

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

IN THE MATTER OF )	
EL DORADO ENERGY, LLC )	PETITION NO. IX-2003-08
)	ORDER RESPONDING TO
)	PETITIONER'S REQUEST THAT THE
)	ADMINISTRATOR OBJECT TO
Permit No. A00652, )	ISSUANCE OF A STATE OPERATING
Issued by the Clark County Department )	PERMIT
of Air Quality and Environmental )	
Management, Nevada )	
)	

**ORDER DENYING PETITION FOR OBJECTION TO PERMIT**

On August 29, 2003, the Environmental Protection Agency ("EPA") received a petition ("Petition") from Robert Hall (the "Petitioner"), requesting that the EPA Administrator object to a state operating permit proposed for issuance by the Clark County Department of Air Quality and Environmental Management ("DAQEM")<sup>1</sup> for a power plant owned and operated by El Dorado Energy in Clark County, Nevada ("El Dorado Energy Permit" or "Permit"), pursuant to Title V of the Clean Air Act ("CAA" or "the Act"), 42 U.S.C. §§ 7661-7661f, CAA §§ 501-507, and DAQEM's approved part 70 program. *See* 66 Fed. Reg. 63188 (Dec. 5, 2001).

According to section 505(a) of the Act, 42 U.S.C. §7661d(a), and 40 CFR §70.8(a), states are required to submit each proposed title V permit to EPA for review. Section 505(b)(1) of the Act authorizes EPA to object to the issuance of a permit on its own initiative if the Administrator finds that it is "not in compliance with the applicable requirements of the [Act], including the requirements of an applicable [state] implementation plan." *See also* 40 CFR §70.8(c). The Act and EPA's implementing regulations provide that, if the Administrator does not object in writing, "any person" may petition the Administrator to object to the permit. CAA §505(b)(2); 40 CFR §70.8(d).

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<sup>1</sup>Clark County's administrative departments were recently reorganized, and the Clark County Department of Air Quality Management ("DAQM"), cited in the Petition and the administrative record as the applicable local air pollution control agency, has been subsumed within a new county department named the Clark County Department of Air Quality and Environmental Management ("DAQEM"). The DAQEM, like its predecessor (i.e., the DAQM), is responsible for administering air quality regulations in Clark County.

Petitioner requests that the Administrator object to the El Dorado Energy Permit, based on allegations concerning: (1) the lack of a pre-construction permit issued pursuant to an EPA-approved State Implementation Plan ("SIP"); (2) the inability of DAQEM to enforce Section 15 of the EPA-approved SIP, which concerns New Source Review permitting; (3) the compliance certification condition; (4) the Air Pollution Control Officer's discretion to request a performance test; (5) the Air Pollution Control Officer's discretion in confidential business information determinations; (6) the lack of pre-construction and post-construction monitoring; (7) missing requirements for Total Suspended Particulate; (8) the lack of CAA Section 111 and 112(r) authority; (9) permit conditions that cite "NSR OP 00652, Modification 0"; (10) the lack of a compliance plan; (11) the lack of a compliance certification; (12) the lack of a SIP or authority to issue new source review permits; and (13) inadequate emission limit compliance requirements.

EPA has now fully reviewed the Petitioner's allegations, and I hereby respond to them in this Order. In considering the allegations, EPA reviewed the El Dorado Energy Permit, the supporting documentation for the El Dorado Energy Permit, and information provided by the Petitioner in the Petition. Based on this review, I deny the Petitioner's request for the reasons set forth below.

## **I. STATUTORY AND REGULATORY FRAMEWORK**

Section 502(d)(1) of the Act calls upon each State to develop and submit to EPA an operating permit program to meet the requirements of Title V. On behalf of the Clark County Board of Health, the State of Nevada submitted a Title V program governing issuance of operating permits in Clark County on January 12, 1994, and submitted revisions to this program on July 18 and September 21, 1994. 40 C.F.R. Part 70, Appendix A. In July of 1995, EPA granted interim approval to this program, as revised.<sup>2</sup> The State of Nevada submitted a revised program on June 1, 2001, and in December of 2001, EPA granted full approval to the Clark County Title V operating permits program. 66 *Fed. Reg.* 63188 (December 5, 2001); 40 C.F.R. Part 70, Appendix A. Major stationary sources of air pollution and other sources covered by Title V are required to obtain an operating permit that includes emission limitations and such other conditions necessary to assure compliance with all applicable requirements of the Act, in accordance with 40 C.F.R. Part 70. 42 U.S.C. §§ 7661a(a) and 7661c(a).

The Title V operating permit program does not generally impose new substantive air quality control requirements (which are referred to as "applicable requirements"), but does require permits to contain monitoring, recordkeeping, reporting, and other requirements to assure compliance by sources with existing applicable requirements. 57 *Fed. Reg.* 32250, 32251 (July 21, 1992). One purpose of the Title V program is to "enable the source, States, EPA, and the

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<sup>2</sup> This program, which became effective on August 14, 1995, was codified in Clark County Board of Health Air Pollution Control Regulations (APCR) Section 19. As explained further in footnote #7, below, since mid-2001, the Clark County Board of County Commissioners has assumed responsibility for the air pollution permitting program from the Clark County Board of Health. The Board of County Commissioners has codified APCR Section 19, previously adopted by the Board of Health, as Clark County Air Quality Regulations (AQR) Section 19.

public to understand better the 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 existing air quality control requirements are appropriately applied to facility emission units in a single document, and therefore enhance compliance with the requirements of the Act. *Id.*

Under Section 505(b), the Administrator is authorized to review state operating permits issued pursuant to Title V, and to object to permits that are not in compliance with the applicable requirements of the Act, including the requirements of a SIP and 40 C.F.R. Part 70. When EPA declines to object to a Title V permit on its own initiative, Section 505(b)(2) of the Act provides that any person may petition the Administrator to object to the issuance of the permit by demonstrating that the permit is not in compliance with all applicable requirements. 42 U.S.C. § 7661d(b)(2); *see also* 40 C.F.R. § 70.8. These petitions “shall 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).” 42 U.S.C. § 7661d(b)(2).

Section 505(b)(2) of the Act, 42 U.S.C. § 7661d(b)(2), requires the Administrator to issue a permit objection if a Petitioner demonstrates that a permit is not in compliance with the requirements of the Act, including the requirements of Part 70 and the applicable implementation plan. *See*, 40 C.F.R. § 70.8(c)(1); *New York Public Interest Research Group, Inc. v. Whitman*, 321 F.3d 316, 333 & n.11 (2d Cir. 2003). If, in responding to a petition, EPA objects to a permit that has already been issued, EPA or the permitting authority will modify, terminate, or revoke and reissue the permit consistent with the procedures in 40 C.F.R. §§ 70.7(g)(4) or (5)(i) and (ii) for reopening a permit for cause. A petition does not stay the effectiveness of the permit or its requirements if the permit was issued after the expiration of EPA's 45-day review period. *See* 42 U.S.C. §§ 7661d(b)(2)-(b)(3); 40 C.F.R. § 70.8.

## **II. STATE IMPLEMENTATION PLAN**

The CAA directs EPA to set national ambient air quality standards (“NAAQS”) for certain pollutants, *see* 42 U.S.C. §§ 7408-09, and directs each State, after notice and public hearings, to adopt and submit to the EPA Administrator a plan for the implementation, attainment and maintenance of the NAAQS for each pollutant. 42 U.S.C. § 7410(a)(1). Such plans are known as “State Implementation Plans” (“SIPs”), and they typically consist of state or local regulations that apply to sources of air pollution within a particular jurisdiction. EPA is required to review and act on each “SIP submittal” – *i.e.*, each package of state or local regulations submitted to EPA for approval as part of the SIP – and to approve those that meet all of the applicable requirements of the CAA. 42 U.S.C. § 7410(k).

SIP-approved regulations apply as federal law to sources of air pollution within the

appropriate jurisdiction. *See* 42 U.S.C. § 7410. When a revision to a SIP-approved regulation is promulgated as required by the CAA, the revision must be submitted to EPA for approval into the SIP. *See* 42 U.S.C. § 7410(a)(2)(H). However, the original SIP-approved regulation remains federally enforceable as part of the SIP until EPA approves the revised regulation as part of the SIP.<sup>3</sup>

### **III. PREVENTION OF SIGNIFICANT DETERIORATION AND NEW SOURCE REVIEW PRECONSTRUCTION PERMIT PROGRAMS**

The CAA requires that every SIP include regulations that implement various requirements listed in section 110(a)(2) of the Act, including the requirement in section 110(a)(2)(C) that SIPs include a comprehensive program regulating the construction of new, and modification of existing, sources of air pollution. 42 U.S.C. § 7410(a)(2)(C). This program, known as the New Source Review (“NSR”) permitting program, is a requirement of every SIP. *Id.* The CAA contains additional requirements for an NSR permitting program applicable to “major” new and modified stationary sources; these are set forth in Parts C and D of Title I of the Act. 42 U.S.C. § 7410(a)(2)(C). Part C, 42 U.S.C. §§ 7470-92, contains specific NSR permitting requirements for major stationary sources that are or will be located in an attainment area (*i.e.*, areas where the concentration of an air pollutant does not exceed the NAAQS), or areas designated “unclassifiable.” *See also* 40 C.F.R. § 51.166.<sup>4</sup> Sources subject to the PSD program are required to meet certain standards, known as Best Available Control Technology, or “BACT,” that are designed to ensure that the air quality does not deteriorate significantly. Part D, 42 U.S.C. §§ 7501-15, contains NSR permitting provisions that regulate construction and modification of major stationary sources in *nonattainment* areas (*i.e.*, areas where the concentration of an air pollutant *exceeds* the NAAQS). *See also* 40 C.F.R. § 51.165. Such sources are required to meet Lowest Achievable Emission Rates (“LAER”) and to offset emission increases resulting from their construction or modification. 42 U.S.C. § 7503(a)(1)-(2).

### **IV. CLARK COUNTY STATIONARY SOURCE PERMITTING PROGRAM**

On April 30, 1971 (36 *Fed. Reg.* 8186), pursuant to section 109 of the Clean Air Act, as amended in 1970, EPA promulgated NAAQS for sulfur oxides (measured as SO<sub>2</sub>), particulate matter (measured as total suspended particulate, or “TSP”), carbon monoxide (CO), photochemical oxidants, hydrocarbons, and nitrogen dioxide. Within 9 months thereafter, each State was required under section 110 of the Act to adopt and submit to EPA a plan which

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<sup>3</sup> Because States typically revise only portions of their SIPs (*i.e.*, selected regulations) at any given time, an approved SIP typically consists of regulations that were promulgated and received EPA approval at various times over a period of several years. *See, e.g.*, 40 C.F.R. Part 52, Subparts B through FFF (listing the SIP-approved regulations of each State).

<sup>4</sup> This portion of the CAA is called “Prevention of Significant Deterioration” or “PSD” because it is designed to ensure that air quality in attainment or unclassifiable areas (areas that meet the NAAQS) does not deteriorate, while still allowing for economic and industrial growth.

provides for the implementation, maintenance, and enforcement of the NAAQS within each State. Nevada's plan ("SIP") was submitted on January 28, 1972. This original plan included, among various other provisions, the complete set of Clark County Board of Health Air Pollution Control Regulations (as revised and adopted locally on August 25, 1971). EPA approved that original plan submittal later that year. 37 *Fed. Reg.* 10842 (May 31, 1972).

On January 19, 1973, the Governor of Nevada submitted amended Clark County regulations ("1973 SIP revision"), as revised and adopted locally on November 22, 1972 and December 27, 1972, to EPA for approval into the Nevada SIP. This 1973 SIP revision represented another complete, but amended, set of Clark County Board of Health air pollution regulations. EPA approved the 1973 SIP revision on May 14, 1973 (38 *Fed. Reg.* 12702) thereby superseding the original set of Clark County regulations in the SIP. The 1973 SIP revision included Clark County Board of Health Air Pollution Control Regulations (APCR) Section 8 ("Registration and Operating Permits"), which established requirements for existing stationary sources to secure registration certificates, provided for annual renewal of certificates, and established requirements for operating permits,<sup>5</sup> and APCR Section 9 ("New and Modified Sources"), which established procedures for new or modified stationary source to secure registration certificates prior to installation or construction. Sections 8 and 9 relied upon the definitions of certain terms as set forth in APCR Section 1 ("Definitions"). The stationary source permitting program embodied in APCR Sections 8 and 9 covered all types of stationary sources: new and existing, major and minor.

Generally, SIPs were to provide for attainment of the NAAQS within 3 years after EPA approval of the plan. However, many areas of the country did not attain the NAAQS within the statutory period. In response, Congress amended the Act in 1977 to establish a new approach, based on area designations, for attaining the NAAQS, and on March 3, 1978 (43 *Fed. Reg.* 8962), under paragraph 107(d)(2) of the Act, EPA promulgated attainment status designations for all States. EPA designated Las Vegas Valley (i.e., hydrographic area 212) as nonattainment for CO, photochemical oxidants, and TSP, and as attainment or unclassifiable for the other NAAQS. All other areas within Clark County were designated as attainment or unclassifiable for all of the NAAQS. In 1979, EPA replaced the photochemical oxidants NAAQS with a NAAQS for ozone, but Las Vegas Valley retained its nonattainment designation upon transition to the new standard.

Under the Act, as amended in 1977, States were required to develop, adopt, and submit preconstruction permitting rules that complied with the revised portions of parts C (PSD) and D (Nonattainment) of Title I of the 1977 amended Act and EPA's revised implementing regulations

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<sup>5</sup> Unlike *preconstruction* permit programs, States were not required under the CAA to submit *operating* permit programs to EPA for approval as part of a given SIP, but some localities, such as Clark County, chose to do so. In such areas, all sources are subject to the operating permit requirements of the SIP-approved rule, but only certain sources (e.g., those defined as "major" under Title V) covered by the SIP-approved operating permit requirements are also subject to operating permit requirements under the Title V operating permit rule (in this case, Clark County Air Quality Regulations Section 19 ("Part 70 Operating Permits"). Operating permit rules developed to comply with Title V are not part of a SIP.

(that were then set forth at 40 C.F.R. Part 51, sections 51.18 and 51.24). In response, the Clark County Board of Health undertook a comprehensive revision of its stationary source permitting program, including requirements for preconstruction review of new and modified stationary sources, which were revised to distinguish between sources proposed for locations in attainment (or unclassifiable) areas (*see* APCR Section 15, subsection 15.13) and those proposed for locations in nonattainment areas (*see* APCR Section, subsection 15.14), and its requirements for operating permits. The Board of Health adopted the revisions as APCR Section 15 ("Source Registration"), which combined new or amended registration and preconstruction review requirements into a single rule, and APCR Section 16 ("Operating Permits"). APCR Sections 15 and 16 relied upon new or revised definitions of certain terms as set forth in a revised APCR Section 1 ("Definitions").

The State of Nevada submitted APCR Sections 1, 15, and 16 to EPA as SIP revisions at various times in 1979 through 1981, and EPA took final actions on them at various times in 1981 and 1982. *See* 46 *Fed. Reg.* 21758 (April 14, 1981); 46 *Fed. Reg.* 43141 (August 27, 1981); 47 *Fed. Reg.* 26386 (June 18, 1982); 47 *Fed. Reg.* 26620 (June 21, 1982). As of the effective dates of EPA's approvals in 1981 and 1982, the revised stationary source registration, preconstruction review, and operating permit program in APCR Sections 1, 15, and 16 superceded (or replaced) the previously-approved APCR Sections 8 and 9 (and the related defined terms in APCR Section 1) in the Nevada SIP. As discussed below, a number of regulatory and judicial actions have affected the status of APCR Sections 1 and 15 with respect to the Nevada SIP, but APCR Section 16 remains in the SIP as originally approved in 1982.

In the years following EPA's approval of APCR Sections 1 and 15 into the Nevada SIP, air quality conditions and regulatory requirements (for both PSD and Nonattainment NSR) changed in a number of ways. For instance, in 1986, EPA redesignated Las Vegas Valley from nonattainment to attainment for the ozone NAAQS. *See* 51 *Fed. Reg.* 41788 (November 19, 1986). In 1987, EPA revised the NAAQS for particulate matter (*see* 52 *Fed. Reg.* 24634), replacing TSP as the indicator for particulate matter with a new indicator called PM-10 that includes only those particles with an aerodynamic diameter less than or equal to a nominal 10 micrometers.<sup>6</sup> In 1988, EPA established maximum allowable increases ("increments") for NO<sub>2</sub> to join those increments already established for TSP and SO<sub>2</sub>. *See* 53 *Fed. Reg.* 40656 (October 17, 1988).

Meanwhile, in Clark County, the Clark County Board of Health undertook a comprehensive revision of the preconstruction review (i.e., New Source Review, or NSR) portion of its stationary source permitting program to respond to local concerns and, on July 9, 1987, adopted new APCR Sections 0 ("Definitions") and 12 ("Preconstruction Review for New or Modified Stationary Sources"). The Board of Health intended the newly-adopted NSR rules,

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<sup>6</sup> EPA later replaced the original particulate matter increments for the PSD program, which had been defined in terms of TSP, with equivalent increments defined in terms of PM-10. *See* 58 *Fed. Reg.* 31622 (June 3, 1993).

which substituted a new legal instrument (an "Authority to Construct" or "ATC") for the outdated "registration certification," to replace the corresponding previously-adopted NSR rules, i.e., APCR Sections 1 and 15, but did not delete the older rules from the local rulebook in recognition of the fact that, by operation of law, APCR Sections 1 and 15 remain in the Nevada SIP until EPA approves their replacement. EPA took no action to approve the newly-adopted NSR rules (i.e. APCR Sections 0 and 12). From 1988 through 1990, the Clark County Board of Health adopted revisions to APCR Sections 0 and 12, but, like the original versions adopted in 1987, EPA took no action to approve them as a revision to the Nevada SIP.

The Clean Air Act was amended significantly again in 1990. The 1990 Clean Air Act Amendments modified certain NSR requirements, and States were required to revise their NSR programs and submit the revisions to EPA as revisions to their SIPs. Also, under the Clean Air Act, as amended in 1990, Las Vegas Valley remained a nonattainment area for CO, was designated nonattainment for PM-10, and was designated as attainment or unclassifiable for the other NAAQS. All areas in Clark County outside of Las Vegas Valley were designated as attainment or unclassifiable for all of the NAAQS.

To account for the changes in circumstances and regulatory requirements that had occurred since the mid-1980's as well as the statutory changes enacted in 1990, the Clark County Board of Health further revised its local (but not EPA-approved) NSR program. On May 27, 1993, the Board of Health adopted a complete set of revisions to the local NSR program, then contained in APCR Sections 0 ("Definitions"), 12 ("Preconstruction Review for New or Modified Stationary Sources"), and 58 ("Emission Reduction Credits") and deleted APCR Sections 1 and 15 pending EPA approval of the newly-revised NSR program. The revised NSR program codified in Board of Health APCR Sections 0, 12, and 58 was intended to comply with the statutory and regulatory requirements for preconstruction review of new major sources or major modifications proposed within attainment (or unclassifiable) areas (referred to as PSD) and within nonattainment areas (referred to as Nonattainment NSR) as well as preconstruction review of new minor sources or minor modifications (referred to as "minor NSR"). On November 30, 1993, the State of Nevada submitted the revised rules to EPA as a revision to the Nevada SIP.

In July 1995, EPA proposed to approve "with a contingency" the SIP submittal that contained the revised NSR program codified as APCR Sections 0, 12, and 58. 60 *Fed. Reg.* 38777 (July 28, 1995). This proposed approval was "contingent" upon Clark County correcting certain deficiencies in the submitted NSR program. EPA's 1995 proposed rule also stated that approval of the new rules would replace existing SIP APCR Sections 1 and 15, *id.* at 38778, and requested public comment. Between December 1995 and April 1998, the Board of Health engaged in a public process to revise the rules in accordance with EPA's concerns.

In April 1998, the Clark County Board of Health adopted revised APCR Sections 0 and 12 (a revised APCR Section 58 had been adopted by the Board in December 1995). Concurrent with the adoption of APCR Sections 0 and 12, the Board of Health also repealed APCR Section 15 in its entirety in the belief that the NSR program had been revised to fix all of the deficiencies

that had been identified by EPA. In May 1999, EPA published a final rule approving the revised NSR program codified in APCR Sections 0 and 12, as adopted by the Board in April 1998, and APCR Section 58, as adopted by the Board in December 1995, as a revision to the Nevada SIP. 64 *Fed. Reg.* 25210 (May 11, 1999). Effective June 10, 1999 (i.e., the effective date of EPA's May 1999 Final Rule), APCR Sections 0, 12, and 58 replaced APCR Sections 1 and 15 as the NSR program in the Nevada SIP.

The replacement of the pre-existing NSR program with the new NSR program in the Nevada SIP was short-lived, however, due to a successful challenge brought against EPA's 1999 Final Rule in the Ninth Circuit Court of Appeals. In *Hall v. EPA*, 273 F.3d 1146 (9th Cir. 2001), the court vacated EPA's 1999 approval on the grounds that EPA did not have an adequate basis under section 110(l) of the Act to conclude that substitution of the pre-existing SIP NSR program (i.e., APCR Sections 1 and 15) with the new NSR program (i.e., APCR Sections, 0, 12, and 58) would not interfere with attainment of the NAAQS for which Las Vegas Valley remained designated nonattainment (i.e., CO and PM-10). The vacatur of EPA's approval of APCR Sections 0, 12 and 58 in *Hall v. EPA* had the effect of re-instituting APCR Sections 1 and 15 as the applicable NSR program in the Nevada SIP.

In the wake of the *Hall* decision, the Clark County Board of County Commissioners<sup>7</sup> adopted further revisions to the NSR program, now contained in Clark County Air Quality Regulations (AQR) Sections 0, 12, 58, and 59, and in October 2003, the State of Nevada submitted the revised NSR program to EPA as a revision to the Nevada SIP. In September of 2004, EPA approved the revised NSR program, *see* 69 *Fed. Reg.* 54006 (September 7, 2004), and thus, as of October 7, 2004 (i.e., the effective date of EPA's September 7, 2004 Final Rule), the NSR program from the early 1980's and codified in Board of Health APCR Sections 1 and 15 has again been superseded in the Nevada SIP by a revised NSR program. The revised NSR program that replaces the previous NSR program in the SIP is codified in Clark County AQR Sections 0, 12, 58, and 59, as submitted to EPA in October 2003.<sup>8</sup>

Locally-adopted NSR rules that EPA subsequently approves under section 110 of the Act

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<sup>7</sup> In June 2001, the Governor of Nevada designated the Clark County Board of Commissioners as the regulatory, enforcement and permitting authority for implementing the federal Clean Air Act within Clark County. This action by the Governor necessitated a transfer of certain pre-existing authorities from the Clark County Board of Health to the County Board of Commissioners. In response to the Governor's designation, the Clark County Board of Commissioners is now the governing agency for air quality programs and regulations in Clark County. The Board of Commissioners oversees DAQEM, which has assumed the responsibilities for air quality permitting, ambient monitoring and enforcement functions that had been performed by the Clark County Health District as well as for air quality planning functions previously performed by Clark County Department of Comprehensive Planning.

<sup>8</sup> A petition for review was filed in the Ninth Circuit Court of Appeals challenging EPA's final approval of the revised NSR program in September 2004 (*Hall v. EPA*, Docket No. 04-75920), but the court recently granted a voluntary, stipulated motion to dismiss in this case, which effectively ends the process for revising the NSR program in Clark County that began originally in 1987 with the Board of Health's adoption of the original APCR Sections 0 and 12.

as revisions to a SIP are but one source of “applicable requirements” from the standpoint of NSR for the purposes of a Title V permit<sup>9</sup> but for this permit, they are the principal source of such requirements, and thus, it is important to identify which NSR rules apply at the time when a given ATC for a new source or modification is issued. For new or modified sources in Clark County, such “applicable requirements” are those set forth in Board of Health APCR Section 9 (and related definitions in APCR Section 1), as approved by EPA in 1973, for the period generally covering 1973 through 1982; Board of Health APCR Section 15 (and related definitions in APCR Section 1), as approved by EPA in 1982, for the period generally covering 1982 through October 2004. From October 2004 until such future time as EPA approves any revised NSR program for Clark County as a revision to the SIP, the NSR-related applicable requirements are set forth in Clark County AQR Sections 12, 58, and 59 (and related definitions in AQR Section 0). From the standpoint of operating permit requirements,<sup>10</sup> the “applicable requirements” are those set forth in Board of Health APCR Section 8 (and related definitions in APCR Section 1), as approved by EPA in 1973, for the period generally covering 1973 through 1982 and those set forth in Board of Health APCR Section 16 (and related definitions in APCR Section 1) from 1982 to the present time.

## V. FACILITY BACKGROUND

The El Dorado Energy facility (“Facility”) is a natural gas-fired power plant with a nominal electrical capacity of 500-MW, located 15 miles southwest of Boulder City, Nevada, in Eldorado Valley (i.e., hydrographic area #167).<sup>11</sup> The Facility received its Authority to Construct (“ATC”)<sup>12</sup> from DAQEM<sup>13</sup> in August, 1997. The Facility has a two on one combined cycle configuration, consisting of two combustion turbine generators (“CTGs”), two heat recovery

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<sup>9</sup> For example, other sources of NSR “applicable requirements” for sources in Clark County include the NSR visibility provisions in 40 C.F.R. 52.28 (“Protection of visibility from sources in nonattainment areas”), which applied from the mid-1980’s until October 2004. See 69 Fed. Reg. 31056, 31067 (June 2, 2004). In addition, effective September 13, 2004, under 40 C.F.R. Part 52, section 52.24(k), the requirements set forth in 40 C.F.R. Part 51, Appendix S apply to new major sources and major modifications of ozone precursors (VOC and NOx) in the newly-designated 8-hour ozone nonattainment area within Clark County. See 69 Fed. Reg. 55956 (September 17, 2004) and 69 Fed. Reg. 23951, 23992 (April 30, 2004).

<sup>10</sup> This statement refers to operating permit requirements approved into the SIP and does not refer to operating permit requirements established under Title V.

<sup>11</sup> This area is outside of Las Vegas Valley and, as noted above in Section IV, at the time the 1997 ATC permit was issued all areas in Clark County outside of Las Vegas Valley were designated as attainment or unclassifiable for all of the NAAQS.

<sup>12</sup> ATC permits are federally enforceable pre-construction permits that reflect the requirements of the attainment area prevention of significant deterioration and nonattainment area new source review (“NSR”) programs.

<sup>13</sup> Actually, the Clark County Health District (acting at the behest of the Clark County Board of Health) issued the permit in 1997 but for the sake of simplicity, “DAQEM,” the current air permitting agency, is used herein to refer generally to the local air pollution source permitting administrative agency in Clark County.

steam generators (“HRSGs”), one steam turbine generator and associated auxiliary systems and equipment. The Facility began commercial operation in June of 2000. The Facility emits oxides of nitrogen (“NO<sub>x</sub>”), CO, volatile organic compounds (“VOC”), and particulate matter (“PM”), all of which are regulated under the District’s federally approved NSR programs<sup>14</sup> or other DAQEM Clean Air Act programs.

On June 2, 2003, DAQEM completed its evaluation of the Title V application for the Facility and issued the draft Title V Permit. Under DAQEM’s rules, this action started a simultaneous 30-day public comment period and a 45-day EPA review period. On June 30, 2003, Mr. Robert Hall of the Nevada Environmental Coalition submitted comments to DAQEM on the draft El Dorado Energy Permit. DAQEM responded to Mr. Hall’s comment letter by a letter dated October 16, 2003 from Lucinda Parker (“Response to Comments”). DAQEM issued the Permit on October 23, 2003.

EPA Region 9 did not object to the proposed permit during its 45-day review period. The Petition to Object to the Permit filed by Mr. Hall was received by EPA Region 9 on August 29, 2003. Since EPA calculates the period for the public to petition the Administrator to object to a permit as if the 30-day public comment and 45-day EPA review periods run sequentially, petitioners have at least 135 days after the issuance of a draft permit to submit a petition.<sup>15</sup> Given that the Petition was filed with EPA on August 29, 2003, I find that it was timely filed. I also find that the Petition meets the statutory requirements that a petitioner’s allegations be based on objections that were raised with reasonable specificity during the comment period or that arose after the public comment period expired.

## **VI. ISSUES RAISED BY THE PETITIONER**

### **A. Lack of a Pre-Construction Permit Issued Pursuant to EPA-approved SIP**

The first issue that the Petitioner raises as grounds for an EPA objection is “the lack of a pre-construction permit for this source that was issued pursuant to an EPA-approved SIP.” Petition, at page 3. The Petitioner alleges that the NSR permit issued by DAQEM to the Facility relaxes SIP requirements because the Facility was permitted under DAQEM Section 12 instead

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<sup>14</sup>As noted above at Section IV, both the Section 15 and Section 12 rules addressed requirements for preconstruction review of new major sources or major modifications proposed for in both PSD and nonattainment NSR areas, but this facility was located in an attainment area.

<sup>15</sup>This 135-day period to petition the Administrator is based on a 30-day District public notice and comment period, a 45-day EPA review period and the 60-day period for a person to file a petition to object with EPA. Where a permitting authority does not use a “concurrent review” process and waits until after the public comment period closes before submitting a proposed permit to EPA, this period may be longer than 135 days if the permitting authority takes time to consider comments received or makes changes to a draft permit before submitting a proposed permit to EPA.

of the SIP-approved Section 15, specifically 15.13<sup>16</sup>. In the view of the Petitioner, the August 19, 1997 ATC permit issued by DAQEM is less stringent than the SIP requires because emission limits were based on the Best Available Control Technology (“BACT”) requirement for major sources instead of Lowest Achievable Emission Rate (“LAER”), which applies to major sources in nonattainment areas. The Petitioner also cites the lack of emission reductions (offsets) as evidence of a deficient NSR permitting process.

The Petitioner is partially correct in that Clark County issued a preconstruction permit for the Facility in 1997 under its Section 12 authority, but as explained in the following paragraphs, the application of Section 12 in this instance had the effect of imposing the same, or more stringent, requirements with respect to control technology and offsets as would have been required if the permit had been reviewed and issued under Section 15. The Facility, a major source located in an area that is in attainment for all criteria pollutants, underwent preconstruction review under the PSD program for NO<sub>x</sub>, VOC, CO, and PM in 1997. The Technical Support Document (“TSD”) prepared by DAQEM for the August 19, 1997 ATC permit states that in the 1997 permit DAQEM applied LAER for NO<sub>x</sub><sup>17</sup>, CO and PM-10, and BACT for VOC and SO<sub>2</sub>.

The Petitioner does not specify which pollutant(s) he believes were erroneously permitted with BACT instead of LAER. However, based on the frequent references to NO<sub>x</sub> in the Petition, EPA assumes that the Petitioner believes that LAER should have been applied for that pollutant. The Petitioner is incorrect on both regulatory and technical grounds. Contrary to the Petitioner’s claim, no portion of Clark County is now or has ever been a nonattainment area for NO<sub>x</sub>. In addition, the El Dorado Valley portion of Clark County was never a nonattainment area for the one-hour ozone standard. Since the El Dorado Valley is in attainment for both ozone (one-hour standard) and NO<sub>x</sub>, and was in attainment for both pollutants when the ATC was issued to the Facility in 1997, DAQEM was not obligated by the CAA to apply LAER for NO<sub>x</sub>, although it did so.

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<sup>16</sup>As more fully described in section IV of this order, at the time the Petition was submitted, Clark County Board of Health APCR Section 15, and related definitions in APCR Section 1, as approved by EPA in 1982, represented the SIP-approved New Source Review program in Clark County. In this Order, “Section 15” is used as a simplified reference to the SIP-approved NSR program from the early 1980’s. Many of Mr. Hall’s complaints stem from the Board of Health’s, or more recently, the County Board of County Commissioner’s, adoption of a different NSR program codified by APCR (now AQR) Section 12 and 58 (and related definitions in Section 0), and repeal of Section 15, for the purposes of issuing permits to new or modified stationary sources in Clark County. On September 7, 2004, EPA promulgated a final rule approving into the Nevada SIP Sections 0, 12, 58, and 59 as adopted by Board of County Commissioners on October 7, 2003. *See 69 Fed. Reg 54006*. In this Order, “Section 12” is used as a simplified reference for the versions of the local NSR program codified in APCR (now AQR) Sections 12 and 58 (and related definitions in Section 0) that were adopted by the Board of Health or the County Board of County Commissioners prior to October 7, 2003 and that were not approved by EPA into the Nevada SIP or that were the subject of EPA’s 1999 NSR approval that was subsequently vacated by the Ninth Circuit in *Hall v. EPA*.

<sup>17</sup> Although both Section 12 and Section 15 required BACT for NO<sub>x</sub> sources in the ozone and NO<sub>x</sub> attainment areas, DAQEM nevertheless applied LAER to that pollutant in the 1997 ATC.

EPA also disagrees that the 1997 ATC did not meet the requirements of SIP-approved Section 15. The SIP only requires LAER for sources located in the Las Vegas Valley (hydrographic area 212).<sup>18</sup> Sources outside the Las Vegas Valley, including sources located in the Eldorado Valley (hydrographic area 167) as the Facility is, are required to apply BACT. *See* 15.13.1 and 15.14.1. Moreover, even though it was not required to do so, DAQEM did apply LAER for NO<sub>x</sub> in the 1997 ATC, despite the fact that the SIP only required BACT. The Petitioner does not allege, nor does the record demonstrate, that a higher emission limit was selected by DAQEM based on what the definition of BACT allows. Indeed, the Petitioner even acknowledges that he does “not object to the emission concentration limits for this source.” Petition, at page 7.

With respect to the Petitioner’s claim that the Facility should have obtained offsets, EPA notes that DAQEM did require offsets for NO<sub>x</sub>, CO, PM-10, and VOC, pursuant to Section 12. *See* TSD for 1997 ATC, pages 12, 17, 20, and 21; and the ATC, pages 13-14.<sup>19</sup> However, offsets were not a federal requirement due to the area’s designation as attainment for all criteria pollutants at the time the ATC was issued in 1997.<sup>20</sup>

Finally, on June 30, 2004, DAQEM updated the administrative record for the Title V permit by revising the TSD that supported that permit decision. The revised TSD includes a streamlining demonstration that compares Sections 12 and 15, and documents in detail how Section 12 requirements are at least as stringent, and in most cases more stringent, than the requirements of Section 15 (section V.A. of the revised TSD)<sup>21</sup>. This analysis demonstrates that the Facility’s permit meets the requirements of the EPA-approved SIP.

In light of the record, including the 1997 ATC, the Title V permit, and the TSDs prepared for these permitting actions, Petitioner has not met his burden of demonstrating that the El Dorado Energy permit is not in compliance with applicable requirements of the CAA on the ground that the 1997 ATC was not issued pursuant to an EPA-approved SIP.

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<sup>18</sup> Section 15 also requires LAER for sources outside the Las Vegas Valley if they would cause significant impact on the Las Vegas Valley, or if the source is in a nonattainment area. Neither of these circumstances are applicable to El Dorado Energy.

<sup>19</sup> The Petitioner alleges that the offsets obtained by the source were improper, but he does not support this claim. Petition, at pages 7, 8, and 9.

<sup>20</sup> Section 15 only requires offsets for VOC emissions from sources in the Las Vegas Valley “such that there will be reasonable progress toward attainment of the air quality standard for ozone.” *See* 15.14.4.2. Even if the Facility were located in the Las Vegas Valley, since all of Clark County was in attainment of the one-hour ozone NAAQS when the ATC was issued in 1997, the SIP’s offset requirement for reasonable further progress was obsolete and no longer applicable.

<sup>21</sup> For a general discussion of streamlining, see White Paper Number 2 for Improved Implementation of the Part 70 Operating Permits Program (March 5, 1996).

B. DAQEM Cannot Enforce Section 15 of EPA-approved SIP

Condition A-11 of the Permit requires that “any request for a Part 70 permit modification must comply with the requirements of AQR Section 12, AQR Section 15 and AQR Subsection 19.5.5.1.” The Petitioner states that DAQEM repealed Section 15 in 1998, and “has no business to now suggest it can enforce regulations that have been repealed.” Petition, at page 9.

DAQEM did repeal Section 15 on April 23, 1998. Prior to the approval of Section 12 into the SIP on September 7, 2004, EPA’s view was that Section 15 remained DAQEM’s SIP-approved NSR rule, and that any NSR permits issued by DAQEM had to satisfy the requirements of the SIP. Therefore, DAQEM was in effect enforcing Section 15 requirements by enforcing Section 12 requirements. If a situation arose in permitting a new or modified stationary source in which Section 15 was more stringent than Section 12, the Section 15 requirements would have applied and would have been federally enforceable. The Petitioner has not articulated why he believes condition A-11 is inconsistent with the permit modification requirements of Part 70 or DAQEM’s EPA-approved Title V program. Accordingly, Petitioner has not met his burden of demonstrating that condition A-11 is not in compliance with applicable requirements of the Act. Therefore, EPA finds no basis to object to the Permit for any reason related to condition A-11.

C. Compliance Certification Condition

The Petitioner requests that EPA object to the permit on the basis that condition A-9, which requires the Facility to submit compliance certifications annually, is “meaningless” and does not require the Facility’s certifications to be based on “all applicable requirements.” Petition, at page 9.

Title V of the CAA, EPA’s implementing regulations at 40 C.F.R. Part 70, and Clark County DAQEM’s EPA-approved Title V program require that all Title V permits contain a condition requiring permittees to submit annual compliance certifications. *See* CAA Section 504(c), 40 C.F.R. 70.6(c)(5)(iii) and DAQEM Section 19.4.3.5. The language in condition A-9, which requires the Facility to submit “compliance certifications with terms and conditions contained in the operating permit, including emission limitations, standards, or work practices,” is virtually identical to the language of §70.6(c)(5)(iii) and Section 19.4.3.5. While the Petitioner may believe that the Permit does not contain all applicable requirements,<sup>22</sup> this belief has no bearing on whether or not the language of condition A-9 satisfies the compliance certification portion of the permit content requirements of Part 70 and Section 19. The Petitioner has provided no evidence to support his claim that condition A-9 warrants an EPA objection. Consequently, Petitioner has not met his burden of demonstrating that condition A-9 is not in compliance with applicable requirements of the Act. Therefore, Petitioner’s request that EPA object to the permit on this basis is hereby denied.

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<sup>22</sup> To the extent Petitioner has alleged that specific applicable requirements are not included in the Permit, I have addressed those allegations elsewhere in this denial.

D. APCO Discretion to Request a Performance Test

The Petitioner requests that EPA object to the Permit because condition A-20 allows the source to avoid complying with the SIP. This condition allows DAQEM's Control Officer to compel sources to conduct performance tests if there is reason to believe that a source's emissions exceed allowable levels. Since the condition refers to "an emission in excess of that allowed by the Air Quality Regulations," the Petitioner states that "since current DAQM regulations are less stringent than the 1979/81 EPA approved SIP, the more stringent standard should apply."

This issue raised by the Petitioner is one he raises throughout his petition, namely that the DAQEM improperly applied NSR requirements to the Facility by implementing Section 12 instead of SIP-approved Section 15. As noted in Section VI.A above, DAQEM has updated the administrative record by adding a streamlining demonstration that shows that Section 12 requirements are at least as stringent, and in most cases more stringent, than the requirements of Section 15. The Petitioner does not provide any specific evidence to bolster his claim with respect to condition A-20, or explain why the condition is inconsistent with Part 70 or the CAA. Accordingly, Petitioner has not met his burden of demonstrating that condition A-20 is not in compliance with applicable requirements of the Act. Accordingly, the Petition is denied with respect to this issue.

E. Control Officer Discretion in Confidential Business Information Determinations

The Petitioner discusses condition A-16, which describes the permittee's right to request that certain records be treated as confidential business information. This condition limits the scope of data that may be treated as confidential by excluding emissions data, standards, or limitations from records that may be considered confidential. It also states that such determinations will be made by the Control Officer and the Administrator on a case-by-case basis. The Petitioner objects to this condition because of the inclusion of the Control Officer in determining whether information may be considered confidential, stating only that this is "inconsistent with 40 C.F.R. § 2.301."

DAQEM cites both Section 19.3.1.3 and 40 C.F.R. § 2.301 as the origin and authority for condition A-16. The Section 19 provision is part of DAQEM's EPA-approved Title V program, and may be included in Title V permits issued by DAQEM. Specifically, Section 19.3.1.3 sets forth DAQEM's criteria for the designation and treatment of confidential information. EPA's regulations in 40 C.F.R. Part 2 establish "basic rules governing business confidentiality claims, the handling by EPA of business information which is or may be entitled to confidential treatment, and determinations by EPA of whether information is entitled to confidential treatment for reasons of business confidentiality." *See* 40 C.F.R. § 2.202(a). Special rules governing certain information obtained under the Clean Air Act are set forth in 40 C.F.R. §2.301. The Petitioner does not explain why he believes condition A-16 is inconsistent with 40 C.F.R. §

2.301. EPA does not interpret DAQEM's inclusion of Part 2 in the citation for this condition as intending to inappropriately create a role for the Control Officer. CBI determinations under Part 2 are solely within EPA's purview. Moreover, the Facility has not asserted any claim of confidential business information and the Petitioner has not asserted that any particular information has been withheld. Thus, Petitioner has not met his burden of demonstrating that the El Dorado Energy Permit is not in compliance with the Act or Part 70 because it contains condition A-16. The Petition is denied with respect to this issue.

F. Pre-Construction and Post-Construction Monitoring

The Petitioner makes frequent references to pre-construction and post-construction monitoring. Petition, at pages 3, 4, 7, 8, 9, 10, and 11. He argues that "the August 19, 1997 ATC did not comply with the SIP requirement (§15.13) for Pre-construction (and Post-Construction) monitoring for ozone that was required since the VOC potential to emit exceeded 40 tons per year (tpy)." Petition, at page 3.

DAQEM's revised TSD for the Title V permit explores this issue in detail. For pre-construction monitoring, DAQEM concludes that while the Petitioner is correct that such monitoring should have been required pursuant to the SIP, a conservative estimate of the Facility's impact predicts that the one-hour ozone NAAQS would not have been violated. In light of DAQEM's analysis, the Petitioner has failed to demonstrate that DAQEM's failure to require pre-construction monitoring resulted in, or may have resulted in, a deficiency in the permit's content. The county's conservative analysis demonstrates that even had monitoring occurred, it would not have established that the Facility's emissions, in conjunction with emissions from existing sources, would have caused or contributed to a violation of the one-hour ozone NAAQS. Therefore DAQEM would not have issued an ATC, or, in turn, a PSD or Title V permit, with more stringent requirements than were ultimately imposed. For post-construction monitoring, DAQEM explains in the revised TSD that it reasonably exercised the discretion allowed by Section 15.13.12 to deem post-construction monitoring unnecessary.

Accordingly, Petitioner has not met his burden of demonstrating that the El Dorado Energy Permit is not in compliance with the Act or Part 70 because of the absence of pre- and post-construction monitoring requirements and EPA denies this portion of the Petition.

G. Requirements for Total Suspended Particulate

The Petitioner states that "the SIP has requirements for total suspended particulate (TSP) which is (sic) completely ignored in the TSD and in the permit." Petition, at page 8.

The Petitioner does not elaborate on this issue or specify which SIP requirements he believes are missing. The Petitioner has not claimed that the Facility's 1997 ATC is inconsistent with any particular SIP NSR requirement with respect to TSP. EPA finds that with this vague and unsubstantiated claim, the Petitioner has not demonstrated that the El Dorado Energy Permit

is not in compliance with the applicable requirements of the Act, including the TSP requirements of the SIP. Accordingly, EPA denies this portion of the Petition.

H. CAA Section 111 and 112 Requirements

The Petitioner states that DAQEM cannot issue Title V permits that implement Sections 111 and 112 of the CAA. “DAQEM cannot issue permits that comply with any approved SIP that includes Section 111 requirements because DAQEM does not have the required SIP regulation and has long ignored the 1979/81 EPA approved SIP rules in any event. DAQEM does not have any authority whatsoever to administer or enforce the Section 112(r) requirements of the Act, since the responsible agency for Section 112(r) is the Nevada Department of Environmental Protection (NDEP).” Petition, at page 8.

The Petitioner is wrong to link DAQEM’s authority to implement Section 111 requirements (New Source Performance Standards, or NSPS) with DAQEM’s SIP. EPA delegates the authority to implement NSPS (except for non-delegable provisions), and this process has nothing to do with NSR regulations or SIPs. *See* 42 U.S.C. § 7411(c). DAQEM has the authority to implement most NSPS, including Subpart GG (stationary gas turbines) and Subpart Db (Industrial-Commercial-Institutional Steam Generating Units), which apply to the Facility. *See* 67 *Fed. Reg.* 20652 (April 26, 2002) (listing NSPS delegated to DAQEM by EPA).

The Petitioner’s statement that DAQEM lacks the authority to enforce Section 112(r) requirements is true (although his claim that NDEP has this authority is incorrect). To date no state or local permitting authority in EPA Region 9, including DAQEM, has received 112(r) delegation. However, this fact is irrelevant in terms of whether the Permit, or any other Title V permit issued by DAQEM, meets the requirements of the CAA and Part 70.

Accordingly, EPA finds that the Petitioner has not demonstrated that the El Dorado Energy Permit is not in compliance with the applicable requirements of the Act because of DAQEM’s alleged lack of authority to issue Title V permits that implement Sections 111 and 112 of the Act. Accordingly, EPA denies this portion of the Petition.

I. Permit Conditions that Cite “NSR OP 00652, Modification 0”

The Petitioner objects to every permit condition that cites “NSR OP 00652, Modification 0” as part of the authority for the condition. He states that this permit “is not a preconstruction permit,” and “it is a sham permit, it is incomplete, and it was not issued pursuant to public notice.” Petition, at page 9.

Like many permitting authorities, DAQEM implements a local operating permit program in addition to the Title V operating permit program. Following the construction and performance testing of a new or modified source, DAQEM issues an operating permit pursuant to Section 16 of its regulations. Section 16 operating permits contain the terms and conditions of a source’s ATC permits, and are not required by DAQEM regulations to undergo public notice. The permit the Petitioner refers to was issued on December 13, 2000. While the Petitioner’s claim that this permit did not undergo public review is correct, it is immaterial because the terms and conditions of this permit were part of the ATC that underwent public review in 1997 pursuant to Sections 12 and 15. Similarly, while the Petitioner’s statement that the December 13, 2000 permit is not a preconstruction permit is true, it is irrelevant because the permit did not authorize the construction of any new or modified stationary source.

EPA has issued guidance on sham permits, i.e., permits with conditions that do not reflect a source's planned mode of operation for the purpose of avoiding major NSR. See EPA memorandum, “Guidance on Limiting Potential to Emit in New Source Permitting,” dated June 13, 1989. The Facility is a major source and underwent pre-construction review under the PSD program for NO<sub>x</sub>, VOC, CO, and PM-10 in 1997. The Petitioner states that NSR OP 00652, Modification 0 was a sham permit, but provides no discussion to substantiate this claim. In fact, his entire argument is limited to the statement that “it is a sham permit.” EPA has reviewed this permit and confirmed that it did not authorize construction or modification of any emission units or affect the Facility’s operation in any way that could be construed as an attempt to circumvent major NSR.

There is nothing in the record to indicate that the permit issued by DAQEM on December 13, 2000 was not a valid local operating permit issued pursuant to Section 16 of DAQEM regulations. The Petitioner has not demonstrated that citing this permit as authority constituted a deficiency in the title V permit, and accordingly the Petition is denied on this issue.

J. Lack of Compliance Plan

The Petitioner discusses “the lack of a compliance plan (an applicable requirement), in the proposed permit,” and states that “No mention was made of all the applicable requirements that the source is not in compliance with.” Petition, at page 10.

Part 70 requires that all Title V permit applications contain a compliance plan containing “a description of the compliance status of the source with respect to all applicable requirements.”

*See* 40 C.F.R. §70.5(c)(8). Where the source is not in compliance the source must also provide a compliance schedule describing “a schedule of remedial measures, including an enforceable sequence of actions with milestones, leading to compliance.” 40 C.F.R. § 70.5(c)(8)(iii)(C). Since the compliance plan is a requirement of Title V applications, not permits, EPA considers the Petitioner’s statement that the permit lacks a compliance plan as an allegation that the proceedings leading up to issuance of the permit were flawed. In determining whether an objection is warranted for alleged flaws in the procedures leading up to permit issuance, EPA considers whether the petitioner has demonstrated that the alleged flaws resulted in, or may have resulted in, a deficiency in the permit's content. *See* CAA Section 505(b)(2) (objection required "if the petitioner demonstrates ... that the permit is not in compliance with the requirements of this Act, including the requirements of the applicable [SIP]"); 40 C.F.R. 70.8(c)(1); *New York Public Interest Research Group, Inc. v. Whitman*, 321 F.3d 316, 333 & n.11 (2d Cir. 2003).

The Petitioner has not demonstrated that the lack of a compliance plan resulted in, or may have resulted in, a deficiency in the El Dorado Energy permit. Nor has the Petitioner even alleged that the Facility is not in compliance with any particular applicable requirements. Thus, the Petitioner has not demonstrated that the Facility’s Permit fails to comply with Part 70 or the Act on the basis of the lack of a compliance plan or compliance schedule, and therefore EPA denies this portion of the Petition.

K. Compliance Certification Missing

The Petitioner points to the compliance certification requirement in 40 C.F.R. 70.5(c)(9)(i) and states that the Facility has not complied with this requirement, and that the certification “is missing.” Petition, at page 10. This provision of Part 70 requires that Title V permit applications contain compliance certifications. The Facility’s Title V permit application, dated December 28, 2000, does contain a compliance certification on page 38. This certification satisfies the criteria established in Part 70 and Section 19. In addition, Condition A-9 noted above requires submittal of annual compliance certifications. Thus, the Petitioner has not demonstrated that the El Dorado Energy Permit is not in compliance with the applicable requirements of the Act, including the compliance certification requirements. Accordingly, EPA denies this portion of the Petition.

L. No SIP or Authority to Issue New Source Review Permits

The Petitioner states that DAQEM “does not have an approved SIP or authority to issue New Source Review (NSR) permits.” Petition, at page 11. In this context, the Petitioner cites *Hall v. EPA*, 273 F.3d 1146 (9th Cir. 2001), in which the court vacated EPA’s approval of DAQEM’s NSR rules into the SIP, and remanded the rules back to EPA for reconsideration consistent with the court’s opinion.

EPA disagrees that DAQEM does not have a SIP-approved NSR program or authority to issue NSR permits. As described in section IV of this Order, EPA approved Section 15 in two

separate rulemakings in 1981 and 1982, and DAQEM was operating under this SIP-approved NSR program at the time that the Facility's ATC was issued. It is true that DAQEM issued the ATC under Section 12, not Section 15, but, as explained in this Order, as applied to the El Dorado Facility, application of Section 12 had the effect of imposing the same, or more stringent, requirements that would have been imposed had the source been reviewed and permitted under Section 15 (with the exception of preconstruction monitoring for ozone - see subsection VI.F. Preconstruction and Post-Construction Monitoring, above).

In any event, the Petitioner has not linked this claim to any condition in the Title V permit and has not demonstrated that the Permit is not in compliance with applicable requirements of the Act. The Petition is denied as to this issue.

M. Emission Limit Compliance Requirements

The Petitioner claims that the Permit lacks compliance requirements to verify compliance with emission limits. "The proposed permit allows non-quantifiable means of measurement (emission factors) in place of continuous emission monitors and performance tests that would quantify emissions." Petition, at page 11.

The Permit only allows the use of emission factors for compliance purposes for the diesel emergency fire pump (condition D-14), which has negligible emissions. The Petitioner's statements regarding performance testing and continuous emissions monitoring systems (CEMS) are false. The Permit requires the use of CEMS for turbine NOx emissions (condition D-5) and performance testing for CO and VOC (condition E-2), as required by EPA's Acid Rain regulations (40 C.F.R. Part 75) and Section 12. The Petitioner has not made a specific claim that the monitoring does not meet the requirements of Part 70, nor did EPA's review of the Permit identify any monitoring deficiency that warrants an objection. Since Petitioner has not demonstrated a deficiency in the permit, the Petition is denied on this issue.

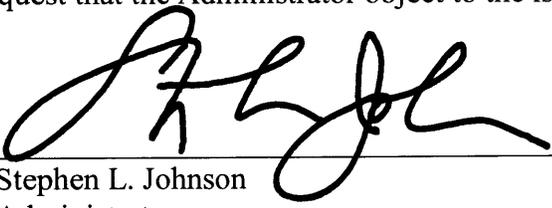
N. Extraneous Issues

The Petitioner raises several other issues that are not related to the Title V Permit for El Dorado Energy. These issues include allegations that DAQEM is not collecting adequate fees to implement the Title V program, and is attempting to revise the SIP without EPA approval. He also discusses Notices of Violation that EPA has issued to sources in Clark County. Finally, he requests that EPA withdraw its approval of the DAQEM Title V program and implement a federal operating permit program. These issues are not germane to the content of the Facility's Title V permit, and are beyond the scope of the Section 505(b)(2) petition process. Therefore, EPA is not responding to these extraneous issues at this time.

**VII. 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 deny the Petitioner's request that the Administrator object to the issuance of the El Dorado Energy Permit.

SEP 22 2005  
Date

  
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Stephen L. Johnson  
Administrator