BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF CF&I Steel, L.P. dba EVRAZ Rocky Mountain Steel	)	
Permit Number: 96OPPB097	)	ORDER RESPONDING TO PETITIONER'S REQUEST THAT THE ADMINISTRATOR OBJECT TO ISSUANCE OF A STATE OPERATING PERMIT
Issued by the Colorado Department of Public Health and Environment, Air Pollution Control Division	)	Petition Number: VIII-2011-01

ORDER PARTIALLY GRANTING AND PARTIALLY DENYING THE PETITION FOR OBJECTION TO PERMIT

The United States Environmental Protection Agency (EPA) received a Petition, dated March 24, 2011, from WildEarth Guardians (WEG or Petitioner) requesting that the EPA object, pursuant to section 505(b)(2) of the Clean Air Act (CAA or the Act), 42 U.S.C. § 7661d, to the issuance of a combined title V operating permit and Prevention of Significant Deterioration (PSD) permit to CF&I Steel, L.P., dba EVRAZ Rocky Mountain Steel (ERMS or EVRAZ), to operate certain steelmaking processes (Steel Mill), located at 2100 South Freeway, Pueblo, Colorado. ERMS is a steel manufacturing plant.

The Colorado Department of Public Health and Environment, Air Pollution Control Division (CDPHE), issued the combined PSD and renewed ERMS Operating Permit 960PPB097 (Permit or Combined Permit), on December 28, 2010, pursuant to title V of the Act, the federal implementing regulations at 40 C.F.R. Part 70, and the Colorado State Implementing Regulations at No. 3 Part C.

The Petition alleges that the Permit does not ensure compliance with applicable requirements under the Clean Air Act in that it fails to: (I) ensure compliance with the Electric Arc Furnace regulatory requirements under 40 C.F.R. § 63.10680 et seq.; (II) ensure ERMS will not cause or contribute to a violation of the National Ambient Air Quality Standards (NAAQS); (III) include stipulated penalty requirements from an underlying Consent Decree; and (IV) adequately address environmental justice.

Based on a review of the Petition and other relevant materials, including the Permit and permit record, the underlying Consent Decree, and relevant statutory and regulatory authorities, I grant in part and deny in part the issues raised by the Petitioner.

STATUTORY AND REGULATORY FRAMEWORK

Section 502(d)(1) of the Act, 42 U.S.C. § 7661a(d)(1), calls upon each state to develop and submit to the EPA an operating permits program intended to meet the requirements of title V of the CAA. The EPA granted interim approval to the title V operating permits program submitted by CDPHE effective February 23, 1995. 60 Fed. Reg. 4563 (January 24, 1995); 40 C.F.R. Part 70, Appendix A. *See also* 61 Fed. Reg. 56368 (October 31, 1996) (revising interim approval). Effective October 16, 2000, the EPA granted full approval to CDPHE's title V operating permits program. 65 Fed. Reg. 49919 (August 16, 2000).

All major stationary sources of air pollution and certain other sources are required to apply for title V operating permits that include emission limitations and such other conditions as are necessary to assure compliance with applicable requirements of the CAA, including the requirements of the applicable State Implementation Plan (SIP). *See* CAA §§ 502(a) and 504(a), 42 U.S.C. §§ 7661a(a) and 7661c(a). The title V operating permits program does not generally impose new substantive air quality control requirements (referred to as "applicable requirements"), but does require permits to contain monitoring, recordkeeping, reporting, and other conditions to assure compliance by sources with applicable requirements. *See* 57 Fed. Reg. 32250, 3225051 (July 21, 1992) (the EPA final action promulgating the Part 70 rule). One purpose of the title V program is to "enable the source, States, the EPA, and the public to better understand the applicable requirements to which the source is subject, and whether the source is meeting those requirements." *Id.* Thus, the title V operating permits program is a vehicle for ensuring that air quality control requirements are appropriately applied to facility emission units and for assuring compliance with these requirements.

Applicable requirements for a new major stationary source or for a major modification of a major source include the requirement to obtain a preconstruction permit that complies with applicable New Source Review (NSR) requirements. Part C of the CAA establishes the PSD program, the preconstruction review program that applies to areas of the country that are designated as attainment or unclassifiable for the NAAQS. CAA §§ 160-169, 42 U.S.C. §§ 7470-7479. PSD requirements are triggered when a new major stationary source is constructed, including new construction on a greenfield site. NSR encompasses both the PSD program as well as the nonattainment NSR program (applicable to areas that are designated as nonattainment with the NAAQS). In attainment areas, a major stationary source may not begin construction or undertake certain modifications without first obtaining a permit which conforms to PSD requirements. CAA § 165(a)(l), 42 U.S.C. § 7475(a)(l). The PSD analysis must address several requirements before the permitting authority may issue a permit, including: (1) an evaluation of the impact of the proposed new major stationary source or major modification on ambient air quality in the area, and (2) an analysis ensuring that the proposed facility is subject to Best Available Control Technology (BACT) for each pollutant subject to regulation under the PSD program. CAA §§ 165(a)(3), (4), 42 U.S.C. §§ 7475(a)(3), (4).

The EPA implements the Act's PSD requirements in two largely identical sets of regulations: one set, found at 40 C.F.R. § 52.21, contains the EPA's federal PSD program, which applies in areas without a SIP-approved PSD program; the other set of regulations, found at 40 C.F.R. § 51.166, contains requirements that state PSD programs must meet to be approved as part of a SIP.

On September 2, 1986, the EPA approved a revision to the Colorado SIP, which provides for initial State issuance and enforcement of permits to prevent the significant deterioration of air quality. 51 *Fed. Reg.* 31125. The EPA also has approved subsequent revisions to Colorado's PSD regulations. 40 C.F.R. § 52.320(c). Consistent with the Act and the EPA's regulations, to obtain a PSD permit in Colorado pursuant to Colorado's SIP, the applicant must, among other things, show that the source or modification will not cause or contribute to a violation of any NAAQS and satisfies the BACT requirement for any pollutant subject to regulation. Thus, the applicable requirements of the Act for a new major source or a major modification in Colorado include the requirement to comply with PSD requirements under the Colorado SIP.

Where a petitioner requests that the Administrator object to the issuance of a title V permit is based in whole, or in part, on a permitting authority's alleged failure to comply with the requirements of its approved PSD program (as with other allegations of inconsistency with the Act), the burden is on the petitioner to demonstrate that the permitting decision was not in compliance with the requirements of the Act, including the requirements of the SIP. Such requirements, as EPA has explained in describing its authority to oversee the implementation of the PSD program in states with approved programs, include the requirements that the permitting authority: (1) follow the required procedures in the SIP; (2) make PSD determinations on reasonable grounds properly supported on the record; and (3) describe the determinations in enforceable terms. *See, e.g.,* 68 *Fed. Reg.* 9,892, 9,894-9,895 (March 3, 2003); 63 *Fed. Reg.* 13,795, 13,796-13,797 (March 23, 1998). *See also In the Matter of Wisconsin Power and Light, Columbia Generating Station,* Petition Number V-2008-1 (Order on Petition) (October 8, 2009), at 8.

The EPA has approved the PSD program into Colorado's SIP, and as the permitting authority for Colorado, CDPHE has substantial discretion in issuing PSD permits. Given this, in reviewing a PSD permitting decision, EPA will not substitute its own judgment for that of the permitting authority. Rather, consistent with the decision in *Alaska Dep't of Envt'l Conservation* v. *EPA,* 540 U.S. 461 (2004), in reviewing a petition to object to a title V permit raising concerns regarding a state or local permitting authority's PSD permitting decision, EPA generally will look to see whether the petitioner has shown that the permitting authority did not comply with its SIP-approved regulations governing PSD permitting or whether the exercise of discretion under such regulations was unreasonable or arbitrary. *See, e.g., In re East Kentucky Power Cooperative, Inc.* (Hugh L. Spurlock Generating Station), Petition No. IV-2006-4 (Order on Petition) (August 30, 2007); *In re Pacific Coast Building Products, Inc.* (Order on Petition) (December 10, 1999); *In re Roosevelt Regional Landfill Regional Disposal Company* (Order on Petition) (May 4, 2000).

Under § 505(a) of the CAA, 42 U.S.C. § 7661d(a), and the implementing regulations at 40 C.F.R. § 70.8(a), States are required to submit each proposed title V operating permit to the

EPA for review. Upon receipt of a proposed permit, the EPA has 45 days to object to final issuance of the permit if it is determined to not be in compliance with applicable requirements or the requirements under Part 70. *See* 40 C.F.R. § 70.8(c). If the EPA does not object to a permit on its own initiative, § 505(b)(2) of the Act, 42 U.S.C. § 7661d(b)(2), provides that any person may petition the Administrator, within 60 days of expiration of the EPA's 45-day review period, to object to the permit. *See also* 40 C.F.R. § 70.8(d). The petition must "be based only on objections to the permit that were raised with reasonable specificity during the public comment period provided by the permitting agency (unless the petitioner demonstrates in the petition to the Administrator that it was impracticable to raise such objections within such period or unless the grounds for such objection arose after such period)." CAA § 505(b)(2), 42 U.S.C. § 7661d(b)(2); *see also* 40 C.F.R. § 70.8(d). In response to such a petition, the CAA requires the Administrator to issue an objection if a petitioner demonstrates that a permit is not in compliance with the requirements of the CAA. 42 U.S.C. § 7661d(b)(2); *see also* 40 C.F.R. § 70.8(c)(1); *New York Public Interest Research Group (NYPIRG) v. Whitman*, 321 F.3d 316, 333 n.11 (2d Cir. 2003). Under § 505(b)(2) of the Act, the burden is on the petitioner to make the required demonstration to the EPA. *MacClarence v. EPA*, 596 F.3d 1123, 1130-33 (9th Cir. 2010); *Sierra Club v. Johnson*, 541 F.3d. 1257, 1266-67 (11th Cir. 2008); *Citizens Against Ruining the Environment v. EPA*, 535 F.3d 670, 677-78 (7th Cir. 2008); *Sierra Club v. EPA*, 557 F.3d 401, 406 (6th Cir. 2009) (discussing the burden of proof in title V petitions). *See also NYPIRG*, 321 F.3d at 333 n.11. If, in responding to a petition, the EPA objects to a permit that has already been issued, the EPA or the permitting authority will modify, terminate, or revoke and reissue the permit consistent with the procedures set forth in 40 C.F.R. §§ 70.7(g)(4) and (5)(i) – (ii), and 40 C.F.R. § 70.8(d).

BACKGROUND

I. The Facility

This Permit was issued for the sources related to the portion of the plant dedicated to the production of steel owned and operated by CF&I Steel, LP dba EVRAZ Rocky Mountain Steel Mills, and is located at 2100 South Freeway, Pueblo, Colorado. The area in which the facility operates is classified as attainment for all criteria pollutants, which means the area is in compliance with the NAAQS. There are no affected States, as defined by 40 C.F.R. § 70.2, within 50 miles of the plant. The Great Sand Dunes National Park and Preserve is a mandatory Federal Class I area within 100 kilometers of the facility. 40 C.F.R. § 81.406.

The entire facility at this site is a steel manufacturing plant, and this Permit is one of five title V permits issued to ERMS for the entire plant operation. This permit covers the activity where scrap steel along with various additives (e.g., carbon, limestone, oxygen, fluxing agents) are used in the batch steel melting process via the electric arc furnace to produce specific grades of steel. ERMS transfers molten steel to the ladle metallurgy station, where it can adjust the steel chemistry. ERMS uses the vacuum tank degasser to remove certain gaseous constituents for specific steels. Finally, ERMS transfers the molten steel to the caster where it casts molten steel into blooms and billets.

II. The Permit

The original Operating Permit was issued December 1, 2001. On December 1, 2005, ERMS submitted a title V renewal application to CDPHE. CDPHE proposed the Permit to the EPA on December 9, 2010; the EPA did not object to the Permit. On December 28, 2010, CDPHE issued the final Permit to ERMS.

The Permit is a combined title V/PSD Permit. Colorado air pollution control regulations under Regulation 3. Part C. Section III.B.7 allow for a source to submit a request for a combined operating permit/construction permit. This PSD Permit was required by a 2003 Consent Decree between ERMS and EPA to resolve civil liability for certain alleged violations of PSD requirements and New Source Performance Standards for Electric Arc Furnaces (EAF). *United States of America v. CF&I Steel, L.P. d/b/a Rocky Mountain Steel Mills,* Consent Decree (2003). In particular, paragraphs 79 and 80 of the Consent Decree required ERMS "to obtain all appropriate federally-enforceable permits for the construction of the modified EAF" and "apply for modifications to its Title V operating permit to include all the requirements of this consent decree." The 2003 Consent Decree was terminated on February 17, 2011.

ISSUES RAISED BY THE PETITIONER

I. The Combined Permit Fails to Assure Compliance with the Electric Arc Furnace Regulations

A. The Combined Permit Fails to Assure Compliance with the Plan Requirements

Claim I.A.1. The Permit Must Contain the Pollution Prevention Plan Requirements

The Petitioner asserts the Combined Permit fails to assure compliance with the pollution prevention plan requirements under 40 C.F.R. § 63.10685(a)(1). Petition at 4. The Petitioner explains that "[t]hese requirements state that the Steel Mill 'must prepare and implement a pollution prevention plan for metallic scrap selection and inspection,'" citing and explaining the requirements in 40 C.F.R. § 63.10685(a)(1)(i)-(iii). *Id.* To support this claim, the Petitioner asserts that "the Combined Permit fails to ensure that an adequate pollution prevention plan is in place and that the Steel Mill will fully comply with a pollution prevention plan to minimize the amount of chlorinated plastics, lead, and free organic liquids that are charged to the furnace." *Id.* According to the Petitioner "[a]lthough the Combined Permit incorporates general requirements under 40 C.F.R. § 63.10685(a) at Section II, Condition 1.20.1, the Combined Permit fails to assure that these requirements will be met." *Id.* If ERMS has submitted a pollution prevention plan to the EPA, the Petitioner argues that the "applicable requirements make clear that the company 'must operate according to the plan as submitted during the review and approval process'." *Id.* (quoting 40 C.F.R. § 63.10685(a)(1)). The Petitioner claims that "as written, the Combined Permit does not ensure compliance with this requirement," explaining that the Permit "does not state that EVRAZ must operate according to the 'plan as submitted.'" *Id.* The Petitioner explains that the Permit "states only that EVRAZ 'shall operate according to the Pollution Prevention Plan,'" further arguing that this Permit requirement "does not seem to refer to the 'plan as submitted,' but rather to an approved pollution plan," which the Petitioner is concerned "may not even exist." *Id.* If a pollution prevention plan was not submitted, the

Petition argues, the facility would be in violation of an applicable requirement and the Permit must contain a compliance schedule, in accordance with title V.[1] *Id.*

The Petitioner further asserts that the Combined Permit must but fails to "incorporate either the entire pollution prevention plan or at least the primary requirements to ensure that the Steel Mill is effectively operated in accordance with the plan submitted." Petition at 5. The Petitioner asserts that "unless the Combined Permit contains all or portions of the pollution prevention plan, it is impossible to ensure that the Steel Mille [sic] is 'operated according to the plan as submitted,'" which the Petitioner claims is "contrary to 40 C.F.R. § 63.10685." *Id.*

In addition, the Petitioner argues that the Permit fails to ensure compliance with 40 C.F.R. § 63.10685(a)(1) because it fails to include monitoring, recordkeeping, and reporting requirements necessary to ensure that the Steel Mill is operated according to any approved pollution prevention plan and to ensure that the relevant permit condition is enforceable, including by citizens in accordance with 40 C.F.R. §70.6(b). *Id.*

In responding to the Petitioner's comments on these issues in the draft permit, CDPHE stated that it did "not find it appropriate to include a copy of the proposed Pollution Prevention Plan in the Title V Operating Permit since it has not been reviewed and approved." CDPHE Response to Comments (RTC) at 2.

Claim I.A.2. The Permit Must Incorporate the Onsite Plan for Demonstrating Compliance with the EPA-Approved Mercury Switch Removal Program

In addition to the allegations regarding the Pollution Prevention Plan, the Petition argues that the Permit fails to ensure compliance with the requirements of 40 C.F.R. § 63.10685(b)(2) because it fails to ensure compliance with 40 C.F.R. § 63.10685(b)(2)(iv), which addresses requirements for an onsite plan[2] for the EPA-approved program for removal of mercury switches. Petition at 7. In comments to CDPHE on the draft permit, the Petitioner asserts that "40 C.F.R. § 63.10685(b)(2)(iv) requires that the permittee develop and maintain a plan demonstrating 'the manner through which [the] facility is participating in the EPA-approved program,'" asserting to CDPHE that "[t]here is no indication that any such plan exists or is sufficient to meet the requirements of 40 C.F.R. § 63.10685(b)(2)(iv), or that it ensures compliance with 40 C.F.R. § 63.10685(b) as a whole." WEG Comments at 2. The Petitioner's comments claim that "[t]he combined Title V/PSD [permit] must at a minimum incorporate the plan required by 40 C.F.R. § 63.10685(b)(2)(iv) to ensure its enforceability and effectiveness." *Id.*

The Petition contends that there is no indication that any such plan exists or is sufficient to meet the requirements of 40 C.F.R. § 63.10685(b)(2)(iv), or that it ensures compliance with 40

[1] The Petitioner asserts that the "Administrator must object if EVRAZ has not submitted a pollution prevention plan to the EPA," and that the Permit must contain a compliance schedule if this plan has not been submitted. Petition at 4. EPA notes that EVRAZ submitted the Pollution Prevention Plan to EPA on June 27, 2008. Therefore, these claims are denied.

[2] For purposes of this Order, "onsite plan" refers to the requirement for a plan to be developed and maintained onsite for demonstrating compliance with the EPA-approved mercury switch removal program in 40 C.F.R. § 63.10685(b)(2)(iv).

C.F.R. § 63.10685(b) as a whole. Petition at 7. The Petitioner notes that it argued in public comments that this plan must be incorporated into the Permit to ensure its enforceability and effectiveness. *Id.* The Petitioner additionally asserts that CDPHE did not adequately respond to its comment on this point because it did not address whether the Permit assures compliance with 40 C.F.R. § 63.10685(b)(2)(iv). *Id.* at 7-8. In addition, the Petition argues that the Permit must, but fails to, include some level of monitoring, recordkeeping, and reporting to ensure that the Steel Mill is operated in accordance with 40 C.F.R. § 63.10685(b)(2)(iv). *Id.* at 8.

In its RTC, CDPHE stated:

> The plan that is required to be developed under 40 C.F.R. § 63.10685(b)(2)(iv) is only required to be maintained onsite. The rule contains no requirement to submit the plan to the permitting authority for review/approval. The Division does not find it appropriate to attach this plan to the permit.

CDPHE RTC at 3.

EPA's response: We view these claims above as being logically related and are, therefore, responding to them together.

EPA regulations implementing the title V program address what information must be contained in a permit. The regulations require each title V permit to include, among other things, "[e]mission limits and standards, including those operational requirements and limitations that assure compliance with all applicable requirements at the time of permit issuance" and "compliance certification, testing, monitoring, reporting and recordkeeping requirements sufficient to assure compliance with the terms and conditions of the permit." 40 C.F.R. § 70.6(a)(1) and (c)(1). The National Emission Standards for Hazardous Air Pollutants (NESHAP) for Area Sources: Electric Arc Furnace Steelmaking Facilities (40 C.F.R. part 63 subpart YYYYY, "EAF") regulations are an applicable requirement under title V in this instance. The EAF regulations require that ERMS develop, submit and *operate* the facility in accordance with the Pollution Prevention Plan. 40 C.F.R. § 63.10685(a)(1) (emphasis added). The source is required by the applicable requirement to operate in accordance with the Pollution Prevention Plan, *i.e.*, the facility "must prepare and implement" a plan to minimize the amounts of specific materials and substances identified in the regulation that are "charged to the furnace" in the production of steel in accordance with 40 C.F.R. § 63.10685(a)(1). This plan must be followed even before it is approved. 40 C.F.R. § 63.10685(a)(1). Therefore, the Pollution Prevention Plan must be included in the permit pursuant to 40 C.F.R. § 70.6(a)(1). *See In re Alliant Energy – EPL Edgewater Generating Station*, Petition No. V-2009-2 (Order on Petition) (August 17, 2010), at 13-14 (determining that a plan must be included in a title V permit where compliance with the plan was required by the applicable requirement, or where the plan was necessary to demonstrate compliance with a permit limit); *In re WE Energies Oak Creek Power Plant* (Order on Petition) (June 12, 2009), at 25-26 (noting that where compliance with an approved plan is required by a construction permit or the SIP, the plan must be included in the title V permit). Because the Pollution Prevention Plan must be included in the Permit, the Permit must also contain "compliance certification, testing, monitoring, reporting and recordkeeping requirements

sufficient to assure compliance" with the Permit terms and conditions related to this Plan. 40 C.F.R. § 70.6(c)(1).

Accordingly, I grant the Petition on this issue as it pertains to the Pollution Prevention Plan and direct CDPHE to include the Pollution Prevention Plan in the Permit for the ERMS plant and to ensure that the Permit contains appropriate compliance certification, testing, monitoring, reporting and recordkeeping requirements to assure compliance with the Permit terms related to this Plan.

The Petitioner also asserts that the "onsite plan" required by 40 C.F.R. § 63.10685(b)(2)(iv) is also an applicable requirement and must be incorporated into the Permit. This onsite plan is developed to demonstrate the manner in which the facility is participating in the "EPA-approved program," i.e., the National Vehicle Mercury Switch Recovery Program, which allows scrap providers to be approved by the Administrator to participate in a program for the removal of mercury switches from motor vehicle scrap based on criteria in the EAF regulations. The Petitioner has not demonstrated that this onsite plan needs to be incorporated into the Permit. While the EAF regulations require facilities to "operate" the facility in accordance with the Pollution Prevention Plan, the regulations for the onsite plan merely require that the facility "develop and maintain onsite a plan demonstrating the manner through which" the "facility is participating in the EPA-approved program." 40 C.F.R. § 63.10685(b)(2)(iv). Since 40 C.F.R. § 63.10685(b)(2)(iv) does not explicitly require that the facility operate in accordance with the onsite plan, and since the Petitioner has not identified any applicable requirement that requires compliance with the onsite plan, the Petitioner has not demonstrated that it must be included in the Permit. Therefore, I deny the Petitioner's claim on this issue as it pertains to incorporating the onsite plan into the Permit.

However, the Petitioner is correct that CDPHE failed to adequately respond to its comments regarding the onsite plan. CDPHE failed to address several points in the Petitioner's comments, including whether the onsite plan existed and whether it was sufficient to satisfy the requirements of 40 C.F.R. § 63.10685(b)(2)(iv) or 40 C.F.R. § 63.10685(b)(2) as whole. It is a general principle of administrative law that an inherent component of any meaningful notice and opportunity for comment is a response by the regulatory authority to significant comments. *Home Box Office* v. *FCC,* 567 F.2d 9, 35 (D.C. Cir. 1977) ("the opportunity to comment is meaningless unless the agency responds to significant points raised by the public."). *See also, In the Matter of Louisiana Pacific Corporation,* Petition V-2006-3 (Order on Petition) (November 5, 2007), at 4-5. The Petitioner is also correct that the Permit fails to ensure compliance with 40 C.F.R. § 63.10685(b)(2)(iv). In particular, the Permit does not include a requirement that ERMS develop and maintain the onsite plan as required by 40 C.F.R. § 63.10685(b)(2)(iv). Accordingly, I grant the Petition on these issues. To address this objection, CDPHE must amend the Permit to include a requirement that ERMS develop and maintain a plan that satisfies the requirements of 40 C.F.R. § 63.10685(b)(2)(iv); consider whether additional recordkeeping, monitoring, or reporting is necessary to assure compliance with any Permit terms that are added to require that ERMS develop and maintain such a plan; and must also adequately respond to the Petitioner's comments on this subject, revising the Permit and permit record as appropriate.

B. The Combined Permit Fails to Assure Compliance with the EAF Scrap Metal Requirements in That it Lacks Adequate Monitoring, Recordkeeping and Reporting Provisions

The Petitioner claims the Combined Permit does not contain monitoring, recordkeeping, or reporting requirements to ensure compliance with the approved mercury program requirements in 40 C.F.R. § 63.10685(b)(2) because the Permit does not contain requirements to ensure that the scrap providers are operating under an approved program. Petition at 6. The Petitioner supports this claim by explaining that "the Permit does not contain requirements that ensure scrap providers are, in fact, operating under a program for the removal of mercury switches that has been approved by the EPA Administrator based on the criteria set forth at 40 C.F.R. §§ 63.10685(b)(2)(i)-(iii)." *Id.* Second, the Petitioner asserts the Permit Conditions 1.20.3, 1.20.4, and 1.20.5 "do not appear to provide sufficient monitoring, recordkeeping, and reporting requirements necessary to ensure compliance with 40 C.F.R. § 63.10685(b)(2)." *Id.* Third, the Petitioner explains that Condition 1.20.3 simply requires that ERMS must keep records to demonstrate compliance, and "it is unclear exactly what 'records' must be kept and how such records will demonstrate compliance." Petition at 7. The Petitioner additionally argues that 1.20.4 and 1.20.5 do not directly speak to recordkeeping and do not relate to assuring compliance with § 63.10685(b)(2).[3] *Id.* Finally, the Petitioner explains that these records are not required to be reported to EPA, CDPHE, or the public, which the Petitioner asserts undermines "any claim that the Combined Permit assures compliance with 40 C.F.R. § 63.10685(b)(2) and is enforceable as a practical matter." *Id.* Fundamentally, the Petitioner argues that nothing in the Permit requires ERMS to gather records to ensure that scrap providers are meeting the criteria in §§ 63.10685(b)(2)(i)-(iii) and are participating in the EPA-approved program, nor does the Permit require such records to be submitted to EPA, CDPHE, or the public to ensure compliance with these requirements. *Id.*

In responding to the Petitioner's comments on the draft permit on these issues, CDPHE stated that:

> Currently, ERMS complies with the mercury requirements of this rule through the option for approved mercury programs. In the interest of streamlining the permit, the Division did not include the language for the other compliance options in the draft permit. The appropriate recordkeeping and reporting requirements of the rule have been included in the permit in conditions 1.20.3, 1.20.4, and 1.20.5. Condition 1.20.4 specifically requires documentation of the scrap provider's participation in an approved mercury switch removal program.

CDPHE RTC at 3.

[3] The State's response to the Petitioner's comment cites three Permit provisions (Permit Conditions 1.20.3, 1.20.4 and 1.20.5). CDPHE RTC at 3. Two of these, Conditions 1.20.4 and 1.20.5, do not directly address the need to keep these records. As noted in the Order, the Petitioner's request for an objection to the Permit is denied on the claim that the recordkeeping and reporting provisions in Condition 1.20.3 are insufficient. However, if the State intended to reference other recordkeeping provisions in its response in place of Conditions 1.20.4 and 1.20.5, EPA requests that the State supplement the record with the correct reference(s) to the provisions of the Permit that the State intended to reference. If the State determines that existing provisions are inadequate to assure compliance, then the State should include additional recordkeeping provisions in the Permit.

EPA's response: We view these claims above as being logically related and are, therefore, responding to them together.

Section 504(c) of the Act requires all title V permits to contain monitoring requirements to assure compliance with permit terms and conditions. *Sierra Club v. EPA,* 536 F.3d 673, 678 (D.C. Cir. 2008). EPA discussed the Part 70 periodic monitoring and sufficiency of monitoring requirements at length in two title V orders issued on May 28, 2009. *See In the Matter of CITGO Refining and Chemicals Company L.P.,* Petition VI-2007-01 (May 28, 2009) *(CITGO Order); In the Matter of Premcor Refining Group, Inc.,* Petition VI-2007-2 (May 28, 2009) *(Premcor Order).* EPA's title V monitoring rules (40 C.F.R. §§ 70.6(a)(3)(i)(A) and (B) and 70.6(c)(1)) are designed to address the statutory requirement that "[e]ach permit issued under [title V] shall set forth ... monitoring . . . requirements to assure compliance with the permit terms and conditions." CAA § 504(c), 42 U.S.C. § 7661c(c). As a general matter, permitting authorities must take three steps to satisfy the monitoring requirements in EPA's Part 70 regulations. First, under 40 C.F.R. § 70.6(a)(3)(i)(A), permitting authorities must ensure that monitoring requirements contained in applicable requirements are properly incorporated into the title V permit. *See CITGO Order* at 7; *Premcor Order* at 7. Second, if the applicable requirement contains no periodic monitoring, permitting authorities must add "periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit." 40 C.F.R. § 70.6(a)(3)(i)(B); *see CITGO Order* at 7; *Premcor Order* at 7. Third, if there is some periodic monitoring in the applicable requirement, but that monitoring is not sufficient to assure compliance with permit terms and conditions, permitting authorities must supplement monitoring to assure such compliance. 40 C.F.R. § 70.6(c)(1). *E.g., CITGO Order* at 6-7; *In the Matter of Wheelabrator Baltimore, L.P.,* at 13 (Order on Petition) (April 14, 2010).

The determination of whether the monitoring is adequate in a particular circumstance generally will be made on a case-by-case basis considering site specific factors. *See CITGO Order* at 7-8 (discussing relevant factors); *see also, In the Matter of United States Steel Corporation - Granite City Works,* Petition V-2009-3, at 7 (January 31, 2011) *(US Steel Order).* However, in many cases, monitoring from the applicable requirement will be sufficient to assure compliance with permit terms and conditions; consequently, EPA recommends the monitoring analysis should begin by assessing whether the monitoring required in the applicable requirement is sufficient. *See CITGO Order* at 7; *US Steel Order* at 7. In addition, the rationale for the monitoring requirements selected by a permitting authority must be clear and documented in the permit record, *CITGO Order* at 7 (citing 40 C.F.R. § 70.7(a)(5)), and permitting authorities have the responsibility to respond to significant comments on the adequacy of monitoring. *Id.*

Title V and EPA's implementation regulations also contain requirements regarding other types of conditions necessary to ensure compliance, such as reporting requirements. CAA § 504(c) requires that each permit set forth "inspection, entry, monitoring, compliance certification, and reporting requirements to assure compliance with the permit terms and conditions." Further, 40 C.F.R. § 70.6(c)(1) requires that title V permits contain "compliance certification, testing, monitoring, reporting, and recordkeeping requirements sufficient to assure compliance with the permit terms and conditions." There are also several specific provisions in

Part 70 addressing these additional types of requirements, such as § 70.6(a)(3)(ii) on recordkeeping. *See Premcor Order* at 8.

The Petition does not point to any of these statutory or regulatory provisions, or any of these title V orders, to support its claims relating compliance assurance provisions, or rely on them to support its arguments. Instead, the Petition focuses on the provisions of the Permit and the requirements of the underlying MACT at issue here. The Combined Permit's requirements include recordkeeping and reporting requirements that require ERMS to "keep records to demonstrate compliance with the requirements for" the "pollution prevention plan … and/or for the use of only restricted scrap." Permit Condition 1.20.3. Furthermore, Permit Conditions 1.20.3.1, 1.20.3.2, and 1.20.3.3[4] require: maintenance and submittal of switch removal records (Condition 1.20.3.1); maintenance of records identifying each scrap provider and documenting the scrap provider's participation in an approved mercury switch removal program (Condition 1.20.3.2); and the requirement for the permittee to submit a semiannual compliance report to the EPA Administrator for the control of contaminants from scrap according to the requirements in 40 C.F.R. § 63.10(e), and this report must clearly identify any deviation from the requirements and the corrective action taken (Condition 1.20.3.3). These Permit Conditions mirror the EAF regulation's recordkeeping and reporting requirements in § 40 C.F.R. § 63.10685(c), and the Petitioner has not demonstrated that any required EAF provision is missing. Moreover, the Petitioner has not demonstrated that these terms are inadequate under title V and does not identify the relevant legal provisions under title V to support the claims in the Petition. Therefore, I deny the Petitioner's request for an objection to the Combined Permit on the claim concerning Permit Condition 1.20.3.

Regarding the Petitioner's claim that the Combined Permit lacks provisions that require the records required by 40 C.F.R. §§ 63.10685(b)(1)-(3) to be reported to EPA, CDPHE, or the public, there is no evidence in the permit record that this issue was raised to CDPHE during the public comment period with reasonable specificity (and the Petitioner does not identify a place where it was raised).[5] The Petitioner has not shown that it was impracticable to raise this objection during the public comment period, and there is no indication that the grounds for this objection arose after the public comment period. *See generally* CAA § 505(b)(2), 42 U.S.C. § 7661d(b)(2); 40 C.F.R. 70.8(d). Section 505(b)(2) of the Act, 42 U.S.C. § 7661d(b)(2), and 40 C.F.R. 70.8(d) state that a petition to object to a title V permit shall be based only on objections to the permit that were raised with reasonable specificity during the public comment period unless the petitioner demonstrates that it was impracticable to raise such objections during the public comment period or unless the grounds for such objection arose after the public comment period. The Petitioner has not satisfied this requirement. The Petition contains neither an explanation of why it was impracticable to raise this objection during the public period nor an explanation that the grounds for this objection arose after the public comment period. The

[4] Although the Combined Permit contains typographical errors in regulatory citations in Permit Conditions 1.20.3, 1.20.3.1, and 1.20.3.2 (citing to provisions of 40 C.F.R. § 60, instead of 40 C.F.R. § 63), this flaw was *not* identified by the Petitioner. However, we request that the State correct these typographical citation errors.

[5] Although the Petition states generally that the claims asserted in Issue 1 were raised with reasonable specificity in its comments on pages 1-2, Petition at 3, those comments only assert generally that the Permit "does not contain monitoring, recordkeeping, or reporting requirements to ensure compliance with" the requirements of 40 C.F.R. §§ 63.10685(b)(2), but do not assert that such records had to be reported to EPA, CDPHE, or the public. WEG Comments at 1-2.

Petitioner was obviously aware of the contents of the ERMS permit, yet failed to show why this particular recordkeeping claim could not be raised in public comments. *See In the Matter of Public Service Company of Colorado, dba Xcel Energy, Hayden Station*, Petition VIII-2009-01, at 10-13 (March 24, 2010) (finding issue was "one that was reasonably ascertainable and could have been raised by the Petitioner before the public comment period closed"). Moreover, there is no requirement in the EAF regulations for ERMS to report these records.[6]

With respect to the Petitioner's claims that the Permit does not contain adequate recordkeeping and reporting requirements to ensure compliance with 40 C.F.R. § 63.10685(b)(2), CDPHE's response on these issues explained that the appropriate recordkeeping and reporting requirements from the EAF regulations were included in the Permit. CDPHE RTC at 3. The Petitioner has not demonstrated that this explanation is unreasonable, that any recordkeeping or reporting requirements relating to 40 C.F.R. § 63.10685(b)(2) were not included, or that the recordkeeping and reporting requirements are insufficient to assure compliance with permit terms reflecting the applicable EAF requirements in 40 C.F.R. § 63.10685(b)(2). EPA notes that the Petitioner has not expressly argued that any title V provision requires recordkeeping or reporting in addition to those in the EAF regulations to assure compliance with permit conditions reflecting this MACT. Accordingly, I deny these recordkeeping and reporting claims.

II. The Combined Permit Fails to Ensure the Steel Mill Will Not Cause or Contribute to a Violation of the NAAQS

A. The Use of Significant Impact Levels for the NO_2 NAAQS is Contrary to the Clean Air Act

The Petitioner claims that CDPHE issued the Permit without ensuring that the Steel Mill would not cause or contribute to violations of the NO_2 NAAQS, contending that CDPHE disclosed that violations of the 1-hour NO_2 standard were modeled and found that the Steel Mill would contribute to these violations. Petition at 8. The Petitioner claims that modeling undertaken by CDPHE as a part of the Combined Permit predicts the NAAQS impacts for 1-hour NO_2 to be as high as 215 ppb, exceeding the 1-hour NO_2 NAAQS of 100 ppb, and that this modeling shows that the Steel Mill will contribute to violations of the 1-hour NO_2 NAAQS standard with a maximum 1-hour NO_2 impact of 1.05 ppb. Petition at 8-9. The Petitioner further argues that Colorado's application of a significant impact level ("SIL") to the 1-hour NO_2 NAAQS analysis for ERMS is contrary to the Clean Air Act's plain language. Petition at 9-11.

The Petitioner asserted in comments to CDPHE that, "[t]he Division's source impact analysis indicates 'widespread modeled violations' of the 1-hour nitrogen dioxide (NO_2) NAAQS." WEG Comments at 5 (citing to the Technical Review Document (TRD) at 35). The Petitioner suggests that "[d]espite this, and despite disclosing that the steel mill will contribute to

[6] The Petitioner requests that to the extent EPA believes that the Petition is not based on comments raised with reasonable specificity during the public comment period, EPA also consider this a petition to reopen the Permit in accordance with 40 C.F.R. § 70.7(f), or alternatively a petition to reopen for cause in accordance with 40 C.F.R. 70.7(f) pursuant to 5 U.S.C. 555(b). Petition at 2 and n.1. EPA is not responding to those alternative requests in this Order.

these violations, the Division concluded that the modification would not cause or contribute to a violation of the NAAQS." *Id.*

The Petitioner's comments to CDPHE on the proposed permit also alleged that:

> The interim significant impact levels that the Division relies on do not appear to be based on a reasonable assessment of the temporal and spatial context of the impacts of the steel mill to modeled violations of the NO_2 NAAQS. Although we understand the EPA has recommended an interim significant impact level of 4 parts per billion, this recommendation is not legally binding. Furthermore, [sic]

WEG Comments at 6. The comment letter's discussion of the NO_2 NAAQS ends at this point.

CDPHE explained in responding to the Petitioner's comments that while the "cumulative 1-hr NO_2 impact analysis discovered numerous modeled violations of the 1-hr NO_2 NAAQS in the Pueblo area", "[t]he proposed ERMS modification's impact at each modeled violation is below Colorado's interim 1-hr NO_2 SIL." MMEIU RTC at 6.[7] Therefore, CDPHE concluded that "the proposed modification at [ERMS] will not cause or contribute to a violation of the 1-hr NO_2 NAAQS." *Id.* CDPHE supported its conclusion by explaining that, "[t]he use of a single interim SIL for each pollutant and averaging period combination is consistent with historical and current practices and equitable in application. As established by the Division Director, EPA's interim 1-hr NO_2 SIL of 4 parts per billion has been adopted as Colorado's interim 1-hr NO_2 SIL." *Id.* CDPHE's response also clarified that the "modeling review comments in the TRD did not include any statement that 'the steel mill will contribute to these violations.'" MMEIU RTC at 6.

The Petitioner asserts that the use of a SIL and CDPHE's "conclusion that impacts from the Steel Mill would not be 'significant' and therefore not 'contribute' to violations of the NAAQS is unsupported by law and the Administrator must object to the Combined Permit." Petition at 9. The Petitioner supports this assertion by claiming that "[t]here is no question that the statute and regulation applicable here prohibit construction of any source that will 'cause or contribute' to any violation of a NAAQS," citing 42 U.S.C. § 7475(a)(3)(B), 40 C.F.R. § 51.166(k)(2) and 40 C.F.R. § 52.21(k)(2). *Id.* The Petitioner further claims that, "[t]he plain text of the Clean Air Act and PSD regulations contain no qualification that the contribution by a permitted facility be above any minimum concentration," arguing that, "[i]n fact, on its plain unambiguous face, the statute prohibits any contribution whatsoever to any NAAQS violation." *Id.*

The Petitioner argues that:

> [C]ontrary to the Clean Air Act's plain language, EPA has historically applied SILs to air impact analyses based, generally, on the legal principle that *de minimis* exemptions may

[7] Modeling, Meteorology, and Emission Inventory Support Unit and Continuous Monitoring and Data Systems Support Unit of the Technical Services Program/Air Pollution Control Division of CDPHE, "Response to Wild Earth Guardians' November 8, 2010 Comments on the Proposed Combined Title V/PSD Permit (95OPPB097) for EVRAZ Rocky Mountain Steel Mills" (Nov. 29, 2010)(MMEIU RTC).

> be created where there is no value (or only trivial value) in regulation. In this case, however, the plain language of the Clean Air Act, as well as judicial limitations on the *de minimis* doctrine, preclude the Division's reliance on a SIL to conclude that the Steel Mill will not contribute to violations of the 1-hour NO_2 NAAQs.

Petition at 9. The Petitioner states that:

> The *de minimis* doctrine is narrow and is "[p]redicated on the notion that 'the Congress is always presumed to intend that pointless expenditures of effort be avoided,'" and that authority to avoid statutory coverage in such instances "'is inherent in most statutory schemes, by implication.'"

Id. (quoting *Shays v. FEC*, 414 F.3d 76, 113-114 (D.C. Cir. 2005), which quotes *Ass'n of Admin. Law Judges v. FLRA*, 397 F.3d 957, 962 (D.C. Cir. 2005)). The Petitioner asserts that, "only where regulation would be pointless can the doctrine apply to avoid 'futile application' of a statute." *Id.* (citing *New York v. EPA*, 10 443 F.3d 880, 888 (D.C. Cir. 2006)).

The Petitioner also cites to *Shays v. FEC* to argue that the doctrine can be applied only in very narrow circumstances, providing several arguments to support its assertion that the judicial principles "foreclose reliance on the *de minimis* doctrine in this case." Petition at 10. First, "[t]he relevant statute here is in fact rigid in mandating a showing that each permit applicant to show [sic] that its proposed source 'will not cause, or contribute to, air pollution in excess of any' NAAQS. The statute does not allow for any exceptions to this mandate." *Id.* The Petitioner asserts that, "[a]bsent a SIL, a permittee contributing any amount to a NAAQS violation must reduce its pollution to eliminate its contribution to the violation," explaining that, "[a]s a result, application of SIL cannot be justified based on the *de minimis* doctrine." *Id.* Second, the Petitioner explains that "because protection of the NAAQS is the Clean Air Act's most central requirement, the Division cannot possibly claim that emissions causing or contributing to violations of the NAAQS are *de minimis*." *Id.* Third, the Petitioner suggests application of SILs "to avoid the consequences of a NAAQS violation (reduced emission rates or permit denial) is an inappropriate and unlawful application of the *de minimis* doctrine in this case." *Id.* at 10-11. The Petitioner explains that "[w]ithout the 4 ppb SIL, EVRAZ must reduce its emissions sufficiently to avoid contributing to any NAAQS violation; or to a level less than 50 tons per year." *Id.* at 10 (citing 42U.S.C. §§ 7475(a)(3) and (b); 40 C.F.R. § 51.166(k)). "Alternatively," the Petitioner suggests that "EVRAZ could obtain emission reductions from other nearby pollution sources so that the cumulative impacts from those sources and the Steel Mill would be below the NAAQS." *Id.* Fourth, the Petitioner asserts that EPA's recognition "that all NAAQS violations are problematic—even those that exceed the NAAQS by no more than the SIL—erases any argument that the SIL represents an insignificant amount of air pollution." *Id.*[8] Finally, the Petitioner claims that, "[i]n this case, in light of the fact that the

[8] To support this argument, the Petition suggests: "EPA has conceded that there is a benefit in preventing even relatively small contributions to violations of NAAQS, including those contributions below the SIL. *See, e.g.*, 75 Fed. Reg. 64892 and 64894 (directing that 'notwithstanding the existence of a SIL, permitting authorities should determine when it may be appropriate to conclude that even a *de minimis* [sic] impact will "cause or contribute" to an air quality problem and seek remedial action from the proposed new source or modification' and stating 'we have historically cautioned states that the use of a SIL may not be appropriate when a substantial portion of any NAAQS or increment is known to be consumed')." Petition at 11. The statements quoted by the Petitioner were made by

maximum modeled violation of the NO_2 NAAQS is as high as 215 ppb, more than twice the level of the NAAQS, it can hardly be concluded that the contribution of emissions from the Steel Mill simply do not matter." *Id.* The Petition concludes by asserting that the "Administrator must . . . object" because the "*de minimis* doctrine cannot justify the Division's issuance of the Combined Permit, which will contribute to violations of the NO_2 NAAQS ... [and i]t cannot serve to support the legality of the Division's interim SIL or EPA's June 29, 2010 interim SIL guidance." *Id.*

EPA's Response to Claim IIA: We view these claims above as being logically related and are, therefore, responding to them together.

I am granting the Petition on this issue on the basis that the permit record fails to provide adequate justification for the use of the SIL in this case. However, as explained in more detail below, EPA does not agree with the Petitioner's contentions that the *de minimis* doctrine cannot support CDPHE's use of the interim SIL here or EPA's June 29, 2010, interim SIL guidance (NO_2 NAAQS Guidance).[9] Rather, EPA has interpreted the *de minimis* doctrine to generally support use of SILs in a "culpability analysis," which may be conducted for purposes of determining whether a proposed source or modification contributes to predicted violations of a NAAQS. *See In re Mississippi Lime Co.*, PSD Appeal 11-01, Slip. Op. at 35-36 (EAB August 9, 2011) (*Mississippi Lime*); *In re Prairie State Generating Co.*, 13 EAD 1, 105 (EAB 2006) (*Prairie State*).

EPA's June 29, 2010, NO_2 NAAQS Guidance recommending the interim SIL for the hourly NO_2 standard made clear that a permitting authority's application of the interim SIL for the 1-hour NO_2 NAAQS must be supported by the permitting record. In that guidance, EPA stated:

> To support the application of this interim SIL in each instance, a permitting authority that utilizes this SIL as part of an ambient air quality analysis should include in the permit record the analysis reflected in this memorandum and the referenced documents to demonstrate that an air quality impact at or below the SIL is *de minimis* in nature and would not cause a violation of the NAAQS.

EPA in the context of a rule promulgating SILs for $PM_{2.5}$. The Petitioner does not demonstrate that EPA's statements were applicable to the SILs for NO_2 at issue here or that the particular circumstances presented in this case were the type of circumstances in which EPA has suggested use of a SIL may not be appropriate. The Petitioner also cites to EPA's *New Source Review Workshop Manual* (Oct. 1990) at C.52, for the proposition that an agency must "take remedial actions through applicable provisions of the state implementation plan to address the predicted violation(s)" even though a source may obtain a permit based on a demonstration that its impact is not significant at any violating receptor at the time of each predicted violation. Petition at 11. EPA's call for this remedial action does not demonstrate that the source issued the permit "causes or contributes" to the violations that must be remedied.

[9] Memorandum from Stephen D. Page, Director, Office of Air Quality Planning and Standards, to Regional Air Division Directors, "Guidance Concerning the Implementation of the 1-hour NO_2 NAAQS for the Prevention of Significant Deterioration Program" (June 29, 2010) (NO_2 NAAQS Guidance). The relevant discussion appears in Attachment 1, Memorandum from Anna Marie Wood, Air Quality Policy Division, to EPA Regional Air Division Directors, "General Guidance for Implementing the 1-hour NO_2 National Ambient Air Quality Standard in Prevention of Significant Deterioration Permits, Including an Interim 1-hour NO_2 Significant Impact Level" (June 28, 2010).

NO_2 NAAQS Guidance at 11. EPA further clarified that, "[t]he application of any SIL that is not reflected in a promulgated regulation should be supported by a record in each instance that shows the value represents a *de minimis* impact, as described above." *Id.* at 13. *See also Mississippi Lime* at 41 (granting the petition for review where the permitting authority failed to substantiate in the record which SIL it applied and its reasons for doing so).

In this case, CDPHE required ERMS to demonstrate that it would not cause or contribute to a violation of the 1-hour NO2 NAAQS and used an interim SIL of 4 ppb (the same level as in EPA's NO_2 NAAQS Guidance) to determine that the proposed modification did not cause or contribute to a violation of that NAAQS because the air quality impact attributable to the modification was below the SIL at location where modeling predicted a violation of the 1-hour NO_2 NAAQS. In light of those decisions and the arguments raised in the Petition, the issue before EPA is whether this approach to the PSD source impact analysis is authorized under the CAA and whether CDPHE provided an adequate rationale in the record to support this approach.

EPA determines that the permitting record lacks a justification to establish the *de minimis* nature of the value used in the permit record. CDPHE's RTC mentions EPA's interim SIL, CDPHE's own historical and current practice, and its adoption of EPA's interim SIL. MMEIU RTC at 6. But there is no discussion to show that the value CDPHE used in its analysis represents a *de minimis* impact. While CDPHE refers to EPA's interim SIL, it does not cite to or specifically adopt the rationale to support application of that SIL that appears in the relevant sections of EPA's NO_2 NAAQS Guidance. Thus, the permit record does not provide sufficient justification to establish the *de minimis* nature of the value used. Therefore, I grant the Petition to object on this issue and direct the CDPHE to supplement the permit record to include adequate justification to support its approach to demonstrating that the modification does not cause or contribute to a violation of the applicable NAAQS.[10] CDPHE also retains the discretion to make other changes to the Permit or permit record to ensure that it contains a demonstration that this modification at ERMS does not cause or contribute to a violation of the NO_2 NAAQS.

For purposes of clarity, EPA reaffirms its interpretation that, with appropriate record support, use of a SIL, as CDPHE did for this Permit, is permissible under the Clean Air Act to determine whether a proposed source or modification contributes to predicted violations of a NAAQS. *See, e.g., Mississippi Lime* at 35-36; *Prairie State*, 13 EAD at 104-109; NO_2 NAAQS Guidance at 11.[11] The application of a SIL in a culpability analysis of this nature is consistent with the *de minimis* doctrine. As explained in recent guidance on this issue:

> The primary purpose of the SIL is to serve as a screening tool to identify a level of ambient impact that is sufficiently low relative to the NAAQS or PSD increments such that the impact can be considered trivial or *de minimis.* Hence, the EPA considers a source whose individual impact falls below a SIL to have a *de minimis* impact on air quality concentrations that already exist. Accordingly, a source that demonstrates that the

[10] An example of such an analysis appears in pages 11-13 of the NO_2 NAAQS Guidance.

[11] EPA has recently filed a brief in a U.S. Court of Appeals for the District of Columbia Circuit defending an EPA rule establishing SILs for PM2.5 against a similar contention that SILs are contrary to the Clean Air Act. *Sierra Club* v. *EPA,* Case No. #10-1413, Brief of Respondent (D.C. Cir., April 6, 2012).

> projected ambient impact of its proposed emissions increase does not exceed the SIL for that pollutant at a location where a NAAQS or increment violation occurs is not considered to cause or contribute to that violation.

NO_2 NAAQS Guidance at 11. EPA further explained, "[t]he concept of a SIL is grounded on the *de minimis* principles described by the court in *Alabama Power Co. v. Costle*, 636 F.2d 323, 360 (D.C. Cir. 1980)." *Id.* (also citing *Sur Contra La Contaminacion v. EPA*, 202 F.3d 443, 448-49 (1st Cir. 2000), which upheld EPA's use of a SIL to allow a permit applicant to avoid a full impact analysis, and *Prairie State*, at 105).

Courts have long recognized that EPA has discretion under the Act to exempt from review some emission increases on *de minimis* grounds. In *Alabama Power*, the D.C. Circuit recognized that EPA has the inherent authority under the CAA to exempt emissions increases from new or modified sources from some or all of the PSD requirements where such emissions would be *de minimis* and thus their regulation would yield only trivial or no value. *Ala. Power Co.*, 636 F.2d at 360-61. Consistent with this, EPA has long interpreted the phrase "cause, or contribute to" in section 165(a)(3) of the Act to refer to significant, or non-*de minimis*, emission contributions. *Prairie State*, 13 EAD at 104-105, 107-08 (affirming use of SIL in such a culpability analysis); *Mississippi Lime* at 35-36 (stating that "the use of a SIL in the culpability analysis for the one-hour SO_2 NAAQS is not improper and [the State] did not clearly err by using a SIL").

The Petitioner's argument that the Act forecloses the use of SILs is based on a misunderstanding of the Act and of how SILs operate. First, section 165(a)(3) of the Act, 42 U.S.C. § 7475(a)(3), does not specify how the required demonstration of whether a source will "cause or contribute to" a NAAQS violation is to be made, and EPA's long-standing interpretation of that provision to allow the use of SILs as means to demonstrate compliance is reasonable. Second, the use of SILs does not waive the mandatory requirement in section 165(a)(3) that a source "demonstrate" that it "will not cause, or contribute to," a violation of the NAAQS. Rather, as used by CDPHE for this Permit, the interim SIL was a means of demonstrating through modeling that the source's impact at the time and place of a predicted NAAQS violation will be sufficiently low that such impact will not contribute to that violation. EPA applied this rationale to support the interim 1-hour NO_2 SIL in the NO_2 NAAQS guidance.

With respect to the Petitioner's claim that CDPHE determined or disclosed that ERMS would contribute to a violation of the 1-hour NO_2 NAAQS, the record indicates that CDPHE concluded that the proposed modification at ERMS did not contribute to a violation of the 1-hour NO_2 NAAQS, but that conclusion was based on use of the interim SIL which is the subject of the Petition grant above. [12] If in responding to that objection, CDPHE revises the permit record to include a justification to support the *de minimis* nature of the SIL used, EPA does not have

[12] Although the Petition asserts that CDPHE "found" that the Steel Mill would contribute to the identified violations, it also acknowledges that CDPHE "asserted" that issuance of the Permit would not cause or contribute to violations of the 1-hour NO_2 NAAQS. Petition at 8. On the page of the TRD cited in the Petition, CDPHE states "the maximum 1-hr NO_2 impact from the modification is 1.05 ppb, 25% of Colorado's interim SIL for 1-hour NO_2. Therefore, the proposed modification … will not cause or contribute to a violation of the 1-hour NO_2 NAAQS." TRD at 35. Thus, the Petitioner's assertion that CDPHE "found" that the Steel Mill would contribute to the identified violations appears unsupported.

reason to believe that any additional action or analysis would be needed to support CDPHE's conclusion. However, if CDPHE chooses to pursue a different course, additional changes to the permit record or Permit may be necessary.

In sum, I grant the Petition to object because the record does not contain a justification to support the approach that CDPHE used in this case to demonstrate the modification does not cause or contribute to a violation of the NO2 NAAQS applied in this instance. To address this objection, CDPHE must ensure that the permit record includes a justification to support its use of the interim SIL, either by incorporating and adopting EPA's rationale for the 1-hour NO_2 SIL, or providing an alternative rationale to support the application of a SIL that is not adopted in a regulation. Alternatively, CDPHE may make other appropriate changes to the Permit or permit record to ensure that it contains a demonstration that the source will not cause or contribute to a violation of the NO_2 NAAQS.

B. The Title V Permit Does Not Limit NO_2 Emissions on an Hourly Basis

The Petitioner argues that CDPHE's conclusion that the Steel Mill will not contribute to violations of the 1-hour NO_2 NAAQS is undermined by the fact that the Combined Permit does not appear to limit NOx emissions on an hourly basis.[13] Petition at 11. The Petitioner asserts that the Combined Permit does not limit NOx emissions on a short-term basis for any pollutant emitting activity except for NOx emission limits on the electric arc furnace and asserts that those limits only restrict NOx emissions on a mass production basis, not an hourly basis. *Id.* at 11-12. The Petitioner further explains that the NOx emissions limits for other pollutant emitting activities are "only on an annual basis." Petition at 12. Citing to examples of the annual emission limits, the Petitioner claims that "[i]t is unclear how a lack of hourly rates for these activities will ensure that the Steel Mill does not cause or contribute to violations of the 1-hour NO_2 NAAQS." *Id.* Based on this analysis, the Petitioner concludes that "[t]he lack of actual hourly emission limits on NOx emissions from the Steel Mill renders any conclusion that the facility will not contribute to violations of the 1-hour NO_2 NAAQS flawed." *Id.*

The Petitioner did not raise these concerns in the public comments submitted to CDPHE on the draft Combined Permit dated November 8, 2010. *See* WEG Comments on Proposed Permit for Rocky Mountain Steel Mill.

EPA's Response:

I deny the Petitioner's request for an objection to the Combined Permit on this claim on the basis that it was not raised to CDPHE with reasonable specificity during the public comment period. There is no evidence in the permit record that this issue was raised to CDPHE during the public comment period with reasonable specificity (and the Petitioner does not identify where it was raised). The Petitioner has not shown that it was impracticable to raise this objection during the public comment period, and there is no indication that the grounds for this objection arose

[13] Although the Petition states in one place that CDPHE's conclusion with respect to the 1-hour NO_2 NAAQS is "undermined by the fact that the Combined Permit does not actually limit NOx emissions on an *annual* basis," Petition at 11 (emphasis added), based on other statements in this section of the Petition which are noted in this Order, EPA interprets this claim to allege that CDPHE failed to impose a short-term limit on NOx emissions.

after the public comment period. *See generally* CAA § 505(b)(2), 42 U.S.C. § 7661d(b)(2); 40 C.F.R. 70.8(d).

As explained above, Section 505(b)(2) of the Act, 42 U.S.C. § 7661d(b)(2), and 40 C.F.R. 70.8(d) state that a petition to object to a title V permit shall be based only on objections to the permit that were raised with reasonable specificity during the public comment period unless the petitioner demonstrates that it was impracticable to raise such objections during the public comment period or unless the grounds for such objection arose after the public comment period. The Petitioner has not satisfied this requirement for this claim, as the Petition contains neither an explanation of why it was impracticable to raise this objection during the public period nor an explanation that the grounds for this objection arose after the public comment period.

In addition, the Petitioner was obviously aware of the contents of the ERMS Permit since the Petitioner provided comments on the Permit, yet failed to show why this particular NAAQS permitting claim could not be raised in public comments. *See In the Matter of Public Service Company of Colorado, dba Xcel Energy, Hayden Station*, Petition VIII-2009-01, at 10-13 (March 24, 2010) (finding issue was "one that was reasonably ascertainable and could have been raised by the Petitioner before the public comment period closed").

For these reasons, I deny this request for an objection to the Permit on this claim.

C. CDPHE Failed to Ensure the ERMS Would Not Cause or Contribute to Violations of the Ozone NAAQS

The Petitioner argues that CDPHE did not analyze the impacts of the Steel Mill to ambient concentrations of ozone and therefore has no basis to conclude that the Combined Permit will not cause or contribute to violations of the ozone NAAQS, as required by the CAA and the Colorado SIP. Petition at 12-13 (citing AQCC Regulation No. 3, Part D, Section VI.A.2.a; 42 U.S.C. § 7475(a)(3) and 40 C.F.R. § 51.166(k)(1)). The Petitioner contends that because CDPHE has done no modeling for ozone for the Permit, any assertion that ERMS will not cause or contribute to violations of the ozone NAAQS is unfounded and without a rational basis. *Id.* at 13. The Petitioner made similar arguments in comments submitted to CDPHE, arguing that an "ozone analysis is necessary" under PSD requirements and alleging that "[w]ith regards to the feasibility of modeling, there is no information or analysis presented by the Division to show that it is infeasible to conduct a modeling assessment to demonstrate that the steel mill will not cause or contribute to a violation of the NAAQS." WEG Comments at 7.

The CDPHE's response explained that while there are photochemical models "capable of assessing the impact of a single source to ambient ozone concentrations," EPA has not identified a preferred model for ozone in Appendix W to 40 C.F.R. Part 51. MMEIU RTC at 8-9. CDPHE's response referred to Section 5.2.1(c) of Appendix W, which states that, for estimating the impact of individual sources for ozone, model users should "consult with the [EPA] Regional Office to determine the most suitable approach on a case-by-case basis (subsection 3.2.2.)." CDPHE further stated that section 3.2.2(e) of Appendix W outlines conditions under which use of an alternative model may be approved if there is no preferred model, but explained that CDPHE lacked all the necessary conditions to propose and obtain EPA approval to use a photochemical model under that section. MMEIU RTC at 9. In particular, CDPHE explained

that "a representative ozone monitoring network does not exist in Pueblo County. Consequently, ozone monitoring data is unavailable to conduct performance evaluations of the photochemical model." *Id.* Therefore, CDPHE determined that "there is no preferred or alternative model for ozone for this ERMS PSD application." *Id.*

CDPHE further explained that its current modeling practices limited ozone modeling to situations where such modeling is feasible and warranted. *Id.* CDPHE went on to clarify that:

> In the absence of modeled impacts, MMEI considered the limited ozone concentrations that were obtained for one location in Pueblo County to determine whether it is likely the area will meet the ozone NAAQS. The highest 8-hour ozone concentration of 0.067 ppm, observed from pre-construction ozone monitoring conducted for the Black Hills Pueblo Airport Generating Station PSD application during the period of June 2009 through September 2009, is below the NAAQS of 0.075 ppm. Continuing at the same location, Xcel began ozone monitoring in April 2010 for a minimum of twelve (12) months to satisfy the post-construction monitoring requirement in the Comanche Generating Station PSD permit issued in 2005 and data from these monitoring efforts are not available to report as of the date of this document.

Id.

The Petitioner takes issue with many statements in CDPHE's response, arguing that it is unclear how there is a lack of ozone monitoring data to conduct a performance evaluation of a photochemical model, and arguing that there are models that are capable of assessing the impact of a single source on ambient ozone concentrations. Petition at 12-13. Regarding CDPHE's statement that four months of monitoring data from 2009 showed ozone concentrations below the ozone NAAQS applied in this case, the Petitioner asserts that the "Clean Air Act requires the Division to ensure that sources do not cause or contribute to future violations of the NAAQS—not past violations." *Id.* at 13. The Petitioner argues "[i]t is unclear how four months of past monitoring alone provides any meaningful insight into future ozone concentrations, particularly given that an assessment of whether a violation of the ozone NAAQS occurs is based on three years of monitoring data." *Id.* (citing 40 C.F.R. § 50.15(b)). The Petitioner concludes by suggesting that "[a]ll that the monitoring data from 2009 shows is that during that four month period, ozone concentrations did not exceed 0.075 ppm. It does not show that the Steel Mill will not cause or contribute to violations of the ozone NAAQS." *Id.* The Petitioner acknowledges that CDPHE is allowed to "exercise [professional] judgment," however, asserts that CDPHE "is not allowed to supplant 'professional judgment' in place of its legal obligations" under the Act and SIP to ensure that sources do not cause or contribute to a violation of the NAAQS. *Id.* The Petitioner concludes by arguing that CDPHE, "was not allowed to exercise professional judgment such that it could avoid altogether analyzing the impacts of the Steel Mill to ambient ozone concentrations in order to ensure that the source would not cause or contribute to violations of the NAAQS. The Administrator must therefore object to the issuance of the Title V Permit." *Id.*

EPA's Response:

As indicated above, to comply with PSD requirements, a source must demonstrate that it will not cause or contribute to a violation of any NAAQS or applicable increment. CAA § 165(a)(3); 40 C.F.R. 51.166(k); Section VI.A.2 of Part D of Regulation Number 3 in the Colorado SIP. As explained below, for ozone, this demonstration necessarily involves an analysis of impacts from the proposed source or modification on ambient ozone concentrations, although quantitative modeling of ozone impacts is not necessarily required.

As EPA recently explained, "the Colorado SIP requires estimates of ambient air concentrations to be based on applicable models, data bases, and other requirements generally required by the EPA, which the EPA interprets to include the requirements of Appendix W of 40 C.F.R. part 51, Guideline on Air Quality Models." 76 *Fed. Reg.* 43906, 43911 (July 22, 2011) (referencing Section VIII.A. of Part A of Regulation Number 3 in the Colorado SIP, which requires, "[a]ll estimates of ambient concentrations required under this Regulation No. 3 shall be based on the applicable air quality models, data bases and other requirements generally approved by EPA and specifically approved by the Division"). Appendix W does not specify a particular model for use in analyzing an individual source's impacts on ambient ozone levels in PSD permitting. Rather, Appendix W Section 5.2.1.c explains: "Choice of methods used to assess the impact of an individual source depends on the nature of the source and its emissions." This provision of Appendix W also explains that, "[t]hus, model users should consult with the Regional Office to determine the most suitable approach on a case-by-case basis." *Id.*

While the Petitioner is correct that CDPHE did not conduct modeling to demonstrate that the emissions from the modification at issue in this Permit would not cause or contribute to a violation of the ozone NAAQS, Appendix W contemplates that other methods, as determined in consultation with the EPA Regional Office, may be appropriate to assess the ozone impacts of an individual source, depending on the nature of the source, its emissions and background concentration. 40 C.F.R. Part 51, App. W section 5.2.1.c. Although quantitative ozone modeling is not necessarily required in each case, section 165(a)(3) of the Act and the PSD regulations do require some form of an analysis of ozone impacts from the proposed source or modification in order to demonstrate that the proposed source or modification will not cause or contribute to a violation of the ozone NAAQS. *See* 40 C.F.R. §§ 51.166(k), 52.21(k). *See also* Letter from Gina McCarthy, EPA Assistant Administrator, Office of Air and Radiation to Robert Ukeiley (Jan. 4, 2012) at 2, n.1 (clarifying that the required PSD demonstration "necessarily involves an analysis." [14]). In a recent action on the Colorado SIP, EPA confirmed that it interpreted the Colorado SIP to require ozone impacts to be assessed in PSD permitting, consistent with federal requirements. 76 *Fed. Reg.* 43906, 43910-11 (July 22, 2011). As EPA has recently explained in other contexts, depending on the nature of the source, its emissions and

[14] In this letter, EPA granted a petition for rulemaking, agreeing to engage in a rulemaking process to evaluate whether updates to Appendix W are warranted for ozone and secondary $PM_{2.5}$ analyses, and explaining that, for technical reasons relating to the complexity of ozone formation, "EPA has chosen to satisfy the requirements of Section 165(e)(3)(D) of the CAA through a process of determining particular models or other analytical techniques that should be used on a case-by-case basis." Letter from Gina McCarthy, EPA Assistant Administrator, Office of Air and Radiation to Robert Ukeiley (Jan. 4, 2012) at 2. EPA made clear, however, that this technical judgment has no effect on a source's obligation to conduct a source impact analysis and demonstrate that the proposed source or modification will not cause or contribute to a violation of any NAAQS or applicable increment, *id.* at n.1, which has long been a requirement under the PSD program. *See* CAA § 165(a)(3); *see also,* 40 C.F.R. §§ 51.166(k), 52.21(k).

background ozone concentrations, "an ozone impact analysis other than modeling may be required." 76 *Fed. Reg.* 41100, 41108 (July 13, 2011). *See also*, 76 *Fed. Reg.* 81371, 81386 (Dec. 28, 2011) (noting that the consultation process "allows flexibility . . . to determine either modeling based or other analysis techniques may be acceptable").

In this case, CDPHE generally addressed the challenges with conducting an ozone impacts analysis for this source, but did not provide an adequate analysis in the record to support a conclusion that the emissions from the modification at issue in this Permit will not cause or contribute to a violation of the ozone NAAQS applied in this case. The record justification with respect to ozone is lacking in several respects. First, CDPHE's ozone analysis and RTC did not discuss the emissions from ERMS or the modification covered by this Permit at all. Thus, CDPHE did not address how ERMS emissions are expected to affect (or not affect) ambient ozone levels. Second, while recognizing there may not be close-by monitoring data, CDPHE did not consider monitoring data in the area that may be representative of conditions at the source. Finally, CDPHE's analysis failed to provide any explanation of how it supports a conclusion that the emissions from the modification for this Permit will not cause or contribute to an ozone NAAQS violation. Therefore, EPA grants the Petition with respect to the Petitioner's assertion that CDPHE failed to provide an adequate analysis to support a conclusion that emissions from the modification at issue in this Permit would not cause or contribute to a violation of the ozone NAAQS applied in this case. EPA directs CDPHE to ensure that the record contains an appropriate analysis showing that emissions from the modification at issue in this Permit will not cause or contribute to a violation of the ozone NAAQS, in accordance with the requirements of the SIP. CDPHE retains the discretion to make any necessary revisions to the Permit or permit record in light of that analysis.[15] EPA can provide recommendations on an appropriate analysis method to use for ozone impacts in this case.

III. The Permit Fails to Include Stipulated Penalty Requirements

The Petitioner argues that the Combined Permit fails to include all relevant requirements set forth in the underlying 2003 Consent Decree between ERMS and the EPA, which the Petitioner alleges is an applicable requirement under title V. Petition at 13. The Petitioner asserts that the Combined Permit was required to contain the stipulated penalties provisions from the Consent Decree. *Id.* Specifically, the Petitioner argues that all the injunctive relief imposed by the Consent Decree must be incorporated into the Permit as required under Paragraph 132.d of the Consent Decree, not just the injunctive relief identified in Paragraph 132.b. *Id.* at 14. Thus, the Petitioner states that "unless and until the Consent Decree is terminated, the Combined Permit must incorporate the stipulated penalties requirements of Paragraphs 92 through 100 of the Consent Decree." *Id.*

CDPHE's response explained that "[i]n general, the Division does not include stipulated penalties in permits." CDPHE RTC at 11. CDPHE further asserted that the Consent Decree did not require the stipulated penalties to be included in the Permit, noting that although Paragraph

[15] Although CDPHE cites the 2010 Comanche monitoring data, it does not discuss those results or indicate what the data show. Because these data could be helpful in evaluating whether qualitative analysis is appropriate for this source, and in evaluating any proposed qualitative analysis, we suggest that CDPHE obtain these data and include it in its analysis, as appropriate, in responding to this Order.

132.d of the Consent Decree requires all injunctive requirements imposed by the Consent Decree to be incorporated into the title V permit, Paragraph 132.b identifies the injunctive relief required in the Consent Decree as residing in specific sections of that document. *Id.* Because the stipulated penalties reside in a section that was not identified in Paragraph 132.b, CDPHE concluded that they did not need to be included in the title V permit. *Id.*

EPA's Response: EPA denies the Petition to object on this issue. The Petitioner has not demonstrated that the Permit fails to assure compliance with an applicable requirement or requirement of Part 70 because it fails to include the stipulated penalties provisions from the 2003 Consent Decree. The Consent Decree between ERMS and EPA terminated on February 17, 2011,[16] and the stipulated penalty provisions in Paragraphs 92 through 100 no longer exist. Moreover, even if the Consent Decree and the stipulated penalty provisions were not terminated and continued to apply, nothing in the Consent Decree nor Part 70 requires inclusion of the Consent Decree stipulated penalties provisions in the Permit.

EPA has explained that all CAA-related requirements in consent decrees and administrative orders resulting from the enforcement of CAA applicable requirements are appropriately treated as applicable requirements and must be included in title V permits. *In the Matter of Citgo Refining and Chemicals Company, L.P.*, Petition No. VI-2007-01 (Order on Petition) (May 28, 2009), at 12. The Petitioner does not cite the *Citgo* Order, and does not show that the stipulated penalties provisions in the 2003 Consent Decree between ERMS and EPA would fall within its ambit. Furthermore, the stipulated penalties provisions in the 2003 Consent Decree do not impose operational requirements for ERMS. Moreover, stipulated penalties provisions are enforceable under provisions of consent decrees that are separate from the consent decree provisions addressing injunctive relief. Accordingly, the Petitioner has not demonstrated that the stipulated penalty provisions are applicable requirements, or requirements of Part 70, that must be included in the Permit.

IV. The Permitting Authority Failed to Consider Environmental Justice Impacts

The Petitioner claims CDPHE failed to consider environmental justice issues. Petition at 14. During the public comment period, the Petitioner asserted that "[t]he combined Title V/PSD permit should address environmental justice impacts in accordance with U.S. Executive Order 12898." Petitioner Comments at 7.[17] CDPHE's response explained that, "EPA has not provided any clear, specific guidance on what a state agency must do to evaluate a project for [environmental justice], nor are there any federal or state regulations requiring an [environmental justice] review." CDPHE Response at 11. CDPHE added that "as part of the permitting process, the project was evaluated for compliance with air quality standards and the evaluation indicates that the project will not cause or contribute to a violation of the standards. The standards are set at levels to be protective of both public health (including 'sensitive' populations) and welfare (including

---

[16] Order Granting Motion to Terminate Consent Decree, Civil Action No. 03-CV-00608-RPM (D. Colo., Feb. 17, 2011).

[17] Another commenter raised comments relating to public participation and environmental justice, and also argued that because of impacts on the predominately low-income and minority community in Pueblo, all practicable measures to reduce, prevent and control mercury emissions from ERMS should be required. Comments from Better Pueblo, Citizens for Clean Air and Water in Pueblo, and Sangre de Cristo Group of the Sierra Club (Nov. 9, 2010) at 4-5, 10-11. The Petition does not raise those issues.

protection against decreased visibility, damage to animals, crops, vegetation, and buildings)." *Id.* CDPHE further explained the public participation opportunities for this Permit, and the emissions reductions which had occurred through decommissioning two old EAFs and replacing them with a new EAF. *Id.* It then concluded that it "believes that [environmental justice] concerns are addressed through the federal NESHAP, the air quality standards analysis, the overall emissions reductions and the public participation opportunities afforded by the permitting process." *Id.* at 12.

The Petition asserts that CDPHE erred in that response. The Petition claims that CDPHE has authority to assess whether the Permit would disproportionately impact minority or low-income communities in Pueblo, but made no effort to do so. Petition at 14-15. The Petition suggests that there are federal requirements that require consideration of environmental justice impacts, and that Executive Order 12898 is one such requirement. *Id.* at 14. The Petition further suggests that the CDPHE's PSD BACT regulations, as well as federal PSD BACT regulations, provide authority to address environmental justice issues, because CDPHE has authority to take environmental and economic impacts into account when establishing BACT limits, and environmental justice "inherently involves an analysis of environmental and economic impacts." *Id.* The Petition thus argues that CDPHE "failed to appropriately take into account relevant factors" in its BACT analysis because it did not address whether disproportionate impacts to low income and minority communities would occur and could be addressed before issuing the Permit. *Id.* at 15.

In addition, the Petitioner disagrees with CDPHE's statements on how environmental justice is addressed through its existing processes, and asserts that CDPHE has made "no effort to ensure that its existing processes actually identify and address any disproportionately high and adverse human health or environmental effects on minority or low income communities." *Id.* The Petition states that CDPHE's view that its existing process addresses environmental justice "is contradicted . . . by the Division's own admission that 'EPA has designated Pueblo as an Environmental Justice . . . community.'" [18]

EPA's Response: Executive Order 12898, signed by President Clinton on February 11, 1994, focuses federal attention on the environmental and human health conditions of minority populations and low-income populations with the goal of achieving environmental protection for all communities. The Executive Order also is intended to promote non-discrimination in federal programs substantially affecting human health and the environment, and to provide minority and low-income communities' access to public information on, and an opportunity for public participation in, matters relating to human health or the environment. It generally directs federal agencies to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority and low-income populations.
Environmental justice issues can be raised and considered in the context of a variety of actions carried out under the Clean Air Act. Title V generally does not impose new, substantive emission control requirements, but rather provides for a public and governmental review process

[18] CDPHE's RTC suggests that, "EPA has designated Pueblo as an Environmental Justice (EJ) community." CDPHE RTC at 11. While EPA has been working with the Pueblo community on environmental justice issues, EPA does not make such designations.

and requires title V permits to assure compliance with all underlying applicable requirements. *See, e.g., In the Matter of Marcal Paper Mills*, Petition No. II-2006-01 (Order on Petition) (November 30, 2006), at 12. Title V can help promote environmental justice through this process and through the requirements for monitoring, compliance certification, reporting and other measures intended to assure compliance with applicable requirements.

With regard to ERMS, EPA denies the environmental justice claims in the Petition. Attention to environmental justice in the implementation of federal environmental programs is a priority for EPA. *See generally*, Office of Environmental Justice, *Plan EJ 2014* (September 2011) (outlining EPA's efforts to promote environmental justice and identifying environmental justice and permitting as a focus area) (available at http://www.epa.gov/environmentaljustice/resources/policy/plan-ej-2014/plan-ej-2011-09.pdf). However, the claims in the Petition largely were not raised in public comments, and fail to demonstrate the Permit is not in compliance with the Act. As a threshold matter, with the exception of the claim that CDPHE was required to comply with Executive Order 12898, the Petitioner's environmental justice claims were not raised with reasonable specificity in comments to the CDPHE. Further, the Petitioner does not demonstrate that it was impracticable to raise these claims in comments, and there is no indication that the grounds for these claims arose after the public comment period. *See* CAA § 505(b)(2), 42 U.S.C. § 7661d(b)(2); 40 C.F.R. 70.8(d). The Petitioner's comment on the draft permit merely asserted that the permit should address environmental justice impacts in accordance with Executive Order 12898, and did not identify any disproportionately high and adverse human health or environmental effects. This generic assertion is not sufficient to raise an issue with reasonable specificity. This public comment also made no mention of addressing environmental justice impacts in the BACT process, and EPA has not identified any other comment that raised this point. EPA also notes that, although the Petition argues that the BACT provisions provide authority to consider environmental justice concerns, the Petition has not identified any specific error with any particular BACT determinations for this Permit based on the alleged failure to consider environmental justice concerns. In addition, Executive Order 12898 technically applies to federal agencies, not to state agencies. Where a state is implementing a federal EPA program under a delegation agreement with EPA, Executive Order 12898 does apply. *In Re Knauf, Fiber Glass, GMBH,* 8 E.A.D. 121, 174 (EAB 1999), but it does not apply to states operating approved programs. While EPA is denying the Petition on the environmental justice issues raised in the Petition, EPA has reviewed the Petitioner's claims that the Permit fails to assure compliance with applicable requirements, and, as noted above, is granting the Petition on several of these claims.

CONCLUSION

For the reasons set forth above and pursuant to section 505(b)(2) of the Clean Air Act and 40 C.F.R. § 70.8(d), I hereby partially deny and partially grant the Petition from WildEarth Guardians, objecting to the Permit consistent with this Order.

Dated: MAY 31 2012

Lisa P. Jackson
Administrator