BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF CF&I Steel, L.P. d/b/a EVRAZ Rocky Mountain Steel	)	
Permit Number: 95OPPB097	)	PETITION TO OBJECT TO ISSUANCE OF A STATE TITLE V OPERATING PERMIT
Issued by the Colorado Department of Public Health and Environment, Air Pollution Control Division	)	Petition Number: VIII-2011-

PETITION FOR OBJECTION

Pursuant to Section 505(b)(2) of the Clean Air Act and 40 C.F.R. § 70.8(d), WildEarth Guardians (hereafter "Petitioner") hereby petitions the Administrator of the U.S. Environmental Protection Agency ("EPA") to object to the Colorado Department of Public Health and Environment, Air Pollution Control Division's ("Division's") proposed issuance of a combined Title V operating permit and Prevention of Significant Deterioration ("PSD") permit (hereafter "Combined Permit") for CF&I Steel doing business as EVRAZ Rocky Mountain Steel (hereafter "EVRAZ") to operate its steelmaking operations (hereafter referred to as the "Steel Mill") in Pueblo, Colorado. *See* Exhibit 1, EVRAZ, Steelmaking Renewed Title V Permit, Permit Number 96OPPB097 (Dec. 28, 2010).

Petitioner hereby petitions the Administrator to object to the issuance of the Combined Permit due to its failure to ensure compliance with applicable requirements under the Clean Air Act. Namely, the Combined Permit fails to:

- Ensure compliance with applicable limits on mercury emissions from the steelmaking operations;
- Ensure that steelmaking operations do not cause or contribute to violations of national ambient air quality standards;
- Incorporate stipulated penalty requirements set forth in an underlying Consent Decree;
- Failed to appropriately address Environmental Justice concerns.

In accordance with Title V of the Clean Air Act, the Administrator has a nondiscretionary duty to object within 60 days if it is demonstrated that the Combined Permit is not in compliance with the Clean Air Act. *See* 42 U.S.C. § 7661d(b)(2). Thus, the Administrator must object to the issuance of the Combined Permit.

INTRODUCTION

The Steel Mill consists of an electric arc furnace that melts scrap steel, along with various additives, to produce specific grades of steel. *See* Exhibit 2, Technical Review Document for Renewal of Operating Permit 96OPPB097 (December 2010) at 1. Molten steel is transferred for further processing at a ladle metallurgy station and vacuum tank degasser, and then transferred to a caster where the steel is cast into blooms and billets. *Id*. In the process, the operations, together with other operations at the Steel Mille, has the potential to release nearly 3,000 tons of toxic air pollutants, including:

- 1,540.2 tons of carbon monoxide;
- 531.4 tons of nitrogen oxides ("NO_x");
- 242.1 tons of particulate matter, including 193.5 tons of particulate matter less than 10 microns in diameter ("PM_{10}");
- 170.2 tons of sulfur dioxide ("SO_2");
- 179.3 tons of volatile organic compounds ("VOCs"); and
- 18.5 tons of hazardous air pollutants ("HAPs"), including, according to EVRAZ's most recent Toxic Release Inventory data, 296 pounds of mercury, 264 pounds of nickel compounds, 720 pounds of lead, 3,500 pounds of manganese compounds, and 168 pounds of chromium compounds—all toxic metal emissions listed under Section 112(b) of the Clean Air Act.

See Exhibit 2 at 2 and Exhibit 3, EPA Toxic Release Inventory Data, 2009.

The Division submitted the proposed Combined Permit for EPA review on December 9, 2010. The EPA's 45-day review period ended on January 23, 2011. Based on Petitioner's conversations with Region 8 EPA staff, the EPA did not object to the issuance of the Combined Permit. This petition is thus timely filed within 60 days following the conclusion of EPA's review period and failure to raise objections.

This petition is based on objections to the permit raised with reasonable specificity during the public comment period. To the extent the EPA may somehow believe this petition is not based on comments raised with reasonable specificity during the public comment period, Petitioner requests the Administrator also consider this a petition to reopen the Combined Permit in accordance with 40 C.F.R. § 70.7(f).[1] A permit reopening and revision is mandated in this case because of one or both of the following reasons:

1. Material mistakes or inaccurate statements were made in establishing the terms and conditions in the permit. *See* 40 C.F.R. § 70.7(f)(1)(iii). As will be discussed in more detail, the Combined Permit suffers from material mistakes in violation of applicable requirements, etc.; and

[1] To the extent the Administrator may not believe citizens can petition for reopening for cause under 40 C.F.R. § 70.7(f), Petitioner also hereby petitions to reopen for cause in accordance with 40 C.F.R. § 70.7(f) pursuant to 5 U.S.C. § 555(b).

2. The permit fails to assure compliance with the applicable requirements. *See*, 40 C.F.R. § 70.7(f)(1)(iv). As will be discussed in more detail, the Combined Permit fails to assure compliance with several applicable requirements.

PETITIONER

Petitioner WildEarth Guardians is a Santa Fe, New Mexico-based nonprofit membership group dedicating to protecting and restoring the American West. WildEarth Guardians has an office in Denver and members throughout Colorado. On November 8, 2010, Petitioner submitted detailed comments regarding the Division's proposed Combined Permit. *See* Exhibit 4, WildEarth Guardians Comments on Proposed Combined Title V and PSD Permit (November 8, 2010). The Division responded to these comments on December 8, 2010. *See* Exhibit 5, Colorado Air Pollution Control Division Response to Comments from WildEarth Guardians on Draft Permit (Dec. 8, 2010) and Exhibit 6, Modeling, Meteorology, and Emission Inventory Unit Response to Comments (Nov. 29, 2010). The objections raised in this petition were raised with reasonable specificity in comments on the Combined Permit

Petitioner requests the EPA object to the issuance of Permit Number 96OPPB097 and/or find reopening for cause for the reasons set forth below.

GROUNDS FOR OBJECTION

I. THE COMBINED PERMIT FAILS TO ENSURE COMPLIANCE WITH AREA SOURCE MACT REQUIREMENTS

Under the Clean Air Act, a Title V Permit must include "enforceable emission limitations and standards [and] such other conditions as are necessary to assure compliance with applicable requirements of [the Clean Air] Act." 42 U.S.C § 7661c(a); 40 C.F.R. § 70.6(a)(1). Applicable requirements under the Clean Air Act include, among other things, "[a]ny standard or requirement under section 112 of the Act[.]" 40 C.F.R. § 70.2.

Here, requirements under section 112 of the Clean Air Act apply to the Steel Mill. In this case, area source maximum achievable control technology ("MACT") requirements under 40 C.F.R. § 63.10680, *et seq*. apply. These standards require, among other things, that the Steel Mill limit its mercury emissions. Unfortunately, the Combined Permit fails assure that the Steel Mill will fully comply with these area source MACT requirements in two key regards. Petitioner raised comments with reasonable specificity regarding this issue. *See* Exhibit 4 at 1-2.

A. The Permit Fails to Assure Compliance With Pollution Prevention Plan Requirements For Chlorinated Plastics, Lead, and Free Organic Liquids

The Combined Permit fails to assure compliance with the pollution prevention plan requirements under 40 C.F.R. § 63.10685(a)(1). These requirements state that the Steel Mill "must prepare and implement a pollution prevention plan for metallic scrap selection and inspection." 40 C.F.R. § 63.10685(a)(1). Furthermore, the pollution prevention plan must include specifications to ensure scrap materials are depleted of undrained substances, requirements for the removal of lead-containing components, and procedures for determining if the requirements and specifications set forth in 40 C.F.R. § 63.10685(a)(1) are met, including procedures for taking corrective action. 40 C.F.R. §§ 63.10685(a)(1)(i)-(iii). These requirements aim to ensure that the Steel Mill "minimize[s] the amount of chlorinated plastics, lead, and free organic liquids that [are] charged to the furnace." 40 C.F.R. § 63.10685(a)(1).

Here, 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. Although 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.

To begin with, it is not even apparent that EVRAZ has submitted a pollution prevention plan in accordance with 40 C.F.R. § 63.10685(a)(1). The Division notes in its Response to Comments that the EPA is responsible for administering the requirements of 40 C.F.R. § 63.10685. *See* Exhibit 5 at 2. The Division further states that, "ERMS has stated that they submitted a copy of the Pollution Prevention Plan to the U.S. Environmental Protection Agency on June 27, 2008." *Id*. However, the Division discloses that, upon inquiry to the EPA, the EPA responded that it "did not have immediate information regarding the status" of the plan and that it would "investigate the standing of the plan." *Id*. Thus, it does not appear as if a pollution prevention plan has even been submitted, contrary to 40 C.F.R. § 63.10685(a)(1).

This is significant because if a pollution prevention plan has not been submitted, then it renders Condition 1.20.1, which requires that EVRAZ operate according to its pollution prevention plan, unenforceable. Furthermore, it means that the Steel Mill is currently in violation of an applicable requirement, meaning the Combined Permit must contain a schedule to bring the source into compliance, in accordance with Title V requirements. *See* 42 U.S.C. § 7661b(b)(1); 40 C.F.R. §§ 70.5(c)(8)(iii)(C) and 70.6(c)(3). The Administrator must therefore object if EVRAZ has not submitted a pollution prevention plan to the EPA.

If EVRAZ has submitted a pollution prevention plan to the EPA, then applicable requirements make clear that the company "must operate according to the plan as submitted during the review and approval process." 40 C.F.R. § 63.10685(a)(1). Unfortunately, as written, the Combined Permit does not ensure compliance with this requirement. For one thing, the Combined Permit does not state that EVRAZ must operate according to the "plan as submitted." The Permit states only that EVRAZ "shall operate according to the Pollution Prevention Plan." Exhibit 1 at 30. This requirement does not seem to refer to the "plan as submitted," but rather to an approved pollution prevention plan, which in this case may not even exist.

Furthermore, it is unclear what the "plan as submitted" even is, and therefore, it is impossible to determine whether EVRAZ will even comply with the "plan as submitted." Although the Division asserted in its Response to Comments that EVRAZ "must continue to comply with their submitted plan" (Exhibit 5 at 2), it is entirely unclear what the "plan as submitted" actually is and therefore, any requirement that EVRAZ follow this plan is vague and unenforceable as a practical matter.

Compounding this problem is that the Combined Permit does not incorporate the pollution prevention plan. Fundamentally, to ensure any semblance of enforceability, the Combined Permit must, as a threshold matter, 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 as submitted. Here, the Combined Permit contains nothing. In response to this concern, the Division asserted that they did not "find it appropriate to include a copy of the proposed Pollution Prevention Plan in the Title V Operating Permit." Exhibit 5 at 2. However, whether or not the Division believes it is appropriate to include the prevention plan is irrelevant. Fundamentally, unless the Combined Permit contains all or portions of the pollution prevention plan, it is impossible to ensure that the Steel Mille is "operated according to the plan as submitted," contrary to 40 C.F.R. § 63.10685. The Administrator must therefore object to the issuance of the Combined Permit.

Finally, the Combined Permit fails to ensure compliance with other provisions of 40 C.F.R. § 63.10685(a)(1). Namely, the Combined Permit fails to include monitoring, recordkeeping, and reporting requirements necessary to ensure that the Steel Mill is operated according to any approved pollution prevention plan. Of concern is that, although ostensibly the Permit requires the Steel Mill to comply with the requirements of 40 C.F.R. § 63.10685(a)(1) by operating according to the approved plan at all times after approval," the Permit does not actually require EVRAZ to provide notice of its plan approval to the Division or the public, or to make the plan available to the Division or the public to ensure the enforceability of this requirement. Without such reporting, it is impossible for the Division or citizens to know whether the Steel Mill is, in fact, meeting the requirements of 40 C.F.R. § 63.10685(a)(1) and worse, impossible to enforce these requirements as a practical matter. This is particularly of concern because although the terms and conditions of the Combined Permit must be "enforceable [by] citizens" in accordance with 40 C.F.R. § 70.6(b), the Permit in this case effectively renders Section II, Condition 1.20.1 unenforceable by citizens.

Although Section II, Condition 1.20.3 requires EVRAZ to "keep records to demonstrate compliance with the requirements for your pollution prevention plan in paragraph (a)(1) of this section" (*see* Exhibit 1 at 31), this Condition does not actually require that any records be reported to the EPA, the Division, or to the public. Furthermore, this Condition is vague and unenforceable as a practical matter. It is unclear exactly what "records" must to be kept. This vagueness is exacerbated due to a lack of monitoring requirements. Without any monitoring requirement in place to assess whether the Steel Mille is operated according to a pollution prevention plan, it is unclear what "records" will be produced in accordance with Section II, Condition 1.20.3. Furthermore, although the Combined Permit requires semiannual compliance reports to be submitted in accordance with 40 C.F.R. § 63.10(e), this requirement only relates to sources with continuous monitoring systems. It is unclear how any reporting under this

requirement is relevant to demonstrating compliance and ensuring the enforceability of 40 C.F.R. § 63.10685(a)(1).

Simply because the Combined Permit states that EVRAZ must comply, does not mean that EVRAZ will be in compliance with the Permit and the underlying applicable requirements. Unless the Permit provides some means of verifying—such as through monitoring, specific recordkeeping, and reporting—whether the Steel Mill is being operated according to an approved pollution prevention plan in accordance with 40 C.F.R. § 63.10685(a)(1), it is impossible to ensure compliance with this applicable requirement and the Administrator must object.

B. Mercury Control Requirements

The Combined Permit further fails to assure compliance with the mercury control requirements under 40 C.F.R. § 63.10685(b)(2). This requirements states that the Steel Mill must "participate in and purchase motor vehicle scrap only from scrap providers who participate in a program for removal of mercury switches that has been approved by the [EPA] Administrator[.]" 40 C.F.R. § 63.10685(b)(2). The regulations further set forth criteria for determining whether a scrap provider participates in an approved program (*see id*. at §§ 63.10685(b)(2)(i)-(ii)), and also sets forth criteria for demonstrating the manner through which the Steel Mille participates in an approved program. *See id*. at § 63.10685(b)(2)(iv).

In this case, the Combined Permit does not contain monitoring, recordkeeping, or reporting requirements to ensure compliance with 40 C.F.R. § 63.10685(b)(2). In particular, 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). These criteria include:

- The program includes outreach that informs the dismantlers of the need for removal of mercury switches and provides training and guidance for removing mercury switches;
- The program has a goal to remove at least 80 percent of mercury switches from the motor vehicle the scrap provider processes; and
- The program sponsor agrees to submit progress reports to the Administrator no less frequently than once every year that provide the number of mercury switches removed or the weight of mercury recovered from the switches, the estimated number of vehicles processed, an estimate of the percent of mercury switches recovered, and certification that the recovered mercury switches were recycled at facilities with permits as required under the rules implementing subtitle C of RCRA (40 CFR parts 261 through 265 and 268).

40 C.F.R. §§ 63.10685(b)(2)(i)-(iii).

In its Response to Comments, the Division asserted that 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." Exhibit 5 at 3. However, these Conditions do not appear to provide sufficient monitoring, recordkeeping, and reporting requirements necessary to ensure compliance with 40 C.F.R. § 63.10685(b)(2). For instance, Condition 1.20.3 simply requires that EVRAZ

"must keep records to demonstrate compliance...for mercury in paragraphs (b)(1) through (3) of this section as applicable." Exhibit 1 at 31. However, as explained, it is unclear exactly what "records" must be kept and how such records will demonstrate compliance. Furthermore, these "records" are not even required to be reported to the EPA, the Division, or to the public, solidly undermining any claim that the Combined Permit assures compliance with 40 C.F.R. § 63.10685(b)(2) and is enforceable as a practical matter. And again, although the Combined Permit requires semiannual compliance reports to be submitted in accordance with 40 C.F.R. § 63.10(e), this requirement only relates to sources with continuous monitoring systems. It is unclear how any reporting under this requirement is relevant to demonstrating compliance and ensuring the enforceability of 40 C.F.R. § 63.10685(b)(2).

Furthermore, to the extent the Division cites Section II, Conditions 1.20.4 and 1.20.5 of the Combined Permit as evidencing adequate recordkeeping and reporting requirements, these conditions do not directly speak to the need to keep records related to the requirements of 40 C.F.R. §§ 63.10685(b)(2)(i)-(iii). Condition 1.20.4 requires that the permittee "install, operate, and maintain a capture system that collects the emissions from the EAF [electric arc furnace] and Condition 1.20.5 states that, "No gases shall be discharged into the atmosphere from the EAF control device exist that contain particulate matter in excess of 0.0052 gr/dscf." Exhibit 1 at 32. These Conditions do not actually relate to assuring compliance with the need to ensure compliance with 40 C.F.R. § 63.10685(b)(2).

Fundamentally, nothing in the Combined Permit requires EVRAZ to gather records that actually ensure that scrap providers are meeting the criteria set forth at 40 C.F.R. §§ 63.10685(b)(2)(i)-(iii) and that actually ensure that such providers are participating in a program for the removal of mercury switches that has been approved by the EPA Administrator. Furthermore, noting in the Combined permit requires such records to be submitted to the EPA, the Division, or the public to ensure compliance with these underlying requirements. Thus, the Combined Permit fails to assure compliance with applicable requirements, in violation of the Clean Air Act.

Finally, the Combined Permit fails to ensure compliance with 40 C.F.R. § 63.10685(b)(2) because it fails to ensure that EVRAZ complies with the requirements of 40 C.F.R. § 63.10685(b)(iv). This underlying applicable requirement states that the permittee "must" develop and maintain a plan demonstrating "the manner through which [the] facility is participating in the EPA-approved program [for removal of mercury switches]." 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 C.F.R. § 63.10685(b) as a whole.

In comments, Petitioner commented that, at a minimum, the plan required by 40 C.F.R. § 63.10685(b)(2)(iv) must be incorporated into the Combined Permit to ensure its enforceability and effectiveness. *See* Exhibit 4 at 2. In response, the Division simply responded that, "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." Exhibit 5 at 3. The Division however, is mistaken. Although 40 C.F.R. § 63.10685(b)(2)(iv) requires that the plan be maintained onsite, it does not state that the plan must only be maintained onsite and cannot be submitted to either the EPA or the Division. Regardless, the Division's response misses the point entirely and does not respond at all as to

whether the Combined Permit assures compliance with 40 C.F.R. § 63.10685(b)(2)(iv).

The Combined Permit must at least require 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). The Permit does not, and therefore the Administrator must object to its issuance.

II. THE COMBINED PERMIT FAILS TO ENSURE THE STEEL MILL WILL NOT CAUSE OR CONTRIBUTE TO VIOLATIONS OF THE NAAQS

Under the Clean Air Act, including the Colorado State Implementation Plan ("SIP"), the Division cannot issue a PSD permit if a source would cause or contribute to violations of the NAAQS. *See* Air Quality Control Commission ("AQCC") Regulation No. 3, Part D, Section VI.A.2.a; *see also* 42 U.S.C. § 7475(a)(3) and 40 C.F.R. § 51.166(k)(1). In this case, the Division issued the Combined Permit without ensuring that the Steel Mill would not cause or contribute to violations of the nitrogen dioxide ("NO_2") and ozone NAAQS.

A. NO_2 NAAQS

Modeling prepared in conjunction with the Combined Permit found "widespread modeled violations" of the nitrogen dioxide ("NO_2") NAAQS. The TRD for the Combined Permit specifically states:

> A cumulative impact analysis was performed for the 1-hr NO2 NAAQS[.] There are numerous modeled violations of the 1-hr of the 1-hr NO2 NAAQS in the Pueblo area (8th and lower nth highs). The maximum modeled 1-hr NO2 concentration (no background) is 215 ppb.

Exhibit 2 at 35. The Division further found that the Steel Mill would contribute to violations with a maximum 1-hour NO_2 impact of 1.05 ppb. *Id*. Despite this, the Division asserted that issuance of the Combined Permit for the Steel Mill would not cause or contribute to violations of the 1-hour NO_2 NAAQS.

The 1-hour NO_2 NAAQS were adopted in early 2010. *See* 75 Fed. Reg. 6474-6537 (Feb. 9, 2010). For the first time ever, the EPA adopted a short-term limit on NO_2 concentrations of no more than 100 parts per billion ("ppb") over a one hour period. The EPA adopted this standard to "provide requisite protection of public health as appropriate under section 109 of the Clean Air Act[.]" *Id*. at 6475.

In issuing the Combined Permit, the Division both disclosed that violations of the 1-hour NO_2 were modeled, and that the Steel Mill would contribute to these violations. This is contrary to the Clean Air Act's prohibition on the issuance of PSD permits that "cause or contribute" to violations and for the reasons below, the Administrator must object to the issuance of the Combined Permit.

1. The Use of Significant Impact Levels are Contrary to the Clean Air Act

As explained above, the NAAQS impacts for 1-hour NO_2 are predicted to be as high as 215 ppb, far exceeding the 1-hour NAAQS of 100 ppb. Modeling prepared by the Division also shows that the Steel Mill will contribute to violations with a maximum 1-hour NO_2 impact of 1.05 ppb.

In response to Petitioner's comments on this issue, the Division asserted that the impact of the Steel Mill to modeled violations of the NO_2 NAAQS would not be "significant" and therefore, issuance of the Combined Permit would not contribute to violations. In doing so, the Division relied on an "interim" significant impact level ("SIL") of 4 ppb that was adopted by the Division Director. *See* Exhibit 6 at 6. In this case, because the impact of the Steel Mill at each modeled violation would be below 4 ppb, the Division concluded that it was appropriate to issue the Combined Permit on the basis that the facility would not contribute to violations of the NAAQS.

The use of a SIL in this case is preposterous and contrary to the plain language of the Clean Air Act. Both the Division's interim NO_2 SIL, as well as the EPA's June 29, 2010 "Guidance Concerning the Implementation of the 1-hour NO2 NAAQS for the Prevention of Significant Deterioration Program," which also recommended a 4 ppb SIL, are fatally flawed in this regard. The Division'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.

There 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. *See* 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). The 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. In fact, on its plain, unambiguous face, the statute prohibits any contribution whatsoever to any NAAQS violation.

However, contrary 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 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.

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.'" *Shays v. FEC*, 414 F.3d 76, 113-114 (D.C. Cir. 2005) (quoting *Ass'n of Admin. Law Judges v. FLRA*, 397 F.3d 957, 962 (D.C. Cir. 2005)). Thus, only where regulation would be pointless can the doctrine apply to avoid "futile application" of a statute. *New York v. EPA*,

443 F.3d 880, 888 (D.C. Cir. 2006).[2] The D.C. Circuit in *Shays v. FEC* explains the very narrow circumstances when the doctrine can be applied:

> First, de minimis exemption power does not extend to extraordinarily rigid statutes. By promulgating a rigid regime, Congress signals that the strict letter of its law applies in all circumstances, thus rebutting the presumption against pointless applications. Second, even absent rigidity, the authority to create these exceptions does not extend to a situation where the regulatory function does provide benefits, in the sense of furthering regulatory objectives, but the agency concludes that the acknowledged benefits are exceeded by the costs. Instead, situations covered by a de minimis exemption must be truly de minimis. That is, they must cover only situations where the burdens of regulation yield a gain of trivial or no value, for otherwise the exemption reflects impermissible second-guessing [of] Congress's calculations, as opposed to avoidance of absurd or futile results.

414 F.3d at 114 (internal quotes and citations omitted). These principles foreclose reliance on the *de minimis* doctrine in this case. First, the relevant statute here is in fact rigid in mandating a showing that each permit applicant to show 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. Second, 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*. Put another way, pollution that contributes to a NAAQS violation (albeit an amount smaller than the SIL) cannot possibly be shown to have "no appreciable effect" on regulation, and therefore to be "pointless." *See Assoc. of ALJs*, 397 F.3d at 962 (characterizing *de minimis* as something having "no appreciable effect" and exempting "pointless expenditure of effort"); *Alabama Power*, 636 F.2d 360 ("Courts should be reluctant to apply the literal terms of a statute to mandate *pointless* expenditures of effort." (emphasis added)); *see also* 61 Fed. Reg. 38,250, 38,292/1 (July 23, 1996) ("Administrative agencies may exempt 'truly de minimis' situations from a statutory comment 'when the burdens of regulation yield a gain of trivial or no value'"). Absent a SIL, a permittee contributing any amount to a NAAQS violation must reduce its pollution to eliminate its contribution to the violation. As a result, application of a SIL cannot be justified based on the *de minimis* doctrine.

Further, the facts in this case demonstrate that there is a definite and identifiable benefit to prohibiting the Steel Mill from contributing to any NAAQS violation, not just those violations where its contribution exceeds 4 ppb. Without 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. 42 U.S.C. §§ 7475(a)(3) and (b); 40 C.F.R. § 51.166(k). Alternatively, 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. In any case, the result would be additional pollution reduction, which is not a "pointless," "trivial," or "futile" result. Instead, it furthers Congress' pollution-reduction purpose in the Clean Air Act. 42 U.S.C. §§ 7401, 7410(a) and 7470. Use of SILs to avoid the consequences of a NAAQS violation (reduced

[2] The D.C. Circuit's decision in *New York v. EPA*, does not determine the validity of the de minimis doctrine to the facts in that case because, as it recognized, EPA's defense of the replacement rule at issue was not based on the de minimis doctrine. 443 F.3d at 888.

emission rates or permit denial) is an inappropriate and unlawful application of the *de minimis* doctrine in this case.

Moreover, to the extent that NAAQS violations must be eliminated—even when impacted by contributions lower than the SIL—use of a SIL is inconsistent with the *de minimis* doctrine. Indeed, 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 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"). In other words, because NAAQS violations are never acceptable and EPA has cautioned that where a NAAQS violation is detected it must be addressed, even where a permittee source's contributions are below the SIL, it cannot be said that avoiding even small contributions to NAAQS violations is "pointless" or "futile." *See also* U.S. EPA, *New Source Review Workshop Manual* (Oct. 1990) at C.52 (stating that where NAAQS violations are predicted but the permittee contributes a concentration below the SIL, "the agency must also take remedial actions through applicable provisions of the state implementation plan to address the predicted violation(s)."). 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.

In this case, in light of the fact that the 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.

The *de minimis* doctrine cannot justify the Division's issuance of the Combined Permit, which will contribute to violations of the NO_2 NAAQS. Furthermore, it cannot serve to support the legality of the Division's interim SIL or EPA's June 29, 2010 interim SIL guidance. The Administrator must therefore object.

2. The Title V Permit Does not Appear to Limit NO_2 Emissions on an Hourly Basis

The Division's assertion that the Steel Mill will not contribute to violations of the 1-hour NO_2 NAAQS is further undermined by the fact that the Combined Permit does not actually limit NOx emissions on an annual basis.

Indeed, the only short-term limits on NOx emissions established by the Combined Permit are for the electric arc furnace. However, this limit only restricts NOx emissions on a mass production basis, not an on hourly basis. Section II, Condition 1.6 only limits NOx emissions to no more than 0.28 lbs/ton of steel produced, and even then, this is based on a 30-day rolling average, not on an hourly rolling average. Although Section II, Condition 1.8 of the Combined Permit restricts production to no more than 185 tons of steel/hour, this throughput limit is based on a daily average, not an hourly average. Thus, it is unclear how this short-term limit will

realistically restrict NOx emissions on an hourly basis in order to prevent the Steel Mill from contributing to violations of the NAAQS.

Of greater concern, however, is that the Combined Permit does not limit NOx emissions on a short-term basis from any other pollutant emitting activity, but rather limits emissions only on an annual basis. For example, the Permit only limits NOx to 35.60 tons/year from the Demag Round Caster (*see* Exhibit 1 at 34), 8.10 tons/year from the Cleaver Brooks natural gas fueled vacuum tank degasser boiler (*see* Exhibit 1 at 47), 24.95 tons/year from the ladle preheat burners (*see* Exhibit 1 at 53), and 7.01 tons/year from the reline ladle refractory process (*see* Exhibit 1 at 55). It is unclear how a lack of hourly emission rates for these activities will ensure that the Steel Mill does not cause or contribute to violations of the 1-hour NO_2 NAAQS. This is especially the case given that the Combined Permit does not require any monitoring of actual NOx emissions from the Demag Round Caster, the Cleaver Brooks natural gas fueled vacuum tank degasser boiler, the ladle preheat burners, and the reline ladle refractory process that would ensure emissions are appropriately limited.[3] The lack of actual hourly 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.

B. Ozone NAAQS

Under the Clean Air Act, including the Colorado SIP the Division cannot issue a PSD permit if a source would cause or contribute to violations of the NAAQS. *See* AQCC Regulation No. 3, Part D, Section VI.A.2.a; *see also* 42 U.S.C. § 7475(a)(3) and 40 C.F.R. § 51.166(k)(1). This requirement includes the ozone NAAQS, which currently limit ozone concentrations to no more than 0.075 parts per million ("ppm") over an 8-hour period. *See* 40 C.F.R. § 50.15.

Despite this duty, the Division 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 NAAQS. The Administrator must therefore object.

The Division provides several arguments for not analyzing the impacts of the Steel Mill to ambient ozone concentrations, all of which fail to provide any reasonable basis for ignoring the requirements of the Clean Air Act.

The Division claimed, for example, "ozone monitoring data is unavailable to conduct performance evaluations of the photochemical model." Exhibit 6 at 9. Yet, as the Division notes, ozone monitoring has taken place at the Black Hills Pueblo Airport Generating Station. *See id*. Further, the Division discloses that ozone monitoring conducted by Xcel Energy at the Comanche Generating Station, which is located near the Steel Mill, has been ongoing since April 2010. *See id*. It is unclear how there is a lack of ozone monitoring data.

The Division next asserted that "current permit modeling practices limit ozone modeling to when it is feasible (SIP-quality ozone modeling and representative monitoring networks to

[3] Although the Combined Permit sets forth emission factors for NOx emissions from these sources, these emission factors are based on fuel throughputs and, in the case of the Demag Round Caster, also production-based, rather than on an hourly basis.

validate photochemical model performance) and warranted (when a proposed source or modification is anticipated to cause a violation or interfere with attainment/maintenance of the ozone NAAQS, as determined by professional judgment." Exhibit 6 at 9. This statement is wholly unsupported. As the Division notes, "photochemical models such as CAMx and CMAQ are capable of assessing the impact of a single source to ambient ozone concentrations." *Id*. Furthermore, to the extent that the Division believes that modeling is only necessary when a source or modification is anticipated to cause a violation or interfere with attainment/maintenance is belied by the fact that the Division has no rational basis for concluding that the Steel Mill will not cause a violation or interfere with attainment/maintenance. The Division has done no modeling whatsoever, thus any assertion that the Steel Mill will not cause or contribute to violations of the ozone NAAQS is simply unfounded.

The Division also points to the fact that four months of monitoring in 2009 showed that ozone concentrations are "below the NAAQS of 0.075 ppm." Exhibit 6 at 9. This, too, is preposterous. 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. It 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. *See* 40 C.F.R. § 50.15(b). All 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.

Finally, with regards to professional judgment, although the Division is allowed to exercise judgment, any exercise of judgment is constrained by the plain requirements of the Clean Air Act. Given that the Act, its regulations, and the Colorado SIP requires that the Division ensure that sources do not cause or contribute to violations of the NAAQS, the Division is not allowed to supplant "professional judgment" in place of its legal obligations. In this case, the Division 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.

III. THE COMBINED PERMIT FAILS TO INCLUDE STIPULATED PENALTY REQUIREMENTS

The Combined Permit fails to include all relevant requirements set forth in the underlying 2003 Consent Decree between EVRAZ and the EPA, an applicable requirement under Title V. *See* Exhibit 7, *United States of American v. CF&I Steel, L.P. d/b/a/ Rocky Mountain Steel Mills*, Consent Decree (2003). In particular, the Combined Permit was required to contain stipulated penalties provisions in the Consent Decree. *See* Exhibit 7, ¶¶ 92-100.

In response to comments, the Division asserted only that:

> Paragraph 132.d of the federal 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 to be found in Sections V—XII, and XV. Since the stipulated penalties reside in Section XVII, the Consent Decree does not require them to be included in the Title V permit. In general, the Division does not include stipulated penalties in permits. It is more appropriate to contain stipulated penalties in compliance documents.

Exhibit 5 at 11. This response is incorrect. Paragraph 132.d does not require only that the injunctive relief set forth at Sections V-XII and XV of the Consent Decree be incorporated into the Combined Permit. Paragraph 132.d states only that the Consent Decree shall "terminate in its entirety" once "All injunctive requirements imposed by this Consent Decree have been incorporated in a Title V permit issued to Rocky Mountain Steel Mills," among other things. Furthermore, Paragraph 133 of the Consent Decree imposes the burden of terminating the Consent Decree upon EVRAZ, and further allows the United States to object and requires that a motion be filed with the U.S. District Court for the District of Colorado. Thus, in this case, unless and until the Consent Decree is terminated, the Combined Permit must incorporate the stipulated penalties requirements of Paragraphs 92-100 of the Consent Decree. The Administrator must therefore object to the issuance of the Combined Permit over its failure to include these applicable requirements.

IV. THE DIVISION FAILED TO ADEQUATELY ADDRESS ENVIRONMENTAL JUSTICE

In response to comments that the Division should address environmental justice impacts, the Division responded that, "EPA has not provided any clear, specific guidance on what a state agency must do to evaluate a project for EJ, nor are there any federal or state regulations requiring an EJ review." Exhibit 5 at 11. This response is straining.

As the EPA is well aware, there are federal requirements that require consideration of Environmental Justice Impacts. Executive Order 12898, for example, requires that:

> To the greatest extent practicable and permitted by law, and consistent with the principles set forth In the report on the National Performance Review, each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States[.]

Executive Order 12898, Section 101.1-101. However, more importantly is that in establishing best available control technology ("BACT") limits under PSD, the Division has broad discretion, indeed authority, to take into account "environmental [and] economic impacts" (*see* AQCC Regulation No. 3, Part D, Section II.A.8; *see also* 40 C.F.R. § 51.166(b)(12). On its face, the Division's PSD obligations seem to provide ample authority to address environmental justice—which inherently involves an analysis of environmental and economic impacts—when establishing BACT limits.

Rather than seek to explicitly address environmental justice impacts, the Division attempted to argue that its existing processes, including public participation and air quality analyses, inherently ensure environmental justice. This is contradicted, however, by the Division's own admission that "EPA has designated Pueblo as an Environmental Justice (EJ) community." Clearly existing processes are not ensuring environmental justice, otherwise there would be no environmental justice issues in Pueblo, Colorado. Regardless, the Division 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. Simply claiming that existing processes ensure environmental justice does not mean that environmental justice is being achieved or addressed in any manner.

The Division's refusal to consider actually addressing environmental justice because of the perception that it was not "required," or the claim that environmental justice is inherently achieved, fundamentally misses the point. The Division had ample authority to assess whether the Combined Permit would disproportionately impact minority or low-income communities in Pueblo, but made no effort to do so. The Administrator must therefore object because the Division failed to appropriately take into account relevant factors in undertaking its BACT analysis by failing to address whether disproportionate impacts to low income and minority communities would occur, and whether those impacts could be addressed, before issuing the Combined Permit, contrary to applicable requirements under the Clean Air Act.

CONCLUSION

For the reasons stated above, Petitioner requests the Administrator object to the Combined Permit issued by the Division for the EVRAZ steelmaking operations. The Administrator has a nondiscretionary duty to issue an objection to the Title V Permit within 60 days in accordance with Section 505(b)(2) of the Clean Air Act.

Respectfully submitted this 24th day of March 2011

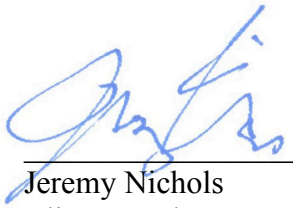

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TABLE OF EXHIBITS