BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF Public Service Company of Colorado, dba Xcel Energy, Valmont Station Permit Number: 96OPBO131 Issued by the Colorado Department of Public Health and Environment, Air Pollution Control Division	)	ORDER RESPONDING TO PETITIONER'S REQUEST THAT THE ADMINISTRATOR OBJECT TO ISSUANCE OF A STATE OPERATING PERMIT Petition Number: VIII-2010-XX

ORDER DENYING PETITION FOR OBJECTION TO PERMIT

The United States Environmental Protection Agency (EPA) received a petition, dated March 18, 2010, from WildEarth Guardians (WEG or Petitioner) requesting that the EPA object, pursuant to section 505(b)(2) of the Clean Air Act (CAA or the Act), 42 U.S.C. § 7661d, to the issuance of an operating permit renewal to Public Service Company of Colorado, dba Xcel Energy ("Xcel"), to operate the Valmont Power Station (Valmont), located at 1800 N. 63rd Street in Boulder County, Colorado. Valmont is a coal-fired power plant.

The Colorado Department of Public Health and Environment, Air Pollution Control Division ("CDPHE"), issued the Valmont operating permit 96OPBO131 (Permit) on March 1, 2010, pursuant to title V of the Act, the federal implementing regulations at 40 CFR Part 70, and the Colorado State Implementing Regulations at No. 3 Part C.

The petition alleges that the Permit does not comply with 40 CFR Part 70 in that it fails to: (I) include a compliance plan for opacity monitoring requirements; (II) ensure compliance with applicable opacity requirements; (III) ensure compliance with particulate matter (PM) limits applicable to the coal-fired boiler; (IV) ensure compliance with CAA §112(j) for air toxics; and (V) ensure compliance with Prevention of Significant Deterioration (PSD) requirements in regard to carbon dioxide (CO_2) emissions.

Based on a review of the petition and other relevant materials, including the Permit and Permit record, and relevant statutory and regulatory authorities, I deny the petition requesting that the EPA object to the Permit.

STATUTORY AND REGULATORY FRAMEWORK

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

All major stationary sources of air pollution and certain other sources are required to apply for title V operating permits that include emission limitations and such other conditions as are necessary to assure compliance with applicable requirements of the CAA, including the requirements of the applicable State Implementation Plan (SIP). *See* CAA §§ 502(a) and 504(a), 42 U.S.C. §§ 7661a(a) and 7661c(a). The title V operating permit program does not generally impose new substantive air quality control requirements (referred to as "applicable requirements"), but does require permits to contain monitoring, recordkeeping, reporting, and other conditions to assure compliance by sources with applicable emission control requirements. *See* 57 Fed. Reg. 32250, 32250-51 (July 21, 1992) (the EPA final action promulgating the Part 70 rule). One purpose of the title V program is to "enable the source, States, the EPA, and the public to better understand the applicable requirements to which the source is subject, and whether the source is meeting those requirements." *Id.* Thus, the title V operating permit program is a vehicle for ensuring that air quality control requirements are appropriately applied to facility emission units and that compliance with these requirements is assured.

Under § 505(a), 42 U.S.C. § 7661d(a), of the CAA and the relevant implementing regulations (40 CFR § 70.8(a)), States are required to submit each proposed title V operating permit to the EPA for review. Upon receipt of a proposed permit, the EPA has 45 days to object to final issuance of the permit if it is determined not to be in compliance with applicable requirements or the requirements under title V. *See* 40 CFR § 70.8(c). If the EPA does not object to a permit on its own initiative, § 505(b)(2) of the Act provides that any person may petition the Administrator, within 60 days of expiration of the EPA's 45-day review period, to object to the permit. [42 U.S.C. § 7661d(b)(2).] *See also* 40 CFR § 70.8(d). The petition must "be based only on objections to the permit that were raised with reasonable specificity during the public comment period provided by the permitting agency (unless the petitioner demonstrates in the petition to the Administrator that it was impracticable to raise such objections within such period or unless the grounds for such objection arose after such period)." CAA § 505(b)(2), 42 U.S.C. § 7661d(b)(2). In response to such a petition, the CAA requires the Administrator to issue an objection if a petitioner demonstrates that a permit is not in compliance with the requirements of the CAA. 42 U.S.C. § 7661d(b)(2); *See also* 40 CFR § 70.8(c)(1); *New York Public Interest Research Group (NYPIRG) v. Whitman*, 321 F.3d 316, 333 n.11 (2d Cir. 2003). Under § 505(b)(2) of the Act, the burden is on the petitioner to make the required demonstration to the EPA. *Sierra Club v. Johnson*, 541 F.3d. 1257, 1266-67 (11th Cir. 2008); *Citizens*

Against Ruining the Environment v. EPA, 535 F.3d 670, 677-78 (7th Cir. 2008); *Sierra Club v. EPA*, 557 F.3d 401, 406 (6th Cir. 2009) (discussing the burden of proof in title V petitions). *See also NYPIRG*, 321 F.3d at 333 n.11. If, in responding to a petition, the EPA objects to a permit that has already been issued, the EPA or the permitting authority will modify, terminate, or revoke and reissue the permit consistent with the procedures set forth in 40 CFR §§ 70.7(g)(4) and (5)(i) – (ii), and 40 CFR § 70.8(d).

BACKGROUND

I. The Facility

Valmont, which is owned and operated by Public Service Company of Colorado, is located at 1800 N. 63rd Street, Boulder, Boulder County, Colorado. The Denver metro area, including Boulder, is classified as attainment/maintenance for particulate matter (PM) less than 10 microns (PM_{10}) and carbon monoxide (CO). Under that classification, all SIP-approved requirements for PM_{10} and CO will continue to apply in order to prevent backsliding under the provisions of section 110(l) of the federal CAA. The Denver metro area, including Boulder, is classified as non-attainment for ozone and is part of the 8-hr Ozone Control Area as defined in Colorado Regulation No. 7, Section II.A.1. (II.A.1. "8-Hour Ozone Control Area" means the counties of Adams, Arapahoe, Boulder (includes part of Rocky Mountain National Park), Douglas, and Jefferson; the cities and counties of Denver and Broomfield; and portions of the counties of Larimer and Weld.) There are no affected states within 50 miles of the plant. Rocky Mountain National Park, Eagles Nest and Rawah National Wilderness Areas, all Federal Class I designated areas, are within 100 kilometers of the plant.

Valmont consists of one 199 Megawatt (MW) coal/natural gas fired boiler and one 50 MW natural gas/No.2 fuel oil-fired combustion turbine. The boiler is equipped with low nitrogen oxide (NO_x) burners and over-fire air to reduce NO_x emissions. Emissions from this boiler pass through a bag-house to reduce PM. The boiler is equipped with a lime spray dryer to reduce sulfur dioxide (SO_2) emissions. The lime spray dryer became operational in August 2002. In addition, Valmont has a natural gas-fired auxiliary boiler to provide heat for the facility when the main boiler is not functioning. Other emission sources at Valmont include fugitive emissions from coal handling and storage, ash handling and disposal and from traffic on paved/unpaved roads. An ash blower system, two (2) recycle ash silos, two (2) recycle ash mixers, two (2) lime storage silos and two (2) ball mill slackers were added to the facility to support the lime spray dryer. These additional emission units became operational in August 2002. Finally, Valmont has a System One cold cleaner solvent vat. Valmont is subject to a Voluntary Emissions Reduction Agreement between Xcel and the CDPHE. The provisions of that agreement became effective on January 1, 2003.

II. The Permit

The original Operating Permit for Valmont was issued September 1, 2001. The expiration date for that permit was September 1, 2006. On July 5, 2005, Xcel submitted a title V renewal application to CDPHE. CDPHE proposed a renewal permit to the EPA on

December 4, 2009; the EPA did not object to the proposed renewal permit. On March 1, 2010, CDPHE issued the Permit to Xcel. Following the issuance of the Permit and receipt by the EPA of the petition, Xcel requested a modification to the Permit which was issued as a minor modification on November 4, 2010.[1]

ISSUES RAISED BY PETITIONER

I. The Title V Permit Fails to Include a Compliance Plan with Applicable Opacity Monitoring Requirements

Petitioner states that title V requirements at 42 U.S.C. § 7661b(b)(1), 40 CFR § 70.5(c)(8)(iii)(C), and 40 CFR § 70.6(c)(3) require that if a facility is in violation of an applicable requirement at the time of permit issuance, the facility's permit must include a schedule containing a sequence of actions with milestones leading to compliance. Petitioner alleges this Permit fails to include a compliance schedule to address ongoing violations of continuous opacity monitoring requirements.

Petitioner states that Xcel has failed, and continues to fail, to continuously monitor opacity from the coal-fired boiler at Valmont in accordance with applicable requirements set forth in title IV, the Acid Rain Program, of the CAA. Petitioner states that 40 CFR § 75.10 requires that opacity must be monitored by installing, certifying, operating, and maintaining "a continuous emission opacity monitoring system." Petition at 4. Further, "the owner or operator must ensure that all continuous emission and opacity monitoring systems required by the part are in operation and monitoring unit emissions or opacity at all times that the unit combusts any fuel." 40 CFR § 75.10(d). *Id.*

Petitioner alleges that Valmont has failed to continuously monitor opacity as required by 40 CFR § 75 and cites "numerous instances of 'unacceptable' opacity monitor downtime" dating from 2004 to 2008 where the monitors were down for reasons Petitioner contends are not allowed under 40 CFR § 75.10(d). Petition at 4. This downtime totals 6.3 hours over the stated 5 year period. *Id.*

Petitioner alleges that the Permit is not in compliance with the CAA because of its failure to include a compliance schedule. Further, Petitioner asserts that regardless of CDPHE's choice not to enforce a violation of an applicable requirement, CDPHE still has a duty to ensure that the Permit complies with the CAA. Petition at 5-6.

EPA's Response:

In alleging that the Permit violates the requirements of the CAA because CDPHE failed to include a compliance plan to ensure compliance with the opacity monitoring required by 40 CFR § 75, Petitioner cites to opacity monitor data gathered from 2004 through 2009. Petition at 4. The supplied data indicates that over a five year period of time, the required opacity monitors were down for a total of 6.3 hours. While the data

[1] Petitioner petitioned on the March 1, 2010, Permit. The March 1, 2010, Permit is the version referred to throughout this Petition as the "Permit."

itself reflects a small amount of downtime[2], it does not indicate why the downtime occurred and the Petitioner has not provided any specific information to support its claim that the amount of downtime is "unacceptable." Determinations of whether past instances of opacity monitor downtime meet the threshold for requiring a compliance plan are fact specific. CDPHE closely monitored the situation. For example, in its December 3, 2009, response to Petitioner's comments (RTC), CDPHE stated that it reviews downtime reports submitted by Valmont and makes determinations whether the operator is taking reasonable and appropriate response measures. Further, in response to reports of monitor downtown in Xcel's excess emission reports, CDPHE notes:

> Of the 21 quarters of data that WEG reviewed, there was no unacceptable monitor down time in 9 of those quarters (relying on PSCo's [Xcel's] notation of unacceptable). Of the twelve quarters of monitor downtime, six of them have less than 15 minutes of downtime and only three quarters indicated monitor downtime of one hour or more. The monitor downtime did not exceed 2 hours in any of the 21 quarters reviewed by WEG.

RTC at 4.

CDPHE had reviewed the first quarter of 2008 excess emission report indicating 1.1 hours of unapproved monitor downtime, and noted:

> The excess emission report indicates that the monitor was not down for an unapproved reason for more than 12 consecutive minutes. Some of the reasons cited for the unapproved downtime were "monitor ran calibration for unknown reason in the middle of the night" or "purge failure switch was sticking and giving invalid alarms". As a second example, the third quarter of 2008 excess emission report indicated 0.6 hours of unapproved monitor downtime. The reasons provided for this downtime were "adjusted purge switch" and "calibration occurred for unknown causes."

RTC at 4.

Concerning whether Valmont was not in compliance with the continuous opacity monitoring system (COMS) requirements of Part 75, CDPHE states, "In regard to requiring a Compliance Plan, a Compliance Plan is required for any applicable requirements for which the source is not anticipated to be in compliance at the time of permit issuance. Past instances of opacity monitor downtime do not meet this threshold." RTC at 5. It is clear CDPHE reviewed the excess emission reports and determined that past instances of opacity monitor downtime did not meet the threshold for concluding that Valmont was not in compliance with the continuous opacity monitoring requirements at the time of permit issuance. RTC at 4-5.

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[2] Petitioners allege that there were 6 hours of downtime at Valmont in the period from the first quarter of 2004 to the last quarter of 2008: This number of downtime hours represents 0.014% of the available operating hours over that period.

Petitioner has not demonstrated that CDPHE was required to include a compliance plan for opacity monitoring in the Permit. CDPHE determined, based on its review of Valmont's excess emission reports, that past instances of opacity monitor downtime did not meet the threshold for concluding that the source was not in compliance at the time of permit issuance. Petitioner has failed to provide evidence to demonstrate that this determination was unreasonable. See *In the Matter of: Wisconsin Power and Light, Columbia Generating Station, Petition No. 11-2008*-1 at 15 (October 8, 2009).[3] For the above reasons, I deny the request to object.[4]

II. Section II, Condition 14.4.3 Violates Applicable Requirements.

Petitioner alleges that Section II, Condition 14.4.3 of the Permit is: 1) an unlawful exception to the continuous opacity monitoring requirements in 40 CFR 75.10(a)(4) and (d); 2) is not needed to satisfy the periodic monitoring requirements of 40 CFR Part 70, as the underlying monitoring requirements in 40 CFR Part 75 require monitoring that assures compliance with the applicable opacity limits; 3) is inconsistent with 40 CFR 75.66, which requires that an alternative monitoring system be authorized by the Administrator; and 4) is inconsistent with 40 CFR 70.6(c)(1) because utilization of an operating report during monitor unavailability fails to assure compliance with the opacity standards. Petition at 6. Therefore, Petitioner claims the title V Permit fails to ensure compliance with the CAA.

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

Condition 14.4.3 provides that when the opacity monitoring system is unable to provide quality assured data in accordance with 40 CFR Part 75 for more than 8 consecutive hours, the source may elect to utilize one of three backup methods to satisfy the requirements for "periodic monitoring under 40 CFR 70 and Colorado Regulation No.3." CDPHE's stated purpose in including this condition was to "fill the monitoring gap and provide credible evidence that the opacity limits are met when the COMS are down." RTC at 5. CDPHE determined that it was appropriate to add Condition 14.4.3 as a backstop in the event that the COMS was not producing quality assured data for some

[3] The Petitioner argues that CDPHE applied its "enforcement discretion" and did not properly determine whether a compliance schedule was required consistent with 40 CFR §§ 70.5(c)(8)(iii)(C) and 70.6(c)(3). Petition at 5. As the EPA noted in the Columbia Generation Order, "EPA notes that if a permitting authority determines that a source is in violation of a requirement at the time of permit issuance, it would not be appropriate for the permitting authority to simply refer to an enforcement policy to determine that no compliance schedule is necessary. But here the State did not expressly find violations at the time of permit issuance necessitating a compliance schedule." See *In the Matter of Wisconsin Power and Light Columbia Generating Station (October 8, 2010)* at 15. In the present matter, CDPHE evaluated whether the source was in non-compliance at the time of permit issuance, and did not find such non-compliance. RTC at 4-5.

[4] In this case, petitioner has not demonstrated that the Valmont permit is not in compliance with the CAA, or that it was unreasonable for CDPHE to conclude that past instances of opacity monitor downtime did not meet the threshold for requiring a compliance plan. EPA notes, however, that opacity monitor downtime may be an actionable violation in the context of an enforcement action. See CAA §§113 (a) and (b).

period of time and to provide for the passage of a reasonable amount of time before the facility would begin using this monitoring method.

Petitioner claims that Condition 14.4.3 is an unlawful exception to the continuous opacity monitoring requirements in 40 CFR 75.10(a)(4) and (d). Petitioner has not demonstrated that the provision "expressly allows Xcel to not utilize the COMS at all times." Petition at 6. CDPHE clearly stated that the monitoring requirements Petitioner complains of are "in addition to the Part 75 opacity monitoring requirements." RTC at 6. This position is fully supported by the language of the Permit itself. By its terms, the requirement to operate the COMS at all times remains in effect even if the facility begins employing the backstop monitoring approach. Permit at 30, Section II, Condition 15.1. Similarly, Petitioner has failed to demonstrate that the provision results in Xcel not being "required to monitor opacity if the monitoring system is unable to provide quality assured data for less than 8 hours." Petition at 7. Under the plain language of the Permit, the requirement to operate the COMS on a continuous basis remains in effect during this time period. Id.

Petitioner also claims that Condition 14.4.3 is contrary to the periodic monitoring requirements of 40 CFR §70.6(a)(3)(i)(B). Petitioner points out that the Condition 14.4.3 itself says it is meant to "satisfy the requirements for periodic monitoring under 40 CFR 70 and Colorado Regulation No. 3." Petition at 8. Petitioner apparently believes that the reference to "periodic monitoring" in the permit necessarily refers to 40 CFR § 70.6(a)(3)(i)(B), and is not referring more broadly to monitoring under Part 70. This is not necessarily the case. See US Steel Order (noting that "in evaluating whether the permit contains monitoring sufficient to assure compliance under 40 CFR §70.6(c)(1), EPA believes it is appropriate to consider whether such monitoring is 'sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit'" under 40 CFR §70.6(a)(3)(i)(B)). See *In the Matter of United States Steel Corporation- Granite City Works*, January 31, 2011 at 8. CDPHE noted in the RTC that the purpose of Condition 14.4.3 was to "fill the monitoring gap and provide credible evidence that the opacity limits are met when the COMS are down." RTC at 5. (Responding to Petitioner's comment raising concern about monitoring downtime, among others.). The Petitioner has not demonstrated that this is not the purpose of the condition. CDPHE could reasonably determine that it was appropriate to add Condition 14.4.3 as a backstop in the event that the COMS was not producing quality assured data for some period of time and to provide for the passage of a reasonable amount of time before the facility would begin using this monitoring method.

While Petitioner is correct that periodic monitoring under 40 CFR § 70.6(a)(3)(i)(B) is not required in this situation, Petition at 7, Petitioner has not demonstrated that CDHPE could not reasonably conclude that it was appropriate to establish monitoring under 40 CFR § 70.6(c)(1) and/or the SIP to fill the gap in the event that the COMS is not producing reliable data for more than 8 hours. This appears to be exactly what was done.

Petitioner's contention that Condition 14.4.3 is contrary to the requirements of 40 CFR §75.66 because the Administrator has not approved the alternative monitoring

methods in accordance with section 412(a) of the CAA is refuted by the terms of the Permit itself. Petition at 8. There is nothing in the Permit indicating that Condition 14.4.3 was intended to be used as an alternative to the requirement to operate a COMS at all times. On the contrary, the Permit says unequivocally that "[t]he permittee shall operate, calibrate and maintain a continuous in-stack monitoring device for the measurement of opacity." Permit at 30, Section II, Condition 15.1. There are no exceptions to this requirement in Condition 14.4.3., or anywhere else in the Permit. Further, as the Petitioner has stated, the Administrator has not formally approved Condition 14.4.3 as a Part 75 approved alternative monitoring procedure. There is no record in the title V Permit history, the Technical Review Document (TRD), or the RTC to indicate that Xcel or CDPHE ever intended Condition 14.4.3 to act as an alternative monitoring procedure under Part 75 requirements.

Petitioner claims that Condition 14.4.3 fails to assure compliance with the applicable opacity limits in the title V permit in accordance with 40 CFR §70.6(c)(1) because it allows Xcel Energy to forego monitoring of opacity entirely if the COMS fails to provide quality assured data in accordance with 40 CFR Part 75 for less than eight hours. Petitioner has not demonstrated that Condition 14.4.3 is inconsistent with 40 CFR §70.6(c)(1). As noted above, the Permit requires Valmont to meet the COMS requirements of 40 CFR Part 75, including during the 8 hour time period mentioned by Petitioner. Finally, Petitioner claims that the use of an "Operating Report During Monitor Unavailability" after the opacity monitoring system is unable to provide quality assured data for more than 8 consecutive hours does not assure compliance with the applicable opacity limits in accordance with 40 CFR §70.6 (c)(1) because it does not actually require opacity monitoring (Petition at 9). This claim is factually incorrect. While it is true that the "Operating Report During Monitor Unavailability" does not involve the direct measurement of opacity, it nevertheless provides a basis for determining that the applicable opacity limit is being met. If it chooses to employ an "Operating Report During Monitor Unavailability," Valmont "must [ ] record and maintain a description of unit operating characteristics that demonstrate the likelihood of compliance with the applicable opacity limitation." Permit at 29. Petitioners do not demonstrate that this monitoring approach – maintaining records of operating characteristics indicating the likelihood of compliance – is inappropriate. See, e.g., 40 CFR §70.6(a)(3)(i)(B) (Recordkeeping provisions may properly constitute monitoring).

For these reasons, I deny all of Petitioner's claims concerning Section II, Condition 14.4.3 of the Permit.

III. The Title V Permit Fails to Assure Compliance with Particulate Matter Limits Applicable to the Coal-Fired Boiler

Petitioner alleges that the title V Permit does not require actual monitoring of PM emissions, that stack testing is too infrequent, that CDPHE cannot rely on compliance assurance monitoring (CAM) to meet title V monitoring requirements, and that CDPHE inappropriately rejected requiring the use of PM Continuous Emissions Monitoring Systems (CEMS). The coal-fired boiler has a PM limit of 0.1 pounds per million British thermal units ("lb/MMBtu"). Permit at 6. Petitioner asserts that the underlying

requirements do not stipulate monitoring and the Permit does not require direct PM monitoring for comparison/compliance with the numeric limit.

Petitioner notes that the PM emission rate for the boiler (0.1 lb/ MMbtu) is listed at Permit Section II, Condition 1.4. Petitioner also notes that the SIP (Regulation No. 1, Section III.A.1.c) does not require monitoring to assure compliance with this SIP-based PM emissions rate for the boiler, and claims that CDPHE failed to add monitoring to the Permit to assure compliance with this SIP-based PM limit as required by the court's decision in *Sierra Club v. EPA,* 536 F.3d 673, 680 (D.C. Cir. 2008). Petitioner further notes that the DC Circuit Court of Appeals has held that even when the underlying applicable requirement stipulates monitoring, permitting authorities must supplement that monitoring if it is inadequate to assure compliance with Permit conditions. *Id.* at 680. Related to this overarching claim, Petitioner makes three specific claims, which we describe and respond to below.

A. The Title V Permit Does Not Require Actual Monitoring of PM Emissions

Petitioner claims Section II, Condition 13.1, in conjunction with Condition 1.4, of the Permit is "vague and unenforceable." Petitioner alleges that the Permit states "compliance with [PM limits] shall be demonstrated by ... [m]aintaining and [o]perating the baghouses in accordance with the requirements identified in Condition 13.1," and by "[c]onducting performance tests in accordance with Condition 13.2." Petition at 10.[5] Petitioner further claims, "[n]one of these Conditions explicitly require monitoring of actual particulate matter emissions to ensure compliance with the rate set forth in Section II, Condition 1.4." Petition at 10. Petitioner claims no correlation is provided to demonstrate that compliance with good engineering practices ("GEP") will maintain compliance with the numeric limit in Condition 1.4. *Id.* at 10-11. Petitioner further claims that GEP are not defined in the Permit and that, as a result, it is impossible to understand what such practices are and whether they will, in fact, be sufficient to assure compliance with the emission rate specified in Condition 1.4. *Id.* Finally, Petitioner alleges that although Condition 13.2 requires stack testing, the condition does not require monitoring of PM emissions to assure compliance with the emission rate in Condition 1.4. *Id.*

B. Stack Testing is too Infrequent, Even if it Could Demonstrate Compliance

Petitioner claims that the stack testing specified in Section II, Condition 13.2 cannot substitute for PM monitoring. Petition at 11. Petitioner claims that this is so for

[5] Condition 13.1 is the "Operation and Maintenance Requirements" and requires "the boiler baghouse shall be maintained and operated in accordance with good engineering practices." Condition 13.2 lists the "Stack Testing" requirements for PM and generally requires testing for PM emissions to be performed on the main boiler within 180 days of renewal permit issuance in accordance with the requirements and procedures set forth in EPA Test Method 5. Frequency of testing thereafter shall be annual except that: (1) if the first test required by this renewal permit or any subsequent test results indicate emissions are less than or equal to 50% of the emission limit, another test is required within five years; (2) if the first test required by this renewal permit or any subsequent test results indicate emissions are more than 50%, but less than or equal to 75% of the emission limit, another test is required within three years; (3) if the first test required by this renewal permit or any subsequent test results indicate emissions are greater than 75% of the emission limit, an annual test is required until the provisions of (1) or (2) are met.

several reasons. First, Petitioner claims that Condition 13.2 requires at most annual stack testing, but also allows for less frequent stack testing (one test every three years if test results are between 50 and 75% of the limit, or one test every five years if test results indicate emissions are less than 50% of the limit) and that this is not adequate to assure compliance with the continuously applicable PM limit. *Id.* Second, Petitioner argues that the heat input rate, on which the PM emission rate is dependent, has varied over the years and concludes that the variability of the heat input data calls into question the validity of relying on annual, or even less frequent, stack testing to assure continuous compliance with the PM emission rate. *Id.* Finally, Petitioner argues that the PM emission rate is an "emission limitation" as defined in CAA § 302(k) and as such applies on a continuous basis and that annual stack testing is, therefore, wholly inadequate to assure compliance. Petition at 12.

C. The Division Cannot Rely on CAM to Meet Title V Monitoring Requirements

Finally, Petitioner claims CDPHE's RTC reasserts the belief that CAM is sufficient for periodic monitoring as required by §70.6(a)(3)(i)(B) (reliable data from the relevant time period that are representative of the source's compliance with the Permit) and assures compliance with the PM emission rate as required by 40 CFR §70.6(c)(1). ("All Part 70 permits shall contain the following with respect to compliance: … testing, monitoring, reporting, and recordkeeping requirements sufficient to assure compliance with the terms and conditions of the permit.") Petition at 12. Petitioner alleges that, as written, the Permit does not support a relationship between compliance with CAM requirements and compliance with the limits in Condition 1.4. *Id.* Petitioner further asserts that there is nothing in the Permit that demonstrates that compliance with the CAM indicator (opacity) automatically means compliance with the numeric PM limit. Petition at 13.

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

The Permit must contain sufficient monitoring to assure compliance with the terms and conditions of the Permit. 40 CFR § 70.6(c)(1). *See also* 40 CFR § 70.6(a)(3)(i)(B). Subsequent to the filing of the Petition, Xcel applied for and the CDPHE issued a modified permit for Valmont (the Modified Permit). As was the case with the Permit, the Modified Permit utilizes a three-pronged approach for assuring compliance with the PM limit: (1) performance testing to demonstrate that the specified limit is being met; (2) operation and maintenance of the baghouse to ensure that it continues to operate properly; and (3) the CAM plan to provide a mechanism for assessing the performance of the baghouse on an ongoing basis. While Petitioner finds the requirements as specified in the Permit to be inadequate in several ways, we conclude that viewed as a whole, this three-pronged approach, as specified in the Modified Permit, is adequate to assure compliance with the applicable PM limit.

We begin our analysis with the Modified Permit's CAM provisions. The Modified Permit's CAM requirements and the attached CAM plan pertain to compliance assurance for the PM limit at the boiler. Modified Permit at 38-42; Permit App. I at 1-5. The

Modified Permit addresses, among other matters, Xcel's request to have the opacity baseline value for Valmont's CAM plan written into the Permit. (See August 10, 2010, correspondence from George Hess, Acting General Manager – Power Generation Colorado, Xcel Energy, to Jacqueline Joyce, Colorado Department of Public Health and Environment, Air Pollution Control Division, regarding Valmont Station, Operating Permit No. 96OPBO131, Minor Permit Modification Request.) The baseline opacity value of 7.5% included in the modification request was based on PM compliance testing required by the Permit and conducted on July 14, 2010, and July 15, 2010, which resulted in a 24-hour average indicator range (as the primary indicator of performance of the baghouse) of 7.5% opacity being adopted. (See Air Pollution Control Division Stack Test memo.) CDPHE subsequently issued the Modified Permit, which incorporates the 7.5% opacity baseline value. (Modified Permit at 38 and Appendix I, page 2.)

The rationale for the selected monitoring requirements must be clear and documented in the Permit record. 40 CFR § 70.7(a)(5). *See In the Matter of Public Service Company, Hayden Station*, Petition Number VIII-2009-01, at 7-8 (March 24, 2010). In conjunction with issuing the Modified Permit, CDPHE also issued a modified TRD dated September 20, 2010, (the Modified TRD) in support thereof. The Modified TRD contains a discussion regarding the rationale for the adoption of the CAM indicator on pages 1-2. The Modified TRD also presents a rationale regarding the adequacy of the three-pronged approach on pages 3-5. In particular, the Modified TRD contains a section titled, "Addendum to the Technical Review Document prepared for the January 1, 2010, Renewal Permit" TRD at 4-5. In that section CDPHE states:

> The CAM monitoring sets specific indicators that are used to monitor the operation of the control device. Under the CAM requirements, ranges are specified for the indicators and operation of the unit outside of the indicator range is subject to investigation, and, if applicable, corrective action in addition to reporting requirements.
>
> The performance tests provide direct evidence of compliance and provided the baghouse is properly operated and maintained, continued compliance with the standard is expected. The CAM requirements serve as specific indicators that the baghouse is operated properly. As a result, all three prongs together are appropriate measures to assure compliance with the particulate matter emission limitations.

See TRD at 5.

We conclude that this is a reasonable explanation of why the three-pronged approach, as identified in the Modified Permit, is sufficient to assure compliance with the applicable PM limit. Further, based on the record, we find that CDPHE has in fact established a reasonable three-pronged approach for assuring compliance with the PM limit and specifically find that the primary CAM indicator (a 24-hour average indicator range of 7.5% opacity) is adequate to assure proper operation and maintenance of the PM control device (baghouse) in the context of this approach. (The intent of the CAM rule is to promote proper operation and maintenance of the control device to assure compliance

with the applicable emission limit. 62 Fed. Reg., 54900, 54902 (Oct. 22, 1997).) As the 7.5% opacity baseline was established on the basis of a performance test demonstrating compliance with the specified PM emission limit, we further find that there is a reasonable correlation between compliance with the 7.5% opacity baseline and compliance with the specified PM emission rate. Opacity emissions must be monitored by a COMS (Modified Permit, Appendix I at 2), thereby assuring continuous compliance with the 7.5% opacity baseline. Thus, the CAM monitoring requirements, along with the other two prongs of the three pronged approach, are adequate to assure compliance with Valmont's PM limit at the boiler.

We conclude that the Modified TRD contains an explanation of both CDHPE's rationale for the adoption of the 7.5% opacity CAM indicator and the adequacy of the three-pronged approach for demonstrating compliance with the applicable PM limit. We further conclude that the three-pronged approach for assuring compliance with the applicable PM limit as specified in the Modified Permit is adequate for that purpose. On this basis, we deny the claim.

D. The Division Inappropriately Rejected PM CEMS as a Means of Assuring Compliance with Particulate Limits

In its comments on the Permit, Petitioner requested that CDPHE require the use of PM CEMS to assure compliance with the PM emission limit in the Permit. The Petitioner asserts that the EPA has required other coal-fired power plants to install, operate, calibrate, and maintain PM CEMS citing consent decrees in *United States v. Tampa Electric Company, United States v. Minnkota Power Cooperative, United States v. Electric Power Company, and United States v. Illinois Power.* In further support of this position, the petition cites to proposed amendments to the New Source Performance Standards (NSPS) for electric utility steam generating units where the EPA concluded: "[T]here is no technical reason that PM CEMS cannot be installed and operate reliably on electric utility steam generating units." 70 Fed. Reg. 9865, 9872, (February 27, 2006). The petition acknowledges that the final amendments to the NSPS did not require the utilization of PM CEMS, but also indicates that the EPA has stated that PM CEMS may be used to demonstrate continuous compliance with PM emission limits. Petition at 14.

CDPHE's response to comments affirmed that PM CEMS represent the most direct method of assuring compliance with emission limits. Nevertheless, CDPHE concluded that the CAM requirements in the Permit (in addition to the other two prongs of the three-pronged approach discussed in the EPA's response to III.A. - C.) were sufficient to assure compliance with the PM emission limit in the Permit. The petition asserts that CDPHE's failure to require PM CEMS was arbitrary.

In response to CDPHE's statement that the CAM requirements in the Permit assure compliance with the applicable PM limit, the petition asserts that the CAM requirements do not assure compliance. This is in part because the Permit does not stipulate that an exceedance of the site-specific opacity trigger (CAM indicator) represents a violation of the PM limits. *Id.*

EPA's Response:

A title V permit must address all applicable requirements. *E.g.*, 40 CFR §§ 70.5(c)(4) and 70.6(a)(1). It must also include monitoring necessary to assure compliance with applicable requirements. *See* CAA § 504(a). *See also In the Matter of Anadarko Petroleum Corporation*, Petition Number VIII-2010-4, at 2 (February 2, 2011); *In the Matter of U.S. Steel Corporation*, Petition Number V-2009-03, at 1 (January 31, 2011). Petitioner fails to identify any applicable requirement that requires the use of PM CEMS for monitoring compliance with the PM limit specified in the Permit. In fact, Petitioner specifically acknowledges that the underlying applicable requirement (i.e., the Colorado SIP requirements relative to the boiler's PM limit) does not specify such monitoring. Petition at 10. Petitioner also has not alleged or demonstrated that PM CEMS are the only monitoring that can assure compliance with the PM limit, and, therefore, must be included in the title V Permit. As discussed above, we believe that CDPHE's three pronged approach to monitoring, including the general CAM approach set forth in the Permit and the Valmont CAM plan (Appendix I of the Permit), is capable of providing adequate PM monitoring at the boiler.

Petitioner has not demonstrated that PM CEMS are required as either an applicable requirement or as monitoring necessary to assure compliance with an applicable requirement. Further, CDPHE adequately explained its rationale for not requiring PM CEMS. Therefore, the EPA denies the petition on the issue that the Permit must include PM CEMS to assure compliance with the boiler's PM limit.

IV. The Title V Permit Fails to Ensure Compliance with Air Toxic Limits Under Section 112(j) of the CAA

Petitioner claims the Permit fails to ensure compliance with CAA § 112(j). Petitioner asserts that Valmont is a major source of hazardous air pollutants (HAPs) and in light of the February 8, 2008, DC Circuit Court ruling which vacated the Clean Air Mercury Rule (CAMR) rule, CDPHE is required to develop a case-by-case Maximum Achievable Control Technology (MACT) limit for Valmont plant and include it in the Permit.

Petitioner notes that CDPHE's response to comments asserted, "Although electric utility steam generating units (EUSGUs) were added to the list of source categories in § 112(c) in December 2000, a deadline for promulgation of those standards was never set. Therefore, the case-by-case MACT requirements of 112(j) do not apply to EUSGUs." Petition at 15; RTC at 5.

Petitioner asserts this argument in the response to comments is misplaced because there was a deadline for promulgation of MACT standards for electric generating units (EGUs), which was "within 2 years after the date" on which EGUs were added to the list of source categories under § 112. Petitioner also states that § 112(j) requires a standard 18 months after the deadline for promulgation of a MACT and that the requirements of § 112(j) have therefore applied since May 2004.

Petitioner further asserts that the response to comments' argument for a §112(j) EGU exemption makes no sense. First, Petitioner asserts that § 112(e)(1) and (3) specifically reference § 112(c)(1), which provides that the list of categories may be periodically revised. Second, Petitioner asserts that § 112(c)(5) sets forth the standards for listing new source categories and sets deadlines for MACT promulgation for new sources. Together, Petitioner asserts that it would seem that § 112(j) was intended to apply to new source categories listed under § 112(c)(1) in accordance with § 112(c)(5).

EPA's Response:

Section 112(j) does not apply to coal and oil-fired EGUs. As the EPA explained in the preamble to a recent proposed rule addressing § 112(j) (75 Fed. Reg. 15655, 15658 (March 30, 2010)), § 112(j) applies to categories or subcategories of sources that are subject to a schedule for promulgation of MACT standards pursuant to § 112(e)(1) and (3) (See § 112(j)(2)). The scheduling requirements of section 112(e)(1) and (e)(3) apply to categories and subcategories of sources "initially listed" for regulation pursuant to § 112(c)(1). Coal and oil-fired EGUs were not initially listed pursuant to § 112(c)(1) and thus are not covered by the schedules in § 112 (e)(1) and (e)(3). *See* 57 Fed. Reg. 31576, 15991/1 (July 16, 1992) (initial source category list); and 58 Fed. Reg. 63941 (Dec. 3, 1993) (the schedule establishing deadlines for the promulgation of emission standards for the categories of sources initially listed pursuant to § 112(c)(1) and (3)).

The EPA does not agree with Petitioner's claim that § 112(j) applies to EGUs merely because § 112(c)(5) establishes a deadline for promulgation of MACT standards for source categories "listed after publication of the initial list." As noted above and as Petitioner recognizes, § 112(j) applies to source categories subject to a schedule under § 112(e)(1) and (3). These provisions of § 112(e) clearly address only sources initially listed. Section 112(e)(1) describes the EPA's obligation to promulgate standards for "categories and subcategories of sources initially listed for regulation pursuant to subsection (c)(1) of this section." Petitioner's argument that § 112(j) applies to later-listed sources because § 112(e)(1) refers to § 112(c)(1) and subsection (c)(1) authorizes revisions to the initial list is without merit because it ignores the fact that § 112(e)(1) by its terms applies only to sources "initially listed" under § 112(c)(1).

In addition, the deadline in § 112(e)(3) for establishing a schedule for promulgation of standards ("24 months after November 15, 1990") also must be read to apply only to sources "initially listed" under § 112(c)(1) and (c)(3). If it applied to source categories listed "at any time" pursuant to § 112(c)(5), the November 15, 1990, date would be impossible to meet for any listings after that date. The EPA denies Petitioner's claim that CAA § 112(j) applies to the EGU at Valmont.

V. The Title V Permit Fails to Ensure Compliance with Prevention of Significant Deterioration Requirements in Regards to Carbon Dioxide Emissions

Petitioner argues that in issuing the Permit, the Division failed to appropriately assess whether CO_2 is subject to regulation in accordance with PSD requirements and whether the source should go through PSD for CO_2 under the CAA, PSD regulations, and

the Colorado SIP. Petitioner argues that PSD for CO_2 is an applicable requirement that must be in the Permit.

Petitioner states the PSD permitting threshold under the Colorado SIP is 250 tons per year (tpy) "of any air pollutant subject to regulation under the Federal Act." Petition at 16. Petitioner also mentions that a major source undergoing a significant modification must only be above the significance threshold.

A. The Division Did Not Assess Whether Carbon Dioxide is Subject to Regulation under the CAA, in Accordance with the Recent Environmental Appeals Board Ruling

Petitioner argues that the Division inappropriately relied on the EPA's interpretation of the term "subject to regulation" when issuing the title V Permit and completely ignored whether CO_2 emissions should be limited by the application of BACT as required by PSD provision in the Colorado SIP, the CAA, and PSD regulations. Petitioner asserts that CDPHE's purported reliance on the EPA's interpretation is impermissible after the opinion of the EPA's Environmental Appeals Board (EAB) in *In re: Deseret Power Cooperative*. Petitioner acknowledges that the EPA subsequently issued an interpretive memorandum on December 18, 2008, to cure the deficiency identified in the EAB decision, but then argues that, because the EPA's interpretation is not binding on states, CDPHE must provide its own independent interpretation of the meaning of the phrase "subject to regulation" as set forth in the Colorado SIP. Petitioner then argues that although the Colorado SIP does not define "subject to regulation," three reasons provide a basis to interpret the SIP to allow the Division to find that CO_2 emissions are subject to regulation: (1) the U.S. Supreme Court held in *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007) that CO_2 is a "pollutant" under the CAA; (2) CO_2 is explicitly regulated under the CO SIP for CEM monitoring, and the Permit at issue requires CO_2 CEMs; and (3) CO_2 is "subject to regulation" because it falls under the definition of "air pollutant" in Colorado's SIP, and the SIP requires PSD provisions to apply to each air pollutant regulated under state law and the CAA. Accordingly, Petitioner argues that the Administrator must object to this Permit "to ensure a consistent and reasonable interpretation of PSD in the context of CO_2 emissions." Petition at 18.

EPA's Response:

Petitioner has failed to demonstrate that CDPHE's Permit is deficient under the CAA. The petition generally repeats public comments submitted to CDPHE on July 14, 2009. However, CDPHE provided a response to these comments on October 22, 2009, and those responses illustrate that CDPHE did assess, as Petitioner requested, whether CO_2 should be addressed in this Permit under PSD permitting regulations in the Colorado SIP. The petition fails to acknowledge or address the response to these comments provided by CDPHE on October 22, 2009, *see MacClarence v. EPA*, 596 F.3d 1123 (9th Cir. 2010), and also fails to demonstrate that CDPHE was required under the PSD provisions of the Colorado SIP to regulate CO_2 emissions in this title V Permit.

First, the Division explained that the existing PSD requirements in the CAA and Colorado SIP were not applicable requirements for this Permit, because it was not apparent that Unit 5 of the Valmont Station had experienced a modification that would trigger the PSD requirements after the original PSD permit for Valmont was issued in 1964. The Division clearly stated that "even if CO_2 were currently considered a regulated pollutant for purposes of the Colorado program and subject to PSD review and BACT, the PSD review requirements would not apply unless a major modification was made." RTC at 24. CDPHE concluded that it was "not apparent that any such modification has been made to Unit 5 based on the current proceedings, and thus PSD would not apply for purposes of CO_2 with the respect to this Title V Permit action." *Id.* The petition does not address this aspect of CDPHE's response or demonstrate any error in CDPHE's conclusion that PSD requirements to cover CO_2 were not applicable to Unit 5 of the Valmont Station.

Second, CDPHE explained that even if additional PSD requirements were applicable to this Permit, the Colorado PSD provisions did not provide explicit or implied authority for CDPHE to apply these PSD requirements to CO_2. CDPHE explained that the "specific provisions of the PSD regulations reflected in Colorado's [SIP] program, which have been approved by the EPA, do not directly regulate CO_2, for example through significance levels" and thus concluded that the "regulatory provisions of the PSD program do not presently afford an explicit foundation for the Division to evaluate this Permit with respect to PSD control provisions for CO_2 emissions." RTC at 24. In addition, the CDPHE response explains that "the Division's implementation practices have maintained consistency with the understanding that the phrase 'subject to regulation' does not include pollutants which are only subject to monitoring or reporting requirements." RTC at 25. Later in its response, CDPHE explains that "the Division is not interpreting the state regulatory provisions as implying that CO_2 is a regulated pollutant under the Act." *Id.* at 26. Thus, Petitioner has not demonstrated that CDPHE failed to consider whether the PSD provisions in the Colorado SIP were applicable to CO_2 emissions.

Nevertheless, the EPA notes the lack of any discussion in CDPHE's response of the basis for its understanding that the term "subject to regulation" does not include pollutants that are only subject to monitoring and reporting requirements. The response notes that CDPHE's interpretation is consistent with the EPA's, but CDPHE does not explain that it incorporated the EPA's reasoning as its basis for interpreting the term "subject to regulation" not to cover pollutants subject to monitoring or reporting requirements. However, the EPA does not consider this weakness in CDPHE's record sufficient to justify granting the petition on this issue. CDPHE provided a rationale for not regulating CO_2 emissions in the title V Permit, including its conclusion that the Colorado SIP did not require CO_2 to be treated as a pollutant "subject to regulation" at the time of its permitting decision.

Colorado's interpretation of that phrase in its SIP as not including pollutants subject only to monitoring or reporting requirements was consistent with the EPA's interpretation at the time under the December 18, 2008, interpretative memorandum. Memorandum from Stephen Johnson, the EPA Administrator, to the EPA Regional

Administrators, *EPA's Interpretation of Regulations that Determine Pollutants Covered by Federal Prevention of Significant Deterioration (PSD) Permit Program* (December 18, 2008); *see also* RTC at 26 (noting that CDPHE's interpretation is supported by the EPA's analysis in that memorandum). This memorandum addressed the concern identified by the EAB in the *Deseret* opinion, and thus established an interpretation of the federal PSD regulations that states were authorized, but not required, to follow to the extent state regulations contained similar language. Memorandum from Stephen Johnson at fn. 1. While Administrator Jackson later granted reconsideration of Administrator Johnson's memo, in order to take public comment on the issues addressed in the Memo and the *Deseret* decision, she did not stay the effectiveness of that memo pending reconsideration. Letter from Lisa P. Jackson, the EPA Administrator, to David Bookbinder, Chief Climate Counsel at Sierra Club (February 17, 2009); *see also* 74 *Fed. Reg.* 51535, 51539 (Oct. 7, 2009) (initiating the public comment process for reconsideration of the interpretation, but stating that the interpretation in Administrator Johnson's memo would continue to apply). Thus, CDPHE was not precluded from applying the same interpretation of "subject to regulation" that the EPA applied at the time and that the EPA had determined to be a permissible interpretation of the CAA and the EPA regulations, in deciding not to regulate CO_2 emissions in this title V Permit. *See In the Matter of American Electric Power Service Corporation, Southwest Electric Power Company, John W. Turk Plant*, Petition Number VI-2008-01 (Order on Petition) at 20-24 (December 15, 2009); *In the Matter of BP Products North America, Inc., Whiting Business Unit,* Order on Petition, at 12-15 (October 16, 2009).

Furthermore, the three additional arguments provided by Petitioner do not demonstrate that CDPHE was required to include PSD requirements for CO_2 in this Permit.[6] As to the first basis provided in the petition – that the U.S. Supreme Court in *Massachusetts v. EPA* had found that CO_2 was a pollutant under the CAA – we note that Petitioner acknowledges that this decision does not mean that CO_2 is "subject to regulation" for PSD purposes. Petition at 17. The fact that CO_2 is a pollutant under the Act does not, in and of itself, make it "subject to regulation" for the purposes of PSD permitting. Accordingly, the Supreme Court's conclusion in *Massachusetts v. EPA* forms no basis for objecting here.

As to the second basis regarding regulation of CO_2 under the Colorado SIP for CEM monitoring, we note that pursuant to § 505(b)(2) of the Act, 42 U.S.C. § 7661d(b)(2) and implementing regulations at 40 CFR § 70.8(d), a petition must be based on objections raised with reasonably specificity during the public comment period provided by the permitting agency, unless Petitioner demonstrates in the petition that it was impracticable to raise such objections within such period or unless the grounds for such objection arose after such period. The EPA reviewed Petitioner's comments submitted to Colorado during the public comment period for this title V permit, and they

[6] EPA has since finalized actions that result in the promulgation of final standards controlling the emission of greenhouse gases (GHGs) from light-duty vehicles. *See* 75 Fed. Reg. 25324 (May 7, 2010). Under EPA's final interpretation of "subject to regulation," *see* 75 Fed. Reg. 17004 (April 2, 2010), the light-duty vehicle rule would control the emission of GHGs such that PSD permitting requirements for GHGs began to apply on January 2, 2011. EPA has also taken corresponding action to ensure orderly application of PSD and title V permitting requirements to GHGs, *see* 75 Fed. Reg. 31514 (June 3, 2010).

did not include any discussion of the CO_2 regulations or the particular CO_2 CEMs in this permit. *See* WEG Comments at 10-12 (addressing only the *Massachusetts* case and the air pollutant definition to argue that CO_2 was "subject to regulation" under the Colorado SIP). A review of the record also reveals that this issue was not raised with reasonable specificity by any other commenter. Petitioner has also failed to explain why it was impracticable to provide this reason to the State during the public comment period. Thus, the alleged regulation of CO_2 CEMs, either generally or in this permit, does not provide a basis for objecting to this permit. *In the Matter of Waste Management of Woodside Sanitary Landfill & Recycling Center,* Petition Number VI-2009-01, at 13-14 (May 27, 2010)(*Waste Management*); *In the Matter of CEMEX Inc., Lyons Cement Plant,* Petition No. VIII-2008-01, at 3 (April 20, 2009)(*CEMEX).* Moreover, as explained above, the Division provided an interpretation of the Colorado SIP finding that pollutants are not subject to PSD permitting requirements when they are subject only to monitoring and reporting requirements, and we have found no basis to reject that interpretation. Thus, there is no additional basis for objecting on this point.

As its third ground, Petitioner argues that CO_2 is "subject to regulation" because it falls under the definition of "air pollutant" in Colorado's SIP, and the SIP requires PSD provisions to apply to each air pollutant regulated under state law and the CAA. The petition simply asserts that CO_2 is regulated under the definition because it is "a gas emitted into the atmosphere" and then argues that this alleged regulation triggers the obligation that PSD provisions apply to the pollutant. Petition at 18. However, at no point does the petition explain how falling within the bounds of the air pollutant definition alone "regulates" a pollutant. Accordingly, there is also no basis for objecting on this ground.

For the reasons stated above, the EPA denies the petition to object to CDPHE's determination that CO_2 was not subject to PSD regulation at the time this Permit was issued.

B. Significant Increases in CO_2 Emissions Have Occurred at the Valmont Coal-Fired Power Plant

Petitioner claims that significant increases of CO_2 have occurred at Valmont, relying on the EPA's Clean Air Market data for 1995 through 2008. Petitioner presents a table of increases, and decreases, in total CO_2 emissions to argue that in 1998, there was an increase of more than 200,000 tpy of CO_2 emissions in the two-year baseline average emissions. Petitioner claims that under Colorado regulations, this amounts to a significant increase of a regulated pollutant at an existing major source, such that this Permit must address PSD BACT for CO_2 emissions.

EPA's Response:

Petitioner's comments on the draft permit did not include any discussion of the CO_2 emission increases now set forth in this petition, even though these data were clearly available during the period the draft permit was available for public review. A review of the record also reveals that this issue was not raised with reasonable specificity by any

other commenter. Therefore, pursuant to § 505(b)(2) of the Act, 42 U.S.C. § 7661d(b)(2) and implementing regulations at 40 C.F.R. § 70.8(d), Petitioner's claim was not raised with reasonable specificity during the comment period. *See Waste Management* at 13-14; *CEMEX* at 3. Petitioner has also failed to explain why it was impracticable to raise these allegations to the State during the public comment period. Therefore, these arguments cannot demonstrate a basis for objection, and the EPA denies the petition on this claim.

In addition, even if the EPA were to consider these claims, the EPA denies the petition to object on this issue because Petitioner has not demonstrated that PSD requirements should have applied to the CO_2 emission increases. As explained above, CDPHE determined that greenhouse gases, including CO_2, were not subject to regulation under the PSD program contained in the Colorado SIP at the time this permitting action occurred (or during any prior time, including the period covered by the emissions data presented in the Petition). Accordingly, any changes in CO_2 emissions that may have occurred would not have triggered PSD permitting obligations. For these reasons, the EPA denies the petition to object on this issue.

CONCLUSION

For the reasons set forth above and pursuant to section 505(b)(2) of the Clean Air Act and 40 CFR § 70.8(d), I hereby deny the petition from WildEarth Guardians objecting to the title V Permit issued to Xcel for the Valmont coal-fired power plant.

Dated: 9/29/11

Lisa P. Jackson
Administrator