Petitioner’s comments did not resolve this issue. The Administrator must object over the failure of the Title V Permit to set forth enforceable emission limitations and standards and comply with applicable requirements, including the Arizona SIP.

d) Attachment “C”, Condition I.B.4.a

This Condition requires Freeport to maintain and operate two fabric filter dust collectors subject to the NSPS at 40 C.F.R. § 60, Subpart LL in a manner consistent with good air pollution control practices for minimizing particulate matter emissions, yet the condition is not enforceable as a practical matter and does not assure compliance with applicable requirements.⁷

Of primary concern is while the Condition requires Freeport to operate the fabric filter dust collectors consistent with good air pollution control practices for minimizing particulate matter emissions, the Condition states that Freeport shall do so only “to the extent practicable.” Specifically, the Condition states that Freeport:

At all times, including periods of startup, shutdown, and malfunction, the Permittee shall, *to the extent practicable*, maintain and operate the following fabric filter dust collectors in a manner consistent with good air pollution control practices for minimizing particulate matter emissions.

Exhibit 1, Title V Permit at 59 (emphasis added). The phrase “to the extent practicable” is ambiguous and not defined. Indeed, neither the identified underlying authority for Condition

⁷ The two fabric filter dust collectors are set forth at Attachment “C”, Condition I.B.4.a(1)-(2) and include: In-Pit Crusher 2 (Process 001-006) and In-Pit Crusher and FB3/P11 FFDC (Process 001-250). See Exhibit 1, Title V Permit at 59.

I.B.4.a, namely A.A.C. R18-2-331.A.3.e, nor the Arizona SIP set forth or define “to the extent practicable.” This lack of definition is problematic as it suggests there are no clear means of assessing whether Freeport is or is not in compliance with Condition I.B.4.a, making the Condition unenforceable.

A lack of specific definition is especially problematic because, as discussed above, the phrase “to the extent practicable” is understood to qualify an action as discretionary in nature. Thus, inclusion of the phrase “to the extent practicable” makes compliance completely discretionary. As Petitioner noted in its comments, the inclusion of the phrase means that Freeport can “operate the mine contrary to the applicable requirements set forth in the draft Title V permit.” Exhibit 3, Comments on Draft Title V Permit at 3. This means Condition I.B.4.a is completely unenforceable and cannot serve to ensure the two fabric filter dust collectors limit particulate emissions in order to assure compliance with the applicable limits set forth under 40 C.F.R. § 60, Subpart LL.⁸

Even if the phrase “to the extent practicable” could be defined so as to establish enforceable sideboards, its inclusion in the Title V Permit is fundamentally contrary to applicable requirements. The NSPS at 40 C.F.R. § 60, Subpart LL does not contain the phrase “to the extent practicable” or otherwise provide that compliance is discretionary. Further, the authority cited for Condition I.B.4.a—A.A.C. R18-2-331.A.3.e—also does not include or reference the phrase. The discretionary inclusion of the phrase “to the extent practicable” in Condition I.B.4.a of the Title V Permit therefore undermines the enforceability of the NSPS and the Title V Permit, contrary to applicable requirements and Title V of the Clean Air Act.

1) ADEQ’s Response to Comments did not Resolve This Issue

In response to Petitioner’s concerns over the inclusion of the phrase “to the extent practicable” in Condition I.B.4.a, ADEQ provided a brief and generic response. The agency stated that the phrase is a “common” phrase “utilized in state and federal rules” and that it appears “in the Arizona Administrative Code as well as the Code of Federal Regulations.” Exhibit 4, Responsiveness Summary to Public Comments at 7. As an example, ADEQ stated that the phrase is included in the “New Source Performance Standards (NSPS) or National Emission Standards for Hazardous Air Pollutants (NESHAP).” *Id.*

While ADEQ is correct that the phrase “to the extent practicable” makes appearances in the Arizona Administrative Code and the Code of Federal Regulations, including in some portions of the NSPS, this response does not address the effect that the phrase has on the enforceability of Condition I.B.4.a. Simply because the phrase “to the extent practicable” may make appearances in state and federal regulations does not make its inclusion in Condition I.B.4.a of the Title V Permit appropriate or justified.

⁸ The discretionary nature and unenforceability of Condition I.B.4.a also indicates the permit fails to ensure the In-Pit Crusher 2 fabric filter dust collector (Process 001-006) will comply with applicable particulate matter limits set forth at Attachment “C”, Condition I.C.2 of the Title V Permit.

ADEQ also asserts that, “The NSPS or NESHAP requires facilities to execute certain actions ‘to the extent practicable’. This means the facility will be expected to be consistent with the conditions of their plans and/or operating scenarios.” Exhibit 4, Responsiveness Summary to Public Comments at 7. However, the NSPS and NESHAP do not require compliance only “to the extent practicable.” While 40 C.F.R. § 60.11(d) of the NSPS contains 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.” Indeed, the phrase “to the extent practicable” is not found anywhere in 40 C.F.R. § 60, Subpart LL and these specific applicable NSPS do not provide for discretionary compliance. It is finally not clear what ADEQ means when it says the phrase “to the extent practicable” will mean the Morenci Mine will be “expected to be consistent with the conditions of their plans and/or operating scenarios.”

ADEQ further stated that the phrase “to the extent practicable” will “ensure the facility will implement the latest processes, controls, and/or technologies available within the mining industry that make a commitment to reduce air pollution.” Exhibit 4, Responsiveness Summary to Public Comments at 7. It is unclear what this response actually means, but ADEQ appears to believe that inclusion of the phrase “to the extent practicable” in the Title V Permit will assist the mining industry in fulfilling its commitment to reduce air pollution. Contrary to this belief, from a practical standpoint, the inclusion of the phrase “to the extent practicable” in Condition I.B.4.a will allow Freeport to renege on its duty to control air pollution at all times. Inclusion of the phrase expressly provides discretion for Freeport to operate the two fabric filter dust collectors contrary to the applicable limits, rendering Condition I.B.4.a unenforceable as a practical matter and contrary to applicable requirements.

2) The Administrator Must Object

Condition I.B.4.a is unenforceable as a practical matter and contrary to applicable requirements given the inclusion of the phrase “to the extent practicable.” ADEQ’s response to Petitioner’s comments did not resolve this issue. The Administrator must object over the failure of the Title V Permit to set forth enforceable emission limitations and standards and comply with applicable requirements, including the NSPS.

2. Attachment “C,” Condition II

This Condition establishes operational and other limitations for activities associated with the Morenci Concentrator. Unfortunately, the “Air Pollution Control Requirements” set forth under this Condition are not enforceable as a practical matter and fail to assure compliance with applicable requirements. Petitioner raised this issue with reasonable specificity on pages 4-5 of its technical comments.

a) Attachment “C”, Condition II.A.3

This Condition requires Freeport to maintain and operate six fabric filter dust collector systems subject to A.A.C. R18-2-721 in a manner consistent with good air pollution control practices for

minimizing particulate matter emissions, yet the condition is not enforceable as a practical matter and does not assure compliance with applicable requirements.⁹

Of primary concern is while the Condition requires Freeport to operate the fabric filter dust collector systems consistent with good air pollution control practices for minimizing particulate matter emissions, the Condition states that Freeport shall do so only “to the extent practicable.” Specifically, the Condition states that Freeport:

At all times, including periods of startup, shutdown, and malfunction, the Permittee shall, ***to the extent practicable***, maintain and operate the following fabric filter dust collectors in a manner consistent with good air pollution control practices for minimizing particulate matter emissions.

Exhibit 1, Title V Permit at 64 (emphasis added). The phrase “to the extent practicable” is ambiguous and not defined. Indeed, neither the identified underlying authority for Condition II.A.3, namely A.A.C. R18-2-331.A.3.e, nor the Arizona SIP set forth or define “to the extent practicable.” This lack of definition is problematic as it suggests there are no clear means of assessing whether Freeport is or is not in compliance with Condition II.A.3, making the Condition unenforceable.

A lack of specific definition is especially problematic because, as discussed above, the phrase “to the extent practicable” is understood to qualify an action as discretionary in nature. Thus, inclusion of the phrase “to the extent practicable” makes compliance completely discretionary. As Petitioner noted in its comments, the inclusion of the phrase means that Freeport can “operate the mine contrary to the applicable requirements set forth in the draft Title V permit.” Exhibit 3, Comments on Draft Title V Permit at 3. This means Condition II.A.3 is completely unenforceable and cannot serve to ensure the six fabric filter dust collector systems limit particulate emissions in order to assure compliance with the applicable limits set forth under A.A.C. R18-2-721.¹⁰

Even if the phrase “to the extent practicable” could be defined so as to establish enforceable sideboards, its inclusion in the Title V Permit is fundamentally contrary to applicable requirements. The Arizona SIP at R18-2-721 does not contain the phrase “to the extent practicable” or otherwise provide that compliance is discretionary. Further, the authority cited for Condition II.A.3—A.A.C. R18-2-331.A.3.e—also does not include or reference the phrase.

⁹ The six fabric filter dust collector systems are set forth at Attachment “C”, Condition II.A.3.a-f and include: Fine Crushing Line C to 3B to 3 FFDC (Process 002-035); Fine Crushing Line C to 3B to 3A FFDC (Process 002-036); 1A/COSB FFDCs 1 through 9 (Process 002-023) and 1B/COSB FFDCs 1 through 9 (Process 002-024); R7/1A and 1B FFDC (Process 002-022), COSB/AFA/2A FFDC (Process 002-025), COSB/AFB/2B FFDC (Process 002-026), COSB/AFC/2C FFDC (Process 002-027), COSB/AFD/2D FFDC (Process 002-028), Fine Crushing Line A FFDC 2 (Process 002-033), and Fine Crushing Line B FFDC 2 (Process 002-034); Fine Crushing Line D FFDC 2 (Process 002-326) and 3/4/5 FFDC (Process 002-038); and 5A/FOSB FFDCs 1 through 9 (Process 002-040) and 5/FOSB FFDCs 1 through 9 (Process 002-041). See Exhibit 1, Title V Permit at 64.

¹⁰ The discretionary nature and unenforceability of Condition II.A.3 also indicates the permit fails to ensure the Fine Crushing Line C to 3B to 3 fabric filter dust collector (Process 002-0035) and the Fine Crushing Line C to 3B to 3A fabric filter dust collector (Process 002-036) will comply with applicable particulate matter limits set forth at Attachment “C”, Condition II.C.2 of the Title V Permit.

The discretionary inclusion of the phrase “to the extent practicable” in Condition II.A.3 of the Title V Permit therefore undermines the enforceability of the Arizona SIP and the Title V Permit, contrary to applicable requirements and Title V of the Clean Air Act.

1) ADEQ’s Response to Comments did not Resolve This Issue

In response to Petitioner’s concerns over the inclusion of the phrase “to the extent practicable” in Condition II.A.3, ADEQ provided a brief and generic response. The agency stated that the phrase is a “common” phrase “utilized in state and federal rules” and that it appears “in the Arizona Administrative Code as well as the Code of Federal Regulations.” Exhibit 4, Responsiveness Summary to Public Comments at 7. As an example, ADEQ stated that the phrase is included in the “New Source Performance Standards (NSPS) or National Emission Standards for Hazardous Air Pollutants (NESHAP).” *Id.*

While ADEQ is correct that the phrase “to the extent practicable” makes appearances in the Arizona Administrative Code and the Code of Federal Regulations, including in some portions of the NSPS, this response does not address the effect that the phrase has on the enforceability of Condition II.A.3. Simply because the phrase “to the extent practicable” may make appearances in state and federal regulations does not make its inclusion in Condition II.A.3 of the Title V Permit appropriate or justified.

ADEQ also asserts that, “The NSPS or NESHAP requires facilities to execute certain actions ‘to the extent practicable’. This means the facility will be expected to be consistent with the conditions of their plans and/or operating scenarios.” Exhibit 4, Responsiveness Summary to Public Comments at 7. While the NSPS and NESHAP are not applicable requirements related to Condition II.A.3, the NSPS and NESHAP do not require compliance only “to the extent practicable.” While 40 C.F.R. § 60.11(d) of the NSPS contains 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.” Further, there is no general duty provision under the NESHAP that states that polluters must comply only “to the extent practicable” and it is unclear what ADEQ is referring to in referencing the NESHAP. It is finally not clear what ADEQ means when it says the phrase “to the extent practicable” will mean the Morenci Mine will be “expected to be consistent with the conditions of their plans and/or operating scenarios.”

ADEQ further stated that the phrase “to the extent practicable” will “ensure the facility will implement the latest processes, controls, and/or technologies available within the mining industry that make a commitment to reduce air pollution.” Exhibit 4, Responsiveness Summary to Public Comments at 7. It is unclear what this response actually means, but ADEQ appears to believe that inclusion of the phrase “to the extent practicable” in the Title V Permit will assist the mining industry in fulfilling its commitment to reduce air pollution. Contrary to this belief, from a practical standpoint, the inclusion of the phrase “to the extent practicable” in Condition II.A.3 will allow Freeport to renege on its duty to control air pollution at all times. Inclusion of the phrase expressly provides discretion for Freeport to operate the six fabric filter dust collector

systems contrary to applicable limits, rendering Condition II.A.3 unenforceable as a practical matter and contrary to applicable requirements.

2) The Administrator Must Object

Condition II.A.3 is unenforceable as a practical matter and contrary to applicable requirements given the inclusion of the phrase “to the extent practicable.” ADEQ’s response to Petitioner’s comments did not resolve this issue. The Administrator must object over the failure of the Title V Permit to set forth enforceable emission limitations and standards and comply with applicable requirements, including the Arizona SIP.

b) Attachment “C”, Condition II.B.4.a

This Condition requires Freeport to maintain and operate six fabric filter dust collectors subject to the NSPS at 40 C.F.R. § 60, Subpart LL in a manner consistent with good air pollution control practices for minimizing particulate matter emissions, yet the condition is not enforceable as a practical matter and does not assure compliance with applicable requirements.¹¹

Of primary concern is while the Condition requires Freeport to operate the fabric filter dust collectors consistent with good air pollution control practices for minimizing particulate matter emissions, the Condition states that Freeport shall do so only “to the extent practicable.” Specifically, the Condition states that Freeport:

At all times, including periods of startup, shutdown, and malfunction, the Permittee shall, *to the extent practicable*, maintain and operate the following fabric filter dust collectors in a manner consistent with good air pollution control practices for minimizing particulate matter emissions.

Exhibit 1, Title V Permit at 66 (emphasis added). The phrase “to the extent practicable” is ambiguous and not defined. Indeed, neither the identified underlying authority for Condition II.B.4.a, namely A.A.C. R18-2-331.A.3.d and A.3.e, nor the Arizona SIP set forth or define “to the extent practicable.” This lack of definition is problematic as it suggests there are no clear means of assessing whether Freeport is or is not in compliance with Condition II.B.4.a, making the Condition unenforceable.

A lack of specific definition is especially problematic because, as discussed above, the phrase “to the extent practicable” is understood to qualify an action as discretionary in nature. Thus, inclusion of the phrase “to the extent practicable” makes compliance completely discretionary. As Petitioner noted in its comments, the inclusion of the phrase means that Freeport can “operate the mine contrary to the applicable requirements set forth in the draft Title V permit.” Exhibit 3, Comments on Draft Title V Permit at 3. This means Condition II.B.4.a is

¹¹ The six fabric filter dust collectors are set forth at Attachment “C”, Condition II.B.4.a(1)-(6) and include: West Transfer Points FFDC (Process 002-311); West Surge Bin FFDC (Process 002-312); West RC FFDC (Process 002-313); East Transfer Points FFDC (Process 002-314); East Surge Bin FFDC (Process 002-315); and East RC FFDC (Process 002-316). See Exhibit 1, Title V Permit at 66.

completely unenforceable and cannot serve to ensure the six fabric filter dust collectors limit particulate emissions in order to assure compliance with the applicable limits set forth under 40 C.F.R. § 60, Subpart LL.¹²

Even if the phrase “to the extent practicable” could be defined so as to establish enforceable sideboards, its inclusion in the Title V Permit is fundamentally contrary to applicable requirements. The NSPS at 40 C.F.R. § 60, Subpart LL does not contain the phrase “to the extent practicable” or otherwise provide that compliance is discretionary. Further, the authority cited for Condition II.B.4.a—A.A.C. R18-2-331.A.3.d and A.3.e—also does not include or reference the phrase. The discretionary inclusion of the phrase “to the extent practicable” in Condition II.B.4.a of the Title V Permit therefore undermines the enforceability of the NSPS and the Title V Permit, contrary to applicable requirements and Title V of the Clean Air Act.

1) ADEQ’s Response to Comments did not Resolve This Issue

In response to Petitioner’s concerns over the inclusion of the phrase “to the extent practicable” in Condition II.B.4.a, ADEQ provided a brief and generic response. The agency stated that the phrase is a “common” phrase “utilized in state and federal rules” and that it appears “in the Arizona Administrative Code as well as the Code of Federal Regulations.” Exhibit 4, Responsiveness Summary to Public Comments at 7. As an example, ADEQ stated that the phrase is included in the “New Source Performance Standards (NSPS) or National Emission Standards for Hazardous Air Pollutants (NESHAP).” *Id.*

While ADEQ is correct that the phrase “to the extent practicable” makes appearances in the Arizona Administrative Code and the Code of Federal Regulations, including in some portions of the NSPS, this response does not address the effect that the phrase has on the enforceability of Condition II.B.4.a. Simply because the phrase “to the extent practicable” may make appearances in state and federal regulations does not make its inclusion in Condition II.B.4.a of the Title V Permit appropriate or justified.

ADEQ also asserts that, “The NSPS or NESHAP requires facilities to execute certain actions ‘to the extent practicable’. This means the facility will be expected to be consistent with the conditions of their plans and/or operating scenarios.” Exhibit 4, Responsiveness Summary to Public Comments at 7. However, the NSPS and NESHAP do not require compliance only “to the extent practicable.” While 40 C.F.R. § 60.11(d) of the NSPS contains 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.” Indeed, the phrase “to the extent practicable” is not found anywhere in 40 C.F.R. § 60, Subpart LL and these specific applicable NSPS do not provide for discretionary compliance. It is finally not clear what ADEQ means when it says the phrase “to the extent practicable” will

¹² The discretionary nature and unenforceability of Condition II.B.4.a also indicates the permit fails to ensure the six fabric filter dust collectors will comply with applicable particulate matter limits set forth at Attachment “C”, Condition II.C.2 of the Title V Permit.

mean the Morenci Mine will be “expected to be consistent with the conditions of their plans and/or operating scenarios.”

ADEQ further stated that the phrase “to the extent practicable” will “ensure the facility will implement the latest processes, controls, and/or technologies available within the mining industry that make a commitment to reduce air pollution.” Exhibit 4, Responsiveness Summary to Public Comments at 7. It is unclear what this response actually means, but ADEQ appears to believe that inclusion of the phrase “to the extent practicable” in the Title V Permit will assist the mining industry in fulfilling its commitment to reduce air pollution. Contrary to this belief, from a practical standpoint, the inclusion of the phrase “to the extent practicable” in Condition II.B.4.a will allow Freeport to renege on its duty to control air pollution at all times. Inclusion of the phrase expressly provides discretion for Freeport to operate the six fabric filter dust collectors contrary to the applicable limits, rendering Condition II.B.4.a unenforceable as a practical matter and contrary to applicable requirements.

2) The Administrator Must Object

Condition II.B.4.a is unenforceable as a practical matter and contrary to applicable requirements given the inclusion of the phrase “to the extent practicable.” ADEQ’s response to Petitioner’s comments did not resolve this issue. The Administrator must object over the failure of the Title V Permit to set forth enforceable emission limitations and standards and comply with applicable requirements, including the NSPS.

c) Attachment “C”, Condition II.B.4.b

This Condition requires Freeport to maintain and operate five fabric filter dust collectors subject to the NSPS at 40 C.F.R. § 60, Subpart LL in a manner consistent with good air pollution control practices for minimizing particulate matter emissions, yet the condition is not enforceable as a practical matter and does not assure compliance with applicable requirements.¹³

Of primary concern is while the Condition requires Freeport to operate the fabric filter dust collectors consistent with good air pollution control practices for minimizing particulate matter emissions, the Condition states that Freeport shall do so only “to the extent practicable.” Specifically, the Condition states that Freeport:

At all times, including periods of startup, shutdown, and malfunction, the Permittee shall, *to the extent practicable*, maintain and operate the following fabric filter dust collectors in a manner consistent with good air pollution control practices for minimizing particulate matter emissions.

¹³ The five fabric filter dust collectors are set forth at Attachment “C”, Condition II.B.4.b(1)-(5) and include: Fine Crushing Line A FFDC 1 (Process 002-029); Fine Crushing Line B FFDC 1 (Process 002-030); Fine Crushing Line C FFDC 1 (Process 002-031); Fine Crushing Line D FFDC 1 (Process 002-032); and 3A/4A/5A FFDC (Process 002-039). See Exhibit 1, Title V Permit at 67.

Exhibit 1, Title V Permit at 66 (emphasis added). The phrase “to the extent practicable” is ambiguous and not defined. Indeed, neither the identified underlying authority for Condition II.B.4.b, namely A.A.C. R18-2-331.A.3.e, nor the Arizona SIP set forth or define “to the extent practicable.” This lack of definition is problematic as it suggests there are no clear means of assessing whether Freeport is or is not in compliance with Condition II.B.4.b, making the Condition unenforceable.

A lack of specific definition is especially problematic because, as discussed above, the phrase “to the extent practicable” is understood to qualify an action as discretionary in nature. Thus, inclusion of the phrase “to the extent practicable” makes compliance completely discretionary. As Petitioner noted in its comments, the inclusion of the phrase means that Freeport can “operate the mine contrary to the applicable requirements set forth in the draft Title V permit.” Exhibit 3, Comments on Draft Title V Permit at 3. This means Condition II.B.4.b is completely unenforceable and cannot serve to ensure the five fabric filter dust collectors limit particulate emissions in order to assure compliance with the applicable limits set forth under 40 C.F.R. § 60, Subpart LL.¹⁴

Even if the phrase “to the extent practicable” could be defined so as to establish enforceable sideboards, its inclusion in the Title V Permit is fundamentally contrary to applicable requirements. The NSPS at 40 C.F.R. § 60, Subpart LL does not contain the phrase “to the extent practicable” or otherwise provide that compliance is discretionary. Further, the authority cited for Condition II.B.4.b—A.A.C. R18-2-331.A.3.e—also does not include or reference the phrase. The discretionary inclusion of the phrase “to the extent practicable” in Condition II.B.4.b of the Title V Permit therefore undermines the enforceability of the NSPS and the Title V Permit, contrary to applicable requirements and Title V of the Clean Air Act.

1) ADEQ’s Response to Comments did not Resolve This Issue

In response to Petitioner’s concerns over the inclusion of the phrase “to the extent practicable” in Condition II.B.4.a, ADEQ provided a brief and generic response. The agency stated that the phrase is a “common” phrase “utilized in state and federal rules” and that it appears “in the Arizona Administrative Code as well as the Code of Federal Regulations.” Exhibit 4, Responsiveness Summary to Public Comments at 7. As an example, ADEQ stated that the phrase is included in the “New Source Performance Standards (NSPS) or National Emission Standards for Hazardous Air Pollutants (NESHA).” *Id.*

While ADEQ is correct that the phrase “to the extent practicable” makes appearances in the Arizona Administrative Code and the Code of Federal Regulations, including in some portions of the NSPS, this response does not address the effect that the phrase has on the enforceability of Condition II.B.4.a. Simply because the phrase “to the extent practicable” may

¹⁴ The discretionary nature and unenforceability of Condition II.B.4.b also indicates the permit fails to ensure the Fine Crushing Line B fabric filter dust collector 1 (Process 002-030), Fine Crushing Line C fabric filter dust collector 1 (Process 002-031), and Fine Crushing Line D fabric filter dust collector 1 (Process 002-032) will comply with applicable particulate matter limits set forth at Attachment “C”, Condition II.C.2 of the Title V Permit.

make appearances in state and federal regulations does not make its inclusion in Condition II.B.4.a of the Title V Permit appropriate or justified.

ADEQ also asserts that, “The NSPS or NESHAP requires facilities to execute certain actions ‘to the extent practicable’. This means the facility will be expected to be consistent with the conditions of their plans and/or operating scenarios.” Exhibit 4, Responsiveness Summary to Public Comments at 7. However, the NSPS and NESHAP do not require compliance only “to the extent practicable.” While 40 C.F.R. § 60.11(d) of the NSPS contains 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.” Indeed, the phrase “to the extent practicable” is not found anywhere in 40 C.F.R. § 60, Subpart LL and these specific applicable NSPS do not provide for discretionary compliance. It is finally not clear what ADEQ means when it says the phrase “to the extent practicable” will mean the Morenci Mine will be “expected to be consistent with the conditions of their plans and/or operating scenarios.”

ADEQ further stated that the phrase “to the extent practicable” will “ensure the facility will implement the latest processes, controls, and/or technologies available within the mining industry that make a commitment to reduce air pollution.” Exhibit 4, Responsiveness Summary to Public Comments at 7. It is unclear what this response actually means, but ADEQ appears to believe that inclusion of the phrase “to the extent practicable” in the Title V Permit will assist the mining industry in fulfilling its commitment to reduce air pollution. Contrary to this belief, from a practical standpoint, the inclusion of the phrase “to the extent practicable” in Condition II.B.4.a will allow Freeport to renege on its duty to control air pollution at all times. Inclusion of the phrase expressly provides discretion for Freeport to operate the five fabric filter dust collectors contrary to the applicable limits, rendering Condition II.B.4.a unenforceable as a practical matter and contrary to applicable requirements.

2) The Administrator Must Object

Condition II.B.4.a is unenforceable as a practical matter and contrary to applicable requirements given the inclusion of the phrase “to the extent practicable.” ADEQ’s response to Petitioner’s comments did not resolve this issue. The Administrator must object over the failure of the Title V Permit to set forth enforceable emission limitations and standards and comply with applicable requirements, including the NSPS.

3. Attachment “C,” Condition III

This Condition establishes operational and other limitations for activities associated with the MLF Fine Crushing Plant. Unfortunately, the “Air Pollution Control Requirements” set forth under this Condition are not enforceable as a practical matter and fail to assure compliance with applicable requirements. Petitioner raised this issue with reasonable specificity on pages 5-6 of its technical comments.

a) Attachment “C”, Condition III.A.3.a

This Condition requires Freeport to utilize wet suppression on Process 003-199 (Conveyor Belt S11 to FOIS) to minimize particulate matter emissions and comply with applicable limits in the Title V Permit and A.A.C. R18-2-721, yet the condition is not enforceable as a practical matter and does not assure compliance with applicable requirements.

Of primary concern is while the Condition requires Freeport to utilize wet suppression to comply with applicable limits, the Condition states that Freeport shall do so only “to the extent practicable.” Specifically, the Condition states that Freeport:

At all times, including periods of startup, shutdown, and malfunction, the Permittee shall, *to the extent practicable*, utilize wet suppression on Process #003-199 (Conveyor Belt S11 to FOIS) to minimize particulate matter emissions and comply with applicable emission limitation and standards of Conditions III.A.2.a and III.A.2.b.

Exhibit 1, Title V Permit at 74 (emphasis added). The phrase “to the extent practicable” is ambiguous and not defined. Indeed, neither the identified underlying authority for Condition III.A.3.a, namely A.A.C. R18-2-306.A.2, nor the Arizona SIP set forth or define “to the extent practicable.” This lack of definition is problematic as it suggests there are no clear means of assessing whether Freeport is or is not in compliance with Condition III.A.3.a, making the Condition unenforceable.

A lack of specific definition is especially problematic because, as discussed above, the phrase “to the extent practicable” is understood to qualify an action as discretionary in nature. Thus, inclusion of the phrase “to the extent practicable” makes compliance completely discretionary. As Petitioner noted in its comments, the inclusion of the phrase means that Freeport can “operate the mine contrary to the applicable requirements set forth in the draft Title V permit.” Exhibit 3, Comments on Draft Title V Permit at 3. This means Condition III.A.3.a is completely unenforceable and cannot serve to ensure particulate matter emissions will be limited to assure compliance with the applicable limits set forth under A.A.C. R18-2-721 and the Title V Permit.

Even if the phrase “to the extent practicable” could be defined so as to establish enforceable sideboards, its inclusion in the Title V Permit is fundamentally contrary to applicable requirements. The Arizona SIP at R18-2-721 does not contain the phrase “to the extent practicable” or otherwise provide that compliance is discretionary. Further, the authority cited for Condition III.A.3.a—A.A.C. R18-2-306.A.2—also does not include or reference the phrase. The discretionary inclusion of the phrase “to the extent practicable” in Condition III.A.3.a of the Title V Permit therefore undermines the enforceability of the Arizona SIP and the Title V Permit, contrary to applicable requirements and Title V of the Clean Air Act.

1) ADEQ’s Response to Comments did not Resolve This Issue

In response to Petitioner’s concerns over the inclusion of the phrase “to the extent practicable” in Condition III.A.3.a, ADEQ provided a brief and generic response. The agency stated that the phrase is a “common” phrase “utilized in state and federal rules” and that it

appears “in the Arizona Administrative Code as well as the Code of Federal Regulations.” Exhibit 4, Responsiveness Summary to Public Comments at 7. As an example, ADEQ stated that the phrase is included in the “New Source Performance Standards (NSPS) or National Emission Standards for Hazardous Air Pollutants (NESHAP).” *Id.*

While ADEQ is correct that the phrase “to the extent practicable” makes appearances in the Arizona Administrative Code and the Code of Federal Regulations, including in some portions of the NSPS, this response does not address the effect that the phrase has on the enforceability of Condition III.A.3.a. Simply because the phrase “to the extent practicable” may make appearances in state and federal regulations does not make its inclusion in Condition III.A.3.a of the Title V Permit appropriate or justified.

ADEQ also asserts that, “The NSPS or NESHAP requires facilities to execute certain actions ‘to the extent practicable’. This means the facility will be expected to be consistent with the conditions of their plans and/or operating scenarios.” Exhibit 4, Responsiveness Summary to Public Comments at 7. While the NSPS and NESHAP are not applicable requirements related to Condition III.A.3.a, the NSPS and NESHAP do not require compliance only “to the extent practicable.” While 40 C.F.R. § 60.11(d) of the NSPS contains 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.” Further, there is no general duty provision under the NESHAP that states that polluters must comply only “to the extent practicable” and it is unclear what ADEQ is referring to in referencing the NESHAP. It is finally not clear what ADEQ means when it says the phrase “to the extent practicable” will mean the Morenci Mine will be “expected to be consistent with the conditions of their plans and/or operating scenarios.”

ADEQ further stated that the phrase “to the extent practicable” will “ensure the facility will implement the latest processes, controls, and/or technologies available within the mining industry that make a commitment to reduce air pollution.” Exhibit 4, Responsiveness Summary to Public Comments at 7. It is unclear what this response actually means, but ADEQ appears to believe that inclusion of the phrase “to the extent practicable” in the Title V Permit will assist the mining industry in fulfilling its commitment to reduce air pollution. Contrary to this belief, from a practical standpoint, the inclusion of the phrase “to the extent practicable” in Condition III.A.3.a will allow Freeport to renege on its duty to control air pollution at all times. Inclusion of the phrase expressly provides discretion for Freeport to not utilize wet suppression to control emissions, rendering Condition III.A.3.a unenforceable as a practical matter and contrary to applicable requirements.

2) The Administrator Must Object

Condition III.A.3.a is unenforceable as a practical matter and contrary to applicable requirements given the inclusion of the phrase “to the extent practicable.” ADEQ’s response to Petitioner’s comments did not resolve this issue. The Administrator must object over the failure of the Title V Permit to set forth enforceable emission limitations and standards and comply with applicable requirements, including the Arizona SIP.

b) Attachment “C”, Condition III.A.3.b

This Condition requires Freeport to maintain and operate several control devices, which are subject to A.A.C. R18-2-721, in a manner consistent with good air pollution control practices for minimizing particulate matter emissions, yet the condition is not enforceable as a practical matter and does not assure compliance with applicable requirements.¹⁵

Of primary concern is while the Condition requires Freeport to operate control devices consistent with good air pollution control practices for minimizing particulate matter emissions, the Condition states that Freeport shall do so only “to the extent practicable.” Specifically, the Condition states that Freeport:

At all times, including periods of startup, shutdown, and malfunction, the Permittee shall, *to the extent practicable*, maintain and operate the following air pollution control devices in a manner consistent with good air pollution control practices for minimizing particulate matter emissions.

Exhibit 1, Title V Permit at 74 (emphasis added). The phrase “to the extent practicable” is ambiguous and not defined. Indeed, neither the identified underlying authority for Condition III.A.3.b, namely A.A.C. R18-2-331.A.3.e, nor the Arizona SIP set forth or define “to the extent practicable.” This lack of definition is problematic as it suggests there are no clear means of assessing whether Freeport is or is not in compliance with Condition III.A.3.b, making the Condition unenforceable.

A lack of specific definition is especially problematic because, as discussed above, the phrase “to the extent practicable” is understood to qualify an action as discretionary in nature. Thus, inclusion of the phrase “to the extent practicable” makes compliance completely discretionary. As Petitioner noted in its comments, the inclusion of the phrase means that Freeport can “operate the mine contrary to the applicable requirements set forth in the draft Title V permit.” Exhibit 3, Comments on Draft Title V Permit at 3. This means Condition III.A.3.b is completely unenforceable and cannot serve to ensure the control devices limit particulate emissions and ensure compliance with the applicable limits set forth under A.A.C. R18-2-721.¹⁶

Even if the phrase “to the extent practicable” could be defined so as to establish enforceable sideboards, its inclusion in the Title V Permit is fundamentally contrary to applicable requirements. The Arizona SIP at A.A.C. R18-2-721 does not contain the phrase “to the extent

¹⁵ The control devices are set forth at Attachment “C”, Condition III.A.3.b(1)-(4) and include: Two fabric filter dust collectors, R9/R10 FFDC (Process 003-273) and R10/R3 FFDC (P003-330); five bag collectors, R3/R4 Bag Collector 3 (Process 003-079), R4/R5/R6 Bag Collector 4 (Process 003-080), FOIS/A1A Bag Collector 7 (Process 003-201), A1A/A2A Bag Collector 8 (Process 003-202), and A1A/A2C Bag Collector 9 (Process 003-203); two scrubbers, Scrubber 3C (Process 003-082) and Scrubber 5 (Process 003-089); and one dust collector, Conveyor Belt 9 Dust Collector (Process 003-307).

¹⁶ The discretionary nature and unenforceability of Condition III.A.3.b also indicates the permit fails to ensure the control devices will comply with applicable particulate matter limits set forth at Attachment “C”, Condition III.C.2 of the Title V Permit.

practicable” or otherwise provide that compliance is discretionary. Further, the authority cited for Condition III.A.3.b—A.A.C. R18-2-331.A.3.e—also does not include or reference the phrase. The discretionary inclusion of the phrase “to the extent practicable” in Condition III.A.3.b of the Title V Permit therefore undermines the enforceability of the Arizona SIP and the Title V Permit, contrary to applicable requirements and Title V of the Clean Air Act.

1) ADEQ’s Response to Comments did not Resolve This Issue

In response to Petitioner’s concerns over the inclusion of the phrase “to the extent practicable” in Condition III.A.3.b, ADEQ provided a brief and generic response. The agency stated that the phrase is a “common” phrase “utilized in state and federal rules” and that it appears “in the Arizona Administrative Code as well as the Code of Federal Regulations.” Exhibit 4, Responsiveness Summary to Public Comments at 7. As an example, ADEQ stated that the phrase is included in the “New Source Performance Standards (NSPS) or National Emission Standards for Hazardous Air Pollutants (NESHAP).” *Id.*

While ADEQ is correct that the phrase “to the extent practicable” makes appearances in the Arizona Administrative Code and the Code of Federal Regulations, including in some portions of the NSPS, this response does not address the effect that the phrase has on the enforceability of Condition III.A.3.b. Simply because the phrase “to the extent practicable” may make appearances in state and federal regulations does not make its inclusion in Condition III.A.3.b of the Title V Permit appropriate or justified.

ADEQ also asserts that, “The NSPS or NESHAP requires facilities to execute certain actions ‘to the extent practicable’. This means the facility will be expected to be consistent with the conditions of their plans and/or operating scenarios.” Exhibit 4, Responsiveness Summary to Public Comments at 7. While the NSPS and NESHAP are not applicable requirements related to Condition III.A.3.b, the NSPS and NESHAP do not require compliance only “to the extent practicable.” While 40 C.F.R. § 60.11(d) of the NSPS contains 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.” Further, there is no general duty provision under the NESHAP that states that polluters must comply only “to the extent practicable” and it is unclear what ADEQ is referring to in referencing the NESHAP. It is finally not clear what ADEQ means when it says the phrase “to the extent practicable” will mean the Morenci Mine will be “expected to be consistent with the conditions of their plans and/or operating scenarios.”

ADEQ further stated that the phrase “to the extent practicable” will “ensure the facility will implement the latest processes, controls, and/or technologies available within the mining industry that make a commitment to reduce air pollution.” Exhibit 4, Responsiveness Summary to Public Comments at 7. It is unclear what this response actually means, but ADEQ appears to believe that inclusion of the phrase “to the extent practicable” in the Title V Permit will assist the mining industry in fulfilling its commitment to reduce air pollution. Contrary to this belief, from a practical standpoint, the inclusion of the phrase “to the extent practicable” in Condition III.A.3.b will allow Freeport to renege on its duty to control air pollution at all times. Inclusion

of the phrase expressly provides discretion for Freeport to operate the control devices contrary to the applicable limits, rendering Condition III.A.3.b unenforceable as a practical matter and contrary to applicable requirements.

2) The Administrator Must Object

Condition III.A.3.b is unenforceable as a practical matter and contrary to applicable requirements given the inclusion of the phrase “to the extent practicable.” ADEQ’s response to Petitioner’s comments did not resolve this issue. The Administrator must object over the failure of the Title V Permit to set forth enforceable emission limitations and standards and comply with applicable requirements, including the Arizona SIP.

c) Attachment “C”, Condition III.B.4

This Condition requires Freeport to maintain and operate nine control devices subject to the NSPS at 40 C.F.R. § 60, Subpart LL in a manner consistent with good air pollution control practices for minimizing particulate matter emissions, yet the condition is not enforceable as a practical matter and does not assure compliance with applicable requirements.^{17, 18}

Of primary concern is while the Condition requires Freeport to operate the control devices consistent with good air pollution control practices for minimizing particulate matter emissions, the Condition states that Freeport shall do so only “to the extent practicable.” Specifically, the Condition states that Freeport:

At all times, including periods of startup, shutdown, and malfunction, the Permittee shall, *to the extent practicable*, maintain and operate the following air pollution control devices in a manner consistent with good air pollution control practices for minimizing particulate matter emissions.

Exhibit 1, Title V Permit at 77 (emphasis added). The phrase “to the extent practicable” is ambiguous and not defined. Indeed, neither the identified underlying authority for Condition III.B.4, namely A.A.C. R18-2-331.A.3.e, nor the Arizona SIP set forth or define “to the extent practicable.” This lack of definition is problematic as it suggests there are no clear means of assessing whether Freeport is or is not in compliance with Condition III.B.4, making the Condition unenforceable.

A lack of specific definition is especially problematic because, as discussed above, the phrase “to the extent practicable” is understood to qualify an action as discretionary in nature.

¹⁷ The control devices are set forth at Attachment “C”, Condition III.B.4(a)-(c) and include: Fabric filter dust collectors FFDC 3A (Process 003-317), FFDC 6A (Process 003-301), FFDC 6B (Process 003-302), FFDC 1 (Process 003-304), and 14/15 FFDC (Process 003-320); Tertiary crushing dust collector (Process 003-306); and Scrubber 4 (Process 003-088). See Exhibit 1, Title V Permit at 77.

¹⁸ Petitioner’s comments mistakenly referred to Condition III.B.4 as Condition III.A.4 in their comments. However, it is clear Petitioner was referring to Condition III.B.4 in referencing the nine control devices subject to the Condition III.B.4.

Thus, inclusion of the phrase “to the extent practicable” makes compliance completely discretionary. As Petitioner noted in its comments, the inclusion of the phrase means that Freeport can “operate the mine contrary to the applicable requirements set forth in the draft Title V permit.” Exhibit 3, Comments on Draft Title V Permit at 3. This means Condition III.B.4 is completely unenforceable and cannot serve to ensure the control devices limit particulate emissions in order to assure compliance with the applicable limits set forth under 40 C.F.R. § 60, Subpart LL.¹⁹

Even if the phrase “to the extent practicable” could be defined so as to establish enforceable sideboards, its inclusion in the Title V Permit is fundamentally contrary to applicable requirements. The NSPS at 40 C.F.R. § 60, Subpart LL does not contain the phrase “to the extent practicable” or otherwise provide that compliance is discretionary. Further, the authority cited for Condition III.B.4—A.A.C. R18-2-331.A.3.e—also does not include or reference the phrase. The discretionary inclusion of the phrase “to the extent practicable” in Condition III.B.4 of the Title V Permit therefore undermines the enforceability of the NSPS and the Title V Permit, contrary to applicable requirements and Title V of the Clean Air Act.

1) ADEQ’s Response to Comments did not Resolve This Issue

In response to Petitioner’s concerns over the inclusion of the phrase “to the extent practicable” in Condition III.B.4, ADEQ provided a brief and generic response. The agency stated that the phrase is a “common” phrase “utilized in state and federal rules” and that it appears “in the Arizona Administrative Code as well as the Code of Federal Regulations.” Exhibit 4, Responsiveness Summary to Public Comments at 7. As an example, ADEQ stated that the phrase is included in the “New Source Performance Standards (NSPS) or National Emission Standards for Hazardous Air Pollutants (NESHAP).” *Id.*

While ADEQ is correct that the phrase “to the extent practicable” makes appearances in the Arizona Administrative Code and the Code of Federal Regulations, including in some portions of the NSPS, this response does not address the effect that the phrase has on the enforceability of Condition II.B.4.a. Simply because the phrase “to the extent practicable” may make appearances in state and federal regulations does not make its inclusion in Condition III.B.4 of the Title V Permit appropriate or justified.

ADEQ also asserts that, “The NSPS or NESHAP requires facilities to execute certain actions ‘to the extent practicable’. This means the facility will be expected to be consistent with the conditions of their plans and/or operating scenarios.” Exhibit 4, Responsiveness Summary to Public Comments at 7. However, the NSPS and NESHAP do not require compliance only “to the extent practicable.” While 40 C.F.R. § 60.11(d) of the NSPS contains 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

¹⁹ The discretionary nature and unenforceability of Condition III.B.4 also indicates the permit fails to ensure that FFDC 3A (Process 003-317), FFDC 6A (Process 003-301), FFDC 6B (Process 003-302), FFDC 1 (Process 003-304), and Scrubber 4 (Process 003-088) will comply with applicable particulate matter limits set forth at Attachment “C”, Condition III.C.2 of the Title V Permit.

practicable.” Indeed, the phrase “to the extent practicable” is not found anywhere in 40 C.F.R. § 60, Subpart LL and these specific applicable NSPS do not provide for discretionary compliance. It is finally not clear what ADEQ means when it says the phrase “to the extent practicable” will mean the Morenci Mine will be “expected to be consistent with the conditions of their plans and/or operating scenarios.”

ADEQ further stated that the phrase “to the extent practicable” will “ensure the facility will implement the latest processes, controls, and/or technologies available within the mining industry that make a commitment to reduce air pollution.” Exhibit 4, Responsiveness Summary to Public Comments at 7. It is unclear what this response actually means, but ADEQ appears to believe that inclusion of the phrase “to the extent practicable” in the Title V Permit will assist the mining industry in fulfilling its commitment to reduce air pollution. Contrary to this belief, from a practical standpoint, the inclusion of the phrase “to the extent practicable” in Condition III.B.4 will allow Freeport to renege on its duty to control air pollution at all times. Inclusion of the phrase expressly provides discretion for Freeport to operate the control devices contrary to the applicable limits, rendering Condition III.B.4 unenforceable as a practical matter and contrary to applicable requirements.

2) The Administrator Must Object

Condition III.B.4 is unenforceable as a practical matter and contrary to applicable requirements given the inclusion of the phrase “to the extent practicable.” ADEQ’s response to Petitioner’s comments did not resolve this issue. The Administrator must object over the failure of the Title V Permit to set forth enforceable emission limitations and standards and comply with applicable requirements, including the NSPS.

4. Attachment “C,” Condition IV

This Condition establishes operational and other limitations for activities associated with the Metcalf Concentrator. Unfortunately, the “Air Pollution Control Requirements” set forth under this Condition are not enforceable as a practical matter and fail to assure compliance with applicable requirements. Petitioner raised this issue with reasonable specificity on pages 6-7 of its technical comments.

a) Attachment “C”, Condition IV.A.3

This Condition requires Freeport to utilize water sprays on Process 017-327 to minimize particulate matter emissions and comply with applicable limits, yet the condition is not enforceable as a practical matter and does not assure compliance with applicable requirements.

Of primary concern is while the Condition requires Freeport to utilize water sprays to comply with applicable limits, the Condition states that Freeport shall do so only “to the extent practicable.” Specifically, the Condition states that Freeport:

At all times, including periods of startup, shutdown, and malfunction, the Permittee shall, *to the extent practicable*, utilize water sprays on the transfer from the Wet Screen Bin to Wet Screens 1/2 (Process #017-327) to saturate the process materials.

Exhibit 1, Title V Permit at 84 (emphasis added). The phrase “to the extent practicable” is ambiguous and not defined. Indeed, neither the identified underlying authority for Condition IV.A.3, namely A.A.C. R18-2-306.A.2, nor the Arizona SIP set forth or define “to the extent practicable.” This lack of definition is problematic as it suggests there are no clear means of assessing whether Freeport is or is not in compliance with Condition IV.A.3, making the Condition unenforceable.

A lack of specific definition is especially problematic because, as discussed above, the phrase “to the extent practicable” is understood to qualify an action as discretionary in nature. Thus, inclusion of the phrase “to the extent practicable” makes compliance completely discretionary. As Petitioner noted in its comments, the inclusion of the phrase means that Freeport can “operate the mine contrary to the applicable requirements set forth in the draft Title V permit.” Exhibit 3, Comments on Draft Title V Permit at 3. This means Condition IV.A.3 is completely unenforceable and cannot serve to ensure particulate matter emissions will be limited to assure compliance with the applicable limits set forth under A.A.C. R18-2-721 and the Title V Permit.

Even if the phrase “to the extent practicable” could be defined so as to establish enforceable sideboards, its inclusion in the Title V Permit is fundamentally contrary to applicable requirements. The Arizona SIP at R18-2-721 does not contain the phrase “to the extent practicable” or otherwise provide that compliance is discretionary. Further, the authority cited for Condition IV.A.3—A.A.C. R18-2-306.A.2—also does not include or reference the phrase. The discretionary inclusion of the phrase “to the extent practicable” in Condition IV.A.3 of the Title V Permit therefore undermines the enforceability of the Arizona SIP and the Title V Permit, contrary to applicable requirements and Title V of the Clean Air Act.

1) ADEQ’s Response to Comments did not Resolve This Issue

In response to Petitioner’s concerns over the inclusion of the phrase “to the extent practicable” in Condition IV.A.3, ADEQ provided a brief and generic response. The agency stated that the phrase is a “common” phrase “utilized in state and federal rules” and that it appears “in the Arizona Administrative Code as well as the Code of Federal Regulations.” Exhibit 4, Responsiveness Summary to Public Comments at 7. As an example, ADEQ stated that the phrase is included in the “New Source Performance Standards (NSPS) or National Emission Standards for Hazardous Air Pollutants (NESHAP).” *Id.*

While ADEQ is correct that the phrase “to the extent practicable” makes appearances in the Arizona Administrative Code and the Code of Federal Regulations, including in some portions of the NSPS, this response does not address the effect that the phrase has on the enforceability of Condition IV.A.3. Simply because the phrase “to the extent practicable” may make appearances in state and federal regulations does not make its inclusion in Condition IV.A.3 of the Title V Permit appropriate or justified.

ADEQ also asserts that, “The NSPS or NESHAP requires facilities to execute certain actions ‘to the extent practicable’”. This means the facility will be expected to be consistent with

the conditions of their plans and/or operating scenarios.” Exhibit 4, Responsiveness Summary to Public Comments at 7. While the NSPS and NESHAP are not applicable requirements related to Condition IV.A.3, the NSPS and NESHAP do not require compliance only “to the extent practicable.” While 40 C.F.R. § 60.11(d) of the NSPS contains 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.” Further, there is no general duty provision under the NESHAP that states that polluters must comply only “to the extent practicable” and it is unclear what ADEQ is referring to in referencing the NESHAP. It is finally not clear what ADEQ means when it says the phrase “to the extent practicable” will mean the Morenci Mine will be “expected to be consistent with the conditions of their plans and/or operating scenarios.”

ADEQ further stated that the phrase “to the extent practicable” will “ensure the facility will implement the latest processes, controls, and/or technologies available within the mining industry that make a commitment to reduce air pollution.” Exhibit 4, Responsiveness Summary to Public Comments at 7. It is unclear what this response actually means, but ADEQ appears to believe that inclusion of the phrase “to the extent practicable” in the Title V Permit will assist the mining industry in fulfilling its commitment to reduce air pollution. Contrary to this belief, from a practical standpoint, the inclusion of the phrase “to the extent practicable” in Condition IV.A.3 will allow Freeport to renege on its duty to control air pollution at all times. Inclusion of the phrase expressly provides discretion for Freeport to not utilize water sprays to control emissions, rendering Condition IV.A.3 unenforceable as a practical matter and contrary to applicable requirements.

2) The Administrator Must Object

Condition IV.A.3 is unenforceable as a practical matter and contrary to applicable requirements given the inclusion of the phrase “to the extent practicable.” ADEQ’s response to Petitioner’s comments did not resolve this issue. The Administrator must object over the failure of the Title V Permit to set forth enforceable emission limitations and standards and comply with applicable requirements, including the Arizona SIP.

b) Attachment “C”, Condition IV.B.4

This Condition requires Freeport to maintain and operate 15 fabric filter dust collectors subject to the NSPS at 40 C.F.R. § 60, Subpart LL in a manner consistent with good air pollution control practices for minimizing particulate matter emissions, yet the condition is not enforceable as a practical matter and does not assure compliance with applicable requirements.²⁰

²⁰ The 15 fabric filter dust collectors are set forth at Attachment “C”, Condition IV.B.4(1)-(15) and include: Secondary Screen Feed Bin FFDC (Process 017-318); Secondary Screening FFDC 1 (Process 017-280); Secondary Screening FFDC 2 (Process 01-281); Secondary Crusher Feed Bin FFDC (Process 017-319); Secondary Crushing FFDC 1 (Process 017-283); Secondary Crushing FFDC 2 (Process 017-284); Crushed Ore A/B Conveyor Transfer Point FFDC (017-285); Crushed Ore B/Tripper Conveyor Transfer Point FFDC (Process 017-286); Crushed Ore Bin FFDC 1 (Process 017-287) Crushed Ore Bin FFDC 2 (Process 017-288); Crushed Ore Bin FFDC 3 (Process 017-289); Crushed Ore Bin FFDC 4 (Process 017-290); Crushed Ore Transfers FFDC (Process 017-291); HRC/HPGR

Of primary concern is while the Condition requires Freeport to operate the fabric filter dust collectors consistent with good air pollution control practices for minimizing particulate matter emissions, the Condition states that Freeport shall do so only “to the extent practicable.” Specifically, the Condition states that Freeport:

At all times, including periods of startup, shutdown, and malfunction, the Permittee shall, ***to the extent practicable***, maintain and operate the following fabric filter dust collectors in a manner consistent with good air pollution control practices for minimizing particulate matter emissions.

Exhibit 1, Title V Permit at 86 (emphasis added). The phrase “to the extent practicable” is ambiguous and not defined. Indeed, neither the identified underlying authority for Condition IV.B.4, namely A.A.C. R18-2-331.A.3.e, nor the Arizona SIP set forth or define “to the extent practicable.” This lack of definition is problematic as it suggests there are no clear means of assessing whether Freeport is or is not in compliance with Condition IV.B.4, making the Condition unenforceable.

A lack of specific definition is especially problematic because, as discussed above, the phrase “to the extent practicable” is understood to qualify an action as discretionary in nature. Thus, inclusion of the phrase “to the extent practicable” makes compliance completely discretionary. As Petitioner noted in its comments, the inclusion of the phrase means that Freeport can “operate the mine contrary to the applicable requirements set forth in the draft Title V permit.” Exhibit 3, Comments on Draft Title V Permit at 3. This means Condition IV.B.4 is completely unenforceable and cannot serve to ensure the six fabric filter dust collectors limit particulate emissions in order to assure compliance with the applicable limits set forth under 40 C.F.R. § 60, Subpart LL.²¹

Even if the phrase “to the extent practicable” could be defined so as to establish enforceable sideboards, its inclusion in the Title V Permit is fundamentally contrary to applicable requirements. The NSPS at 40 C.F.R. § 60, Subpart LL does not contain the phrase “to the extent practicable” or otherwise provide that compliance is discretionary. Further, the authority cited for Condition IV.B.4—A.A.C. R18-2-331.A.3.e—also does not include or reference the phrase. The discretionary inclusion of the phrase “to the extent practicable” in Condition IV.B.4 of the Title V Permit therefore undermines the enforceability of the NSPS and the Title V Permit, contrary to applicable requirements and Title V of the Clean Air Act.

Crusher FFDC (Process 017-292); and Wet Screen Feed FFDC (Process 017-294). See Exhibit 1, Title V Permit at 86.

²¹ The discretionary nature and unenforceability of Condition IV.B.4 also indicates the permit fails to ensure that the fabric filter dust collectors will comply with applicable particulate matter limits set forth at Attachment “C”, Condition IV.C.2 of the Title V Permit.

1) ADEQ's Response to Comments did not Resolve This Issue

In response to Petitioner's concerns over the inclusion of the phrase "to the extent practicable" in Condition IV.B.4, ADEQ provided a brief and generic response. The agency stated that the phrase is a "common" phrase "utilized in state and federal rules" and that it appears "in the Arizona Administrative Code as well as the Code of Federal Regulations." Exhibit 4, Responsiveness Summary to Public Comments at 7. As an example, ADEQ stated that the phrase is included in the "New Source Performance Standards (NSPS) or National Emission Standards for Hazardous Air Pollutants (NESHAP)." *Id.*

While ADEQ is correct that the phrase "to the extent practicable" makes appearances in the Arizona Administrative Code and the Code of Federal Regulations, including in some portions of the NSPS, this response does not address the effect that the phrase has on the enforceability of Condition IV.B.4. Simply because the phrase "to the extent practicable" may make appearances in state and federal regulations does not make its inclusion in Condition IV.B.4 of the Title V Permit appropriate or justified.

ADEQ also asserts that, "The NSPS or NESHAP requires facilities to execute certain actions 'to the extent practicable'. This means the facility will be expected to be consistent with the conditions of their plans and/or operating scenarios." Exhibit 4, Responsiveness Summary to Public Comments at 7. However, the NSPS and NESHAP do not require compliance only "to the extent practicable." While 40 C.F.R. § 60.11(d) of the NSPS contains 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." Indeed, the phrase "to the extent practicable" is not found anywhere in 40 C.F.R. § 60, Subpart LL and these specific applicable NSPS do not provide for discretionary compliance. It is finally not clear what ADEQ means when it says the phrase "to the extent practicable" will mean the Morenci Mine will be "expected to be consistent with the conditions of their plans and/or operating scenarios."

ADEQ further stated that the phrase "to the extent practicable" will "ensure the facility will implement the latest processes, controls, and/or technologies available within the mining industry that make a commitment to reduce air pollution." Exhibit 4, Responsiveness Summary to Public Comments at 7. It is unclear what this response actually means, but ADEQ appears to believe that inclusion of the phrase "to the extent practicable" in the Title V Permit will assist the mining industry in fulfilling its commitment to reduce air pollution. Contrary to this belief, from a practical standpoint, the inclusion of the phrase "to the extent practicable" in Condition IV.B.4 will allow Freeport to renege on its duty to control air pollution at all times. Inclusion of the phrase expressly provides discretion for Freeport to operate the 15 fabric filter dust collectors contrary to the applicable limits, rendering Condition IV.B.4 unenforceable as a practical matter and contrary to applicable requirements.

2) The Administrator Must Object

Condition IV.B.4 is unenforceable as a practical matter and contrary to applicable requirements given the inclusion of the phrase “to the extent practicable.” ADEQ’s response to Petitioner’s comments did not resolve this issue. The Administrator must object over the failure of the Title V Permit to set forth enforceable emission limitations and standards and comply with applicable requirements, including the NSPS.

5. Attachment “C,” Condition V

This Condition establishes operational and other limitations for activities associated with the Combined Molybdenum Floatation, Copper and Molybdenum Concentrate Processing Operations. Unfortunately, the “Air Pollution Control Requirements” set forth under this Condition are not enforceable as a practical matter and fail to assure compliance with applicable requirements. Petitioner raised this issue with reasonable specificity on page 7 of its technical comments.

a) Attachment “C”, Condition V.C.3

This Condition requires Freeport to utilize a hydrogen sulfide scrubber system to minimize particulate matter and hydrogen sulfide emissions and comply with applicable limits in the Title V Permit and in the Arizona SIP at A.A.C. R18-2-730, yet the condition is not enforceable as a practical matter and does not assure compliance with applicable requirements.

Of primary concern is while the Condition requires Freeport to utilize a hydrogen sulfide scrubber system to comply with applicable limits, the Condition states that Freeport shall do so only “to the extent practicable.” Specifically, the Condition states that Freeport:

At all times, including periods of startup, shutdown, and malfunction, the Permittee shall, *to the extent practicable*, maintain and operate the H₂S Scrubber System to minimize particulate matter and hydrogen sulfide emissions from Combined Molybdenum Floatation and (when necessary) NaHS Storage Tanks 1 and 2 (Process 018-336) to comply with the applicable emission limitations and standards of Condition V.C.2.d above.

Exhibit 1, Title V Permit at 95 (emphasis added). The phrase “to the extent practicable” is ambiguous and not defined. Indeed, neither the identified underlying authority for Condition V.C.3, namely A.A.C. R18-2-331.A.3.e, nor the Arizona SIP set forth or define “to the extent practicable.” This lack of definition is problematic as it suggests there are no clear means of assessing whether Freeport is or is not in compliance with Condition V.C.3, making the Condition unenforceable.

A lack of specific definition is especially problematic because, as discussed above, the phrase “to the extent practicable” is understood to qualify an action as discretionary in nature. Thus, inclusion of the phrase “to the extent practicable” makes compliance completely discretionary. As Petitioner noted in its comments, the inclusion of the phrase means that Freeport can “operate the mine contrary to the applicable requirements set forth in the draft Title

V permit.” Exhibit 3, Comments on Draft Title V Permit at 3. This means Condition V.C.3 is completely unenforceable and cannot serve to ensure hydrogen sulfide scrubber system operates and that particulate matter and hydrogen sulfide emissions will be limited to assure compliance with the applicable limits set forth under A.A.C. R18-2-730 and the Title V Permit.

Even if the phrase “to the extent practicable” could be defined so as to establish enforceable sideboards, its inclusion in the Title V Permit is fundamentally contrary to applicable requirements. The Arizona SIP at R18-2-730 does not contain the phrase “to the extent practicable” or otherwise provide that compliance is discretionary. Further, the authority cited for Condition V.C.3—A.A.C. R18-2-331.A.3.e—also does not include or reference the phrase. The discretionary inclusion of the phrase “to the extent practicable” in Condition V.C.3 of the Title V Permit therefore undermines the enforceability of the Arizona SIP and the Title V Permit, contrary to applicable requirements and Title V of the Clean Air Act.

1) ADEQ’s Response to Comments did not Resolve This Issue

In response to Petitioner’s concerns over the inclusion of the phrase “to the extent practicable” in Condition V.C.3, ADEQ provided a brief and generic response. The agency stated that the phrase is a “common” phrase “utilized in state and federal rules” and that it appears “in the Arizona Administrative Code as well as the Code of Federal Regulations.” Exhibit 4, Responsiveness Summary to Public Comments at 7. As an example, ADEQ stated that the phrase is included in the “New Source Performance Standards (NSPS) or National Emission Standards for Hazardous Air Pollutants (NESHAP).” *Id.*

While ADEQ is correct that the phrase “to the extent practicable” makes appearances in the Arizona Administrative Code and the Code of Federal Regulations, including in some portions of the NSPS, this response does not address the effect that the phrase has on the enforceability of Condition V.C.3. Simply because the phrase “to the extent practicable” may make appearances in state and federal regulations does not make its inclusion in Condition V.C.3 of the Title V Permit appropriate or justified.

ADEQ also asserts that, “The NSPS or NESHAP requires facilities to execute certain actions ‘to the extent practicable’. This means the facility will be expected to be consistent with the conditions of their plans and/or operating scenarios.” Exhibit 4, Responsiveness Summary to Public Comments at 7. While the NSPS and NESHAP are not applicable requirements related to Condition V.C.3, the NSPS and NESHAP do not require compliance only “to the extent practicable.” While 40 C.F.R. § 60.11(d) of the NSPS contains 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.” Further, there is no general duty provision under the NESHAP that states that polluters must comply only “to the extent practicable” and it is unclear what ADEQ is referring to in referencing the NESHAP. It is finally not clear what ADEQ means when it says the phrase “to the extent practicable” will mean the Morenci Mine will be “expected to be consistent with the conditions of their plans and/or operating scenarios.”

ADEQ further stated that the phrase “to the extent practicable” will “ensure the facility will implement the latest processes, controls, and/or technologies available within the mining industry that make a commitment to reduce air pollution.” Exhibit 4, Responsiveness Summary to Public Comments at 7. It is unclear what this response actually means, but ADEQ appears to believe that inclusion of the phrase “to the extent practicable” in the Title V Permit will assist the mining industry in fulfilling its commitment to reduce air pollution. Contrary to this belief, from a practical standpoint, the inclusion of the phrase “to the extent practicable” in Condition V.C.3 will allow Freeport to renege on its duty to control air pollution at all times. Inclusion of the phrase expressly provides discretion for Freeport to not utilize the hydrogen sulfide scrubber system, rendering Condition V.C.3 unenforceable as a practical matter and contrary to applicable requirements.

2) The Administrator Must Object

Condition V.C.3 is unenforceable as a practical matter and contrary to applicable requirements given the inclusion of the phrase “to the extent practicable.” ADEQ’s response to Petitioner’s comments did not resolve this issue. The Administrator must object over the failure of the Title V Permit to set forth enforceable emission limitations and standards and comply with applicable requirements, including the Arizona SIP.

6. Attachment “C,” Condition VI

This Condition establishes operational and other limitations for activities associated with the Lime Slaking Plants and Lime Transloading. Unfortunately, the “Air Pollution Control Requirements” set forth under this Condition are not enforceable as a practical matter and fail to assure compliance with applicable requirements. Petitioner raised this issue with reasonable specificity on pages 7-8 of its technical comments.

a) Attachment “C”, Condition VI.D.1

This Condition requires Freeport to utilize dust filters to minimize particulate matter emissions from Lime Silo 1 (Process 004-231) and Lime Silo 2 (Process 004-232) and comply with applicable limits in the Title V Permit, yet the condition is not enforceable as a practical matter and does not assure compliance with applicable requirements.

Of primary concern is while the Condition requires Freeport to utilize dust filters to comply with applicable limits, the Condition states that Freeport shall do so only “to the extent practicable.” Specifically, the Condition states that Freeport:

At all times, including periods of startup, shutdown, and malfunction, the Permittee shall, *to the extent practicable*, maintain and operate dust filters on the following equipment to minimize particulate matter emissions and comply with applicable emission limitations and standards of Condition VI.B.2 above.

Exhibit 1, Title V Permit at 97 (emphasis added). The phrase “to the extent practicable” is ambiguous and not defined. Indeed, neither the identified underlying authority for Condition VI.D.1, namely A.A.C. R18-2-306.A.2, nor the Arizona SIP set forth or define “to the extent

practicable.” This lack of definition is problematic as it suggests there are no clear means of assessing whether Freeport is or is not in compliance with Condition VI.D.1, making the Condition unenforceable.

A lack of specific definition is especially problematic because, as discussed above, the phrase “to the extent practicable” is understood to qualify an action as discretionary in nature. Thus, inclusion of the phrase “to the extent practicable” makes compliance completely discretionary. As Petitioner noted in its comments, the inclusion of the phrase means that Freeport can “operate the mine contrary to the applicable requirements set forth in the draft Title V permit.” Exhibit 3, Comments on Draft Title V Permit at 3. This means Condition VI.D.1 is completely unenforceable and cannot serve to ensure the dust filters will operate and limit particulate matter emissions to assure compliance with the applicable limits set forth under the Title V Permit.

Even if the phrase “to the extent practicable” could be defined so as to establish enforceable sideboards, its inclusion in the Title V Permit is fundamentally contrary to applicable requirements. The Arizona SIP does not contain the phrase “to the extent practicable” or otherwise provide that compliance is discretionary. Further, the authority cited for Condition VI.D.1—A.A.C. R18-2-306.A.2—also does not include or reference the phrase. The discretionary inclusion of the phrase “to the extent practicable” in Condition VI.D.1 of the Title V Permit therefore undermines the enforceability of the Arizona SIP and the Title V Permit, contrary to applicable requirements and Title V of the Clean Air Act.

1) ADEQ’s Response to Comments did not Resolve This Issue

In response to Petitioner’s concerns over the inclusion of the phrase “to the extent practicable” in Condition VI.D.1, ADEQ provided a brief and generic response. The agency stated that the phrase is a “common” phrase “utilized in state and federal rules” and that it appears “in the Arizona Administrative Code as well as the Code of Federal Regulations.” Exhibit 4, Responsiveness Summary to Public Comments at 7. As an example, ADEQ stated that the phrase is included in the “New Source Performance Standards (NSPS) or National Emission Standards for Hazardous Air Pollutants (NESHAP).” *Id.*

While ADEQ is correct that the phrase “to the extent practicable” makes appearances in the Arizona Administrative Code and the Code of Federal Regulations, including in some portions of the NSPS, this response does not address the effect that the phrase has on the enforceability of Condition VI.D.1. Simply because the phrase “to the extent practicable” may make appearances in state and federal regulations does not make its inclusion in Condition VI.D.1 of the Title V Permit appropriate or justified.

ADEQ also asserts that, “The NSPS or NESHAP requires facilities to execute certain actions ‘to the extent practicable’. This means the facility will be expected to be consistent with the conditions of their plans and/or operating scenarios.” Exhibit 4, Responsiveness Summary to Public Comments at 7. While the NSPS and NESHAP are not applicable requirements related to Condition VI.D.1, the NSPS and NESHAP do not require compliance only “to the extent practicable.” While 40 C.F.R. § 60.11(d) of the NSPS contains 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.” Further, there is no general duty provision under the NESHAP that states that polluters must comply only “to the extent practicable” and it is unclear what ADEQ is referring to in referencing the NESHAP. It is finally not clear what ADEQ means when it says the phrase “to the extent practicable” will mean the Morenci Mine will be “expected to be consistent with the conditions of their plans and/or operating scenarios.”

ADEQ further stated that the phrase “to the extent practicable” will “ensure the facility will implement the latest processes, controls, and/or technologies available within the mining industry that make a commitment to reduce air pollution.” Exhibit 4, Responsiveness Summary to Public Comments at 7. It is unclear what this response actually means, but ADEQ appears to believe that inclusion of the phrase “to the extent practicable” in the Title V Permit will assist the mining industry in fulfilling its commitment to reduce air pollution. Contrary to this belief, from a practical standpoint, the inclusion of the phrase “to the extent practicable” in Condition VI.D.1 will allow Freeport to renege on its duty to control air pollution at all times. Inclusion of the phrase expressly provides discretion for Freeport to not utilize the dust filters, rendering Condition VI.D.1 unenforceable as a practical matter and contrary to applicable requirements.

2) The Administrator Must Object

Condition VI.D.1 is unenforceable as a practical matter and contrary to applicable requirements given the inclusion of the phrase “to the extent practicable.” ADEQ’s response to Petitioner’s comments did not resolve this issue. The Administrator must object over the failure of the Title V Permit to set forth enforceable emission limitations and standards and comply with applicable requirements, including the Arizona SIP.

b) Attachment “C”, Condition VI.D.2

This Condition requires Freeport to utilize a bin vent filter to minimize particulate matter emissions from the Metcalf Lime Silo (Process 004-275) and comply with applicable limits in the Title V Permit, yet the condition is not enforceable as a practical matter and does not assure compliance with applicable requirements.

Of primary concern is while the Condition requires Freeport to utilize a bin vent filter to comply with applicable limits, the Condition states that Freeport shall do so only “to the extent practicable.” Specifically, the Condition states that Freeport:

At all times, including periods of startup, shutdown, and malfunction, the Permittee shall, *to the extent practicable*, maintain and operate a bin vent filter on the Metcalf Lime Silo (Process #004-275) to minimize particulate matter emissions and comply with applicable emission limitations and standards of Conditions VI.B above.

Exhibit 1, Title V Permit at 97 (emphasis added). The phrase “to the extent practicable” is ambiguous and not defined. Indeed, neither the identified underlying authority for Condition VI.D.2, namely A.A.C. R18-2-306.A.2, nor the Arizona SIP set forth or define “to the extent

practicable.” This lack of definition is problematic as it suggests there are no clear means of assessing whether Freeport is or is not in compliance with Condition VI.D.2, making the Condition unenforceable.

A lack of specific definition is especially problematic because, as discussed above, the phrase “to the extent practicable” is understood to qualify an action as discretionary in nature. Thus, inclusion of the phrase “to the extent practicable” makes compliance completely discretionary. As Petitioner noted in its comments, the inclusion of the phrase means that Freeport can “operate the mine contrary to the applicable requirements set forth in the draft Title V permit.” Exhibit 3, Comments on Draft Title V Permit at 3. This means Condition VI.D.2 is completely unenforceable and cannot serve to ensure the bin vent filter will operate and limit particulate matter emissions to assure compliance with the applicable limits set forth under the Title V Permit.

Even if the phrase “to the extent practicable” could be defined so as to establish enforceable sideboards, its inclusion in the Title V Permit is fundamentally contrary to applicable requirements. The Arizona SIP does not contain the phrase “to the extent practicable” or otherwise provide that compliance is discretionary. Further, the authority cited for Condition VI.D.2—A.A.C. R18-2-306.A.2—also does not include or reference the phrase. The discretionary inclusion of the phrase “to the extent practicable” in Condition VI.D.2 of the Title V Permit therefore undermines the enforceability of the Arizona SIP and the Title V Permit, contrary to applicable requirements and Title V of the Clean Air Act.

1) ADEQ’s Response to Comments did not Resolve This Issue

In response to Petitioner’s concerns over the inclusion of the phrase “to the extent practicable” in Condition VI.D.2, ADEQ provided a brief and generic response. The agency stated that the phrase is a “common” phrase “utilized in state and federal rules” and that it appears “in the Arizona Administrative Code as well as the Code of Federal Regulations.” Exhibit 4, Responsiveness Summary to Public Comments at 7. As an example, ADEQ stated that the phrase is included in the “New Source Performance Standards (NSPS) or National Emission Standards for Hazardous Air Pollutants (NESHAP).” *Id.*

While ADEQ is correct that the phrase “to the extent practicable” makes appearances in the Arizona Administrative Code and the Code of Federal Regulations, including in some portions of the NSPS, this response does not address the effect that the phrase has on the enforceability of Condition VI.D.2. Simply because the phrase “to the extent practicable” may make appearances in state and federal regulations does not make its inclusion in Condition VI.D.2 of the Title V Permit appropriate or justified.

ADEQ also asserts that, “The NSPS or NESHAP requires facilities to execute certain actions ‘to the extent practicable’. This means the facility will be expected to be consistent with the conditions of their plans and/or operating scenarios.” Exhibit 4, Responsiveness Summary to Public Comments at 7. While the NSPS and NESHAP are not applicable requirements related to Condition VI.D.2, the NSPS and NESHAP do not require compliance only “to the extent practicable.” While 40 C.F.R. § 60.11(d) of the NSPS contains 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.” Further, there is no general duty provision under the NESHAP that states that polluters must comply only “to the extent practicable” and it is unclear what ADEQ is referring to in referencing the NESHAP. It is finally not clear what ADEQ means when it says the phrase “to the extent practicable” will mean the Morenci Mine will be “expected to be consistent with the conditions of their plans and/or operating scenarios.”

ADEQ further stated that the phrase “to the extent practicable” will “ensure the facility will implement the latest processes, controls, and/or technologies available within the mining industry that make a commitment to reduce air pollution.” Exhibit 4, Responsiveness Summary to Public Comments at 7. It is unclear what this response actually means, but ADEQ appears to believe that inclusion of the phrase “to the extent practicable” in the Title V Permit will assist the mining industry in fulfilling its commitment to reduce air pollution. Contrary to this belief, from a practical standpoint, the inclusion of the phrase “to the extent practicable” in Condition VI.D.2 will allow Freeport to renege on its duty to control air pollution at all times. Inclusion of the phrase expressly provides discretion for Freeport to not utilize the bin vent filter, rendering Condition VI.D.2 unenforceable as a practical matter and contrary to applicable requirements.

2) The Administrator Must Object

Condition VI.D.2 is unenforceable as a practical matter and contrary to applicable requirements given the inclusion of the phrase “to the extent practicable.” ADEQ’s response to Petitioner’s comments did not resolve this issue. The Administrator must object over the failure of the Title V Permit to set forth enforceable emission limitations and standards and comply with applicable requirements, including the Arizona SIP.

c) Attachment “C”, Condition VI.D.3

This Condition requires Freeport to utilize water spray mist control systems to minimize particulate matter emissions from Lime Slaker 1 (Process 004-233) and Lime Slaker 2 (Process 004-234) and comply with applicable limits in the Title V Permit, yet the condition is not enforceable as a practical matter and does not assure compliance with applicable requirements.

Of primary concern is while the Condition requires Freeport to utilize water spray mist control systems to comply with applicable limits, the Condition states that Freeport shall do so only “to the extent practicable.” Specifically, the Condition states that Freeport:

At all times, including periods of startup, shutdown, and malfunction, the Permittee shall, ***to the extent practicable***, maintain and operate water spray mist control systems on the following equipment to minimize particulate matter emissions and comply with applicable emission limitations and standards of Conditions VI.B above.

Exhibit 1, Title V Permit at 97 (emphasis added). The phrase “to the extent practicable” is ambiguous and not defined. Indeed, neither the identified underlying authority for Condition VI.D.3, namely A.A.C. R18-2-306.A.2, nor the Arizona SIP set forth or define “to the extent

practicable.” This lack of definition is problematic as it suggests there are no clear means of assessing whether Freeport is or is not in compliance with Condition VI.D.3, making the Condition unenforceable.

A lack of specific definition is especially problematic because, as discussed above, the phrase “to the extent practicable” is understood to qualify an action as discretionary in nature. Thus, inclusion of the phrase “to the extent practicable” makes compliance completely discretionary. As Petitioner noted in its comments, the inclusion of the phrase means that Freeport can “operate the mine contrary to the applicable requirements set forth in the draft Title V permit.” Exhibit 3, Comments on Draft Title V Permit at 3. This means Condition VI.D.3 is completely unenforceable and cannot serve to ensure the water spray mist control systems will operate and limit particulate matter emissions to assure compliance with the applicable limits set forth under the Title V Permit.

Even if the phrase “to the extent practicable” could be defined so as to establish enforceable sideboards, its inclusion in the Title V Permit is fundamentally contrary to applicable requirements. The Arizona SIP does not contain the phrase “to the extent practicable” or otherwise provide that compliance is discretionary. Further, the authority cited for Condition VI.D.3—A.A.C. R18-2-306.A.2—also does not include or reference the phrase. The discretionary inclusion of the phrase “to the extent practicable” in Condition VI.D.3 of the Title V Permit therefore undermines the enforceability of the Arizona SIP and the Title V Permit, contrary to applicable requirements and Title V of the Clean Air Act.

1) ADEQ’s Response to Comments did not Resolve This Issue

In response to Petitioner’s concerns over the inclusion of the phrase “to the extent practicable” in Condition VI.D.3, ADEQ provided a brief and generic response. The agency stated that the phrase is a “common” phrase “utilized in state and federal rules” and that it appears “in the Arizona Administrative Code as well as the Code of Federal Regulations.” Exhibit 4, Responsiveness Summary to Public Comments at 7. As an example, ADEQ stated that the phrase is included in the “New Source Performance Standards (NSPS) or National Emission Standards for Hazardous Air Pollutants (NESHAP).” *Id.*

While ADEQ is correct that the phrase “to the extent practicable” makes appearances in the Arizona Administrative Code and the Code of Federal Regulations, including in some portions of the NSPS, this response does not address the effect that the phrase has on the enforceability of Condition VI.D.3. Simply because the phrase “to the extent practicable” may make appearances in state and federal regulations does not make its inclusion in Condition VI.D.3 of the Title V Permit appropriate or justified.

ADEQ also asserts that, “The NSPS or NESHAP requires facilities to execute certain actions ‘to the extent practicable’. This means the facility will be expected to be consistent with the conditions of their plans and/or operating scenarios.” Exhibit 4, Responsiveness Summary to Public Comments at 7. While the NSPS and NESHAP are not applicable requirements related to Condition VI.D.3, the NSPS and NESHAP do not require compliance only “to the extent practicable.” While 40 C.F.R. § 60.11(d) of the NSPS contains 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.” Further, there is no general duty provision under the NESHAP that states that polluters must comply only “to the extent practicable” and it is unclear what ADEQ is referring to in referencing the NESHAP. It is finally not clear what ADEQ means when it says the phrase “to the extent practicable” will mean the Morenci Mine will be “expected to be consistent with the conditions of their plans and/or operating scenarios.”

ADEQ further stated that the phrase “to the extent practicable” will “ensure the facility will implement the latest processes, controls, and/or technologies available within the mining industry that make a commitment to reduce air pollution.” Exhibit 4, Responsiveness Summary to Public Comments at 7. It is unclear what this response actually means, but ADEQ appears to believe that inclusion of the phrase “to the extent practicable” in the Title V Permit will assist the mining industry in fulfilling its commitment to reduce air pollution. Contrary to this belief, from a practical standpoint, the inclusion of the phrase “to the extent practicable” in Condition VI.D.3 will allow Freeport to renege on its duty to control air pollution at all times. Inclusion of the phrase expressly provides discretion for Freeport to not utilize water spray mist control systems, rendering Condition VI.D.3 unenforceable as a practical matter and contrary to applicable requirements.

2) The Administrator Must Object

Condition VI.D.3 is unenforceable as a practical matter and contrary to applicable requirements given the inclusion of the phrase “to the extent practicable.” ADEQ’s response to Petitioner’s comments did not resolve this issue. The Administrator must object over the failure of the Title V Permit to set forth enforceable emission limitations and standards and comply with applicable requirements, including the Arizona SIP.

d) Attachment “C”, Condition VI.D.4

This Condition requires Freeport to utilize a wet scrubber to minimize particulate matter emissions from the Metcalf Lime Slaker (Process 004-276) and comply with applicable limits in the Title V Permit, yet the condition is not enforceable as a practical matter and does not assure compliance with applicable requirements.

Of primary concern is while the Condition requires Freeport to utilize a wet scrubber to comply with applicable limits, the Condition states that Freeport shall do so only “to the extent practicable.” Specifically, the Condition states that Freeport:

At all times, including periods of startup, shutdown, and malfunction, the Permittee shall, *to the extent practicable*, maintain and operate the Metcalf Lime Slaker Wet Scrubber on the Metcalf Lime Slaker (Process #004-276) to minimize particulate matter emissions and comply with applicable emission limitations and standards of Conditions VI.B above.

Exhibit 1, Title V Permit at 97-98 (emphasis added). The phrase “to the extent practicable” is ambiguous and not defined. Indeed, neither the identified underlying authority for Condition

VI.D.4, namely A.A.C. R18-2-331.A.3.e, nor the Arizona SIP set forth or define “to the extent practicable.” This lack of definition is problematic as it suggests there are no clear means of assessing whether Freeport is or is not in compliance with Condition VI.D.4, making the Condition unenforceable.

A lack of specific definition is especially problematic because, as discussed above, the phrase “to the extent practicable” is understood to qualify an action as discretionary in nature. Thus, inclusion of the phrase “to the extent practicable” makes compliance completely discretionary. As Petitioner noted in its comments, the inclusion of the phrase means that Freeport can “operate the mine contrary to the applicable requirements set forth in the draft Title V permit.” Exhibit 3, Comments on Draft Title V Permit at 3. This means Condition VI.D.4 is completely unenforceable and cannot serve to ensure the wet scrubber will operate and limit particulate matter emissions to assure compliance with the applicable limits set forth under the Title V Permit.

Even if the phrase “to the extent practicable” could be defined so as to establish enforceable sideboards, its inclusion in the Title V Permit is fundamentally contrary to applicable requirements. The Arizona SIP does not contain the phrase “to the extent practicable” or otherwise provide that compliance is discretionary. Further, the authority cited for Condition VI.D.4—A.A.C. R18-2-331.A.3.e—also does not include or reference the phrase. The discretionary inclusion of the phrase “to the extent practicable” in Condition VI.D.4 of the Title V Permit therefore undermines the enforceability of the Arizona SIP and the Title V Permit, contrary to applicable requirements and Title V of the Clean Air Act.

1) ADEQ’s Response to Comments did not Resolve This Issue

In response to Petitioner’s concerns over the inclusion of the phrase “to the extent practicable” in Condition VI.D.4, ADEQ provided a brief and generic response. The agency stated that the phrase is a “common” phrase “utilized in state and federal rules” and that it appears “in the Arizona Administrative Code as well as the Code of Federal Regulations.” Exhibit 4, Responsiveness Summary to Public Comments at 7. As an example, ADEQ stated that the phrase is included in the “New Source Performance Standards (NSPS) or National Emission Standards for Hazardous Air Pollutants (NESHAP).” *Id.*

While ADEQ is correct that the phrase “to the extent practicable” makes appearances in the Arizona Administrative Code and the Code of Federal Regulations, including in some portions of the NSPS, this response does not address the effect that the phrase has on the enforceability of Condition VI.D.4. Simply because the phrase “to the extent practicable” may make appearances in state and federal regulations does not make its inclusion in Condition VI.D.4 of the Title V Permit appropriate or justified.

ADEQ also asserts that, “The NSPS or NESHAP requires facilities to execute certain actions ‘to the extent practicable’. This means the facility will be expected to be consistent with the conditions of their plans and/or operating scenarios.” Exhibit 4, Responsiveness Summary to Public Comments at 7. While the NSPS and NESHAP are not applicable requirements related to Condition VI.D.4, the NSPS and NESHAP do not require compliance only “to the extent

practicable.” While 40 C.F.R. § 60.11(d) of the NSPS contains 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.” Further, there is no general duty provision under the NESHAP that states that polluters must comply only “to the extent practicable” and it is unclear what ADEQ is referring to in referencing the NESHAP. It is finally not clear what ADEQ means when it says the phrase “to the extent practicable” will mean the Morenci Mine will be “expected to be consistent with the conditions of their plans and/or operating scenarios.”

ADEQ further stated that the phrase “to the extent practicable” will “ensure the facility will implement the latest processes, controls, and/or technologies available within the mining industry that make a commitment to reduce air pollution.” Exhibit 4, Responsiveness Summary to Public Comments at 7. It is unclear what this response actually means, but ADEQ appears to believe that inclusion of the phrase “to the extent practicable” in the Title V Permit will assist the mining industry in fulfilling its commitment to reduce air pollution. Contrary to this belief, from a practical standpoint, the inclusion of the phrase “to the extent practicable” in Condition VI.D.4 will allow Freeport to renege on its duty to control air pollution at all times. Inclusion of the phrase expressly provides discretion for Freeport to not utilize the Metcalf Lime Slaker Wet Scrubber, rendering Condition VI.D.4 unenforceable as a practical matter and contrary to applicable requirements.

2) The Administrator Must Object

Condition VI.D.4 is unenforceable as a practical matter and contrary to applicable requirements given the inclusion of the phrase “to the extent practicable.” ADEQ’s response to Petitioner’s comments did not resolve this issue. The Administrator must object over the failure of the Title V Permit to set forth enforceable emission limitations and standards and comply with applicable requirements, including the Arizona SIP.

e) Attachment “C”, Condition VI.D.5

This Condition requires Freeport to utilize a dust collector to minimize particulate matter emissions and comply with applicable limits in the Title V Permit, yet the condition is not enforceable as a practical matter and does not assure compliance with applicable requirements.

Of primary concern is while the Condition requires Freeport to utilize a dust collector to comply with applicable limits, the Condition states that Freeport shall do so only “to the extent practicable.” Specifically, the Condition states that Freeport:

At all times, including periods of startup, shutdown, and malfunction, the Permittee shall, *to the extent practicable*, maintain and operate the Lime Transloading Dust Collector (Process #004-445) to minimize particulate matter emissions and comply with applicable emission limitations and standards of Conditions VI.B above.

Exhibit 1, Title V Permit at 97-98 (emphasis added). The phrase “to the extent practicable” is ambiguous and not defined. Indeed, neither the identified underlying authority for Condition

VI.D.5, namely A.A.C. R18-2-331.A.3.e, nor the Arizona SIP set forth or define “to the extent practicable.” This lack of definition is problematic as it suggests there are no clear means of assessing whether Freeport is or is not in compliance with Condition VI.D.5, making the Condition unenforceable.

A lack of specific definition is especially problematic because, as discussed above, the phrase “to the extent practicable” is understood to qualify an action as discretionary in nature. Thus, inclusion of the phrase “to the extent practicable” makes compliance completely discretionary. As Petitioner noted in its comments, the inclusion of the phrase means that Freeport can “operate the mine contrary to the applicable requirements set forth in the draft Title V permit.” Exhibit 3, Comments on Draft Title V Permit at 3. This means Condition VI.D.5 is completely unenforceable and cannot serve to ensure the Lime Transloading Dust Collector will operate and limit particulate matter emissions to assure compliance with the applicable limits set forth under the Title V Permit.

Even if the phrase “to the extent practicable” could be defined so as to establish enforceable sideboards, its inclusion in the Title V Permit is fundamentally contrary to applicable requirements. The Arizona SIP does not contain the phrase “to the extent practicable” or otherwise provide that compliance is discretionary. Further, the authority cited for Condition VI.D.5—A.A.C. R18-2-331.A.3.e—also does not include or reference the phrase. The discretionary inclusion of the phrase “to the extent practicable” in Condition VI.D.5 of the Title V Permit therefore undermines the enforceability of the Arizona SIP and the Title V Permit, contrary to applicable requirements and Title V of the Clean Air Act.

1) ADEQ’s Response to Comments did not Resolve This Issue

In response to Petitioner’s concerns over the inclusion of the phrase “to the extent practicable” in Condition VI.D.5, ADEQ provided a brief and generic response. The agency stated that the phrase is a “common” phrase “utilized in state and federal rules” and that it appears “in the Arizona Administrative Code as well as the Code of Federal Regulations.” Exhibit 4, Responsiveness Summary to Public Comments at 7. As an example, ADEQ stated that the phrase is included in the “New Source Performance Standards (NSPS) or National Emission Standards for Hazardous Air Pollutants (NESHAP).” *Id.*

While ADEQ is correct that the phrase “to the extent practicable” makes appearances in the Arizona Administrative Code and the Code of Federal Regulations, including in some portions of the NSPS, this response does not address the effect that the phrase has on the enforceability of Condition VI.D.5. Simply because the phrase “to the extent practicable” may make appearances in state and federal regulations does not make its inclusion in Condition VI.D.4 of the Title V Permit appropriate or justified.

ADEQ also asserts that, “The NSPS or NESHAP requires facilities to execute certain actions ‘to the extent practicable’. This means the facility will be expected to be consistent with the conditions of their plans and/or operating scenarios.” Exhibit 4, Responsiveness Summary to Public Comments at 7. While the NSPS and NESHAP are not applicable requirements related to Condition VI.D.5, the NSPS and NESHAP do not require compliance only “to the extent

practicable.” While 40 C.F.R. § 60.11(d) of the NSPS contains 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.” Further, there is no general duty provision under the NESHAP that states that polluters must comply only “to the extent practicable” and it is unclear what ADEQ is referring to in referencing the NESHAP. It is finally not clear what ADEQ means when it says the phrase “to the extent practicable” will mean the Morenci Mine will be “expected to be consistent with the conditions of their plans and/or operating scenarios.”

ADEQ further stated that the phrase “to the extent practicable” will “ensure the facility will implement the latest processes, controls, and/or technologies available within the mining industry that make a commitment to reduce air pollution.” Exhibit 4, Responsiveness Summary to Public Comments at 7. It is unclear what this response actually means, but ADEQ appears to believe that inclusion of the phrase “to the extent practicable” in the Title V Permit will assist the mining industry in fulfilling its commitment to reduce air pollution. Contrary to this belief, from a practical standpoint, the inclusion of the phrase “to the extent practicable” in Condition VI.D.5 will allow Freeport to renege on its duty to control air pollution at all times. Inclusion of the phrase expressly provides discretion for Freeport to not utilize the Lime Transloading dust Collector, rendering Condition VI.D.5 unenforceable as a practical matter and contrary to applicable requirements.

2) The Administrator Must Object

Condition VI.D.5 is unenforceable as a practical matter and contrary to applicable requirements given the inclusion of the phrase “to the extent practicable.” ADEQ’s response to Petitioner’s comments did not resolve this issue. The Administrator must object over the failure of the Title V Permit to set forth enforceable emission limitations and standards and comply with applicable requirements, including the Arizona SIP.

7. Attachment “C,” Condition VII

This Condition establishes operational and other limitations for activities associated with the Solution Extraction/Electrowinning (SX/EW) Operations. Unfortunately, the “Air Pollution Control Requirements” set forth under this Condition are not enforceable as a practical matter and fail to assure compliance with applicable requirements. Petitioner raised this issue with reasonable specificity on pages 8-9 of its technical comments.

a) Attachment “C”, Condition VII.D.1

This Condition requires Freeport to utilize dust filters to utilize covers on the mixer-settler units associated with four operations in order comply with applicable operational limits in the Title V Permit,

yet the condition is not enforceable as a practical matter and does not assure compliance with applicable requirements.²²

Of primary concern is while the Condition requires Freeport to utilize covers on the mixer-settler units to comply with applicable limits, the Condition states that Freeport shall do so only “to the extent practicable.” Specifically, the Condition states that Freeport:

At all times, including periods of startup, shutdown, and malfunction, the Permittee shall, *to the extent practicable*, utilize covers on the mixer-settler units associated with the following operations to comply with the applicable operational limitations of Condition VII.C above.

Exhibit 1, Title V Permit at 100 (emphasis added). The phrase “to the extent practicable” is ambiguous and not defined. Indeed, neither the identified underlying authority for Condition VII.D.1, namely A.A.C. R18-2-306.A.2, nor the Arizona SIP set forth or define “to the extent practicable.” This lack of definition is problematic as it suggests there are no clear means of assessing whether Freeport is or is not in compliance with Condition VII.D.1, making the Condition unenforceable.

A lack of specific definition is especially problematic because, as discussed above, the phrase “to the extent practicable” is understood to qualify an action as discretionary in nature. Thus, inclusion of the phrase “to the extent practicable” makes compliance completely discretionary. As Petitioner noted in its comments, the inclusion of the phrase means that Freeport can “operate the mine contrary to the applicable requirements set forth in the draft Title V permit.” Exhibit 3, Comments on Draft Title V Permit at 3. This means Condition VII.D.1 is completely unenforceable and cannot serve to ensure the covers on the mixer-settler units will operate in compliance with the applicable limits set forth under the Title V Permit.

Even if the phrase “to the extent practicable” could be defined so as to establish enforceable sideboards, its inclusion in the Title V Permit is fundamentally contrary to applicable requirements. The Arizona SIP does not contain the phrase “to the extent practicable” or otherwise provide that compliance is discretionary. Further, the authority cited for Condition VII.D.1—A.A.C. R18-2-306.A.2—also does not include or reference the phrase. The discretionary inclusion of the phrase “to the extent practicable” in Condition VII.D.1 of the Title V Permit therefore undermines the enforceability of the Arizona SIP and the Title V Permit, contrary to applicable requirements and Title V of the Clean Air Act.

1) ADEQ’s Response to Comments did not Resolve This Issue

In response to Petitioner’s concerns over the inclusion of the phrase “to the extent practicable” in Condition VII.D.1, ADEQ provided a brief and generic response. The agency stated that the phrase is a “common” phrase “utilized in state and federal rules” and that it

²² The four operations are set forth at Attachment “C”, Condition VII.D.1.a-d and include: Central SX (Process 009-117); Metcalf SX (Process 009-118); Modoc SX (Process 009-119) and Stargo SX (Process 009-349). See Exhibit 1, Title V Permit at 100.

appears “in the Arizona Administrative Code as well as the Code of Federal Regulations.” Exhibit 4, Responsiveness Summary to Public Comments at 7. As an example, ADEQ stated that the phrase is included in the “New Source Performance Standards (NSPS) or National Emission Standards for Hazardous Air Pollutants (NESHAP).” *Id.*

While ADEQ is correct that the phrase “to the extent practicable” makes appearances in the Arizona Administrative Code and the Code of Federal Regulations, including in some portions of the NSPS, this response does not address the effect that the phrase has on the enforceability of Condition VII.D.1. Simply because the phrase “to the extent practicable” may make appearances in state and federal regulations does not make its inclusion in Condition VII.D.1 of the Title V Permit appropriate or justified.

ADEQ also asserts that, “The NSPS or NESHAP requires facilities to execute certain actions ‘to the extent practicable’. This means the facility will be expected to be consistent with the conditions of their plans and/or operating scenarios.” Exhibit 4, Responsiveness Summary to Public Comments at 7. While the NSPS and NESHAP are not applicable requirements related to Condition VII.D.1, the NSPS and NESHAP do not require compliance only “to the extent practicable.” While 40 C.F.R. § 60.11(d) of the NSPS contains 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.” Further, there is no general duty provision under the NESHAP that states that polluters must comply only “to the extent practicable” and it is unclear what ADEQ is referring to in referencing the NESHAP. It is finally not clear what ADEQ means when it says the phrase “to the extent practicable” will mean the Morenci Mine will be “expected to be consistent with the conditions of their plans and/or operating scenarios.”

ADEQ further stated that the phrase “to the extent practicable” will “ensure the facility will implement the latest processes, controls, and/or technologies available within the mining industry that make a commitment to reduce air pollution.” Exhibit 4, Responsiveness Summary to Public Comments at 7. It is unclear what this response actually means, but ADEQ appears to believe that inclusion of the phrase “to the extent practicable” in the Title V Permit will assist the mining industry in fulfilling its commitment to reduce air pollution. Contrary to this belief, from a practical standpoint, the inclusion of the phrase “to the extent practicable” in Condition VII.D.1 will allow Freeport to renege on its duty to control air pollution at all times. Inclusion of the phrase expressly provides discretion for Freeport to not utilize covers on the mixer-settler units, rendering Condition VII.D.1 unenforceable as a practical matter and contrary to applicable requirements.

2) The Administrator Must Object

Condition VII.D.1 is unenforceable as a practical matter and contrary to applicable requirements given the inclusion of the phrase “to the extent practicable.” ADEQ’s response to Petitioner’s comments did not resolve this issue. The Administrator must object over the failure of the Title V Permit to set forth enforceable emission limitations and standards and comply with applicable requirements, including the Arizona SIP.

b) Attachment “C”, Condition VII.D.2

This Condition requires Freeport to utilize dust filters to utilize covers on the mixer-settler units associated with the Modoc Test Facility SX (Process 009-422) in order comply with applicable operational limits in the Title V Permit, yet the condition is not enforceable as a practical matter and does not assure compliance with applicable requirements.

Of primary concern is while the Condition requires Freeport to utilize covers on the mixer-settler units to comply with applicable limits, the Condition states that Freeport shall do so only “to the extent practicable.” Specifically, the Condition states that Freeport:

At all times, including periods of startup, shutdown, and malfunction, the Permittee shall, *to the extent practicable*, utilize covers on the mixer-settler units associated with the Modoc Test Facility SX (Process #009-422) to comply with the applicable operational limitations of Condition VII.C above.

Exhibit 1, Title V Permit at 100 (emphasis added). The phrase “to the extent practicable” is ambiguous and not defined. Indeed, neither the identified underlying authority for Condition VII.D.2, namely A.A.C. R18-2-306.A.2, nor the Arizona SIP set forth or define “to the extent practicable.” This lack of definition is problematic as it suggests there are no clear means of assessing whether Freeport is or is not in compliance with Condition VII.D.2, making the Condition unenforceable.

A lack of specific definition is especially problematic because, as discussed above, the phrase “to the extent practicable” is understood to qualify an action as discretionary in nature. Thus, inclusion of the phrase “to the extent practicable” makes compliance completely discretionary. As Petitioner noted in its comments, the inclusion of the phrase means that Freeport can “operate the mine contrary to the applicable requirements set forth in the draft Title V permit.” Exhibit 3, Comments on Draft Title V Permit at 3. This means Condition VII.D.2 is completely unenforceable and cannot serve to ensure the covers on the mixer-settler units will operate in compliance with the applicable limits set forth under the Title V Permit.

Even if the phrase “to the extent practicable” could be defined so as to establish enforceable sideboards, its inclusion in the Title V Permit is fundamentally contrary to applicable requirements. The Arizona SIP does not contain the phrase “to the extent practicable” or otherwise provide that compliance is discretionary. Further, the authority cited for Condition VII.D.2—A.A.C. R18-2-306.A.2—also does not include or reference the phrase. The discretionary inclusion of the phrase “to the extent practicable” in Condition VII.D.2 of the Title V Permit therefore undermines the enforceability of the Arizona SIP and the Title V Permit, contrary to applicable requirements and Title V of the Clean Air Act.

1) ADEQ’s Response to Comments did not Resolve This Issue

In response to Petitioner’s concerns over the inclusion of the phrase “to the extent practicable” in Condition VII.D.2, ADEQ provided a brief and generic response. The agency stated that the phrase is a “common” phrase “utilized in state and federal rules” and that it

appears “in the Arizona Administrative Code as well as the Code of Federal Regulations.” Exhibit 4, Responsiveness Summary to Public Comments at 7. As an example, ADEQ stated that the phrase is included in the “New Source Performance Standards (NSPS) or National Emission Standards for Hazardous Air Pollutants (NESHAP).” *Id.*

While ADEQ is correct that the phrase “to the extent practicable” makes appearances in the Arizona Administrative Code and the Code of Federal Regulations, including in some portions of the NSPS, this response does not address the effect that the phrase has on the enforceability of Condition VII.D.2. Simply because the phrase “to the extent practicable” may make appearances in state and federal regulations does not make its inclusion in Condition VII.D.2 of the Title V Permit appropriate or justified.

ADEQ also asserts that, “The NSPS or NESHAP requires facilities to execute certain actions ‘to the extent practicable’. This means the facility will be expected to be consistent with the conditions of their plans and/or operating scenarios.” Exhibit 4, Responsiveness Summary to Public Comments at 7. While the NSPS and NESHAP are not applicable requirements related to Condition VII.D.2, the NSPS and NESHAP do not require compliance only “to the extent practicable.” While 40 C.F.R. § 60.11(d) of the NSPS contains 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.” Further, there is no general duty provision under the NESHAP that states that polluters must comply only “to the extent practicable” and it is unclear what ADEQ is referring to in referencing the NESHAP. It is finally not clear what ADEQ means when it says the phrase “to the extent practicable” will mean the Morenci Mine will be “expected to be consistent with the conditions of their plans and/or operating scenarios.”

ADEQ further stated that the phrase “to the extent practicable” will “ensure the facility will implement the latest processes, controls, and/or technologies available within the mining industry that make a commitment to reduce air pollution.” Exhibit 4, Responsiveness Summary to Public Comments at 7. It is unclear what this response actually means, but ADEQ appears to believe that inclusion of the phrase “to the extent practicable” in the Title V Permit will assist the mining industry in fulfilling its commitment to reduce air pollution. Contrary to this belief, from a practical standpoint, the inclusion of the phrase “to the extent practicable” in Condition VII.D.2 will allow Freeport to renege on its duty to control air pollution at all times. Inclusion of the phrase expressly provides discretion for Freeport to not utilize covers on the mixer-settler units, rendering Condition VII.D.2 unenforceable as a practical matter and contrary to applicable requirements.

2) The Administrator Must Object

Condition VII.D.2 is unenforceable as a practical matter and contrary to applicable requirements given the inclusion of the phrase “to the extent practicable.” ADEQ’s response to Petitioner’s comments did not resolve this issue. The Administrator must object over the failure of the Title V Permit to set forth enforceable emission limitations and standards and comply with applicable requirements, including the Arizona SIP.

c) Attachment “C”, Condition VII.D.3

This Condition requires Freeport to utilize dust filters to utilize one or more methods on the cells associated with the Central EW (Process 009-121), Southside EW (Process 009-122), Stargo EW (Process 009-221), and Modoc Test Facility EW (Process 009-423) in order comply with applicable operational limits in the Title V Permit, yet the condition is not enforceable as a practical matter and does not assure compliance with applicable requirements.²³

Of primary concern is while the Condition requires Freeport to utilize one or more methods to comply with applicable limits, the Condition states that Freeport shall do so only “to the extent practicable.” Specifically, the Condition states that Freeport:

At all times, including periods of startup, shutdown, and malfunction, the Permittee shall, *to the extent practicable*, utilize one or more of the following methods on the cells associated with Central EW (Process#009-121); Southside EW (Process #009-122), Stargo EW (Process #009-221), and Modoc Test Facility EW (Process 009-423) to comply with the applicable operational limitations of Condition VII.C above.

Exhibit 1, Title V Permit at 100 (emphasis added). The phrase “to the extent practicable” is ambiguous and not defined. Indeed, neither the identified underlying authority for Condition VII.D.3, namely A.A.C. R18-2-306.A.2, nor the Arizona SIP set forth or define “to the extent practicable.” This lack of definition is problematic as it suggests there are no clear means of assessing whether Freeport is or is not in compliance with Condition VII.D.3, making the Condition unenforceable.

A lack of specific definition is especially problematic because, as discussed above, the phrase “to the extent practicable” is understood to qualify an action as discretionary in nature. Thus, inclusion of the phrase “to the extent practicable” makes compliance completely discretionary. As Petitioner noted in its comments, the inclusion of the phrase means that Freeport can “operate the mine contrary to the applicable requirements set forth in the draft Title V permit.” Exhibit 3, Comments on Draft Title V Permit at 3. This means Condition VII.D.3 is completely unenforceable and cannot serve to ensure one or more methods will be utilized in order to assure compliance with the applicable limits set forth under the Title V Permit.

Even if the phrase “to the extent practicable” could be defined so as to establish enforceable sideboards, its inclusion in the Title V Permit is fundamentally contrary to applicable requirements. The Arizona SIP does not contain the phrase “to the extent practicable” or otherwise provide that compliance is discretionary. Further, the authority cited for Condition VII.D.3—A.A.C. R18-2-306.A.2—also does not include or reference the phrase. The discretionary inclusion of the phrase “to the extent practicable” in Condition VII.D.3 of the Title V Permit therefore undermines the enforceability of the Arizona SIP and the Title V Permit, contrary to applicable requirements and Title V of the Clean Air Act.

²³ The methods are identified at Attachment “C”, Condition VII.D.3.a-f and include: Foam; Blankets; Surfactants; Brushes; Thermal retention balls; or Other effective means as approved by the Director. See Exhibit 1, Title V Permit at 100.

1) ADEQ's Response to Comments did not Resolve This Issue

In response to Petitioner's concerns over the inclusion of the phrase "to the extent practicable" in Condition VII.D.3, ADEQ provided a brief and generic response. The agency stated that the phrase is a "common" phrase "utilized in state and federal rules" and that it appears "in the Arizona Administrative Code as well as the Code of Federal Regulations." Exhibit 4, Responsiveness Summary to Public Comments at 7. As an example, ADEQ stated that the phrase is included in the "New Source Performance Standards (NSPS) or National Emission Standards for Hazardous Air Pollutants (NESHAP)." *Id.*

While ADEQ is correct that the phrase "to the extent practicable" makes appearances in the Arizona Administrative Code and the Code of Federal Regulations, including in some portions of the NSPS, this response does not address the effect that the phrase has on the enforceability of Condition VII.D.3. Simply because the phrase "to the extent practicable" may make appearances in state and federal regulations does not make its inclusion in Condition VII.D.3 of the Title V Permit appropriate or justified.

ADEQ also asserts that, "The NSPS or NESHAP requires facilities to execute certain actions 'to the extent practicable'. This means the facility will be expected to be consistent with the conditions of their plans and/or operating scenarios." Exhibit 4, Responsiveness Summary to Public Comments at 7. While the NSPS and NESHAP are not applicable requirements related to Condition VII.D.3, the NSPS and NESHAP do not require compliance only "to the extent practicable." While 40 C.F.R. § 60.11(d) of the NSPS contains 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." Further, there is no general duty provision under the NESHAP that states that polluters must comply only "to the extent practicable" and it is unclear what ADEQ is referring to in referencing the NESHAP. It is finally not clear what ADEQ means when it says the phrase "to the extent practicable" will mean the Morenci Mine will be "expected to be consistent with the conditions of their plans and/or operating scenarios."

ADEQ further stated that the phrase "to the extent practicable" will "ensure the facility will implement the latest processes, controls, and/or technologies available within the mining industry that make a commitment to reduce air pollution." Exhibit 4, Responsiveness Summary to Public Comments at 7. It is unclear what this response actually means, but ADEQ appears to believe that inclusion of the phrase "to the extent practicable" in the Title V Permit will assist the mining industry in fulfilling its commitment to reduce air pollution. Contrary to this belief, from a practical standpoint, the inclusion of the phrase "to the extent practicable" in Condition VII.D.3 will allow Freeport to renege on its duty to control air pollution at all times. Inclusion of the phrase expressly provides discretion for Freeport to not utilize one or more methods, rendering Condition VII.D.3 unenforceable as a practical matter and contrary to applicable requirements.

2) The Administrator Must Object

Condition VII.D.3 is unenforceable as a practical matter and contrary to applicable requirements given the inclusion of the phrase “to the extent practicable.” ADEQ’s response to Petitioner’s comments did not resolve this issue. The Administrator must object over the failure of the Title V Permit to set forth enforceable emission limitations and standards and comply with applicable requirements, including the Arizona SIP.

8. Attachment “C,” Condition VIII

This Condition establishes operational and other limitations for activities associated with the Concrete Batch Plant. Unfortunately, the “Air Pollution Control Requirements” set forth under this Condition are not enforceable as a practical matter and fail to assure compliance with applicable requirements. Petitioner raised this issue with reasonable specificity on page 9 of its technical comments.

a) Attachment “C”, Condition VIII.D.2

This Condition requires Freeport to utilize bin vent filters to minimize particulate matter emissions from Fly Ash Silo (Process 010-146) and Cement Silo (Process 010-147) and comply with applicable limits in the Title V Permit, yet the condition is not enforceable as a practical matter and does not assure compliance with applicable requirements.

Of primary concern is while the Condition requires Freeport to utilize bin vent filters to comply with applicable limits, the Condition states that Freeport shall do so only “to the extent practicable.” Specifically, the Condition states that Freeport:

At all times, including periods of startup, shutdown, and malfunction, the Permittee shall, *to the extent practicable*, maintain and operate bin vent filters on the following equipment to minimize particulate matter emissions and comply with applicable emission limitations and standards of Condition VIII.B above.

Exhibit 1, Title V Permit at 101 (emphasis added). The phrase “to the extent practicable” is ambiguous and not defined. Indeed, neither the identified underlying authority for Condition VIII.D.2, namely A.A.C. R18-2-306.A.2, nor the Arizona SIP set forth or define “to the extent practicable.” This lack of definition is problematic as it suggests there are no clear means of assessing whether Freeport is or is not in compliance with Condition VIII.D.2, making the Condition unenforceable.

A lack of specific definition is especially problematic because, as discussed above, the phrase “to the extent practicable” is understood to qualify an action as discretionary in nature. Thus, inclusion of the phrase “to the extent practicable” makes compliance completely discretionary. As Petitioner noted in its comments, the inclusion of the phrase means that Freeport can “operate the mine contrary to the applicable requirements set forth in the draft Title V permit.” Exhibit 3, Comments on Draft Title V Permit at 3. This means Condition VIII.D.2 is completely unenforceable and cannot serve to ensure the bin vent filters will operate and limit

particulate matter emissions to assure compliance with the applicable limits set forth under the Title V Permit.

Even if the phrase “to the extent practicable” could be defined so as to establish enforceable sideboards, its inclusion in the Title V Permit is fundamentally contrary to applicable requirements. The Arizona SIP does not contain the phrase “to the extent practicable” or otherwise provide that compliance is discretionary. Further, the authority cited for Condition VIII.D.2—A.A.C. R18-2-306.A.2—also does not include or reference the phrase. The discretionary inclusion of the phrase “to the extent practicable” in Condition VIII.D.2 of the Title V Permit therefore undermines the enforceability of the Arizona SIP and the Title V Permit, contrary to applicable requirements and Title V of the Clean Air Act.

1) ADEQ’s Response to Comments did not Resolve This Issue

In response to Petitioner’s concerns over the inclusion of the phrase “to the extent practicable” in Condition VIII.D.2, ADEQ provided a brief and generic response. The agency stated that the phrase is a “common” phrase “utilized in state and federal rules” and that it appears “in the Arizona Administrative Code as well as the Code of Federal Regulations.” Exhibit 4, Responsiveness Summary to Public Comments at 7. As an example, ADEQ stated that the phrase is included in the “New Source Performance Standards (NSPS) or National Emission Standards for Hazardous Air Pollutants (NESHAP).” *Id.*

While ADEQ is correct that the phrase “to the extent practicable” makes appearances in the Arizona Administrative Code and the Code of Federal Regulations, including in some portions of the NSPS, this response does not address the effect that the phrase has on the enforceability of Condition VIII.D.2. Simply because the phrase “to the extent practicable” may make appearances in state and federal regulations does not make its inclusion in Condition VIII.D.2 of the Title V Permit appropriate or justified.

ADEQ also asserts that, “The NSPS or NESHAP requires facilities to execute certain actions ‘to the extent practicable’. This means the facility will be expected to be consistent with the conditions of their plans and/or operating scenarios.” Exhibit 4, Responsiveness Summary to Public Comments at 7. While the NSPS and NESHAP are not applicable requirements related to Condition VIII.D.2, the NSPS and NESHAP do not require compliance only “to the extent practicable.” While 40 C.F.R. § 60.11(d) of the NSPS contains 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.” Further, there is no general duty provision under the NESHAP that states that polluters must comply only “to the extent practicable” and it is unclear what ADEQ is referring to in referencing the NESHAP. It is finally not clear what ADEQ means when it says the phrase “to the extent practicable” will mean the Morenci Mine will be “expected to be consistent with the conditions of their plans and/or operating scenarios.”

ADEQ further stated that the phrase “to the extent practicable” will “ensure the facility will implement the latest processes, controls, and/or technologies available within the mining

industry that make a commitment to reduce air pollution.” Exhibit 4, Responsiveness Summary to Public Comments at 7. It is unclear what this response actually means, but ADEQ appears to believe that inclusion of the phrase “to the extent practicable” in the Title V Permit will assist the mining industry in fulfilling its commitment to reduce air pollution. Contrary to this belief, from a practical standpoint, the inclusion of the phrase “to the extent practicable” in Condition VIII.D.2 will allow Freeport to renege on its duty to control air pollution at all times. Inclusion of the phrase expressly provides discretion for Freeport to not utilize the bin vent filters, rendering Condition VIII.D.2 unenforceable as a practical matter and contrary to applicable requirements.

2) The Administrator Must Object

Condition VIII.D.2 is unenforceable as a practical matter and contrary to applicable requirements given the inclusion of the phrase “to the extent practicable.” ADEQ’s response to Petitioner’s comments did not resolve this issue. The Administrator must object over the failure of the Title V Permit to set forth enforceable emission limitations and standards and comply with applicable requirements, including the Arizona SIP.

9. Attachment “C,” Condition X

This Condition establishes operational and other limitations for activities associated with the Concentrate Leach Plant. Unfortunately, the “Air Pollution Control Requirements” set forth under this Condition are not enforceable as a practical matter and fail to assure compliance with applicable requirements. Petitioner raised this issue with reasonable specificity on pages 9-10 of its technical comments.

a) Attachment “C”, Condition X.D.1

This Condition requires Freeport to utilize mist eliminators to minimize particulate matter emissions and comply with applicable limits for the PLV Cooling Tower (Process 014-240), Oxygen Plant Cooling Tower 1 (Process 014-241), and Oxygen Plant Cooling Tower 2 (Process 014-460), yet the condition is not enforceable as a practical matter and does not assure compliance with applicable requirements.

Of primary concern is while the Condition requires Freeport to utilize mist eliminators to comply with applicable limits, the Condition states that Freeport shall do so only “to the extent practicable.” Specifically, the Condition states that Freeport:

At all times, including periods of startup, shutdown, and malfunction, the Permittee shall, *to the extent practicable*, maintain and operate mist eliminators on the following equipment to minimize particulate matter emissions and comply with applicable emission limitations and standards of Condition X.B.1 and X.B.2 above.

Exhibit 1, Title V Permit at 108 (emphasis added). The phrase “to the extent practicable” is ambiguous and not defined. Indeed, neither the identified underlying authority for Condition X.D.1, namely A.A.C. R18-2-306.A.2, nor the Arizona SIP set forth or define “to the extent practicable.” This lack of definition is problematic as it suggests there are no clear means of

assessing whether Freeport is or is not in compliance with Condition X.D.1, making the Condition unenforceable.

A lack of specific definition is especially problematic because, as discussed above, the phrase “to the extent practicable” is understood to qualify an action as discretionary in nature. Thus, inclusion of the phrase “to the extent practicable” makes compliance completely discretionary. As Petitioner noted in its comments, the inclusion of the phrase means that Freeport can “operate the mine contrary to the applicable requirements set forth in the draft Title V permit.” Exhibit 3, Comments on Draft Title V Permit at 3. This means Condition X.D.1 is completely unenforceable and cannot serve to ensure the mist eliminators will operate and limit particulate matter emissions to assure compliance with the applicable limits set forth under the Title V Permit.

Even if the phrase “to the extent practicable” could be defined so as to establish enforceable sideboards, its inclusion in the Title V Permit is fundamentally contrary to applicable requirements. The Arizona SIP does not contain the phrase “to the extent practicable” or otherwise provide that compliance is discretionary. Further, the authority cited for Condition X.D.1—A.A.C. R18-2-306.A.2—also does not include or reference the phrase. The discretionary inclusion of the phrase “to the extent practicable” in Condition X.D.1 of the Title V Permit therefore undermines the enforceability of the Arizona SIP and the Title V Permit, contrary to applicable requirements and Title V of the Clean Air Act.

1) ADEQ’s Response to Comments did not Resolve This Issue

In response to Petitioner’s concerns over the inclusion of the phrase “to the extent practicable” in Condition X.D.1, ADEQ provided a brief and generic response. The agency stated that the phrase is a “common” phrase “utilized in state and federal rules” and that it appears “in the Arizona Administrative Code as well as the Code of Federal Regulations.” Exhibit 4, Responsiveness Summary to Public Comments at 7. As an example, ADEQ stated that the phrase is included in the “New Source Performance Standards (NSPS) or National Emission Standards for Hazardous Air Pollutants (NESHAP).” *Id.*

While ADEQ is correct that the phrase “to the extent practicable” makes appearances in the Arizona Administrative Code and the Code of Federal Regulations, including in some portions of the NSPS, this response does not address the effect that the phrase has on the enforceability of Condition X.D.1. Simply because the phrase “to the extent practicable” may make appearances in state and federal regulations does not make its inclusion in Condition X.D.1 of the Title V Permit appropriate or justified.

ADEQ also asserts that, “The NSPS or NESHAP requires facilities to execute certain actions ‘to the extent practicable’. This means the facility will be expected to be consistent with the conditions of their plans and/or operating scenarios.” Exhibit 4, Responsiveness Summary to Public Comments at 7. While the NSPS and NESHAP are not applicable requirements related to Condition X.D.1, the NSPS and NESHAP do not require compliance only “to the extent practicable.” While 40 C.F.R. § 60.11(d) of the NSPS contains 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.” Further, there is no general duty provision under the NESHAP that states that polluters must comply only “to the extent practicable” and it is unclear what ADEQ is referring to in referencing the NESHAP. It is finally not clear what ADEQ means when it says the phrase “to the extent practicable” will mean the Morenci Mine will be “expected to be consistent with the conditions of their plans and/or operating scenarios.”

ADEQ further stated that the phrase “to the extent practicable” will “ensure the facility will implement the latest processes, controls, and/or technologies available within the mining industry that make a commitment to reduce air pollution.” Exhibit 4, Responsiveness Summary to Public Comments at 7. It is unclear what this response actually means, but ADEQ appears to believe that inclusion of the phrase “to the extent practicable” in the Title V Permit will assist the mining industry in fulfilling its commitment to reduce air pollution. Contrary to this belief, from a practical standpoint, the inclusion of the phrase “to the extent practicable” in Condition X.D.1 will allow Freeport to renege on its duty to control air pollution at all times. Inclusion of the phrase expressly provides discretion for Freeport to not utilize mist eliminators, rendering Condition X.D.1 unenforceable as a practical matter and contrary to applicable requirements.

2) The Administrator Must Object

Condition X.D.1 is unenforceable as a practical matter and contrary to applicable requirements given the inclusion of the phrase “to the extent practicable.” ADEQ’s response to Petitioner’s comments did not resolve this issue. The Administrator must object over the failure of the Title V Permit to set forth enforceable emission limitations and standards and comply with applicable requirements, including the Arizona SIP.

b) Attachment “C”, Condition X.D.2

This Condition requires Freeport to operate bin vent filters to minimize particulate matter emissions and comply with applicable limits for the Flocculant Bin (Process 014-348), Lime Silo (Process 014-254), and Supersack Unloader (Process 014-253), yet the condition is not enforceable as a practical matter and does not assure compliance with applicable requirements.

Of primary concern is while the Condition requires Freeport to operate bin vent filters to comply with applicable limits, the Condition states that Freeport shall do so only “to the extent practicable.” Specifically, the Condition states that Freeport:

At all times, including periods of startup, shutdown, and malfunction, the Permittee shall, *to the extent practicable*, operate bin vent filters on the following equipment to minimize particulate matter emissions and comply with applicable emission limitations and standards of Condition X.B.1 and X.B.2 above.

Exhibit 1, Title V Permit at 108 (emphasis added). The phrase “to the extent practicable” is ambiguous and not defined. Indeed, neither the identified underlying authority for Condition X.D.2, namely A.A.C. R18-2-306.A.2, nor the Arizona SIP set forth or define “to the extent practicable.” This lack of definition is problematic as it suggests there are no clear means of

assessing whether Freeport is or is not in compliance with Condition X.D.2, making the Condition unenforceable.

A lack of specific definition is especially problematic because, as discussed above, the phrase “to the extent practicable” is understood to qualify an action as discretionary in nature. Thus, inclusion of the phrase “to the extent practicable” makes compliance completely discretionary. As Petitioner noted in its comments, the inclusion of the phrase means that Freeport can “operate the mine contrary to the applicable requirements set forth in the draft Title V permit.” Exhibit 3, Comments on Draft Title V Permit at 3. This means Condition X.D.2 is completely unenforceable and cannot serve to ensure the bin vent filters will operate and limit particulate matter emissions to assure compliance with the applicable limits set forth under the Title V Permit.

Even if the phrase “to the extent practicable” could be defined so as to establish enforceable sideboards, its inclusion in the Title V Permit is fundamentally contrary to applicable requirements. The Arizona SIP does not contain the phrase “to the extent practicable” or otherwise provide that compliance is discretionary. Further, the authority cited for Condition X.D.2—A.A.C. R18-2-306.A.2—also does not include or reference the phrase. The discretionary inclusion of the phrase “to the extent practicable” in Condition X.D.2 of the Title V Permit therefore undermines the enforceability of the Arizona SIP and the Title V Permit, contrary to applicable requirements and Title V of the Clean Air Act.

1) ADEQ’s Response to Comments did not Resolve This Issue

In response to Petitioner’s concerns over the inclusion of the phrase “to the extent practicable” in Condition X.D.2, ADEQ provided a brief and generic response. The agency stated that the phrase is a “common” phrase “utilized in state and federal rules” and that it appears “in the Arizona Administrative Code as well as the Code of Federal Regulations.” Exhibit 4, Responsiveness Summary to Public Comments at 7. As an example, ADEQ stated that the phrase is included in the “New Source Performance Standards (NSPS) or National Emission Standards for Hazardous Air Pollutants (NESHAP).” *Id.*

While ADEQ is correct that the phrase “to the extent practicable” makes appearances in the Arizona Administrative Code and the Code of Federal Regulations, including in some portions of the NSPS, this response does not address the effect that the phrase has on the enforceability of Condition X.D.2. Simply because the phrase “to the extent practicable” may make appearances in state and federal regulations does not make its inclusion in Condition X.D.2 of the Title V Permit appropriate or justified.

ADEQ also asserts that, “The NSPS or NESHAP requires facilities to execute certain actions ‘to the extent practicable’. This means the facility will be expected to be consistent with the conditions of their plans and/or operating scenarios.” Exhibit 4, Responsiveness Summary to Public Comments at 7. While the NSPS and NESHAP are not applicable requirements related to Condition X.D.2, the NSPS and NESHAP do not require compliance only “to the extent practicable.” While 40 C.F.R. § 60.11(d) of the NSPS contains 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.” Further, there is no general duty provision under the NESHAP that states that polluters must comply only “to the extent practicable” and it is unclear what ADEQ is referring to in referencing the NESHAP. It is finally not clear what ADEQ means when it says the phrase “to the extent practicable” will mean the Morenci Mine will be “expected to be consistent with the conditions of their plans and/or operating scenarios.”

ADEQ further stated that the phrase “to the extent practicable” will “ensure the facility will implement the latest processes, controls, and/or technologies available within the mining industry that make a commitment to reduce air pollution.” Exhibit 4, Responsiveness Summary to Public Comments at 7. It is unclear what this response actually means, but ADEQ appears to believe that inclusion of the phrase “to the extent practicable” in the Title V Permit will assist the mining industry in fulfilling its commitment to reduce air pollution. Contrary to this belief, from a practical standpoint, the inclusion of the phrase “to the extent practicable” in Condition X.D.2 will allow Freeport to renege on its duty to control air pollution at all times. Inclusion of the phrase expressly provides discretion for Freeport to not operate bin vent filters, rendering Condition X.D.2 unenforceable as a practical matter and contrary to applicable requirements.

2) The Administrator Must Object

Condition X.D.2 is unenforceable as a practical matter and contrary to applicable requirements given the inclusion of the phrase “to the extent practicable.” ADEQ’s response to Petitioner’s comments did not resolve this issue. The Administrator must object over the failure of the Title V Permit to set forth enforceable emission limitations and standards and comply with applicable requirements, including the Arizona SIP.

c) Attachment “C”, Condition X.D.3

This Condition requires Freeport to maintain and operate Vent Gas Cyclone 1, Spray Condenser 1, and PLV Scrubber 1 to minimize particulate matter emissions and comply with applicable limits for the Pressure Leach Vessel 1 (Process 014-458), yet the condition is not enforceable as a practical matter and does not assure compliance with applicable requirements.

Of primary concern is while the Condition requires Freeport to maintain and operate controls to comply with applicable limits, the Condition states that Freeport shall do so only “to the extent practicable.” Specifically, the Condition states that Freeport:

At all times when operating under AOS2, including periods of startup, shutdown, and malfunction, the Permittee shall, *to the extent practicable*, maintain and operate Vent Gas Cyclone 1, Spray Condenser 1, and PLV Scrubber 1 to minimize particulate matter emissions from Pressure Leach Vessel 1 (Process #014-458) (AOS2) and comply with applicable emission limitations and standards of Condition X.B.1.c above.

Exhibit 1, Title V Permit at 108 (emphasis added). The phrase “to the extent practicable” is ambiguous and not defined. Indeed, neither the identified underlying authority for Condition X.D.3, namely A.A.C. R18-2-331.A.3.e, nor the Arizona SIP set forth or define “to the extent

practicable.” This lack of definition is problematic as it suggests there are no clear means of assessing whether Freeport is or is not in compliance with Condition X.D.3, making the Condition unenforceable.

A lack of specific definition is especially problematic because, as discussed above, the phrase “to the extent practicable” is understood to qualify an action as discretionary in nature. Thus, inclusion of the phrase “to the extent practicable” makes compliance completely discretionary. As Petitioner noted in its comments, the inclusion of the phrase means that Freeport can “operate the mine contrary to the applicable requirements set forth in the draft Title V permit.” Exhibit 3, Comments on Draft Title V Permit at 3. This means Condition X.D.3 is completely unenforceable and cannot serve to ensure the controls will operate and limit particulate matter emissions to assure compliance with the applicable limits set forth under the Title V Permit.

Even if the phrase “to the extent practicable” could be defined so as to establish enforceable sideboards, its inclusion in the Title V Permit is fundamentally contrary to applicable requirements. The Arizona SIP does not contain the phrase “to the extent practicable” or otherwise provide that compliance is discretionary. Further, the authority cited for Condition X.D.3—A.A.C. R18-2-331.A.3.e—also does not include or reference the phrase. The discretionary inclusion of the phrase “to the extent practicable” in Condition X.D.3 of the Title V Permit therefore undermines the enforceability of the Arizona SIP and the Title V Permit, contrary to applicable requirements and Title V of the Clean Air Act.

1) ADEQ’s Response to Comments did not Resolve This Issue

In response to Petitioner’s concerns over the inclusion of the phrase “to the extent practicable” in Condition X.D.3, ADEQ provided a brief and generic response. The agency stated that the phrase is a “common” phrase “utilized in state and federal rules” and that it appears “in the Arizona Administrative Code as well as the Code of Federal Regulations.” Exhibit 4, Responsiveness Summary to Public Comments at 7. As an example, ADEQ stated that the phrase is included in the “New Source Performance Standards (NSPS) or National Emission Standards for Hazardous Air Pollutants (NESHAP).” *Id.*

While ADEQ is correct that the phrase “to the extent practicable” makes appearances in the Arizona Administrative Code and the Code of Federal Regulations, including in some portions of the NSPS, this response does not address the effect that the phrase has on the enforceability of Condition X.D.3. Simply because the phrase “to the extent practicable” may make appearances in state and federal regulations does not make its inclusion in Condition X.D.3 of the Title V Permit appropriate or justified.

ADEQ also asserts that, “The NSPS or NESHAP requires facilities to execute certain actions ‘to the extent practicable’. This means the facility will be expected to be consistent with the conditions of their plans and/or operating scenarios.” Exhibit 4, Responsiveness Summary to Public Comments at 7. While the NSPS and NESHAP are not applicable requirements related to Condition X.D.3, the NSPS and NESHAP do not require compliance only “to the extent practicable.” While 40 C.F.R. § 60.11(d) of the NSPS contains 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.” Further, there is no general duty provision under the NESHAP that states that polluters must comply only “to the extent practicable” and it is unclear what ADEQ is referring to in referencing the NESHAP. It is finally not clear what ADEQ means when it says the phrase “to the extent practicable” will mean the Morenci Mine will be “expected to be consistent with the conditions of their plans and/or operating scenarios.”

ADEQ further stated that the phrase “to the extent practicable” will “ensure the facility will implement the latest processes, controls, and/or technologies available within the mining industry that make a commitment to reduce air pollution.” Exhibit 4, Responsiveness Summary to Public Comments at 7. It is unclear what this response actually means, but ADEQ appears to believe that inclusion of the phrase “to the extent practicable” in the Title V Permit will assist the mining industry in fulfilling its commitment to reduce air pollution. Contrary to this belief, from a practical standpoint, the inclusion of the phrase “to the extent practicable” in Condition X.D.3 will allow Freeport to renege on its duty to control air pollution at all times. Inclusion of the phrase expressly provides discretion for Freeport to not operate controls, rendering Condition X.D.3 unenforceable as a practical matter and contrary to applicable requirements.

2) The Administrator Must Object

Condition X.D.3 is unenforceable as a practical matter and contrary to applicable requirements given the inclusion of the phrase “to the extent practicable.” ADEQ’s response to Petitioner’s comments did not resolve this issue. The Administrator must object over the failure of the Title V Permit to set forth enforceable emission limitations and standards and comply with applicable requirements, including the Arizona SIP.

d) Attachment “C”, Condition X.D.4

This Condition requires Freeport to maintain and operate Vent Gas Cyclone 2, Spray Condenser 2, and PLV Scrubber 2 to minimize particulate matter emissions and comply with applicable limits for the Pressure Leach Vessel 2 (Process 014-459), yet the condition is not enforceable as a practical matter and does not assure compliance with applicable requirements.

Of primary concern is while the Condition requires Freeport to maintain and operate controls to comply with applicable limits, the Condition states that Freeport shall do so only “to the extent practicable.” Specifically, the Condition states that Freeport:

At all times when operating under AOS2, including periods of startup, shutdown, and malfunction, the Permittee shall, *to the extent practicable*, maintain and operate Vent Gas Cyclone 2, Spray Condenser 2, and PLV Scrubber 2 to minimize particulate matter emissions from Pressure Leach Vessel 2 (Process #014-459) (AOS2) and comply with applicable emission limitations and standards of Condition X.B.1.d above.

Exhibit 1, Title V Permit at 108 (emphasis added). The phrase “to the extent practicable” is ambiguous and not defined. Indeed, neither the identified underlying authority for Condition

X.D.4, namely A.A.C. R18-2-331.A.3.e, nor the Arizona SIP set forth or define “to the extent practicable.” This lack of definition is problematic as it suggests there are no clear means of assessing whether Freeport is or is not in compliance with Condition X.D.4, making the Condition unenforceable.

A lack of specific definition is especially problematic because, as discussed above, the phrase “to the extent practicable” is understood to qualify an action as discretionary in nature. Thus, inclusion of the phrase “to the extent practicable” makes compliance completely discretionary. As Petitioner noted in its comments, the inclusion of the phrase means that Freeport can “operate the mine contrary to the applicable requirements set forth in the draft Title V permit.” Exhibit 3, Comments on Draft Title V Permit at 3. This means Condition X.D.4 is completely unenforceable and cannot serve to ensure the controls will operate and limit particulate matter emissions to assure compliance with the applicable limits set forth under the Title V Permit.

Even if the phrase “to the extent practicable” could be defined so as to establish enforceable sideboards, its inclusion in the Title V Permit is fundamentally contrary to applicable requirements. The Arizona SIP does not contain the phrase “to the extent practicable” or otherwise provide that compliance is discretionary. Further, the authority cited for Condition X.D.4—A.A.C. R18-2-331.A.3.e—also does not include or reference the phrase. The discretionary inclusion of the phrase “to the extent practicable” in Condition X.D.4 of the Title V Permit therefore undermines the enforceability of the Arizona SIP and the Title V Permit, contrary to applicable requirements and Title V of the Clean Air Act.

1) ADEQ’s Response to Comments did not Resolve This Issue

In response to Petitioner’s concerns over the inclusion of the phrase “to the extent practicable” in Condition X.D.4, ADEQ provided a brief and generic response. The agency stated that the phrase is a “common” phrase “utilized in state and federal rules” and that it appears “in the Arizona Administrative Code as well as the Code of Federal Regulations.” Exhibit 4, Responsiveness Summary to Public Comments at 7. As an example, ADEQ stated that the phrase is included in the “New Source Performance Standards (NSPS) or National Emission Standards for Hazardous Air Pollutants (NESHAP).” *Id.*

While ADEQ is correct that the phrase “to the extent practicable” makes appearances in the Arizona Administrative Code and the Code of Federal Regulations, including in some portions of the NSPS, this response does not address the effect that the phrase has on the enforceability of Condition X.D.4. Simply because the phrase “to the extent practicable” may make appearances in state and federal regulations does not make its inclusion in Condition X.D.4 of the Title V Permit appropriate or justified.

ADEQ also asserts that, “The NSPS or NESHAP requires facilities to execute certain actions ‘to the extent practicable’. This means the facility will be expected to be consistent with the conditions of their plans and/or operating scenarios.” Exhibit 4, Responsiveness Summary to Public Comments at 7. While the NSPS and NESHAP are not applicable requirements related to Condition X.D.4, the NSPS and NESHAP do not require compliance only “to the extent

practicable.” While 40 C.F.R. § 60.11(d) of the NSPS contains 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.” Further, there is no general duty provision under the NESHAP that states that polluters must comply only “to the extent practicable” and it is unclear what ADEQ is referring to in referencing the NESHAP. It is finally not clear what ADEQ means when it says the phrase “to the extent practicable” will mean the Morenci Mine will be “expected to be consistent with the conditions of their plans and/or operating scenarios.”

ADEQ further stated that the phrase “to the extent practicable” will “ensure the facility will implement the latest processes, controls, and/or technologies available within the mining industry that make a commitment to reduce air pollution.” Exhibit 4, Responsiveness Summary to Public Comments at 7. It is unclear what this response actually means, but ADEQ appears to believe that inclusion of the phrase “to the extent practicable” in the Title V Permit will assist the mining industry in fulfilling its commitment to reduce air pollution. Contrary to this belief, from a practical standpoint, the inclusion of the phrase “to the extent practicable” in Condition X.D.4 will allow Freeport to renege on its duty to control air pollution at all times. Inclusion of the phrase expressly provides discretion for Freeport to not operate controls, rendering Condition X.D.4 unenforceable as a practical matter and contrary to applicable requirements.

2) The Administrator Must Object

Condition X.D.4 is unenforceable as a practical matter and contrary to applicable requirements given the inclusion of the phrase “to the extent practicable.” ADEQ’s response to Petitioner’s comments did not resolve this issue. The Administrator must object over the failure of the Title V Permit to set forth enforceable emission limitations and standards and comply with applicable requirements, including the Arizona SIP.

e) Attachment “C”, Condition X.D.5

This Condition requires Freeport to maintain and operate a scrubber to minimize particulate matter and VOC emissions and comply with applicable limits for PLV 2-Stage Scrubber (Process 014-239), yet the condition is not enforceable as a practical matter and does not assure compliance with applicable requirements.

Of primary concern is while the Condition requires Freeport to maintain and operate the scrubber to comply with applicable limits, the Condition states that Freeport shall do so only “to the extent practicable.” Specifically, the Condition states that Freeport:

At all times, including periods of startup, shutdown, and malfunction, the Permittee shall, *to the extent practicable*, maintain and operate the PLV 2-Stage Scrubber to minimize particulate matter and volatile organic compound emissions from PLV 2-Stage Scrubber (Process #014-239) and comply with applicable emission limitations and standards of Condition X.B.3.c above.

Exhibit 1, Title V Permit at 108 (emphasis added). The phrase “to the extent practicable” is ambiguous and not defined. Indeed, neither the identified underlying authority for Condition X.D.5, namely A.A.C. R18-2-331.A.3.e, nor the Arizona SIP set forth or define “to the extent practicable.” This lack of definition is problematic as it suggests there are no clear means of assessing whether Freeport is or is not in compliance with Condition X.D.5, making the Condition unenforceable.

A lack of specific definition is especially problematic because, as discussed above, the phrase “to the extent practicable” is understood to qualify an action as discretionary in nature. Thus, inclusion of the phrase “to the extent practicable” makes compliance completely discretionary. As Petitioner noted in its comments, the inclusion of the phrase means that Freeport can “operate the mine contrary to the applicable requirements set forth in the draft Title V permit.” Exhibit 3, Comments on Draft Title V Permit at 3. This means Condition X.D.5 is completely unenforceable and cannot serve to ensure the scrubber will operate and limit particulate matter and VOC emissions to assure compliance with the applicable limits set forth under the Title V Permit.

Even if the phrase “to the extent practicable” could be defined so as to establish enforceable sideboards, its inclusion in the Title V Permit is fundamentally contrary to applicable requirements. The Arizona SIP does not contain the phrase “to the extent practicable” or otherwise provide that compliance is discretionary. Further, the authority cited for Condition X.D.5—A.A.C. R18-2-331.A.3.e—also does not include or reference the phrase. The discretionary inclusion of the phrase “to the extent practicable” in Condition X.D.5 of the Title V Permit therefore undermines the enforceability of the Arizona SIP and the Title V Permit, contrary to applicable requirements and Title V of the Clean Air Act.

1) ADEQ’s Response to Comments did not Resolve This Issue

In response to Petitioner’s concerns over the inclusion of the phrase “to the extent practicable” in Condition X.D.5, ADEQ provided a brief and generic response. The agency stated that the phrase is a “common” phrase “utilized in state and federal rules” and that it appears “in the Arizona Administrative Code as well as the Code of Federal Regulations.” Exhibit 4, Responsiveness Summary to Public Comments at 7. As an example, ADEQ stated that the phrase is included in the “New Source Performance Standards (NSPS) or National Emission Standards for Hazardous Air Pollutants (NESHAP).” *Id.*

While ADEQ is correct that the phrase “to the extent practicable” makes appearances in the Arizona Administrative Code and the Code of Federal Regulations, including in some portions of the NSPS, this response does not address the effect that the phrase has on the enforceability of Condition X.D.5. Simply because the phrase “to the extent practicable” may make appearances in state and federal regulations does not make its inclusion in Condition X.D.5 of the Title V Permit appropriate or justified.

ADEQ also asserts that, “The NSPS or NESHAP requires facilities to execute certain actions ‘to the extent practicable’. This means the facility will be expected to be consistent with the conditions of their plans and/or operating scenarios.” Exhibit 4, Responsiveness Summary to

Public Comments at 7. While the NSPS and NESHAP are not applicable requirements related to Condition X.D.5, the NSPS and NESHAP do not require compliance only “to the extent practicable.” While 40 C.F.R. § 60.11(d) of the NSPS contains 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.” Further, there is no general duty provision under the NESHAP that states that polluters must comply only “to the extent practicable” and it is unclear what ADEQ is referring to in referencing the NESHAP. It is finally not clear what ADEQ means when it says the phrase “to the extent practicable” will mean the Morenci Mine will be “expected to be consistent with the conditions of their plans and/or operating scenarios.”

ADEQ further stated that the phrase “to the extent practicable” will “ensure the facility will implement the latest processes, controls, and/or technologies available within the mining industry that make a commitment to reduce air pollution.” Exhibit 4, Responsiveness Summary to Public Comments at 7. It is unclear what this response actually means, but ADEQ appears to believe that inclusion of the phrase “to the extent practicable” in the Title V Permit will assist the mining industry in fulfilling its commitment to reduce air pollution. Contrary to this belief, from a practical standpoint, the inclusion of the phrase “to the extent practicable” in Condition X.D.5 will allow Freeport to renege on its duty to control air pollution at all times. Inclusion of the phrase expressly provides discretion for Freeport to not operate the scrubber, rendering Condition X.D.5 unenforceable as a practical matter and contrary to applicable requirements.

2) The Administrator Must Object

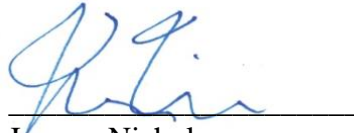
Condition X.D.5 is unenforceable as a practical matter and contrary to applicable requirements given the inclusion of the phrase “to the extent practicable.” ADEQ’s response to Petitioner’s comments did not resolve this issue. The Administrator must object over the failure of the Title V Permit to set forth enforceable emission limitations and standards and comply with applicable requirements, including the Arizona SIP.

CONCLUSION

Pursuant to 42 U.S.C. § 7611d(b)(2) and 40 C.F.R. § 70.8(d), the EPA must object to the issuance of the Title V Permit for the Morenci Mine in Greenlee County, Arizona. As this Petition demonstrates, the Title V Permit fails to assure compliance with applicable requirements under the Clean Air Act and applicable requirements under Title V. Many of the Title V Permit's various air pollution control requirements are unenforceable as a practical matter and that fail to assure compliance with applicable requirements. Accordingly, Petitioners requests that the Administrator object to the Title V Permit and require ADEQ to revise and reissue the Permit in a manner that complies with the requirements of the Clean Air Act.

DATED: December 6, 2024

Respectfully submitted,



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cc (per 40 C.F.R. § 70.8(d) and A.A.C. R18-2-307(E)):

By U.S. Certified Mail

Karen Peters
Executive Deputy Director
Arizona Department of Environmental Quality
1110 W Washington Street, Suite 160
Phoenix, AZ 85007

By U.S. First Class Mail

Freeport-McMoRan—Morenci
4521 U.S. Highway 191
Morenci, AZ 85540

TABLE OF EXHIBITS

Exhibit

1. Final Morenci Mine Title V Permit
2. Final Morenci Mine Title V Permit Technical Support Document
3. Comments of the Center for Biological Diversity on the draft Title V Permit for the Morenci Mine (June 14, 2024)
4. ADEQ Responsiveness Summary to Public Comments (August 23, 2024)